322 W. 47th St. HDFC v Tibaldeo
2020 NY Slip Op 32020(U)
June 23, 2020
Supreme Court, New York County
Docket Number: 160162/2014
Judge: David Benjamin Cohen

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 58

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322 WEST 47TH STREET HDFC,

Plaintiff/Counterclaim-Defendant,

Index No. 160162/2014

- against -

Decision/Order

CAMILLE TIBALDEO, LAWRENCE GUARINO,

Defendants/Counterclaim-Plaintiffs,

- and –

MARGIE LOO, and RAFAEL PEREZ,

Defendants.

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322 WEST 47TH STREET HDFC,

Petitioner-Landlord,

Index No. L&T 68515/2017

- against -

LAWRENCE GUARINO
322 West 47th Street
Apt 5F
New York, NY 10036

Respondent-Occupant,

"JOHN AND/OR JANE DOE,"

Respondents-Occupants

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322 WEST 47TH STREET HDFC,

Petitioner-Landlord,

Index No. L&T 68514/17

-against-

CAMILLE TIBALDEO
322 West 47th Street
Apt 2R
New York, NY 10036

Respondent-Occupant,

"JOHN AND/OR JANE DOE,"

Respondents-Occupants.
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HON. DAVID B. COHEN, J.:

Plaintiff 322 West 47th Street HDFC (plaintiff), commenced this action in 2014 seeking a judgment of possession and the eviction of defendant/counterclaim-plaintiff Lawrence Guarino (Guarino), along with three other holdover tenants, from its apartment building (*see* New York State Courts Electronic Filing [NYSCEF] Doc No. 342, summons and complaint). Guarino has counterclaimed seeking a declaration that he is not a holdover tenant, but a shareholder and the rightful owner of apartment 5F, and an order that plaintiff provide him with a certificate of shares evincing his ownership of the apartment's shares (*see* NYSCEF Doc No. 343, answer and counterclaims of Guarino). As discussed below, this court summarily dismissed the complaint in 2016 and severed the counterclaims (*see* NYSCEF Doc. No. 260, decision and order, August 8, 2016). In 2017, plaintiff separately commenced a summary holdover proceeding in Civil Court's Housing Court, in which Guarino proffered a general denial and eight defenses (*see* NYSCEF Doc No. 262, petition in *322 W. 47th St. HDFC v Guarino*, Civ Ct, NY County, L&T index No. 68515/2017; Doc No. 347, verified answer in *322 W. 47th St. HDFC v Guarino*, Civ Ct, NY County, L&T index No. 68515/2017). In 2018, this court ordered the removal of the summary proceeding from Civil Court and joined it with this action (*see* NYSCEF Doc No. 157, order at unnumbered 3, 5). Guarino was permitted to file an amended answer (*see* NYSCEF Doc No. 349, amended answer with affirmative defenses and counterclaims), and plaintiff replied (*see* NYSCEF Doc No. 350, reply to amended answer with counterclaims).

In motion sequence 009, plaintiff moves for summary judgment and the dismissal of Guarino's affirmative defenses and counterclaims (*see* NYSCEF Doc No. 255, notice of motion of plaintiff). Guarino cross-moves for summary dismissal of the petition and the granting of his counterclaims (*see* NYSCEF Doc No. 303, notice of cross motion of Guarino).

In motion sequence 010, Guarino seeks leave to file second amended pleadings (*see* NYSCEF Doc No. 281, notice of motion of Guarino).

For the reasons set forth below, plaintiff's motion for summary judgment is granted in part and otherwise denied, and Guarino's cross motion for summary judgment is denied; Guarino's motion for leave to amend the pleadings is granted.

Background and Procedural History

Plaintiff is a housing development fund corporation (HDFC), formed under section 402 of the Business Corporation Law and article 11 of the Private Housing Finance Law, and pursuant to an eviction offering plan (*see* NYSCEF Doc No. 256, affirmation of plaintiff's counsel in support, ¶ 13).[1] According to Martha Hauze, the president of plaintiff's board of directors, plaintiff owns the building known as 322 West 47th Street, New York, NY 10036, consisting of nine residential units and one commercial unit (*see* NYSCEF Doc No. 257, affidavit of Hauze in support, ¶¶ 1, 3).

In 1993, Guarino was selected by plaintiff and its managing agent, the Clinton Housing Development Company (CHDC), to potentially become a low-income resident shareholder in the cooperative corporation, and to lease apartment 5F (*see* NYSCEF Doc No. 305, affidavit of Guarino, ¶ 5; Doc No. 306, letter, CHDC to Guarino, March 22, 1993). Guarino signed a six-

[1] This type of dwelling is also termed a subsidized low-income cooperative housing project (*see Matter of 322 W. 47th St. HDFC v Loo*, 153 AD3d 1142, 1143 [1st Dept 2017]).

month lease agreement for the term June 1, 1993 through December 31, 1993; the rent was $215.00 a month, and the security deposit was $215.00, of which there is no question he tendered (*see* NYSCEF Doc No. 307, lease agreement; Doc No. 257, affidavit of Hauze in support, ¶ 7). The rider to the lease described the six-month term as a "probationary period" during which time plaintiff would evaluate Guarino's "future contribution to the low income coop," and determine whether it would "offer to sell the shares and attendant proprietary lease in the [cooperative corporation] to the Tenant" (NYSCEF Doc No. 307, lease agreement at HDFC 000254, ¶ 1). After the passage of six months, CHDC notified Guarino in writing that he had "successfully completed" the probationary period, and that plaintiff's board was offering to sell him the apartment shares for $250.00, with his security deposit to be applied toward the purchase price (*see* NYSCEF Doc No. 308, letter, CHDC to Guarino, January 25, 1994). Guarino "[i]mmediately" telephoned his acceptance (*see* NYSCEF Doc No. 305, affidavit of Guardino, ¶ 10). The CHDC attorney contacted him by letter dated January 30, 1994, indicating that once she had received her letter countersigned by Guarino showing that he had knowingly chosen to proceed without an attorney, her office would schedule a closing (*see* NYSCEF Doc No. 309, letter, Simons to Guarino, January 30, 1994). Guarino countersigned and returned the letter on February 5, 1994 (*see* NYSCEF Doc No. 309).

The closing did not occur.

In 1996, plaintiff served Guarino with a petition, filed in Civil Court, New York County, Housing Part, alleging that he was a month-to-month tenant whose lease had expired in December 1993, and that plaintiff had elected to terminate his tenancy as of September 30, 1996 (*see* NYSCEF Doc No. 310, petition in *322 W. 47th St. HDFC v Guarino*, Civ Ct, NY County, L&T index No. 108802/1996, ¶¶ 5-7). Although the Civil Court file for the 1996 proceeding can

no longer be located (*see* NYSCEF Doc No. 378, affidavit of Joseph Siwik, ¶¶ 3-4), Guarino affirms that he represented himself in this proceeding, and "answered the [p]etition by explaining … that I was not a tenant but, rather, was entitled to the shares of the [p]remises because of my acceptance of [plaintiff]'s written offer" (NYSCEF Doc No. 305, affidavit of Guarino, ¶ 16). According to Guarino, the proceeding "settled" (*see* NYSCEF Doc No. 305, ¶ 16; Doc No. 304, memorandum of Guarino's counsel in support at 8).

In 1997, plaintiff commenced a second summary proceeding alleging that Guarino was a month-to-month tenant whose lease term expired as of November 15, 1997 and plaintiff has elected to terminate his tenancy (*see* NYSCEF Doc No. 311, petition in *322 W. 47th St HDFC v Guarino*, Civ Ct, NY County, L&T index No. 115827/1997, ¶¶ 4-5). The Civil Court file for this proceeding also cannot be located (*see* NYSCEF Doc No. 378, affidavit of Joseph Siwik, ¶¶ 3-4), but Guarino has provided an uncertified copy of his answer, drafted by his then-attorney, alleging that he "entered into a legal relationship with [plaintiff] whereby [plaintiff] conveyed to [Guarino] a six (6) month probationary tenancy … with an option to purchase at the end of the term"; the second of the three affirmative defenses included that plaintiff had engaged in tortious interference with the "contractual right to purchase option" (NYSCEF Doc No, 312, verified answer in *322 W. 47th St HFDC v Guarino,* Civ Ct, NY County, L&T index No. 115827/1997, unnumbered pages 1, 2, March 30, 1998). This proceeding was apparently discontinued during discovery (*see* NYSCEF Doc No. 305, affidavit of Guarino, ¶ 19; *see also* Doc No. 395, decision/order in *322 W. 47th St. HDFC v Guarino,* Civ Ct., NY County, L&T index No. 115827/1997, April 20, 1998 [J. Doherty] [deeming answer of 3/30/1998 to be served and filed; transferred case to Part T]; Doc No. 313, decision/order in *322 W. 47th St. HDFC v Guarino,*

L&T index No. 115827/1997, April 20, 1998 [J. Hoffman] [directing plaintiff to produce certain documents]).

