Park Knoll Assoc. v Conover
2020 NY Slip Op 35680(U)
March 22, 2020
Supreme Court, Westchester County
Docket Number: Index No. 55221/2018
Judge: Gretchen Walsh
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER - COMMERCIAL DIVISION

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PARK KNOLL ASSOCIATES,

Plaintiff,

-against-

PEG CONOVER, RAE ACAMPORA, DAVID FAJARDO, LARISSA MOSKOWITZ, ANNE PICCIANO, ARLENE DIAZ, MARGARET INGRASSIA, JOHN DOE, JANE DOE, ALEX JEFFERY, MCLEAN LAW, P.C., IRA GOLDENBERG, GOLDENBERG & SELKER, LLP, RICHARD RESNIK, SEYFARTH SHAW, LLP, SAVIGNANO ACCOUNTANTS AND ADVISORS and PARK KNOLL OWNERS, INC.,

Defendants.

Index No. 55221/2018
Motion Seq. Nos. 3, 4
Motion Date: 11/15/2019

DECISION AND ORDER

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PARK KNOLL OWNERS, INC.,

Counterclaim Plaintiff,

-against-

PARK KNOLL ASSOCIATES,

Counterclaim Defendant,

-and-

HARRIN PLATZNER, JOSEPH GLEN LALLI, PATRICIA ANN LALLI, CEVIN SOLING and AMBER JO SALAMONTE,

Additional Counterclaim Defendants.

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WALSH, J.

Defendant/Counterclaim Plaintiff Park Knoll Owners, Inc. (the "Cooperative" or "Corporation") moves this Court for an Order: (1) pursuant to CPLR 3212 granting the Cooperative summary judgment on its Counterclaim for issuance of a declaration declaring the May 13, 2003 transfer to Harrin and Crystal Platzner (the "Platzner Transfer") of one hundred (100) shares of Cooperative stock allocated to Garages F-13 and F-14 (the "Garage Stock" or "Garages"), and the August 11, 2006 transfer to Joseph Glen Lalli and his wife, Patricia Ann Lalli (the "Lalli Transfer") of fifty (50) shares of stock in the Cooperative allocated to Garage H-5, are in violation of the Cooperative's certificate of incorporation, by-laws, proprietary lease and offering plan, and therefore invalid, null and void *ab initio*;[1] (2) dismissing all of the affirmative defenses set forth in the Answers of Plaintiff-Counterclaim Defendant Park Knoll Associates ("PKA") and Counterclaim Defendant Cevin Soling ("Soling"), both dated July 30, 2019; (3) dismissing PKA's First Amended Complaint, dated August 13, 2018; and (4) entering default judgment against Counterclaim Defendant Harrin Platzner[2] and in favor of the Cooperative for the relief sought in the counterclaim due to his failures to answer or appear in this action.

Plaintiff/Counterclaim Defendant PKA, Counterclaim Defendant Soling, and purportedly Counterclaim Defendant Harrin Platzner through a power of attorney issued to Soling, oppose the Cooperative's motion and cross-move for an Order: (1) granting summary judgment pursuant to CPLR 3212 dismissing the Counterclaim and Third Affirmative Defense of Defendant Cooperative; and (2) extending the time, *nunc pro tunc,* for Counterclaim Defendant Harrin Platzner to file the Answer and Affirmative Defenses of Harrin Platzner to the Counterclaim of

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[1] By Stipulation dated October 4, 2019, Glen J. Lalli s/h/a Joseph Glen Lalli and Patricia Ann Lalli (collectively, the "Lallis") and Amber Jo Salamone s/h/a/ Amber Jo Salamonte ("Salamonte") entered into a stipulation of settlement of the Cooperative's Counterclaim. By Order dated October 29, 2019, this Court dismissed with prejudice any claims brought against Glen J. Lalli s/h/a Joseph Glen Lalli and Patricia Ann Lalli (collectively, the "Lallis") without costs as to any party (Doc. No. 145). Therefore, the Court shall omit the portions of the parties' contentions relating to the Lallis and Salamonte, except for factual background.

[2] The Cooperative also moved for a default judgment to be entered against the Lallis and Salamonte, but based on the stipulation of settlement with these Counterclaim Defendants, this branch of the Cooperative's motion has been rendered moot.

the Cooperative (Doc. No. 119) to October 4, 2019 pursuant to CPLR 2004. These motions/cross-motions have been consolidated for purposes of deliberation and determination.

FACTUAL AND PROCEDURAL BACKGROUND

This action is the latest of a number of disputes[3] among the parties with all issues primarily focused around the validity of the issuance of garage stock at a cooperative housing complex commonly known as Park Knoll located in West Harrison, New York. A full statement of the factual and procedural background of this case, as well as the parties' respective positions, is set forth in the Court's prior Decision and Order dated March 15, 2019 (the "March Order") in which the Court denied the motion of Defendants Peg Conover, Rae Acampora, David Fajardo, Larissa Moskowitz, Anne Picciano, Arlene Diaz, Margaret Ingrassia (the "Board Defendants") and the Cooperative (collectively the "Coop Defendants") seeking a declaration nullifying the Platzner Transfer and the Lalli Transfer as void *ab initio* without prejudice and with leave to renew.

In short, in the March Order, the Court denied the Cooperative's motion for the issuance of a declaration as premature, holding that:

> Here, the Coop Defendants have not simply moved to dismiss this action, they have moved for affirmative relief in the form of an order declaring that the Garage Stock Transfers were void *ab initio.* However, the Coop Defendants have not interposed an answer asserting an affirmative defense of *ultra vires* nor have they interposed a counterclaim for a declaratory judgment that the Garage Stock Transfers were void *ab initio* as *ultra vires.* The law is well settled that the defense of *ultra vires* is an affirmative defense that must be pleaded . . . Furthermore, since the Coop Defendants are seeking affirmative relief in the form of an order declaring the Garage Stock transfers were void *ab initio*, such a defense is more appropriately pleaded as a counterclaim.

(March Order at 23).

The Court also determined that the Cooperative's requested declaration could not be

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[3]In September 2019, the Appellate Division, Second Department, *inter alia* affirmed a motion by the Cooperative to confirm an arbitration award made to it following PKA's alleged breach of the parties' settlement (*Matter of Park Knoll Owners, Inc. v Park Knoll Associates*, 175 AD3d 1410 [2d Dept 2019]).

considered unless all necessary parties were first joined, holding that:

> [T]he Court believes that the motion must also be denied for failure to join necessary parties. . . Here, there is no information in the record as to whether the garages are being used by the Platzners and Lallis or their successors-in-interest. Clearly, if the Platzner and Lalli Garage Stock transfers are found to be void *ab initio,* the Platzners and Lallis, as well as their successors-in-interest, would be aggrieved by such a determination. [footnote omitted] Thus, if the Coop Defendants were to obtain a declaratory judgment in their favor, the property rights of the purported owners of the Garage Stock, all of whom are not parties to this action, could and would be adversely affected without affording them the opportunity to be heard on the issue. . . . Here the owners of the Garage Stock are necessary parties to this proceeding ....

(March Order at 23-27).

<u>The Cooperative's Counterclaim</u>

Following the March Order, on May 29, 2019, the Coop Defendants filed their Verified Answer, Affirmative Defenses and Counterclaims ("Ans.").[1] The Cooperative brings a Counterclaim for declaratory judgment declaring that the purported transfers to the Platzners and Soling are all void *ab initio*, invalid and ineffective against the Cooperative and any share certificates issued in connection with those invalid transfers are void (Ans. at ¶ 149). The Cooperative is a domestic corporation that owns Park Knoll consisting of 228 residential apartments and 160 parking spaces, of which 115 are indoor parking garage spaces and 45 are outdoor parking spaces (collectively the "Parking Spaces") (Counterclaim at ¶¶ 109-110). The Cooperative's day-to-day affairs are carried out by its board of directors (the "Board" or "Board of Directors") (*id.* at ¶ 111). PKA, a limited liability partnership, is and was the sponsor of the Cooperative's cooperative conversion pursuant to an offering plan filed with the New York State Attorney General in 1986 (the "Offering Plan") (*id.* at ¶¶112-3). The Cooperative avers that PKA, as the sponsor of the cooperative conversion, drafted, prepared, and presented the Offering Plan (*id* at ¶ 119).

The Cooperative states that in a section entitled "The Offer," the Offering Plan provides that:

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[1] While all the Coop Defendants seek dismissal of the First Amended Complaint, only the Cooperative brings the Counterclaim.