The derivative action, 2008-2013

In February 2008, plaintiff and board president Hauze became the subject of a nearly five-year derivative action commenced by shareholders and board members Betty Benavides and Cindy Ho, who are not parties in this instant action (*see* NYSCEF Doc No. 334, summons and complaint in *Benavides v Hauze*, Sup Ct, NY County, index No. 102278/ 2008). The complaint alleged in part that the board of directors ousted Hauze from the presidency because of various disputed activities, and elected Benavides as president/treasurer and Ho as secretary, but Hauze continued to act as president to the detriment of the building's operations (*see* NYSCEF Doc No. 334, complaint in *Benavides*, ¶¶ 12, 15, 17). Hauze's fifth counterclaim alleged that Hauze was the duly elected president of the corporation and its only director and that Benavides had breached her fiduciary duties by "unauthorized contracts," in particular entering into a contract with Merlot Management, a managing agent; Hauze sought declarations that neither Benavides nor Ho was a shareholder in good standing, orders enjoining them from acting on behalf of plaintiff, and a declaration that "any contract executed by [Benavides] with Merlot Management *or any other third party on behalf of the [c]orporation* to be null and void" (*see* NYSCEF Doc No. 335, verified answer in *Benavides*, ¶¶ 54, 65-66, 68, 75 [emphasis added]).

After a jury found, in 2012, that Hauze had not breached her fiduciary duties, and that Benavides had, Supreme Court issued its judgment and order, dated February 14, 2013, denying Benavides's motion to set aside the verdict and dismissing the entirety of the complaint (*see* NYSCEF Doc No. 337, judgment and order in *Benavides* at 1-2). The court declared Benavides and Ho were "not shareholders in good standing" and enjoined them from acting as directors,

and that Hauze was plaintiff's only director and its duly elected president (*see* Doc 337 No. at 4, § III [a-c]). Pertaining to the fifth counterclaim:

> "the Court denies [Hauze]'s claim that any contract executed by [Benavides] with Merlot Management be declared void; but the Court declares and enjoins Benavides and Ho from acting on behalf of the corporation"

(NYSCEF Doc No. 337, judgment and order in *Benavides* at 4, § III [e]).

The signing of the proprietary lease, June 3, 2009

Meanwhile, on June 3, 2009, Guarino signed the shareholder proprietary lease for apartment 5F with a term beginning June 3, 2009 and running until January 19, 2092 (*see* NYSCEF Doc No. 316, proprietary lease at 2-3). Benavides signed as president on behalf of the corporation, and Ho signed as witness, although not as an officer (*see* NYSCEF Doc No. 316 at 39). According to Guarino's attorney, Lawrence A. Omansky, Esq., who witnessed the closing, in addition to the lease, the parties also signed shares of stock (*see* NYSCEF Doc No. 340, affirmation by Lawrence Omansky, ¶¶ 5, 7, 9). The proprietary lease indicates that the corporation had accepted Guarino's "security rent deposit of $250.00" as payment in full for the shares (NYSCEF Doc No. 316 at LG00049). Attorney Omansky filed and recorded the conveyance with the New York City Department of Finance, making it available on the New York City Automated Registration Information System (ACRIS) (*see* NYSCEF Doc No. 340, affirmation of Omansky, ¶ 9; Doc No. 317, NYC Department of Finance, Office of the City Register, Recording and Endorsement Cover Page).

Renewal lease rejected by Guarino, July 2013

Guarino made monthly payments of $215.00 from June 1, 1993 until March 2013 (*see* NYSCEF Doc No. 257, affidavit of Hauze in support, ¶ 16). In March 2013, following the conclusion of the derivative action, plaintiff offered Guarino a renewal lease with a monthly rent

of $700.00 (*see* NYSCEF Doc No. 257, ¶¶ 15-17). Guarino refused to sign the lease on the basis that he is a shareholder, not a tenant, and because his "maintenance up to that point had been only $215.00 per month" (NYSCEF Doc No. 305, affidavit of Guarino, ¶ 33).

In July 2013, plaintiff commenced a new, third holdover proceeding, asserting that Guarino's month-to-month tenancy had been terminated on May 31, 2013, he had remained in occupancy, and in the early morning of June 11, 2013, had "threatened the board president [Hauze]" and had "forcibly kicked in" her apartment door (*see* NYSCEF Doc No. 318, petition in *332 W. 47th St. HDFC v Guarino*, Civ Ct, NY County, L&T index No. 72672/2013, ¶¶ 4-6). The proceeding was discontinued without prejudice on July 16, 2013 (*see* NYSCEF Doc No. 305, affidavit of Guarino, ¶ 34 [a], citing Doc No. 319, case jacket in *332 West 47th Street HDFC*).

A fourth holdover proceeding, commenced in or about October 2013, asserted that his month-to-month tenancy had expired and his right to occupancy terminated after August 17, 2023; it alleged that Guarino owed $3,500.00 in back rent, having failed to pay $700.00 in rent from May through August 2013, and again asserted its claim that Guarino had threatened the board president and forcibly opened her apartment door (*see* NYSCEF Doc No. 320, petition in *332 W. 47th St. HDFC v Guarino*, Civ Ct, NY County, L&T index No. 82088/2013, ¶¶ 2, 5-6). The proceeding was discontinued without prejudice by stipulation on January 17, 2014 (*see* NYSCEF Doc No. 320, Doc No. 321, stipulation of settlement). A fifth holdover proceeding was commenced in about March 2014, and alleged that Guarino's month-to-month occupancy was terminated as of February 14, 2014 because of his failure to sign the 2013 lease agreement, as well as his earlier threat to the board president and the forcible opening of her apartment door (*see* NYSCEF Doc No. 322, petition in *332 W. 47th St. HDFC v Guarino*, Civ Ct, NY County,

L&T index No. 59697/2014, ¶¶ 2-7). The proceeding was marked withdrawn and discontinued by decision/order in October 2014 (*see* NYSCEF Doc No. 323, decision/order in *332 W. 47th St. HDFC v Guarino*, decision and order, October 28, 2014). The record does not show that Guarino filed answers in any of these three proceedings.

Commencement of the ejectment action, 2014

In October 2014, plaintiff commenced this ejectment action against Guarino and the three other defendants named in the caption, seeking their removal based on their status as non-rent regulated tenants without signed leases whose tenancies were terminated by notices dated January 26, 2014 (*see* NYSCEF Doc No. 342, summons and complaint, ¶¶ 48-49). Their tenancies were terminated "after [d]efendants refused to purchase the shares and enter in proprietary leases attendant to their apartments, refused to enter into new leases and/or breached the HDFC's rules" (NYSCEF Doc No. 342, ¶ 50).[2] As to Guarino, the complaint alleged specifically that the signing of the 2009 proprietary lease by Benavides was unauthorized and ultra vires, and in line with Benavides's other acts found "void" in the derivative action (*see* NYSCEF Doc No. 342, ¶¶ 32-34). It also noted the June 11, 2013 incident where Guarino forcibly opened Hauze's door and the police "had to be called," and alleged his continuing harassment and intimidation of Hauze (*see* NYSCEF Doc No. 342, ¶¶ 36-37). Guarino's answer[3] included counterclaims, the first of which sought a declaration that based on the 1993-1994 agreement, he is the legal owner of the shares of apartment 5F and should be issued a certificate of shares reflecting his ownership, and the second of which demanded a certificate of

[2] The proceedings against the other defendants have been resolved (*see* NYSCEF Doc No. 256, affirmation of plaintiff's counsel in support, ¶ 2 n 1 [noting the evictions of Margie Loo and Rafael Perez]; *see also* Doc No. 430, amended judgment as against Camille Tibaldeo, October 17, 2019, filed and docketed Jan. 7, 2020).

[3] The answer was originally filed on behalf of Guarino and then-codefendant Tibaldeo.

shares based on his signing the proprietary lease in 2009 and abiding by all the requirements of the lease, with his occupancy governed by the lease accordingly (*see* NYSCEF Doc No. 343, answer and counterclaims, ¶¶ 31-43).

Plaintiff moved for summary judgment in 2015 and Guarino cross-moved for summary judgment on his counterclaims and dismissal of the complaint (*see* NYSCEF Doc No. 67, plaintiff motion for summary judgment; Doc No. 85, cross motion of Guarino). In 2016, this court granted Guarino's cross motion to the extent that it dismissed the complaint, finding it "fatally defective" because the predicate notice was inadequate and therefore failed to state a cause of action (*see* NYSCEF Doc No. 260, decision and order at 3, August 8, 2016). The court severed Guarino's counterclaims (*id.*).