> Under this Plan, the Apartment Corporation is offering for sale a total of 183,350 shares of its capital stock . . . Under the terms of the Proprietary Lease, shares allocated to the parking spaces will be offered only to purchasers of shares allocated to apartments and may be transferred only to tenant-shareholders of the Apartment Corporation or purchasers who are simultaneously purchasing shares allocated to an apartment (*id.* at ¶ 120, Offering Plan at 2).[2]

The Cooperative also quotes the section entitled "Features of Cooperative Ownership Under This Plan," providing:

> This Plan has been designed to give each purchaser the same rights and benefits generally enjoyed by owners of cooperative apartments. These rights and benefits include:
>
> (i) the right to exclusive possession of the apartment and of the parking space(s), if any, purchased under a long term lease (commonly known as a "Proprietary Lease");
>
> (ii) the right, in the opinion of counsel set forth below, to deduct, from his income for Federal, State and local income tax purposes, that portion of the maintenance charges paid by him which represents his pro rata share of real estate taxes and mortgage interest paid or incurred by the Apartment Corporation with respect to the Property; . . . (*id.* at ¶ 121, Offering Plan at 4).

The Cooperative quotes the section of the Offering Plan entitled "Unsold Shares," which provides:

> At closing, all Unsold Shares shall be acquired and owned by Sponsor or by individuals designated by Sponsor, as part of the consideration for the exchange of the Property to the Apartment Corporation . . . It is presently contemplated that all Unsold Shares shall be acquired and retained by Sponsor...
>
> 1. Each holder of Unsold Shares shall have the right, freely and without charge, to sublet his Unsold Apartments and Unsold Parking Spaces one or more times to such person and on such terms and conditions as he deems desirable. Each holder of Unsold Shares shall also have the right, freely and without charge (except for stock transfer stamps), to sell such Unsold Shares and transfer the appurtenant Proprietary Lease to any person provided, that Unsold Shares allocated to parking spaces may only be sold to persons who already own the shares allocated to an apartment in the Buildings or purchasers who simultaneously purchase the shares allocated to an apartment in the Buildings (*id.* at ¶ 122, Offering Plan at 130).

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[2] Unless otherwise noted, emphasis added to documents quoted in the Amended Answer is that of the Cooperative.

The Cooperative further quotes portions of a Tax Opinion provided by Mandel and Resnick, P.C. (the "Mandel Op."), included as an exhibit to the Offering Plan, dated January 13, 1986, which provides at the "Discussion" portion, in pertinent part:

> Pursuant to Section 216 of the IRC, a "tenant-stockholder" (as defined in the IRC) of a qualified cooperative housing corporation is allowed to deduct that portion of the amounts paid to the cooperative housing corporation within his taxable year that represents his proportionate share of (i) real estate taxes paid or incurred by the corporation on the land and building owned by it and (ii) interest paid or incurred by the corporation on its indebtedness contracted in the acquisition of such land and building. To qualify as a cooperative housing corporation, the following four (4) fundamental requirements must be met:
>
> * * *
>
> Second Requirement: Each stockholder must be entitled, solely by reason of his ownership of the corporation's shares, to occupy for dwelling purposes an apartment in the building owned or leased by the corporation. Under your certificate of incorporation, each stockholder will be entitled solely by virtue of his ownership of your shares, to a Proprietary Lease covering the apartment to which his block of shares is allocated . . .
>
> In addition, a stockholder may purchase shares allocated to a parking space on the Property. Under the terms of the Proprietary Lease, shares allocated to parking spaces will be offered only to purchasers of shares allocated to apartments and may be transferred only to your tenant-stockholders or purchasers who are simultaneously purchasing shares allocated to an apartment. . . . (*id.* at ¶ 123, Offering Plan, Ex. A, Mandel Op. at 57-59).

The Cooperative alleges its governing documents were prepared and drafted by PKA, as sponsor, to comply with its representations in the Offering Plan (*id.* at ¶ 124).

The Cooperative further points out its certificate of incorporation (the "Certificate of Incorporation") at Paragraph SECOND, Subsection (b), which provides:

> The primary purpose of this Corporation is to make apartments in the apartment building or buildings owned or leased by the Corporation available to its shareholders for residential purposes under leases commonly known as proprietary leases. All such shareholders shall be entitled solely by reason of their ownership of shares in the Corporation to proprietary leases entitling them to occupy apartment in the said apartment building for residential purposes. Anything herein contained to the contrary notwithstanding, <u>shares of the Corporation shall be issued solely in</u>

connection with the execution of proprietary leases for apartments in said building (*id.* at ¶ 125, Ex. B).

The Cooperative's by-laws (the "By-laws") provide at Article VI, entitled "Capital Shares," in pertinent part:

> Section 1. Capital Shares. Shares of stock of the corporation shall be issued only in connection with the execution and delivery by the purchaser and the corporation of a proprietary lease of an apartment in the building owned by the corporation, and the ownership of the said shares so issued shall entitle the holder thereof to occupy for dwelling purposes the apartment specified in the proprietary lease so executed and delivered in connection with the issuance of said shares, subject to the covenants and agreements contained in such proprietary lease. Shares of stock of the corporation hereafter acquired and subsequently reissued, and unissued but authorized shares of the corporation hereafter issued, shall only be so reissued or issued, as the case may be, in conjunction with the execution of a proprietary lease of an apartment in the building.
>
> Section 2. Certificates and Issuance. Certificates of the shares of the corporation shall be in the form prepared by the Board of Directors . . .
>
> Section 3. Transfer. Transfers of shares shall be made only upon the books of the corporation by the holder in person . . . and filed with the secretary, and on the surrender of the certificate of such shares . . . No such transfer shall be valid or effected until all the requirements with respect thereto set forth in the proprietary lease shall have been satisfied and complied with.
>
> Section 4. Units of Issuance. Shares issued to accompany each proprietary lease shall be issued in the amount allocated by the Board of Directors to the apartment or other space described in such proprietary lease. Unless and until all proprietary leases which shall have been executed by the corporation shall have been terminated, the shares of stock which accompany each proprietary lease shall be represented by a single certificate and shall not be sold or transferred except to the corporation or as an entirety to a person who has acquired such proprietary lease, or a new one in place thereof, after complying with and satisfying the requirements of such proprietary lease in respect to the assignment thereof.
>
> Section 8. Legend on Shares Certificate. Certificates representing shares of the corporation shall bear a legend reading as follows:
>
>> "The rights of any holder of the shares evidenced by this certificate are subject to the provisions of the Certificate of Incorporation and the by-laws of the corporation and to all the terms, covenants,

> conditions and provisions of a certain proprietary lease made between the Corporation, as Lessor, and the person in whose name this certificate is issued, as Lessee, for an apartment in the apartment house which is owned by the Corporation and operated as a 'cooperative', which proprietary lease limits and restricts the title and rights of any transferee of this certificate.
>
> The shares represented by this certificate are transferable only as an entirety and only to an assignee of such proprietary lease approved in writing in accordance with the provisions of the proprietary lease..." (*id.* at ¶ 126, Ex. C).

The Cooperative states that its By-laws, at Article XII, entitled "Reports," provide:

> 2. Tax Deduction Statement. The corporation shall, on or before March 15th following the close of a fiscal year, send to each shareholder listed on the books of the corporation for the prior fiscal year, a statement setting forth the amount per share of that portion of the rent paid by such shareholder under his proprietary lease during such year which has been used by the corporation for payment of real estate taxes and interest on mortgage or other indebtedness paid by the corporation with respect to property owned by it (*id.* at ¶ 127, Ex. C).

The Cooperative also quotes from its proprietary lease (the "Proprietary Lease") at Section 16, entitled "Assignment," which states:

> Transfer of Parking Spaces. (b) The Lessee shall not transfer the shares of the Lessor allocated to the parking space(s) to which this lease is appurtenant, or any interest therein, and no such transfer shall take effect as against the Lessor for any purpose, until:
>
> (i) all shares of the Lessor allocated to a parking space to which this Lease is appurtenant shall have been transferred to an existing lessee shareholder of Lessor or to an assignee of a proprietary lease issued by Lessor who simultaneously therewith becomes an owner of the shares of the Lessor allocated to any apartment in the Buildings (*id.* at ¶ 128, Ex. D).

As the Cooperative states, the Proprietary Lease at Section 45, entitled "Unity of Shares and Lease" provides:

> 45. The shares of the Lessor held by the Lessee and allocated to the Apartment and parking space(s), if any, have been acquired and are owned subject to the following conditions agreed upon with the Lessor and with each of the other proprietary lessees for their mutual benefit:

> (a) the shares represented by a stock certificate are transferable only if all of such shares allocated to the Apartment are transferred as an entirety and all of such shares allocated to a parking space, if any, are transferred as an entirety; and
>
> (b) the shares shall not be transferred except to the Lessor or to an assignee of this Lease . . . after compliance with all of the provisions of Paragraph 16 of this Lease relating to assignments (*id.* at ¶ 129, Ex. D).