The 2017 holdover proceeding

Plaintiff commenced its sixth holdover against Guarino in about July 2017 (*see* NYSCEF Doc No. 262, petition in *322 W. 47th St. HDFC v Guarino*, Civ Ct, NY County, L&T index No. 68515/2017). The petition alleged in pertinent part that Guarino was a month-to-month tenant whose permission to remain in the apartment expired on June 30, 2017, pursuant to a notice of termination; the reasons for termination included that he was not the owner of the apartment's shares and had failed to sign a written lease proffered to him in March 2013, and that plaintiff/petitioner intended to sell the shares and use the proceeds for capital and building operating expenses (*see* NYSCEF Doc No. 262, ¶ 6).

Guarino's verified answer included general denials, several affirmative defenses and a counterclaim for attorney's fees (*see* NYSCEF Doc No. 347, verified answer). The first counterclaim sought a declaratory judgment that he has been a shareholder since 2009 when he signed the proprietary lease, and an order that plaintiff provide him with the corresponding

certificate of shares, asserting that other shareholders, in particular Benavides and Ho, were never given certificates when they closed on their apartments (*see* NYSCEF Doc No. 347, verified answer).

"Consolidation" of the holdover proceeding and ejectment action

In March 2018, this court ordered removal of the pending summary proceeding from Civil Court and joined that proceeding with this action (*see* NYSCEF Doc No. 157, order at unnumbered 3, 5). Guarino was permitted to file an amended answer (*see* NYSCEF Doc No. 349). His amended answer now includes six counterclaims: (1) declaratory judgment, based on the 1993-1994 agreement, that he is a shareholder and entitled to specific performance, i.e., an order directing plaintiff to provide him with a certificate of shares; (2) declaratory judgment, based on the 2009 signing of the proprietary lease, that he is a shareholder and entitled to specific performance; (3) an order, based on his fully abiding by the terms of the proprietary lease since the time of signing, that he be provided with a certificate of shares; (4) declaratory judgment and specific performance based on plaintiff's continuous breach of the 1993 contract shown in filing ill-founded summary proceedings commenced against him; (5) specific performance based on promissory estoppel; and (6) attorney's fees.

Plaintiff's subsequent reply to the counterclaims included 13 affirmative defenses, among them unclean hands, documentary evidence and waiver and laches (*see* NYSCEF Doc No. 350, reply to amended answer with counterclaims).

Plaintiff's motion and Guarino's cross motion for summary judgment (mot. seq. 009)

Plaintiff's arguments

Plaintiff seeks summary dismissal of Guarino's counterclaims in this action and his defenses in the now-transferred and joined Housing Court action.[4] It argues that the first counterclaim, seeking a declaratory judgment that based on the 1993-1994 agreement, Guarino is the proprietary lease holder for apartment 5F, is barred by the six-year statute of limitations governing declaratory actions, given that Guarino only sought declaratory relief in November 2014 (*see* NYSCEF Doc No. 256, affirmation of plaintiff's counsel in support, ¶¶ 26-32). Guarino's second counterclaim seeking a declaration that to the extent he was not a shareholder in 1993, he became a shareholder in 2009 by signing the proprietary lease, must be dismissed based on documentary evidence: plaintiff's books and records do not show that Guarino ever paid monies for the purchase of the apartment and his original $215.00 security deposit continues to be held in the corporation's bank account dedicated to security deposits; he was never issued a stock certificate, and the proprietary lease is invalid because it was not issued in accordance with the offering plan and by-laws or signed by Hauze, plaintiff's legitimate representative (*see* NYSCEF Doc No. 256, ¶¶ 33-36; *see also* NYSCEF Doc No. 257, affidavit of Hauze in support, ¶¶ 10-13). The third, fourth and fifth counterclaims seeking an order directing plaintiff to issue a stock certificate, based respectively on Guarino's claimed adherence to the terms of the proprietary lease, plaintiff's alleged breach of its 1993 agreement to sell the apartment shares to Guarino, and promissory estoppel based on Guarino's claimed reasonable reliance on the 1993 agreement that he would be made a shareholder, are barred by the six-year statute of limitations

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[4] Because this court previously dismissed the complaint, Guarino's proposed amended affirmative defenses need not be addressed.

governing specific performance (*see* NYSCEF Doc No. 256, ¶¶ 48, 49, 51-52, citing *Feldman v Teitelbaum*, 160 AD2d 832 [2d Dept 1990]; CPLR 213 [2]).[5]

Turning to Guarino's defenses in the Housing Court proceeding, plaintiff argues that the first defense, that the petition misstates Guarino's interest as he is a shareholder, has no merit as he was never an owner of shares but only a month-to-month tenant whose tenancy has been terminated (*see* NYSCEF Doc No. 256, ¶¶ 72-74). The second defense that Guarino is a rent-stabilized tenant is without merit because plaintiff is an HDFC, formed pursuant to an eviction offering plan, and by law not subject to rent stabilization (*see* NYSCEF Doc No. 256, ¶¶ 54-56, citing Administrative Code of the City of New York § 26-504 [a]; Rent Stabilization Code § 2520.11; *Jerome Ave. Hous. Dev. Fund Corp. v King*, 147 Misc 2d 162 [App Term, 1st Dept 1990]). The third defense, that "there is another action pending" is no longer applicable, as the Civil Court matter has been joined with the instant action (*see* NYSCEF Doc No. 256, ¶¶ 58-59).

The fourth defense alleging that promissory estoppel bars plaintiff from maintaining a holdover proceeding, fails to allege the existence of a sufficiently clear and unambiguous promise that Guarino would be made a shareholder, or that he reasonably relied on such a promise or suffered damages as a result (*see* NYSCEF Doc No. 280, memorandum of plaintiff's counsel in support at 11-12, citing *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d 836, 841-842 [1st Dept 2011]). Additionally, the alleged promise to make him a cooperative shareholder violates the statute of frauds (*see* NYSCEF Doc No. 280, memorandum of plaintiff's counsel in support at 12). The fifth defense alleging that plaintiff waived its right to bring the proceeding, the sixth defense that the claim is barred by laches because plaintiff delayed asserting its claim, and the seventh defense that Guarino should be given a pre- and post-

[5] Guarino's sixth counterclaim seeking attorney's fees need not be addressed at this time.

judgment opportunity to cure if plaintiff is found entitled to a judgment, should all be dismissed because they only state legal conclusions and unsubstantiated claims and do not raise a genuine triable issue of fact (*see* NYSCEF Doc No. 256, affirmation of plaintiff's counsel, ¶¶ 63-66; Doc No. 280, memorandum of plaintiff's counsel in support at 11-12).

Finally, the eighth defense, that the notice of termination fails to sufficiently plead "good cause," is belied by plaintiff's 2017 notice of termination explicating its reasons for terminating Guarino's right to occupy the apartment, including that he is not the owner of the shares allocated to 5F and failed to sign a written rental lease for that apartment in March 2013 (*see* NYSCEF Doc No. 256, affirmation of plaintiff's counsel in support, ¶¶ 67-70, citing Doc No. 261, notice of termination by 322 West 47th Street HDFC, addressed to Guarino, May 18, 2017). In another litigation involving the same plaintiff and another tenant in the building, the Appellate Term found the plaintiff had established requisite good cause for the occupant's eviction as a month-to-month tenant based on her failure to purchase the shares of her unit after the building was converted to cooperative ownership and the subsequent expiration of her lease (*see* NYSCEF Doc No. 256, ¶¶ 69-70, citing *322 W. 47th St. HDFC v Loo*, 50 Misc 3d 143 [A], *1, 2016 NY Slip Op 50227 [U], **1 [App Term 1st Dept 2016], *affd* 153 AD3d 1143 [1st Dept 2017]). The Appellate Division affirmed, holding that the landlord, an HDFC not subject to the rent stabilization rules, had not and could not waive its right to bring an eviction procedure even 20 years after the building's conversion (*see* NYSCEF Doc No. 256, ¶ 70).

Guarino's cross motion and opposition[6]

Guarino asserts that the closing did not occur in 1994 because the then-president of the board of directors retaliated against him after he refused to pay a personal fee in addition to the price of the shares (*see* NYSCEF Doc No. 305, affidavit of Guarino, ¶¶ 12-14). According to board member Benavides, the board president unilaterally informed the other board members "that he no longer wanted to offer shares to Mr. Guarino" (NYSCEF Doc No. 325, affidavit of Betty Benavides, ¶¶ 14-15). Nonetheless, Benavides "repeatedly" promised Guarino that the board would "honor its agreement" and go forward with a formal closing, "as soon as [plaintiff]'s affairs were in order and it had the money to retain the services of an attorney" (NYSCEF Doc No. 305, affidavit of Guarino, ¶ 21; *see also* Doc No. 325, affidavit of Benavides, ¶ 21).