In summary, the Cooperative asserts that the Offering Plan and the organizational documents, as prepared and drafted by PKA, require that:

> (a) Cooperative shares may only be issued in connection with the execution of a proprietary lease, which entitles its owner to occupy an apartment;
>
> (b) Transfers of shares are neither valid nor effective unless and until all the requirements set forth in the appurtenant proprietary lease (which must be executed when the shares are issued) have been satisfied and complied with;
>
> (c) Shares may only be transferred as an entirety which includes the underlying apartment being transferred and its accompanying parking space (if any);
>
> (d) The rights of a holder of a share certificate are necessarily determined from, subject to, and governed by, the Cooperative's Certificate of Incorporation, the By-laws, and the proprietary lease executed in connection with the issuance of that share certificate;
>
> (e) A transfer of shares allocated solely to a parking space that is unaccompanied by the execution of an appurtenant apartment proprietary lease is not effective as against the Cooperative.
>
> (f) Shares allocated to garage spaces cannot be transferred except to apartment owners; and
>
> (g) "Unsold Shares" (as that term is defined by the By-laws and Offering Plan) that are allocated to garage spaces may only be sold to persons who already own the shares allocated to a cooperative apartment or purchasers who simultaneously purchase the shares allocated to a cooperative apartment (*id.* at ¶ 130).

The Cooperative alleges that in or about May 2003, Platzner and his wife acquired in the Platzner Transfer one hundred (100) shares of corporate stock in the Cooperative allocated to Garages F-13 and F-14 (*id.* at ¶ 131). It claims that in connection with the Platzner Transfer,

Platzner and his wife were allegedly issued Cooperative share certificates numbers 603 and 604 (*id.* at ¶ 132). Platzner's wife, Crystal Platzner, died on or about July 22, 2017 (*id.* at ¶ 133). The Cooperative contends that the Platzners were not Cooperative lessees or shareholders of the Cooperative at the time of the Platzner Transfer (*id.* at ¶ 134). It claims that the Platzner Transfer did not occur, and the Garage Stock was not issued in connection with the Platzners' execution of a proprietary lease or their purchase of a Cooperative apartment (*id.* at ¶ 135).

According to the Cooperative, in or about 2016, Platzner and his wife purportedly transferred the Platzner Garages to Soling, Counterclaim Defendant PKA's general partner (*id.* at ¶ 136). It alleges that Soling was not a Cooperative lessee or shareholder of the Cooperative at the time the Platzners claimed to transfer the Platzner Garages to him (*id.* at ¶ 137). The Cooperative alleges that the Platzners' attempted transfer of the Platzner Garages to Soling did not occur in connection with Soling's execution of a proprietary lease or his purchase of a Cooperative apartment (*id.* at ¶ 138).

According to the Cooperative, the attempted transfers to the Platzners and then to Soling are all in violation of the terms of the Certificate of Incorporation, and are thus invalid and ineffective against the Cooperative and any share certificates issued in connection with those invalid transfers are void because the Platzners and Soling were not Cooperative lessees or shareholders in the Cooperative at the time of the purported transfers and the purported transfers did not include the Platzners' or Soling's acquisition of a Cooperative apartment or execution of a proprietary lease (*id.* at ¶ 143).

The Cooperative asserts that the purported transfers to the Platzners and Soling are also in violation of the By-laws, and are thus invalid and ineffective against the Cooperative and any share certificates issued in connection with those invalid transfers are void because the cooperative shares purportedly issued in connection with those purported transfers were not issued in conjunction with a proprietary lease's execution (*id.* at ¶ 144). It argues that the purported transfers to the Platzners and Soling violate the Cooperative's form of proprietary lease which makes clear that transfers of garages and parking spaces are of no effect against the Cooperative unless the garages and parking spaces are transferred to a proprietary lessee (*id.* at ¶ 145). According to the Cooperative, the claimed transfers to the Platzners and Soling further

violate and are unavoidably inconsistent with the description of PKA's offering included in PKA's Offering Plan where PKA makes clear that garages and parking spaces may only be transferred to proprietary lessees (*id.* at ¶ 146).

The Cooperative alleges that any shares issued in connection with the purported transfers to the Platzners and Soling are all void because, per the By-laws, share certificates may only be issued in compliance with the proprietary lease appurtenant to those issued shares. Because the purported transfers to the Platzners and Soling did not include an appurtenant proprietary lease, the share certificates issued in connection therewith are void pursuant to the By-laws (*id.* at ¶ 147). It further contends that any shares issued in connection with the purported transfers to the Platzners and Soling are all void because they were not issued in the form prepared by the Board of Directors, and are thus invalid, void and of no effect (*id.* at ¶ 148).

The Cooperative contends that, based on the foregoing, it is entitled to a declaratory judgment declaring that the purported transfers to the Platzners and Soling are all void *ab initio,* invalid and ineffective against the Cooperative and any share certificates issued in connection with those invalid transfers are void.[3]

The PKA Parties' Answers to the Counterclaim

In response to the Cooperative's Counterclaim, PKA and Cevin Soling filed Answers on July 30, 2019 raising various affirmative defenses (NYSCEF Doc. Nos. 78, 82). On October 4, 2019, Cevin Soling's attorney filed a document captioned "Answer and Affirmative Defenses of Harrin Platzner to the Counterclaim of Park Knoll Owners, Inc." ostensibly "by his agent Cevin Soling pursuant to an irrevocable power of attorney" (NYSCEF Doc. No. 119). In response, on October 7, 2019, the Cooperative filed a "Notice of Return and Rejection of Answer" arguing that Platzner's Answer "is untimely; the purported power of attorney is invalid and fails to meet

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[3] On September 27, 2019, counsel for Defendants Richard Resnick and Seyfarth Shaw LLP, Eddy Salcedo, Esq., submitted an affirmation ("Salcedo Aff."; NYSCEF Doc. No. 116) joining and supporting the Cooperative's motion and requesting that if the Court determines that the stock transfers are void *ab initio*, "then all of Plaintiff's claims in this action, against all of the defendants, fall away – a fact that Plaintiff's counsel acknowledged on the record at the October 10, 2018 Court conference (*see* Transcript of the October 10, 2018 Court Proceeding, a copy of which is annexed hereto as **Exhibit A**, at 20:6-20)" (Salcedo Aff. at ¶ 5).

the statutory requirements set forth in General Obligations Law § 5-1501B(1)(c) and (d); and because it purports to assign and transfer Platzner's right, title and interest in and to certain corporate shares without the Cooperative's approval" (Doc. No. 121). On October 7, 2019 the Cooperative, the Lallis, and Salamonte entered into a stipulation of settlement (NYSCEF Doc. No. 120) and, based on this stipulation, the Court dismissed any claims relating to the Lallis and Salamonte on October 29, 2019 (NYSCEF Doc. No. 145).

On October 28, 2019, PKA, Soling, and Platzner filed a cross-motion for summary judgment seeking dismissal of the Cooperative's Counterclaim and Third Affirmative Defense and seeking to extend the time *nunc pro tunc* for Platzner to file his Answer and Affirmative Defenses to October 4, 2019 pursuant to CPLR 2004. On November 15, 2019, the Cooperative filed its Reply in opposition to the cross-motion and in further support of its motion.

A. The Cooperative's Contentions in Support of Its Motion (Mot. Seq. No. 003)

In support of its motion, the Cooperative submits: (1) an Affirmation of Jerry A. Weiss, Esq. dated September 9, 2019, together with accompanying exhibits ("Weiss Aff."); (2) an Affidavit of Peg Conover sworn to on September 9, 2019, together with accompanying exhibits ("Conover Aff."); and (3) a Memorandum of Law dated September 9, 2012 (the "Coop. Mem.").

Weiss affirms that he is the attorney for the Cooperative and Board Defendants. After restating portions of the Court's March Order (Weiss Aff. at ¶¶ 3-5), Weiss contends that the Cooperative addressed the Court's concerns set forth in the March Order in that the Cooperative joined issue, serving and filing its Answer with Counterclaim seeking declaratory relief (*id.* at ¶¶ 6-7, Ex. A). He also argues that the Cooperative joined as parties Harrin Platzner, Joseph Glen Lalli, Patricia Ann Lalli, Cevin Soling and Amber Jo Salamonte (*id.* at ¶¶ 7-8, Ex. A). He finally affirms that, although Harrin Platzner's wife, Crystal Platzner, was also a co-transferee (with Harrin) under the Platzner Transfer and in accordance with the Order should have been joined on the Counterclaim, Crystal Platzner died on or about July 22, 2017 and any interest she may have had in the Garage Stock transferred to Harrin, her surviving spouse, by operation of law (*id.* at ¶ 9).

Weiss states that PKA's counsel interposed an Answer to the Counterclaim, as well as entered an appearance on behalf of Soling and interposed an Answer (virtually identical to

PKA's Answer) on Soling's behalf (*id.* at ¶¶ 10-11, Exs. B, C). According to Weiss, Counterclaim Defendant Platzner was personally served with the Counterclaim on June 11, 2019 (*id.* at ¶ 14, Ex. J). Weiss contends that Harrin Platzner, has failed to answer the Counterclaim and the time for doing so has lapsed and that, therefore, this Court should enter a default judgment against Platzner and in favor of the Cooperative for the relief sought in the Counterclaim (*id.* at ¶ 15).