Guarino "easily" meets the elements of his promissory estoppel counterclaim: there is a clear and unambiguous promise that he would become a shareholder following a six-month probationary period; he reasonably relied on that promise by accepting a six-month lease and subsequently investing substantial time and money renovating his premises, and he would suffer "unconscionable injury" should the court find, all these years later, that he had had no reason to rely on the promises (*see* NYSCEF Doc No. 304, memorandum of Guarino's counsel in support at 38-39, citing *MatlinPatterson ATA Holdings LLC v Federal Express Corp.*, 87 AD3d at 841-842; *Castellotti v Free*, 138 AD3d 198, 204 [1st Dept 2016]; *see also* Doc No. 305, affidavit of Guarino, ¶¶ 3-5). Furthermore, it is well understood that preliminary writings, letters or memoranda, such as the letters and communications between CHDC, plaintiff's attorney and

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[6] The court will not address the branch of Guarino's cross motion regarding collateral estoppel, as the affirmative defense was not included in his amended complaint as required under CPLR 3018 [b]). The issue is addressed in his separate motion seeking to further amend his pleadings.

Guarino, are sufficient to bring an agreement out of the purview of the statute of frauds and render it legally enforceable (*see* NYSCEF Doc No. 304 at 18, 38, 34-35, citing *160 Chambers St. Realty Corp. v Register of City of N.Y.*, 226 AD2d 606, 606-607 [2d Dept 1996]).

Benavides and Ho had been shareholders and board members for the entirety of Guarino's tenancy and in 2009 they were in good standing and had explicit authority to enter into the proprietary lease agreement with Guarino on behalf of the cooperative corporation (*see* NYSCEF Doc No. 304, memorandum of Guarino's counsel in support at 11-12, 24). At the very least, it was reasonable for him to rely on their apparent authority to represent plaintiff at the closing (*see* NYSCEF Doc No. 304 at 24-25, citing *Pasquarella v 1525 William St., LLC*, 120 AD3d 982, 983-984 [4th Dept 2014]). Notably, the conveyance was done in compliance with corporate procedures: Benavides as president gave notice in April 2009 to the entire board of directors, presumably including Hauze, that the board would meet on May 7, 2009 to discuss and vote on the closing of Guarino's apartment (*see* NYSCEF Doc No. 315, notice of board of directors meeting, April 21, 2009). "Two-thirds" of the-then board met and approved the closing on that date (*see* NYSCEF Doc No. 305, affidavit of Guarino, ¶ 27). After the closing, the conveyance was recorded in ACRIS.

The 2009 proprietary lease should be considered a binding contract because it was signed by Guarino and plaintiff and "sets forth legally enforceable promises and representations by both parties" (*see* NYSCEF Doc No. 304, memorandum of law in support of Guarino at 17; Doc No. 316, proprietary lease). Further, Guarino performed all that was required under the agreement by tendering the purchase price and "abiding by all other duties imposed by the proprietary lease" (*see* NYSCEF Doc No. 304 at 18, 28, citing *Cai-Lian Chen v 342 W. 48 St. Hous. Dev. Fund Corp.*, 2008 NY Slip Op 32126 [U] [Sup Ct, NY County 2008] [where the plaintiff-tenant

had performed all that was required of him, as a matter of law the defendant-corporation was required to issue him stock and a lease]).

Noting that the basis for the ejectment action is his refusal to sign a new lease in 2013 with its "shocking" increase in rent from $215.00 to $700.00, a month, Guarino argues that his counterclaims fall under the umbrella of CPLR 203 (d), the relation back provision, which allows defenses and counterclaims to be deemed timely asserted when they arise from a series of occurrences on which a claim in the complaint depends, to the extent of the demand in the complaint (*see* NYSCEF Doc No. 304 at 13, 22-23, 31-32). His counterclaims also fall under the savings provision of (CPLR 205 [b]), which provides that where a complaint has been served to which the defendant has answered and asserted defenses and counterclaims, after which the complaint is terminated for any reason and a new action is commenced addressing the same occurrences, then the defendant may assert the same defenses and counterclaims in its answer and they will be deemed timely. Guarino points out that in the several summary proceedings commenced over the years by plaintiff, his consistent defense was always that he is a shareholder and not a tenant (*see* NYSCEF Doc No. 304 at 30, 31-33). In contrast, he argues that plaintiff's affirmative defenses asserted in its reply, are time-barred since, "in essence [they] seek a declaration ... that the [p]roprietary [l]ease is invalid," but were not interposed until 2019, more than nine years after that lease was signed (NYSCEF Doc No. 304 at 23; *see in general* Doc No. 350, reply to amended answer).

Addressing plaintiff's argument that its corporate records do not show that Guarino actually paid $250.00 to purchase the shares of the apartment, Guarino points to the final page of the proprietary lease, signed by Benavides on behalf of plaintiff as seller and Guarino as purchaser, which states that plaintiff "consent[ed]" to the release of the rent security deposit of

$250.00 as payment in full for the shares (*see* NYSCEF Doc No. 336, proprietary lease at LG00049). However, Guarino now explains in his affidavit, and corroborated by Benavides and Ho, that, in fact, his security deposit of $215.00 was applied directly and he paid $35.00 in cash to Benavides at the closing to total $250.00 (*see* NYSCEF Doc No. 305, affidavit of Guarino, ¶ 29; Doc No. 325, affidavit of Benavides, ¶ 40; Doc No. 339, affidavit of Ho, ¶ 40). Guarino's then-attorney avers that Guarino paid the difference between the purchase price and his security deposit on the day of the closing (*see* NYSCEF Doc No. 340, affirmation of Omansky, ¶ 8).[7]

Guarino should not be penalized for the corporation's recordkeeping issues, as he had no control over it (*see* NYSCEF Doc No. 304, memorandum of Guarino's counsel in support at 26-27, quoting *Kooleraire Serv. & Installation Corp. v Board of Educ. of City of N.Y.*, 28 NY2d 101, 106 [1971] ["a party to a contract cannot rely on the failure of another to perform a condition precedent where [it] has frustrated or prevented the occurrence of the condition"]). Alternatively, plaintiff's motion should be denied because no depositions have been taken and discovery is ongoing (*see* NYSCEF Doc No. 304 at 43-44). In any event, he should be allowed an opportunity to cure under RPAPL § 753 (4), which provides that where a possessory proceeding is based on a tenant's breach of a lease provision, the court will grant a 30-day stay of issuance of the warrant to allow time for the respondent to cure the breach, meaning in his case, to sign the 2013 rental lease (*see* NYSCEF Doc No. 304 at 44-45; *see also* Doc No. 390, memorandum of Guarino's counsel in reply at 27-28, citing *601 W. 136 St. HDFC v Olivares*, 2014 NY Slip Op 31474 [U], *5 [Civ Ct, New York County 2014] [staying the warrant to allow the respondent an opportunity to cure his failure to timely renew his lease pursuant to RPAPL § 753 (4)]).

[7] These allegations are included as part of Guarino's proposed second amended answer, the subject of motion sequence 010, discussed below.

Plaintiff's opposition and reply

Plaintiff disputes Guarino's reliance on the doctrines of apparent authority, reasonable reliance and promissory estoppel, and contends that he acted with unclean hands, and "in conspiracy" with Benavides to arrange the issuance and signing of the proprietary lease during the pendency of the derivative action (*see* NYSCEF Doc No. 376, ¶¶ 54, 59-61). Guarino had notice that any agreement entered into with Benavides would be void, because Hauze, writing as board president, had contacted him by letter dated May 13, 2009, advising him in part that Benavides was not "legally authorized to act on [plaintiff's] behalf," and that "any contracts she entered into on behalf of plaintiff were invalid" (NYSCEF Doc No. 376, affirmation of plaintiff's attorney in further support, ¶¶ 54-55, citing Doc No. 381, letter, Hauze to Guarino, May 13, 2009). He entered into the transaction knowing it was neither legal nor valid, or at least had constructive knowledge thereof.[8]

Most importantly, the proprietary lease indicates that it is to be accompanied by a shareholder's certificate indicating the number of shares sold (*see* NYSCEF Doc No. 316, proprietary lease at 10, § 4.01), and without the certificate, the proprietary lease is not binding and does not give Guarino ownership rights (*see* NYSCEF Doc No. 376, reply affirmation of plaintiff's counsel in further support, ¶¶ 21-23, citing *In re Lefrak*, 215 BR 930, 934 [SD NY 1998], *affd* 227 BR 222 [SD NY 1998]; *Susskind v 1136 Tenants Corp.*, 43 Misc 2d 588, 589-590 [Civ Ct, NY County 1964]). Further, even if Benavides was a legitimate member of the board at the time the proprietary lease was signed, she failed to take the necessary steps to make the lease binding which, in addition to issuing a stock certificate, included signing the lease

[8] Guarino's attorney, Mr. Omansky, was also the attorney of record for Benavides and Ho in the derivative action (*see* NYSCEF Doc No. 340, affirmation of Omansky, ¶ 10).

along with another designated officer of the board, signing a counterpart original proprietary lease for delivery to plaintiff, depositing the sale proceeds into plaintiff's account, and executing or remitting an affidavit of sale to New York City, as required by the corporation by-laws (*see* NYSCEF Doc No. 376, reply affirmation by plaintiff's counsel in further support, ¶¶ 47-49).