In her Affidavit in support of the Cooperative's motion, Peg Conover avers that she is a defendant and an officer and director of the Cooperative and is fully familiar with the facts and circumstances herein (Conover Aff. at ¶ 1). Conover annexes multiple exhibits including: (1) portions of the Sponsor PKA's Offering Plan (Ex. K); (2) a copy of the Cooperative's Certificate of Incorporation (Ex. L); (3) a copy of the Cooperative's By-laws (Ex. M); (4) a copy of the Cooperative's form proprietary license (Ex. N); (5) copies of share certificates numbers 603 and 604 executed by Harrin Platzner and issued to Harrin and Crystal Platzner in connection with the Platzner Transfer of the Garages portions of the Sponsor-PKA's Offering Plan (Ex. O); (6) copies of the Stock Receipts Pages accompanying and evidencing share certificates numbers 603 and 604 in connection with the Platzner Transfer (Ex. P); and (7) a copy of a share certificate number 677 issued to Glen Joseph Lalli and Patricia Ann Lalli in connection with the Lalli Transfer of Garage H-5 (Ex. Q).

In its Memorandum of Law, the Cooperative argues that it should be awarded summary judgment on its request for declaratory relief because a corporation's powers are circumscribed and limited to those conferred by its organizational documents, such as its Certificate of Incorporation (Coop. Mem. at 4). When a corporation engages in conduct that exceeds the scope or is in violation of its Certificate of Incorporation, the action or conduct is void (*id.*). Here, the Certificate of Incorporation provides that "shares of the Corporation shall be issued solely in connection with the execution of proprietary leases for apartments in said building" (Coop. Mem. at 4-5; Conover Aff. Ex. L [Certificate of Incorporation of Park Knoll Owners, Paragraph SECOND, Subsection [b]). Therefore, the Cooperative contends, by the terms of the Certificate of Incorporation, "the Cooperative is without the capacity or ability to issue share certificates when not in connection with the execution of a proprietary lease" (Coop. Mem. at 5).

According to the Cooperative, to the extent that the Cooperative issues shares not in connection with the execution of a proprietary lease – such as the shares purportedly issued in connection with the Platzner and Lalli Transfers – those shares are "necessarily unauthorized by the Certificate of Incorporation and void" (*id.*). Therefore, the Cooperative argues that the Court should declare the Platzner and Lalli Transfers and all purposed share certificates issued in connection therewith as null and void *ab initio* because the issued share certificates are violative of the Cooperative's Certificate of Incorporation, By-laws, and Offering Plan and must "be deemed a legal nullity and never entitled to legal effect." The Cooperative requests that, upon issuance of the requested declaration, the Court grant summary judgment dismissing PKA's Complaint, given that it rests and relies on the validity and enforceability of the void Platzner and Lalli Transfers (*id.* at 6).

The Cooperative also contends that PKA's and Soling's affirmative defenses must be dismissed because they "do not have standing to interpose many of their affirmative defenses because they relate to Counterclaim Defendant Platzner - not PKA or Soling" (*id.*). It argues that Platzner is in default, "having neither appeared nor answered the Counterclaim" (*id.*). The Cooperative argues that "Soling's attempt to legitimatize and justify his affirmative defenses by referring to himself as Platzner's assignee is utterly lacking in merit" (*id.*). It contends that because the purported share transfers that Platzner executed and issued to himself in connection with the Platzner Transfer were null and void *ab initio*, Platzner has no shares to assign to Soling. It also contends that PKA "admits and concedes that no such 'assignment' from Platzner to Soling was ever recognized, permitted or acknowledged by the Cooperative 'on the grounds the attempted transfer is void'" (*id.*).

With respect to PKA's and Soling's First Affirmative Defense relying on BCL § 203(a),[4] the Cooperative contends that BCL § 203(a) is neither applicable nor relevant to the Platzner and Lalli Transfers because it is limited to instances where the corporation acts or transfers property

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[4] Business Corporation Law § 203(a) provides "No act of a corporation and no transfer of real or personal property to or by a corporation, otherwise lawful, shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such transfer...."

and here the Cooperative neither acted nor participated in the Transfers and the Garage Stock purportedly transferred in connection therewith were not the Cooperative's property; the shares certificates were an "original issue" from PKA who transferred them to Platzner (Coop. Mem. at 8). The Cooperative argues that Platzner, as the principal of Platzner Investment Group, which PKA retained as agent to sell and manage its cooperative apartments and garage spaces, admits and concedes that he executed and issued the Platzner Transfer share certificates to himself (*id.*).

The Cooperative argues that PKA's and Soling's Second and Third Affirmative Defenses, alleging that the Cooperative's Counterclaim is barred by the Cooperative's prior release of Platzner and by *res judicata* based on the parties' settlement of an action entitled *Park Knoll Owners, Inc. v. Park Knoll Associates,* Index No. 12391/2009, New York Supreme Court for Westchester County (the "2009 Action") fail (*id.* at 10). It contends that, because the Transfers and share certificates purportedly issued in connection therewith are null and void *ab initio* from inception by operation of law, "neither the Cooperative's release nor the doctrine of *res judicata* can bar the requested declaration" (*id.* at 10-11). The Cooperative also argues that *res judicata* cannot bar the Counterclaim because Crystal Platzner was alive at the time of the 2009 Action, was a necessary party, and was not joined (*id.* at 11-12). It additionally contends that neither PKA nor Soling have standing to assert or rely on a release from the Cooperative to Platzner, given that they were not parties to that release (*id.* at 12). The Cooperative contends that PKA and Soling have no standing to assert their Fourth Affirmative Defense (estoppel, waiver and ratification) or their Fifth Affirmative Defense (laches). The Cooperative argues that their Sixth Affirmative Defense, that their Counterclaim is barred by the statute of limitations, fails because the nullification of the Transfers took place at the time of the Transfers and the statute of limitations does not operate to make an agreement that was void at its inception valid by the mere passage of time (*id.* at 15-17).

In their Seventh Affirmative Defense, PKA and Soling allege that PKA amended the Offering Plan by filing a 26th Amendment with the New York State Attorney General in or about July 2018 and, as a result, the Platzner and Lalli Transfers and the stock certificates issued in connection therewith do not contravene the amended Offering Plan. The Cooperative, however, argues that the Amendment "is incapable of altering, amending or modifying the Cooperative's

Certificate of Incorporation, and By-Laws, both of which make the Platzner and Lalli Transfers void *ab initio* given that the Transfers were not made to an existing proprietary lessee or in connection with the execution of [a] proprietary lease" (*id.* at 17-18). In their Eighth Affirmative Defense, PKA and Soling allege that Platzner is not a party to a proprietary lease and therefore cannot be bound by its terms. In response, the Cooperative does not contest this assertion, but instead argues that it is precisely because the Platzner Transfer was not accompanied by the execution of a proprietary lease that the Platzner Transfer and any shares purportedly issued in connection therewith are null and void (*id.*). Finally, with respect to PKA's and Soling's Ninth Affirmative Defense, that the Counterclaim fails to state a claim, the Cooperative argues that this defense should be dismissed because all of the other affirmative defenses are legally insufficient (*id.* at 18).

B. The PKA Parties' Contentions in Support of Their Cross-Motion (Mot. Seq. No. 004)

In opposition to the Cooperative's motion and in support of their cross-motion for summary judgment, PKA, along with Counterclaim Defendant Soling and Counterclaim Defendant Platzner (collectively the "PKA Parties") submit: (1) an Affirmation of W. James MacNaughton, Esq. dated October 28, 2019, together with exhibits ("MacNaughton Aff."); (2) an Affidavit of Cevin Soling, sworn to on October 15, 2019, together with exhibits ("Soling Aff."); and (3) a Memorandum of Law dated October 28, 2019 ("PKA Mem.").

In his Affirmation, MacNaughton, the PKA Parties' counsel, affirms that he has inspected the Cooperative's stock book on several occasions. According to MacNaughton, the stock book listed, at all times, Harrin and Crystal Platzner as owners of record for one hundred (100) shares of the Cooperative's stock allocated to Garages F-13 and F-14 (MacNaughton Aff. at ¶ 2). MacNaughton further states that, to the best of his knowledge, the Cooperative has made no effort to eject Platzner from the use or occupancy of garages described in the Platzner Stock (*id.* at ¶ 3). He affirms that he has attended several meetings of the Cooperative as the duly appointed proxy of Harrin and Crystal Platzner (*id.* at ¶ 4). He asserts that to the best of his knowledge, the Cooperative made no effort to question the legitimacy of the Platzner Stock before the action was filed, even though PKA asked the Cooperative to investigate the issuance of the Platzner Stock in 2016 (*id.* at ¶ 5). MacNaughton cites to the sworn testimony of Salamonte, Glen Lalli and

Goldberg[5] and states that the Cooperative has treated the stock issued to Glen Lalli and his wife appurtenant to Garage H-5 (the "Lalli Stock") as valid and approved the sale of the Lalli Stock to Mary Jo Salamonte, who owns an apartment at the complex (*id.* at ¶ 6).