Additionally, Guarino has violated the terms of the proprietary lease and the by-laws. He has made threats to and harassed Hauze, and recently refused to let the building maintenance enter his apartment to correct his leaking air conditioner, creating a nuisance(*see* NYSCEF Doc No. 377, affidavit of Hauze in further support, ¶¶ 7-9).

Neither CPLR 203 (d) nor CPLR 205 (b) are available to render Guarino's counterclaims timely. CPLR 203 (d), the relation-back statute, allows a defense or counterclaim to be asserted even if the statute of limitations had run between the time the complaint was served and the answer containing the defense or counterclaim was interposed, as long as the defense or counterclaim would have been timely when the complaint was first served (*see* NYSCEF Doc No. 385, memorandum of plaintiff's counsel in further support at 17, citing 5A Carmody-Wait 2d § 31:15). Guarino's counterclaims were not timely when the complaint was filed in 2014 (*see* NYSCEF Doc No. 385 at 17). As well, the statute may be used only as a defense or shield, not to claim affirmative relief such as a declaration that he is a shareholder and an order that plaintiff provide him with a certificate (*see* NYSCEF Doc No 385 at 18,19, citing *Brody v Brody*, 20 Misc 3d 350, 354 [Sup Ct, Nassau County 2008], *affd* 62 AD3d 928 [2d Dept 2009]). Further, because the complaint in this action has been dismissed, Guarino's untimely counterclaims cannot be used as an "offset" (*see* NYSCEF Doc No. 385 at 19, citing *Sawyer v Wight*, 196 F Supp 2d 220, 229 [ED NY 2002] [granting summary dismissal of the counterclaims

because the court had already disposed of the plaintiff's claims against the defendant and "there is nothing for [the defendant's] untimely claims to offset"]).

Similarly, CPLR 205 (b), the savings provision, is inapplicable (*see* NYSCEF Doc No. 385 at 21-26). That statute requires that: (1) there was a previous action where the defendant served an answer, (2) the action was terminated, (3) a new action was commenced based on the same transactions and occurrences, and (4) the defendant asserted the same defenses or counterclaims as in the original action (*see* NYSCEF Doc No. 385 at 23, citing CPLR 205 [b]). Guarino has not shown that in each of the previous Housing Court proceedings, he served an answer and consistently asserted his rights as a shareholder and sought declaratory and injunctive relief (*see* NYSCEF Doc No. 385 at 23-24).

Guarino has not offered any factual argument for his conclusion that the terms of the renewal lease were unconscionable (*see* NYSCEF Doc. No. 385 at 29). He should be directed, pursuant to RPAPL § 749 (3), to pay use and occupancy as of June 2013. Plaintiff proposes that $700.00 a month is a fair market value for the apartment and would serve as the basis to determine the amount of use and occupancy (*see* NYSCEF Doc No. 376, affirmation by plaintiff's counsel in reply, ¶¶ 101-103, citing RPAPL § 749 [3]). Alternatively, it seeks a hearing to establish the monthly fair market value to be charged as use and occupancy (*see* NYSCEF Doc No. 376, ¶ 103).

Guarino's reply

Plaintiff errs in arguing that it is the certificate of shares that provides proof of ownership, and that without it, Guarino cannot establish that he is a shareholder, because it is actually the agreement to establishes ownership (*see* NYSCEF Doc No. 390, reply memorandum of law at 13). As stated by the Court of Appeals in *United States Radiator Corp. v State*:

> "The certificate of the corporation for the shares, or the stock certificate, is not necessary to the existence of the shares or their ownership. It is merely the written evidence of those facts. It expresses the contract between the shareholder and the corporation and his co-shareholders. But it is *the payment*, or the obligation to pay for shares of stock, *accepted by the corporation*, that creates both the shares and their ownership"

(*see* NYSCEF Doc No. 390 at 13, quoting 208 NY 144, 149-150 [1913] [emphases added]; *see also Matter of Walsh v Somerset Group, Inc.*, 45 AD2d 915, 915-916 [4th Dept 1974] [holding that upon payment in full of the subscription price, the purchasers acquired all the rights and privileges of holders of subscribed shares; the stock certificate was "only evidence of their shareholder status and was not necessary to its creation"]).

As to statutes of limitations, CPLR 203 (d) and CPLR 205 (b) may be utilized to bring Guarino's counterclaims within the statute of limitations. His counterclaims are timely because they arose from the same series of transactions or occurrences upon which plaintiff's claim depends. All of plaintiff's discontinued summary proceedings from 1996 onward have attempted to evict him from the apartment based on his allegedly being a holdover occupant, and although each subsequent proceeding terminated his occupancy on a new date based on plaintiff's new notices of termination, they are clearly a "series of transactions or occurrences" which bring them under the aegis of CPLR 203 (d). Similarly, CPLR 205 (b) is applicable because his answers submitted in opposition to plaintiff's summary proceedings, all consistently asserted the same defense that he was not a tenant and not subject to holdover proceedings (*see* NYSCEF Doc No. 390 at 20-22).

Finally, plaintiff, an HDFC, by law must articulate good cause for seeking Guarino's eviction, so as to provide constitutional due process (*see 512 E. 11th St. HDFC v Grimmet*, 181 AD2d 488, 489 [1st Dept 1992], *appeal dismissed* 80 NY2d 892 [1992]). Plaintiff has not done so. It is not sufficient for an HDFC to seek eviction solely based on the expiration of the tenant's lease (*see 512 E. 11th St. HDFC* at 489). Plaintiff must provide fact-specific reasons that pertain

to his tenancy; here, plaintiff's reasons must take into consideration his decades-long residency in the apartment (*see* NYSCEF Doc No. 390 at 25-26). In addition, plaintiff has not explained why its proposed rent increase from $215.00 to $700.00 a month should not be deemed unconscionable and thus void (*see* NYSCEF Doc No. 390 at 25-26).

Motion for leave to amend (seq. no. 010)

Guarino's arguments

Guarino seeks to amend his pleadings for a second time to add both a counterclaim and an affirmative defense sounding in collateral estoppel, as well as certain additional allegations (*see* NYSCEF Doc No. 284, proposed second amended answer; Doc No. 285, proposed amended verified answer in *322 W. 47th St. HDFC v Guarino*, L&T index No. 68515/2017). He points out that CPLR 3025 (b) provides that leave to amend should be "freely given," on terms that are just (*see* NYSCEF Doc No. 282, memorandum of Guarino's counsel in support at 7, quoting CPLR 3025 [b]). He argues that plaintiff will suffer no prejudice, because document discovery is ongoing, and depositions have not yet been scheduled, so that plaintiff will have a full opportunity to pursue discovery as related to the amended answers (*see* NYSCEF Doc No. 282, memorandum of Guarino's counsel in support at 8-9, citing *Jeboda v Danza*, 133 AD3d 569, 570 [2d Dept 2015]).

Guarino seeks to amend because, during document exchange, it became clear that plaintiff was aware that he had entered into the proprietary lease with Benavides in 2009, and therefore had had a "full and fair opportunity" to litigate the validity of the lease during the course of the derivative action including at trial (*see* NYSCEF Doc No. 282 at 9). Notably, after the trial, Supreme Court "refused to award the HDFC any relief in connection with its

counterclaim that 'any' contract" signed by Benavides be declared null and void" (*see* NYSCEF Doc No. 282 at 11).

The elements of a valid claim for collateral estoppel are clearly met: plaintiff was a party in the derivative action and asserted a counterclaim seeking a nullification by Supreme Court of "any" third-party contract which Benavides signed on behalf of plaintiff; plaintiff should have known that Benavides entered into the proprietary lease agreement with Guarino in 2009; and after the trial, Supreme Court "refused to award the HDFC any relief in connection with its counterclaim that 'any' contract [signed by Benavides] be declared null and void" (*see* NYSCEF Doc No. 282 at 11). Thus, plaintiff may not relitigate the question of the validity of the lease, or of the circumstances surrounding its signing (*see* NYSCEF Doc No. 282 at 11).

As alleged in the proposed second amended answer, plaintiff was aware that during the years of the derivative action, Benavides continued to sign contracts on plaintiff's behalf, including Guarino's proprietary lease, yet never sought preliminary injunctive relief to stop her from acting in its name (*see* NYSCEF Doc No. 284, proposed amended counterclaims, redlined ¶¶ 54-55). After the conclusion of the trial, Supreme Court held that Hauze had failed to offer evidence in support of its counterclaim regarding third-party contracts signed by Benavides, and "explicitly" denied Hauze's counterclaim, a ruling which plaintiff did not appeal or seek to reargue (*see* NYSCEF Doc No. 284, ¶ 56). Guarino's proposed amended defense in the Housing Court matter includes the statement that, "[t]here is an identity of issues between [plaintiff]'s current position regarding Guarino's proprietary lease and that taken in the [d]erivative [a]ction," and because "the exact issue" was decided against plaintiff in the derivative action, it may not re-litigate the issue, and is precluded from denying the validity of the proprietary lease (see NYSCEF Doc No. 285, proposed amended answer, redlined ¶¶ 19-20).

In sum, plaintiff impermissibly seeks to reargue its position that it took during the trial, that all contracts signed by Benavides were null, a position to which Supreme Court gave no credence (*see* NYSCEF Doc No. 283, ¶ 21, citing Doc No. 295, reply of plaintiff to amended answer with counterclaims, ¶ 16). Plaintiff must be collaterally estopped from another opportunity to assert this argument (*see* NYSCEF Doc No. 283, affirmation of Guarino's counsel in support, ¶ 22).

Plaintiff's arguments in opposition

For collateral estoppel to apply, the issue must have been material to the first action or proceeding and essential to its decision (*see* NYSCEF Doc No. 363, memorandum of plaintiff's counsel in opposition at 7, citing *Silberstein v Silberstein*, 218 NY 525, 528 [1916]). The derivative action sought to determine who had the right to control the cooperative corporation, and did not focus on the legitimacy of contracts signed by Benavides other than that purportedly between Benavides and Merlot Management (*see* NYSCEF Doc No. 363, memorandum of law in opposition at 9, 10, citing *Penthouse Media Group, Inc. v Pachulski Stang Ziehl & Jones LLP*, 406 BR 453, 458 [SD NY 2009] ["the incentive and initiative to litigate and the actual extent of litigation" are all important factors to consider in determining whether collateral estoppel applies]). The proprietary lease "was clearly not a central issue," nor essential to Supreme Court's determination (NYSCEF Doc No. 363 at 8, citing *233233 Co. v City of New York*, 171 AD2d 492, 496 [1st Dept 1991]; *see Liddle, Robinson & Shoemaker v Shoemaker*, 304 AD2d 436, 440 [1st Dept 2003]). Because the legitimacy of other contracts entered into by Benavides, in particular the proprietary lease, was not actually litigated and necessarily decided in the derivative action, plaintiff is not collaterally estopped from now arguing that the proprietary lease has no legal import (*see* NYSCEF Doc No. 360, ¶¶ 27, 30).

Guarino's reply

The validity of the proprietary lease is the same issue as that addressed in the derivative action, namely the authority of Benavides to act on behalf of the corporation. Hauze's fifth counterclaim seeking to nullify "any" contracts signed by Benavides, clearly included contracts signed before the action commenced as well as those signed during the course of litigation, including the proprietary lease (*see* NYSCEF Doc No. 365, memorandum of Guarino's counsel in reply at 4-5). Plaintiff had five years of litigation to fully develop and pursue its claims (*see* NYSCEF Doc No. 365 at 6-7, citing *Sterling Ins. Co. v Chase*, 287 AD2d 892, 894 [3d Dept 2001] [holding collateral estoppel was applicable because the "defendant, who was represented by counsel at a jury trial, had a full and fair opportunity to litigate the underlying…issue"]). Because plaintiff did not seek a temporary injunction to prevent Benavides from acting in the name of the corporation as early as 2008, it should be understood to have consented to Benavides continuing to act on its behalf during the years of litigation, and that any contracts signed by Benavides during that time were ratified (*see* NYSCEF Doc No. 365, memorandum of Guarino's counsel in reply at 5 n 1). Therefore, a claim alleging collateral estoppel has merit and his motion to amend should be granted.

Discussion

Motion and cross motion for summary judgment (mot. seq. 009)

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The party opposing summary judgment must "rebut[ ] with factual proof" the moving party's claims (*Alvarez*, 68

NY2d at 325). Summary judgment will be denied "where there is any doubt as to the existence of a factual issue or where the existence of a factual issue is arguable" (*Matter of New York City Asbestos Litig.*, 33 NY3d 20, 25 [2019] [quotation marks and citation omitted]; *see Genesis Merchant Partners, L.P. v Gilbride, Tusa, Last & Spellane, LLC*, 157 AD3d 479, 482 [1st Dept 2018]). The issue for the court is not whether the plaintiff can ultimately establish liability, but "whether there exists a substantial issue of fact in the case on the issue of liability which requires a plenary trial" (*Barr v County of Albany*, 50 NY2d 247, 254 [1980]). Facts will be viewed in the light most favorable to the non-moving party (*see Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]). The court's role "is limited to issue finding, not issue resolving" (*Amatulli v Delhi Constr. Corp.*, 77 NY2d 525, 531-532 [1991]). The court will not assess credibility (*see Ferrante v American Lung Assn.*, 90 NY2d 623, 631 [1997]).

The 1993-1994 agreement

The first, fourth and fifth counterclaims in Guarino's amended answer pertain to the 1993-1994 agreement. For the reasons that follow, summary dismissal is granted on all three.

The first counterclaim seeks a declaration that Guarino is a shareholder and an order directing plaintiff to provide him with a certificate of shares. His fourth amended counterclaim, alleging breach of the agreement, also seeks an order directing plaintiff to issue him a certificate of shares so as to ensure his ownership rights and prevent plaintiff from claiming he is a tenant without occupancy rights.

The question of the existence of an enforceable contract is generally one of law and may be properly determined on a motion for summary judgment (*see Central Fed. Sav., F.S.B. v National Westminster Bank, U.S.A.*, 176 AD2d 131, 132 [1st Dept 1991]). A letter or memorandum can be enforced as a contract if it "identifies the parties, describes the subject

matter, states the essential terms, and is signed by the party to be charged" (*160 Chambers St. Realty Corp.*, 226 AD2d at 606-607). The writing's effectiveness will not be impaired where the parties anticipate executing a more formal contract, as long as it includes all the essential terms of the agreement (*id.* at 607). Here, while Guarino has established that plaintiff offered to sell him the shares of the apartment in the cooperative corporation for $250.00, that he accepted the offer, and that plaintiff evidenced an intent to be bound, it cannot be held that an enforceable contract existed. There is no indication of the commencement date nor the length of time the lease would be in force, potentially running afoul of General Obligations Law § 5-701. In any event, both the declaratory judgment action and the action seeking specific performance are subject to a six-year statute of limitations (*see* CPLR 213 [2]). Guarino took no action to seek declaratory relief or specific performance within six years after he accepted plaintiff's offer to sell him the shares, and the statutes of limitation have long run.

Guarino's fifth counterclaim offers an alternative argument that if the court does not find a contract, then the agreement should be addressed under the doctrine of promissory estoppel. Even if his allegations sufficiently alleged an agreement subject to promissory estoppel, it would be barred by the six-year statute of limitations (*see Kates v GFI Group Inc.*, 2009 NY Slip Op 33367 [U], *6 [Sup Ct, NY County 2009]; CPLR 213 [2]).

The 2009 Signing of the Proprietary Lease

The second and third counterclaims are based on Guarino's signing of the 2009 proprietary lease and seek declarative and injunctive relief to establish his status as a tenant-shareholder. These arguments and allegations were initially asserted as the first and second counterclaims in Guarino's 2014 answer, which were served within six years of the lease signing

and are therefore timely. The issue becomes whether the amended counterclaims, clearly served after the expiration of the statutes of limitation, may be considered timely asserted.

As to the second amended counterclaim, although Guarino argues that CPLR 203 (d) allows it to be deemed timely asserted because it is related to the original first counterclaim, a better analysis is based on application of CPLR 203 (f), which concerns counterclaims and defenses in *amended* pleadings and allows them to be deemed interposed at the time the original counterclaim or defense was served, even if they would not be timely asserted otherwise, "unless the original pleading does not give notice of the ... series of transactions or occurrences, to be proved pursuant to the amended pleading" (CPLR 203 [f]).[9] The intent is to ensure that the nonmoving party receives notice of the transactions or occurrences to be proved through the amended pleading. Here, it is held that pursuant to CPLR 203 (f), Guarino's first counterclaim sufficiently gave notice to plaintiff of the allegations he seeks to prove to establish entitlement to declaratory and injunctive relief as set forth in the second amended counterclaim, and it is deemed timely.