He affirms that he attended the Cooperative's Annual Meeting for 2016 and presented to the Board of Directors the proposed Shareholder's Resolution annexed as Exhibit F and asked that it be submitted to the shareholders for a vote (*id.* at ¶ 7). According to MacNaughton, Mr. Goldenberg, the Cooperative's attorney and accountant, publicly said the Platzner Stock did not jeopardize the Cooperative's IRC 216 Status. He states that the Board of Directors did not submit the Shareholder's Resolution for a shareholder vote and that the Shareholder's Resolution called for the appointment of an independent counsel to investigate the circumstances surrounding the issuance of the Platzner Stock and its effect on the IRC 216 Status. He states that he has reviewed all PKA's records in its possession regarding the Cooperative and that PKA has no records that show it sold the Platzner Stock to the Platzners in 2003 (*id.* at ¶ 8-9).

MacNaughton affirms that the Cooperative has refused to grant PKA access to its stock book or any other records that would show the person(s) from whom the Platzners acquired the Platzner Stock (*id.* at ¶ 10). He contends that the Cooperative has refused to seek any guidance from the IRS on whether and to what extent the Cooperative or its shareholders have been prejudiced by the issuance of the Platzner Stock and has refused to appear for depositions or produce any documents regarding the sale of the Lalli Stock to Ms. Salamonte (*id.* at ¶ 11, Ex. M).

In his Affidavit, Soling avers that he is the general partner of PKA and moves in his capacity as an assignee of Harrin and Crystal Platzner for the stock they owned in the Cooperative for Garages F-13 and F-14 and as the agent of Harrin Platzner to litigate the validity of the Platzner Stock (Soling Aff. at ¶ 1). Soling avers that in 2010, the Cooperative terminated the stock certificates and proprietary leases for several dozen garages and open parking spaces owned by PKA (the "Disputed Garages") pursuant to a Notice to Quit (*id.* at ¶ 2, Ex. A).

He contends that the Cooperative then took possession of the Disputed Garages and

[5]McNaughton asserts that the deposition transcripts of Salamonte, Glen Lalli and Goldberg are attached as Exhibits G-M; however, there is no deposition transcript of a Goldberg.

claimed to own all of them. According to Soling, this was one of several actions that precipitated the 2009 Action (Soling Aff. at ¶ 2). Soling avers that in 2014, PKA signed a Settlement Agreement dated April 1, 2014 with the Cooperative, Platzner and others (the "Settlement Agreement") (*id.* at ¶ 3, Ex. A). He contends that paragraph 4 of the Settlement Agreement obligated the Cooperative to return the Disputed Garages to PKA.

According to Soling, in early 2016, when PKA tried to close on the Settlement Agreement, the Cooperative refused to issue stock certificates or proprietary leases to PKA for any of the Disputed Garages (*id.* at ¶ 4). He contends that the Cooperative refused to explain why it would not issue stock certificates or proprietary leases to PKA for the Disputed Garages (*id.*). Soling avers that, in 2016, he learned the Cooperative had issued stock certificates for garages to the Platzners in 2003 and the Lallis in 2006, although he avers that "PKA has no records of its own regarding the issuance of either the Platzner Stock or Lalli Stock" (*id.* at ¶ 5). Soling asserts that PKA asked the Cooperative in 2016 to explain why it would permit stock for garages to be issued and outstanding for the Platzners and Lallis but refused to issue PKA stock for the Disputed Garages and that the Cooperative refused to provide an explanation other than to say the issuance of the Platzner Stock had been an "impropriety" (*id.*) He claims that he decided to buy the Platzner Stock and Lalli Stock if possible to remove the Platzners and Lallis as necessary parties to any future settlement over garage related issues but that Mr. Lalli refused to sell his stock. He contends that the Platzners were willing to sell him the Platzner Stock (*id.* at ¶ 6)

Soling contends that in 2016, he entered into an agreement with Harrin and Crystal Platzner to purchase the Platzner Stock from them for $12,000 (*id.* at ¶ 7, Ex. B). He avers that the Platzners gave him their warranty and representation that "[t]here are no liens, [e]ncumbrances or claims on or to the Stock by any third party" (the "Warranty"). He argues that in 2016, the Cooperative rejected his direction that the Cooperative list him as the owner of record for the Platzner Stock in the Cooperative's stock book (*id.* at ¶ 8). Soling states that when the Cooperative filed its Counterclaim against him he then filed a cross-claim against Platzner on July 30, 2019 for breach of the Warranty (the "Cross-Claim"). He contends that, as of October 28, 2019, Platzner had not entered an appearance, answered or otherwise responded to the Counterclaim or Cross-Claim (*id.* at ¶ 9). He contends that it then became apparent to him that,

in September of 2019, Platzner "would not enter an appearance in the action or otherwise personally defend the validity of the Platzner Stock" and he decided to exercise his appointment as Platzner's agent to respond to the Counterclaim and file the Answer "as the duly appointed agent" for Platzner (*id.* at ¶ 10). Soling additionally requests that the time of the filing of the Platzner Answer be extended *nunc pro tunc* to the date of its actual filing (*id.* at ¶ 11).

In their Memorandum of Law, the PKA Parties admit that they and the Cooperative agree that the Cooperative's Certificate of Incorporation, By-laws, and Offering Plan (collectively the "Organizational Documents") provide that a shareholder who owns stock allocated to a garage should also own stock allocated to an apartment (the "Contemporaneous Ownership Requirement") (PKA Mem. at 1). The PKA Parties also admit that they and the Cooperative agree the Platzner Stock does not comply with the Contemporaneous Ownership Requirement.

However, they contend that the Cooperative does not deny it had ample opportunity in the 2009 Action – ten years ago – to call Platzner to account for his actions in issuing the Platzner Stock (*id.* at 2). The PKA Parties argue that the Cooperative does not deny that it could have sought the remedy of nullification of the Platzner Stock and/or other appropriate remedies such as money damages in the 2009 Action. According to the PKA Parties, instead, the Cooperative has always treated the Platzner Stock (and other stock issued in violation of the Contemporaneous Ownership Requirement) as valid and legitimate for nearly sixteen (16) years and throughout the pendency of the 2009 Action (*id.*).

In support of their arguments that the Cooperative's Counterclaim should be barred based on the doctrines of waiver, estoppel and ratification, the PKA Parties contend that the Cooperative has, since 2003, carried and continues to carry the Platzners as the owners of record of the Platzner Stock in the Cooperative's stock book (*id.* at 2-3; 8-11). They assert that the Cooperative has, since 2003, collected and continues to collect maintenance fees for the Platzner Stock (*id.*). The PKA Parties contend that the Platzners used Garages F-13 and F-14 for their own personal use for many years (*id.*). They argue that the Cooperative has made no effort to eject Platzner from the use or occupancy of the Garages described in the Platzner Stock (*id.*). The PKA Parties contend that the Cooperative accepted the vote of Platzner's proxy for the Platzner Shares at the 2016 Annual Meeting (*id.*). According to the PKA Parties, the Cooperative made no

effort to question the legitimacy of the Platzner Stock before this action was filed, even though PKA asked the Cooperative to investigate the issuance of the Platzner Stock in 2016. The PKA Parties state that the Cooperative has likewise treated the Lalli Stock – also issued in breach of the Contemporaneous Ownership Requirement – as valid and approved the sale of the Lalli Stock to Mary Jo Salamonte, who owns an apartment at the complex (*id.*).

The PKA Parties claim that the Counterclaim is barred by the Cooperative's general release to Platzner in 2014, which bars all claims by the Cooperative against Platzner that had accrued on or before 2014, including the Counterclaim. According to the PKA Parties, the Cooperative released Platzner from all claims, including any claim the Platzner Stock was void *ab initio*, when it executed the Settlement Agreement dated April 1, 2014, at the recommendation of its attorneys. They contend that the Cooperative confirmed the validity of the Platzner Stock by giving Platzner a general release in 2014 knowing he owned the Platzner Stock and then dismissing the 2009 Action with prejudice in 2016. They claim that the Cooperative erred when it issued the Platzner Stock in 2003 and that then the Cooperative "compounded its error when – in reliance on the advice of the attorneys who are Defendants in this action – it failed to correct that error in the 2009 Action" (*id.* at 3). The PKA Parties assert that the Cooperative "bound itself to its error when – in reliance on the advice of the attorneys who are Defendants in this action – it gave a general release to Platzner and dismissed the 2009 Action with prejudice" (*id.*).