Turning to the merits of the second amended counterclaim, both parties have raised material questions of fact that preclude granting summary judgment to either side. These questions include whether Benavides was in good stead and had actual authority, or reasonably believed that she did, to sign on behalf of the corporation, in particular as Supreme Court's 2013 judgment and order does not indicate what period of time Benavides failed to carry out her

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[9] CPLR 203 (d), the so-called relation-back provision, concerns counterclaims and defenses asserted in pleadings, rather than amended pleadings. Many decisions have held that CPLR 203 (f), which pertains to amended pleadings, is the proper statute to address the timeliness of amended counterclaims and defenses, rather than CPLE 203 (d) (*see, e.g. Joseph Barsuk, Inc. v Niagara Mohawk Power Corp.*, 281 AD2d 876, 877 [4th Dept 2001]; *Coleman, Grasso & Zasada Appraisals Inc. v Coleman*, 46 AD2d 893, 894 [3rd Dept 1998]). Other decisions have employed CPLR 203 (d) in similar situations (*see United States Fid. & Guar. Co. v Delmar Dev. Partners, LLC*, 22 AD3d 1017, 1020 [3d Dept 2005]). In any event, CPLR 203 (f) is applicable in the case at bar.

fiduciary duties. There is also a question of whether Guarino was a good faith purchaser and reasonably relied on Benavides's presumed authority, and how he understood Hauze's May 2009 letter concerning Benavides's lack of legal authorization to act on behalf of the corporation.

There are also questions concerning the transaction itself, in particular the seeming disparity between the description of the transaction of the sale as recorded in the lease, witnessed by Guarino's attorney, and the absence of corroboration of the sale in plaintiff's books and records. There is a question of whether plaintiff customarily did not provide certificates of shares to shareholders, but also whether Guarino may be unfairly penalized for Benavides's failures to follow through administratively with the recording and copying of the lease and other disparities as noted by plaintiff. These are questions for the factfinder, and accordingly, summary judgment on the second amended counterclaim will not be awarded to either party.

The third amended counterclaim seeks an order that plaintiff provide Guarino with a certificate of shares based on his having allegedly complied with all requirements and demands made on him in order to effectuate the signing of the lease. In Guarino's original answer, he asserted entitlement to the relief based on his conduct throughout his *entire* tenancy. With the narrowing of the focus of the counterclaim, the amended third counterclaim in essence overlaps with his second amended counterclaim in which he argues that the signing of the proprietary lease was in all events regular and legal. Accordingly, the third counterclaim is dismissed as it is essentially duplicative of the second counterclaim.

Affirmative Defenses

Plaintiff seeks dismissal of all eight of Guarino's affirmative defenses. As an initial matter, plaintiff's motion for summary dismissal is granted as to the second and third defenses

for the reasons articulated in its brief. The fourth defense sounding in promissory estoppel is dismissed based on the running of the six-year statute of limitations.

Turning to the remaining defenses, the court examines the first defense which is that the petition misidentifies Guarino's interest in the tenancy by describing him as a month-to-month tenant rather than as a shareholder not subject to holdover proceedings, and entitled to a certificate of shares to confirm that position. This is the essence of Guarino's arguments in his counterclaims, since the question is whether he is legally and validly entitled to the proprietary lease and a certificate of shares. Therefore, the first defense remains a question of fact to be determined by the fact finder.

The fifth and sixth affirmative defenses are waiver and laches. Waiver has been described as a knowing and intelligent relinquishment of a known right, based on a clear manifestation of intent to relinquish a contractual protection, and can be seen in affirmative conduct or by a failure to act (*see Fundamental Portfolio Advisors, Inc. v Tocqueville Asset Mgt., L.P.*, 7 NY3d 96, 104 [2006]). Laches is described as, "such neglect or omission to assert a right ..., taken in conjunction with the lapse of time, ... and other circumstances causing prejudice to an adverse party, [which] operates as a bar in a court of equity" (*Matter of Schulz v State of New York*, 81 NY2d 336, 348 [1993] [internal quotation marks and citation omitted]). Whether a party can rely on either or both of these defenses is a question of fact (*see Funk v Seligson, Rothman & Rothman, Esqs.*, 165 AD3d 429, 431 [1st Dept 2018] [waiver]; *Bloom v Town Bd of Yorktown*, 88 AD2d 895, 895 [2d Dept 1982]; *Dougherty v Rye*, 63 NY2d 989, 991 [1984] [laches]).

Guarino contends that by allowing four years to elapse between his refusal to sign the renewal lease, and the commencement of the ejection action, plaintiff has waived its right to seek

to evict him and its claim is subject to laches. However, neither waiver nor laches is appropriate. Plaintiff, an HDFC formed under Article 11 of the Private Financing Housing Law, is exempt from the Rent Stabilization Law (Admin Code of the City of New York § 26-504 [a], Rent Stabilization Code § 2520.11). This means that tenants who remain in the building after its conversion to an HDFC, and who do not buy shares, lose their rent-stabilized status at the expiration of their lease, although they may remain in occupancy. An HDFC may rent to tenants using rent stabilization leases, but the tenants do not thereby become rent stabilized. In effect, the HDFC's statutory exemption remains in force, even years after the expiration of a tenant's lease agreement (*see 546 W. 156th St. HDFC v Smalls*, 43 AD3d 7, 11 [1st Dept 2007]; *see also 512 E. 11th St. v Grimmet*, 181 AD2d at 489). For example, in a litigation involving this plaintiff and a former tenant in plaintiff's building, the First Department held that despite having offered the tenant renewal rent stabilized leases for years, plaintiff was nonetheless entitled to seek removal of the tenant 20 years after its conversion (*see 322 West 47th St. HDFC v Loo*, 153 AD3d at 1144). Here, unless Guarino is in fact a shareholder, plaintiff was free to terminate his tenancy at any time, given that his residential lease expired at the end of 1993 and was never renewed. The passage of time makes no difference, and neither waiver nor laches apply to an HDFC. The fifth and sixth defenses are therefore dismissed for failure to state a cause of action.

Guarino's seventh defense is that if he is unsuccessful in this action, he is entitled to cure his breach by signing the 2013 renewal lease, citing RPAPL § 753 (4). Section 753 (4) of the RPAPL addresses stays of evictions in residential premises and provides that where an eviction is premised on the respondent having breached a provision of the lease, the respondent is entitled to a 30-day stay of the issuance of the warrant to correct the violation (*see 67 8th Ave. Assoc. v Hochstadt*, 88 AD2d 843 [1st Dept 1982]; *Baja Realty, Inc. v Karoussos*, 120 Misc 2d 824, 825

[*33]

[App Term, 1st Dept 1983]). As no warrant has issued, summary dismissal is denied, but enforcement is premature.

The eighth defense alleges both that plaintiff has not established good cause for seeking to evict Guarino, and that the proffered rent increase in unconscionable. The requirement that a plaintiff show good cause derives from its legal status as an HDFC. An HDFC, an entity with direct governmental oversight, triggers constitutional due process protections for its tenants including notice of the reason for an eviction above and beyond that the lease expired (*see 512 E. 11th St. HDFC v Grimmet*, 181 AD2d at 489). As noted in *City of New York v Valera* (216 AD2d 237 [1st Dept 1995]), sufficient notice entails compliance with RPAPL § 714 (4), and requires the HDFC to state the alleged cause for termination and inform the tenant of the factual and legal claims at issue, so as to provide the tenant with the ability to interpose its defenses (*id.* at 238). Plaintiff argues persuasively that under the law, its notice of termination and petition sufficiently allege "good cause" for its decision, in particular that Guarino is not the owner of the shares allocated to 5F, and he refused to sign a written lease for 5F when offered to him by plaintiff in March 2013.

Guarino also claims that the nearly 226 percent proposed monthly rent increase is unconscionable and should be deemed void. When a party claims, or when it appears to the court that a lease or a lease provision may be unconscionable, Real Property Law § 235-c (2) provides an opportunity to the parties to present evidence at a hearing to aid the court in making a determination. For instance, in *Ardrey v 12 W. 27th St. Assocs.*, 117 AD2d 538 [1st Dept 1986]), the Court held that where a lease clause is claimed to be unconscionable, the trial judge must provide the parties with "a reasonable opportunity to present evidence as to its setting, purpose and effect to aid the court in making the determination" (117 AD2d at 540, citing Real

Property Law § 235-c [2]). Thus, in *303 W. 122nd St. HDFC v Hussein* (46 Misc 3d 136 [A]; 2015 NY Slip Op 50131 [U] [App Term, 1st Dept 2015]), Appellate Term ruled that the trial court's sua sponte end-of-trial dismissal of the landlord's petition based on its finding that the "extreme rent increase" violated the unconscionability doctrine was in error and directed a new trial to afford the parties an opportunity to argue the "purpose and effect [of the provision at issue] to aid the court in making the determination [of unconscionability]" (2015 NY Slip Op 50131[U], *1). Accordingly, the court here reserves decision on this branch of Guarino's eighth defense pending determination at trial.

Use and occupancy

RPAPL § 749 (3) provides that a landlord may collect as use and occupancy, the amount payable at the time the summary proceeding was commenced, and the reasonable amount of use and occupancy up until the time the warrant is issued. "It is well established that a holdover tenant retaining possession of real property is liable to the landlord for the reasonable value of the use and occupancy of the premises" (*Peck v Lodge*, 2003 NY Slip Op 30230[U], *22 [Sup Ct, NY County 2003]).

Courts have broad discretion to award use and occupancy pendente lite (*see 43rd St. Deli, Inc. v Paramount Leasehold, L.P.*, 107 AD3d 501, 501 [1st Dept 2013]). Here, Guarino is a holdover tenant whose monthly payments were, up until March 2019, sporadic for several years. Payment of use and occupancy pendente lite, "'accommodates the competing interests of the parties in affording necessary and fair protection to both' . . . and preserves the status quo until a final judgment is rendered" (*MMB Assoc. v Dayan*, 169 AD2d 422, 422 [1st Dept 1991] [internal citations omitted]). The courts may therefore award use and occupancy without a hearing on an interim basis, and may look to the most recently charged amount of rent to set the rate (*see New*

York Physicians LLP v Ironwood Realty Corp., 103 AD3d 410, 411 [1st Dept 2013]; *but see 43rd St. Deli, Inc*, 107 AD3d at 501-502 [where the plaintiff-tenant had allegedly defaulted, with the landlord claiming that the lease had lapsed making the tenant a holdover tenant, it was "premature to find that the rent under the lease is the correct pendente lite payment"]).

Plaintiff contends that the fair market rate for the apartment is about $700.00 monthly, the same amount as the monthly rent provided in the 2013 lease. Guarino has not raised an argument in opposition. Accordingly, plaintiff's request for ongoing use and occupancy pendente lite from Guarino is granted in the amount of $700.00 monthly, with use and occupancy payable as of July 2017 and continuing until the conclusion of this action. Importantly, should Guarino prevail on his claim that he is a shareholder, plaintiff will be required to offset any overcharge (*see New York Physicians LLP v Ironwood Realty Corp.*, 103 AD3d at 411).

Accordingly, plaintiff's motion for summary judgment and dismissal is granted as to the first, third, fourth and fifth counterclaims in the within action, and the second, third, fourth, fifth, and sixth defenses, as well as the branch of the eighth defense alleging no good cause was shown; and is otherwise denied.

The court has considered the parties' other arguments and found them unavailing.

Guarino's motion for leave to amend (mot. seq. 010)

The standard applied on a motion to amend a pleading is "much less exacting" than that applied on a motion seeking summary judgment (*see James v R & G Hacking Corp.*, 39 AD3d 385, 386 [1st Dept 2007]). Permission should be "freely given" (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]). The movant need only show that its proposed amendments are not "palpably insufficient or clearly devoid of merit" (*MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). However, to conserve judicial

resources, the court may examine the underlying merits of the proposed causes of action (*see Eighth Ave. Garage Corp. v H.K.L. Realty Corp.*, 60 AD3d 404, 405 [1st Dept 2009], *appeal dismissed* 12 NY3d 80 [2009]). Where the application clearly lacks merit, the court may properly deny the motion (*see Lau v Human Resources Admin.*, 168 AD3d 565, 566 [1st Dept 2019], *app dismissed* 33 NY3d 1056 [2019]).

Guarino seeks to add a claim of collateral estoppel as a new third counterclaim in both his answer in the ejectment action (*see* NYSCEF Doc No. 284, proposed second amended answer with affirmative defenses and counterclaim, redlined ¶¶ 74-85), and in his answer to the proceeding commenced in Housing Court (*see* NYSCEF Doc No. 285, proposed amended answer, redlined ¶¶ 8-22).[10] Plaintiff opposes, in part arguing that defendant's amendment is time-barred as collateral estoppel is an affirmative defense that must be initially pleaded or waived, but Guarino is only now seeking to include it as a defense, years after the conclusion of the derivative action. Guarino counters that he only learned of plaintiff's long-held knowledge of the lease agreement during the recent exchange of documents and has brought his motion to amend expeditiously.

The doctrine of collateral estoppel, if invoked in a subsequent action or proceeding, "prevent[s] a party from relitigating an issue decided against that party in a prior adjudication" (*Staatsburg Water Co. v Staatsburg Fire Dist.*, 72 NY2d 147, 152 [1988]). The party seeking to invoke the doctrine must show "an identity of issue which has necessarily been decided in the

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[10] Guarino has also added new allegations in the proposed second amended answer pertaining mostly to the derivative action (*see* NYSCEF Doc No. 284, redlined ¶¶ 48-58), and in the proposed amended verified answer in the former Housing Court matter (*see* Doc No. 285, redlined ¶¶ 10-128). He also seeks to add the allegations concerning the closing and his payment for the shares, in particular that his $215.00 security deposit "was released from the bank where it had been held and ... put toward" the purchase price, and that he "paid an additional $35.00 on June 3, 2009 to complete the purchase" (NYSCEF Doc No. 284, proposed second amended answer with affirmative defenses and counterclaims, ¶ 44).

prior action and is decisive of the present action, and [that there was] a full and fair opportunity to contest the decision now said to be controlling" (*Schwartz v Public Administrator*, 24 NY2d 65, 70 [1969]). It "bars a litigant from disputing an issue in another proceeding when that issue was decided against the litigant in a proceeding in which [it] had a full and fair opportunity to contest the matter" (*Feinberg v Boros*, 99 AD3d 219, 226 [1st Dept 2012] [internal quotation marks and citation omitted]).

Collateral estoppel is "an elastic doctrine" (*see Staatsburg Water Co.*, 72 NY2d at 153). Determining whether a party had a full and fair opportunity to contest a prior determination will not be based on a formula (*see Gilberg v Barbieri*, 53 NY2d 285, 292 [1981]). It will not be sufficient to simply refer "to the procedure benefits available in the first forum" and conclude that a party had its full day in court to contest the prior matter (*see Staatsburg Water Co.*, 72 NY2d at 153, citation omitted). Instead, there must be a "practical inquiry into the realities of litigation" (*Gilberg v Barbieri*, 53 NY2d at 292 [internal quotation marks and citation omitted]).

Here, although plaintiff argues it did not have knowledge of the signing of the proprietary lease in 2009, Guarino has alleged that Hauze was given notice of the April 2009 board meeting the subject of which was the vote and approval of the closing on Guarino's apartment and can be deemed to have known of its signing. The transaction was also recorded in ACRIS, a public database. Guarino has thus proposed sufficient allegations upon which it could be argued that plaintiff should be collaterally estopped from challenging the proprietary lease. Plaintiff's assertions that it only learned of the proprietary lease after the conclusion of the derivative action and should have the opportunity to challenge its legality, and that Supreme Court did not explicitly rule on the legitimacy of the proprietary lease, merely raise questions of fact but are not enough to result in a denial of Guarino's motion to amend.

Leave to amend a pleading is "freely given" upon terms that are just (*see* NYSCEF Doc No. 282, memorandum of law of Guarino's counsel in support at 7). Guarino's proposed amended pleadings are not "palpably improper or insufficient as a matter of law" (NYSCEF Doc No. 282 at 8, quoting *Barnes v County of Nassau*, 108 AD2d 50, 52 [2d Dept 1985]). Leave is appropriate when there is no prejudice or surprise to the opposing party (*see* NYSCEF Doc No. 282 at 7, citing *Fahey v County of Ontario*, 44 NY2d 934, 935 [1978]).

Therefore, Guarino's motion for leave to amend is granted, but notes that Guarino has offered no reason for his tardy explanation that he paid $35.00 in cash to supplement the amount of his security deposit so as to fully pay for the shares, in particular as he had intimate knowledge of the transaction at the time. Guarino is directed to file a clean copy of the second amended complaint after which plaintiff shall respond.

Accordingly, it is

ORDERED that plaintiff's motion for summary judgment is granted, to the extent of dismissing the first, third, fourth and fifth counterclaims, and the second, third, fourth, fifth, and sixth defenses, and the branch of the eighth defense alleging failure to allege good cause, and is otherwise denied; and it is further

ORDERED that Guarino's cross motion for summary judgment is denied; and it is further

ORDERED that plaintiff is awarded interim use and occupancy in the amount of $700.00 a month, commencing July 2017, payable immediately and continuing through the time of trial or settlement; and it is further

ORDERED that Guarino's motion to further amend his answer is granted, and he is to file and serve a second amended answer within 25 days of the date of this decision, after which plaintiff shall reply within the time frame provided by the CPLR; and it is further

ORDERED that the parties are to appear for a compliance conference (by video or telephone conference) on August 17, 2020.

Dated: June 23, 2020

ENTER:

J.S.C.
HON. DAVID B. COHEN
J.S.C.