The PKA Parties contend that, in 2016, at the Cooperative's Annual Meeting, the Cooperative's attorney and accountant publicly stated that the Platzner Stock did not jeopardize the Cooperative's IRC 216 Status (*id.* at 4). They state that the Cooperative's Board of Directors also refused to submit to the shareholders for their approval a resolution for the appointment of an independent counsel to investigate the circumstances surrounding the issuance of the Platzner Stock and its effect on the IRC 216 Status (*id.*). The PKA Parties argue that "the Cooperative and its attorneys are no doubt in an awkward position if the Court finds the Platzner Stock is valid," but claim that "the Cooperative put itself into that bind – under the tutelage of its attorneys" (*id.*). They contend that the Cooperative "willfully turned a blind eye to the tax implications of keeping the Platzner Stock on the corporate books for over sixteen years – again under the tutelage of its attorneys and accountants" and that the "costs of untying this Gordian knot should be paid by the

responsible parties – the Board of Directors and attorneys – not the individuals who own and have owned the Platzner Stock for many, many years without question or interference" (*id.*).

The PKA Parties then assert that BCL § 203(a) bars nullification of the Platzner Stock because Platzner acquired the Platzner Stock directly from the Cooperative, and not as "unsold shares" from PKA, as evidenced by the Cooperative's stock book listing the Platzners as the owners of record of the Platzner Stock (*id.* at 4-8). They contend that the Stock Receipts Page offered by the Cooperative is inadmissible hearsay (*id.*).

According to PKA Parties, *res judicata* bars the Counterclaim because the validity of the Platzner Stock was an adjudicated claim in the 2009 Action where the Cooperative had the opportunity to make the claim and instead dismissed the 2009 Action with prejudice (*id.* at 11-14). It is their position that *res judicata* applies to transactions that are void *ab initio* and that the doctrine applies here because the Cooperative was a party to the 2009 Action and did not litigate the validity of the Platzner Stock in the 2009 Action. They assert that there is no authority to support the argument that the Cooperative escapes the preclusive effect of the 2009 Action simply because neither Soling nor Crystal Platzner was a party to the 2009 Action; it is enough that the Cooperative was a party to the 2009 Action. The PKA Parties also assert that PKA and Soling have standing to assert *res judicata* because Soling is the assignee and agent of Platzner and PKA was a party to the 2009 Action (*id.* at 15-16).

They contend that the Counterclaim also is barred by statute of limitations, which they argue expired in 2014 as well as laches (*id.* at 18-19). The PKA Parties claim that, since the Cooperative has not offered any admissible evidence proving that Crystal Platzner is deceased, its failure to join her (or her estate) in this action amounts to a failure to join a necessary party (*id.* at 19). The PKA Parties contend that the Cooperative is seeking an improper advisory opinion based on a speculative injury since it has denied under oath that its shares have lost value due to the issuance of the Platzner Stock in violation of the Contemporaneous Ownership Requirement and that Platzner's participation in the issuance of the Platzner Stock has caused it any damages (*id.* at 20-21). The PKA Parties assert that Soling, as the assignee of Platzner's stock, has standing to assert all of Platzner's defenses to the Counterclaim (*id.* at 22). They also contend that Soling has standing to assert the Affirmative Defenses as Platzner's agent pursuant

to a power of attorney which Platzner gave Soling in 2016.

C. The Cooperative's Contentions in Further Support of its Motion for Summary Judgment

In further support of its motion, the Cooperative submits: (1) a Reply Affirmation of Jeffrey A. Weiss, Esq., dated November 15, 2019 ("Weiss Aff."); (2) a Reply Affidavit of Ira Goldenberg ("Goldenberg Aff."), dated November 5, 2019; and (3) a Reply Memorandum of Law dated November 15, 2019 ("Reply").

In its Reply, the Cooperative argues that it should be awarded summary judgment on its counterclaim for declaratory relief, dismissing PKA's and Soling's affirmative defenses and dismissing PKA's Complaint, because an action under BCL § 203(a) has no applicability to the facts at bar. The Cooperative contends that BCL § 203(a) is limited to instances where the corporation acts or transfers property and the Cooperative "neither acted nor participated in the Platzner or Lalli Transfers and the Garage Spaces purportedly transferred in connection therewith were not the Cooperative's property" (Reply at 3; Weiss Aff. at ¶¶ 5-6). It contends that the Garage Spaces that were transferred were an "original issue" (*i.e.,* "Unsold Shares") from sponsor PKA who then transferred them to Platzner, citing stock receipts pages accompanying the Platzner Transfers share certificates as evidence, and that therefore BCL § 203(a) has no relevance to this case (Reply at 3-4; Conover Aff. Ex. P; Weiss Aff. at ¶ 6). The Cooperative argues that the stock receipts pages are admissible because they were submitted as an exhibit to the Affidavit of Peg Conover, an officer and director of the Cooperative with personal knowledge, and through the Affidavit of the Cooperative's transfer agent, Ira Goldenberg, showing that the stock receipts pages were included in the Cooperative's stock certificate book (Reply at 3-5; Weiss Aff. at ¶¶ 7-13; Goldenberg Aff. at ¶¶ 2-6).

The Cooperative argues that the counterclaim is not barred by *res judicata* or the Platzner General Release in the 2009 Action. It contends that *res judicata* cannot bar this action since Crystal Platzner, who the Cooperative contends is a necessary party as a purported owner of the Garage Spaces, was alive at the time of the 2009 Action but was not included in the Action. The Cooperative also argues that *res judicata* is also inapplicable to the Counterclaim because the issues raised herein (*i.e.*, the validity of the shares issued in connection with the Platzner Transfer) do not arise out of the same factual grouping or transactions underlying the 2009

Action (Reply at 7-11; Weiss Aff. at ¶¶14-18). It argues that the 2009 Action's Complaint shows that the Cooperative was seeking to recover damages resulting from the Sponsor's breach and failure to sell parking spaces – not because the Sponsor had sold parking spaces that failed to meet the Contemporaneous Ownership Requirement (*id.*).

The Cooperative contends that PKA's and Soling's reliance on the Cooperative's general release of Platzner is similarly misplaced because PKA and Soling lack standing to assert or rely on a release from the Cooperative to Platzner because they were not parties to that release (Reply at 11-12; Weiss Aff. at ¶¶ 19-24). It argues that Platzner himself would be unable to rely on the general release to bar the Cooperative's Counterclaim, even if he had timely appeared, because PKA and Soling failed to produce a copy of the Cooperative's general release and the scope of such a general release cannot be expanded to include the Cooperative's Counterclaim for declaratory relief in this action. It contends that the scope of the 2009 Action was to recover damages for Platzner's numerous breaches of his fiduciary obligations and the scope of the general release cannot be extended to include the Counterclaim given the allegations underlying the Cooperative's Complaint in the 2009 Action (Reply at 13-14; Weiss Aff. at ¶¶ 25-30).

The Cooperative also contends that Soling cannot rely on the "so-called power of attorney" that Soling received from Platzner because the PKA Parties' cross-motion does not include a copy of the purported power of attorney and therefore it is not before the Court.[6] It argues that Platzner is in default and has not demonstrated a reasonable excuse for his default or a meritorious defense to the Counterclaim. Moreover, the Cooperative contends that Soling has invalidated his power of attorney by filing a cross-claim against his principal, Platzner, therefore creating an unavoidable conflict of interest between Soling, as cross-claim plaintiff and Soling as attorney-in-fact for Platzner, cross-claim defendant (*id.*).

Finally the Cooperative contends that the power of attorney cannot be accepted because it fails to meet the requirements of GOL § 5-1501B, which requires that, to be valid, "a statutory

[6]The only power of attorney attached to Soling's Affidavit is a power of attorney by the Platzners to MacNaughton authorizing MacNaughton to do things necessary to effectuate the Platzner Transfer. However, there is a power of attorney attached to the Answer and Affirmative Defenses of Harrin Platzner (NYSCEF Doc. No. 119), which the Court has considered for the purposes of this motion.

short form power of attorney, or a non-statutory power of attorney, executed in this state by a principal, must: ... (c) Be signed and dated by any agent acting on behalf of the principal with the signature of the agent duly acknowledged in the manner prescribed for the acknowledgment of a conveyance of real property ... (d) Contain the exact wording of the: (1) 'Caution to the Principal' in paragraph (a) of subdivision one of section 5-1513 of this title; and (2) 'Important Information for the Agent' in paragraph (n) of subdivision one of section 5-1513 of this title" (Reply at 14-15; Weiss Aff. at ¶ 29). The Cooperative argues that because the power of attorney upon which Soling relies is neither signed nor dated by Soling and fails to include the exact wording set forth in GOL § 5-1413(a) and (n), it is ineffective. The Cooperative contends that Soling cannot rely on the exclusions set forth in GOL § 5-1501C, which exclude from statutory compliance powers of attorney "given primarily for a business or commercial purpose" because the Cooperative is a residential cooperative and therefore conveyances of its shares are not made for commercial or business purposes. The Cooperative argues that, for these reasons, it is entitled to the dismissal of PKA's and Soling's Second and Third Affirmative Defenses as a matter of law (*id.*).

The Cooperative next contends that, given PKA's and Soling's inability to demonstrate detrimental reliance or prejudicial delay, their defenses of estoppel, ratification and laches cannot stand. It argues that PKA and Soling cannot demonstrate prejudicial reliance or change in position resulting from the Cooperative's acceptance of Platzner's vote or his monthly payments and that even Platzner is unable to show that he suffered prejudice as a consequence of the Cooperative's acceptance of his monthly payments since he admittedly enjoyed the use and occupancy of the parking spaces that PKA improperly transferred to him (Reply at 16-18; Weiss Aff. ¶¶ at 31-34). The Cooperative argues that its acceptance of his vote similarly caused no prejudice to Platzner, only benefit, and therefore the defenses of estoppel and ratification are thus inapplicable. According to the Cooperative, the PKA Parties' inability to demonstrate prejudicial delay resulting from the Cooperative's continued course of conduct similarly negates their laches defense, as mere lapse of time without a showing of prejudice does not sustain a defense of laches (*id.*).

According to the Cooperative, the statute of limitations does not bar the Cooperative's Counterclaim, as the PKA Parties rely on BCL § 203(a) to argue the relevance of the statute of

limitations, which it contends is inapplicable (Reply at 18-19; Weiss Aff. at ¶ 35). The Cooperative further contends that Crystal Platzner is not a necessary party to this action, because upon her death, her ownership of the shares passed to Harrin Platzner by operation of law. The Cooperative annexes a certified copy of her death certificate which confirms her date of death as July 22, 2017, after the 2009 Action was filed but before the Counterclaim in this action was interposed (Reply at 19; Weiss Aff. at ¶¶ 36-37). According to the Cooperative, the Counterclaim presents a justiciable controversy because it involves present prejudice to the Cooperative, given PKA's six claims interposed in its Amended Complaint which seek recovery of not less than $3,000,000 on each of the first five causes of action and recovery of the Tax Deduction Damages (as defined therein) on the sixth cause of action (Reply at 19-20; Weiss Aff. at ¶¶ 38-39).

Finally, the Cooperative argues that Platzner's motion by Soling, as attorney in fact, for leave to file Platzner's Answer *nunc pro tunc* must be denied because: (1) Soling has not provided a power of attorney and the MacNaughton power of attorney upon which Soling relies is ineffective; and (2) Platzner, by Soling, has failed to show a meritorious defense to the Counterclaim or a justifiable excuse for his default in timely answering the Counterclaim (Reply at 21-22; Weiss Aff. at ¶¶ 40-47). The Cooperative states that the Cooperative served Platzner with the Counterclaim in June 2019, Soling interposed his own answer (and cross-claims against Platzner) on July 30, 2019, then waited more than two months – until October 4, 2019 – before appearing on behalf of Platzner (*id.*). The Cooperative contends that "Soling's conduct – weighing his options to see whether it was to his personal and selfish benefit to appear on Platzner's behalf or not – is itself sufficient to invalidate the power of attorney" (*id.*). Regarding Platzner's meritorious defenses, the Cooperative notes that the defenses set forth in Platzner's proposed answer are identical to the defenses interposed by PKA and Soling (*id.*).

STANDARD OF REVIEW

The proponent of a motion for summary judgment "bears the initial burden of demonstrating its prima facie entitlement to the requested relief" (*Reyes v Arco Wentworth Mgt. Corp*, 83 AD3d 47, 50 [2d Dept 2011]; *see also Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). The moving party must tender sufficient evidence to demonstrate as a matter of law the absence

of a material issue of fact. Failure to make that initial showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]; *Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012]).

Once the moving party has made a *prima facie* showing of entitlement to summary judgment, the burden of production shifts to the opponent, who must go forward and produce sufficient evidence in admissible form to establish the existence of a triable issue of fact or demonstrate an acceptable excuse for failing to do so (*Reyes*, *supra*, 83 AD3d at 50; *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). A party opposing summary judgment may not rest on mere conclusions or unsupported assertions; rather the party must "affirmatively demonstrate the merit of its claim or defense" (*Collado v Jiacono*, 126 AD3d 927, 928 [2d Dept 2015]; *Sun Yau Ko v Lincoln Sav. Bank*, 99 AD2d 943 [1st Dept 1984], *affd* 62 NY2d 938 [1984]).

"It is not the function of a court deciding a summary judgment motion to make credibility determinations or findings of fact, but rather to identify material triable issues of fact (or point to the lack thereof)" (*Vega*, *supra* 18 NY3d at 504).

Since summary judgment is a drastic remedy, it should not be granted where there is any doubt as to the existence of a triable issue (*Pizzo-Juliano v Southside Hosp.*, 129 AD3d 695 [2d Dept 2015]; *William J. Jenack Estate Appraisers & Auctioneers, Inc., supra*). Thus, when the existence of an issue of fact is even arguable or debatable, summary judgment should be denied (*Stone v Goodson,* 8 NY2d 8, 12 [1960]; *Collado*, *supra*). In reviewing a motion for summary judgment, the Court must accept as true the evidence presented by the nonmoving party and must deny the motion "if there is any doubt as to the existence of a triable issue" (*Herrin v Airborne Freight Corp.*, 301 AD2d 500, 501 [2d Dept 2003]; *see also Stukas v Streiter*, 83 AD3d 18 [2d Dept 2011]).

DISCUSSION

The PKA Parties' Cross-Motion for Leave to File Platzner's Answer *Nunc Pro Tunc*

The parties do not dispute that Platzner has failed to enter an appearance, answer, or

otherwise respond to the Cooperative's Counterclaim and Soling's Cross-Claim in this action. Soling also does not dispute that he filed Harrin Platzner's Answer, purportedly as his agent, more than two months late and without leave of Court. Therefore, Platzner is in default and the PKA Parties' cross-motion seeks an order permitting Platzner to file his answer, through his purported agent Soling, *nunc pro tunc*.

First, as an initial matter, the power of attorney upon which Soling relies as authorization to act as Platzner's agent and to file his Answer in this action is ineffective. Soling contends that he was appointed by the Platzners as their agent "to act on [the Platzners'] behalf in any and all matters pertaining to or arising out of the [Platzner] Stock if and to the extent Cevin Soling's ownership of the [Platzner] Stock is not recognized by PKA or any other person or if the Stock should, for any reason, be nullified or revoked" (Soling Aff. at ¶ 1 [*citing* Platzner Ans. Ex. A]). However, a review of the power of attorney reveals that it fails to comport with the requirements of GOL § 15-1501B.

Second, by asserting a cross-claim against Herrin Platzner in this action, Soling has created a conflict of interest between himself and Herrin Platzner such that even if the power of attorney comported with the statutory requirements, his power of attorney could not be enforced. New York courts will only permit an attorney-in-fact to act as an agent appearing on behalf of the principal where the absence of a conflict of interest is established (*Matter of Estate of Kunkis,* 162 Misc 2d 672, 675 [Sur Ct, NY County 1994]; *Matter of Luby,* 180 Misc 2d 621, 624 [Sup Ct, Suffolk County 1999]). Here, in his Answer, which Soling filed prior to filing Platzner's Answer purportedly acting as his agent, Soling brought a cross-claim against Platzner. As he is bringing a claim against Platzner in this action, Soling has created an unavoidable conflict of interest preventing him from acting as Platzner's agent and attorney-in-fact and making the power of attorney ineffective.

Third, Platzner (through Soling) has failed to show a reasonable excuse for the default. It is well settled that to avoid the entry of a default judgment, the party must demonstrate a reasonable excuse for the default and a meritorious defense to the underlying action (CPLR 5015[a][1]; *Grinage v City of New York,* 45 AD3d 729 [2d Dept 2007], *citing Giovanelli v Rivera,* 23 AD3d 616 [2d Dept 2005]; *Zino v Joab Taxi, Inc.*, 20 AD3d 521, 522 [2d Dept 2005];

Pampalone v Giant Bldg. Maintenance, Inc., 17 AD3d 556 [2d Dept 2005]; *Ennis v Lema*, 305 AD2d 632, 633 [2d Dept 2003]). The determination of what constitutes a reasonable excuse lies within the sound discretion of the court (*Cline v Shorter,* 242 AD2d 660 [2d Dept 1997]; *Juseinoski v. Board of Educ. of City of N.Y.,* 15 AD3d 353, 356 [2d Dept 2005]; *Ennis v Lema,* 305 AD2d at 633). In order to substantiate a claimed excuse, counsel "must submit facts in evidentiary form to justify the default" by means of "an affirmation ... [containing] a detailed explanation of [the] oversights" (*Hospital for Joint Diseases v Elrac, Inc.*, 11 AD3d 432, 433 [2d Dept 2004]; *see also Gourdet v Hershfeld,* 277 AD2d 422 [2nd Dept 2000]; *General Elec. Capital Auto Lease, Inc. v Terzi*, 232 AD2d 449, 450 [2d Dept 1996]).

Here, Platzner has failed to appear or respond entirely and Soling has failed to offer any justification for his untimely – and ineffective – attempt to appear on Platzner's behalf. The Cooperative served Platzner with its Counterclaim on June 11, 2019 and Soling interposed his Answer and Cross-Claim against Platzner on July 30, 2019 (NYSCEF Doc. Nos. 7, 82). Soling then waited until October 4, 2019 to file his purported Answer on behalf of Platzner (NYSCEF Doc. No. 119).

As a rationale for his delay, Soling merely provides an Affidavit in which he admits that "[w]hen the Cooperative filed its Counterclaim against me in this case, I filed a cross-claim against Harrin Platzner on July 30, 2019" and that "Platzner has not entered an appearance, answered or otherwise responded to the Counterclaim or Cross Claim" (Soling Aff. at ¶ 9). He claims that when "[i]t became apparent to me in September of this year Mr. Platzner would not enter an appearance in this action or otherwise personally defend the validity of the Platzner Stock," he "decided to exercise my appointment as Mr. Platzner's agent to respond to the Counterclaim and had my attorney file the Platzner answer, making clear I am filing the Platzner Answer as the duly appointed agent for Mr. Platzner" (*id.* at ¶ 10). This explanation, following Soling's Cross-Claim against Platzner, does not constitute a reasonable excuse.[7] For the

[7]Because the Court is finding that Soling (on the purported behalf of Platzner) did not establish a reasonable excuse, the Court does not have to address whether Soling established a meritorious defense for Platzner. But even if it did, based on the discussion *infra*, it would find that Soling failed to establish a meritorious defense.

foregoing reasons Platzner is in default and the Court shall grant the branch of the Cooperative's motion seeking the entry of a default judgment against Platzner. And for the same reasons, the PKA Parties' cross-motion seeking an order permitting Platzner to file his answer, through his purported agent Soling, *nunc pro tunc* shall be denied.

The Cooperative's Counterclaim

A corporation's powers and existence are confined to and circumscribed by its certificate of incorporation (*Scovill v Thayer,* 105 U.S. 143, 148 [1881]; *Auburn & C. Plank-Road Co. v Douglass*, 5 Seld. 444, 453 [1854] ["a corporation is strictly confined to the privileges conferred by its charter, and can take no implied rights as against the law-making power"]; *Mechanics Bank v New York & New Haven R.R. Co.,* 13 NY 599 [1856] [holding that a corporation's issuance of shares that exceeded the amount authorized by its certificate of incorporation was void]; *Matter of Marino,* 172 AD2d 525 [2d Dept 1991] [reversing and granting rescission of a stock purchase agreement, holding that the issuance of shares by a corporation that exceeded the number of shares authorized by its certificate of incorporation was void]).

As set forth above, the Certificate of Incorporation provides "shares of the Corporation shall be issued solely in connection with the execution of proprietary leases for apartments in said building" (Exhibit "L," Paragraph SECOND, Subsection [b]). By the terms of the Certificate of Incorporation therefore, the Cooperative is without the capacity or the ability to issue share certificates when not in connection with the execution of a proprietary lease. And, to the extent that the Cooperative issues shares not in connection with the execution of a proprietary lease – such as the shares purportedly issued in connection with the Platzner Transfer – those shares are necessarily unauthorized by the Certificate of Incorporation and void, being no different from an issuance of shares that exceeds the number of shares authorized by the Certificate of Incorporation.

When a corporation engages in conduct that exceeds the scope or is in violation of its certificate of incorporation, the action or conduct is void *ab initio,* and therefore all other claims and counterclaims are denied (*711 Kings Highway Com, v. F.I.M.'s Marine Repair Service Inc.*, 51 Misc 2d 373 [Sup Ct, Kings County 1966]).

Here, as in *Marino*, there is no dispute that the Certificate of Incorporation requires shares to be issued in connection with the execution of proprietary leases for apartments and that the Platzner Shares were not issued in connection with the execution of any proprietary lease (*see Matter of Marino,* 172 AD2d 525, 525-26 [2d Dept 1991]; *Zuckerman v City of New York,* 49 NY2d 557 [1980]).

For these reasons, the Plazner Transfer and Platzner Stock issued in connection therewith are null and void *ab initio*. The issued share certificates, being violative of the Cooperative's Certificate of Incorporation, as well as its By-laws and Offering Plan, must be deemed a legal nullity and not entitled to legal effect. Therefore, because the Platzner Transfer and Platzner Stock are null and void *ab initio*, Platzner had no shares to assign to Soling and the Cooperative is entitled to the declaratory judgment requested unless the PKA Parties have a valid defense to the grant of this declaratory judgment, which is addressed below.

PKA's and Soling's Arguments in Opposition

The Court will next consider the arguments and affirmative defenses of PKA and Soling.

Crystal Platzner is Not a Necessary Party

Because a failure to join necessary parties is a due process requirement, the Court will first address PKA's and Soling's argument that, because the Cooperative has not joined Crystal Platzner in this action, "apparently in the belief she is deceased and her husband succeeded to her interests in the Platzner Stock," the Court does not have all of the necessary parties before it (PKA Mem. at 19).

To begin with, as discussed *supra*, Platzner Transfer and Platzner Stock are null and void *ab initio.* [8] "A legal nullity at its creation is never entitled to legal effect because '[v]oid things are as no things'" *Faison v Lewis,* 25 NY3d 220, 224 [2015] *quoting Marden v Dorthy,* 160 NY 39, 45 [1899] [forged deed void at inception]). "By dictionary definition (Ballentine, Law Dictionary, 2d ed.) 'null and void' means, '[t]hat which binds no one; that which is incapable of

[8] PKA admits that "no 'assignment' from Platzner to Soling was ever recognized, permitted or acknowledged by the Cooperative "on the grounds 'the attempted transfer is void'" (PKA Amended Complaint ¶ 89).

giving rise to any rights or obligations under any circumstances; that which is of no effect'" (*Zogby v State,* 53 Misc 2d 740, 743 [Ct Cl 1967]). Therefore Platzner had no shares to assign to Soling. Similarly, there were no shares to pass upon Crystal's death to her estate, to her husband, or to anyone else.

In any event, any purported rights Crystal Platzner had to the Platzner Stock were transferred to Soling in the assignment she and her husband made to him in 2016. It is well settled that "consistent with the principle that an absolute assignment renders the assignee the real party in interest, the assignor in such a transaction is not a necessary party in an action to enforce rights granted pursuant to the assignment" (3 Carmody-Wait 2d § 19:67; *Schwartz v Putnam C.C., Inc.,* 57 AD2d 614, 614 [2d Dept 1977] [where husband assigned interest in mortgage to wife, a proper party plaintiff, the husband was not a necessary party, despite the fact that he handled some business matters relating to the mortgage]). Soling cannot have it both ways; he cannot rely on an assignment to claim an interest in the Platzner Stock – albeit an ineffective one of shares that are void *ab initio* – and then claim that Crystal is a necessary party. In its March Order, while the Court suggested that the Platzners may be necessary parties, it did not make an explicit finding based on the insufficient record and was more concerned about ensuring that anyone who may have a claimed interest in the Platzner and Lalli Stock be afforded notice of the action and an opportunity to be heard. The record now being fully developed, it is clear that in the 2016 assignment to Soling, the Platzners relinquished all of their rights, title and interest in the Platzner Stock to Soling and were divorcing themselves of the issue over its validity as evidenced by the purported power of attorney. Harrin received notice and an opportunity to be heard on behalf of himself and his deceased wife in this action but opted to default. Because Crystal was not a necessary party to this action, and because it is likely in any event that her shares devolved to Harrin Platzner who defaulted in this action, the failure to join Crystal Platzner is not a bar to this Court's determination of the Cooperative's motion for summary judgment on its Counterclaim.

<u>The Cooperative's Counterclaim Presents a Justiciable Controversy</u>

PKA and Soling argue that the Cooperative seeks an improper advisory opinion based on speculative injury. They contend that "[u]nless and until the Cooperative admits the Lost IRC

216 Status Damages – or at least the reasonable possibility of such damages – the injury caused by the Platzner Stock to the Cooperative (separate and apart from the shareholders) is not sufficiently definite, i.e., justiciable, for a declaratory ruling on the validity of the Platzner Stock" (PKA Mem. at 21).

To constitute a justiciable controversy, there must be "a real dispute between adverse parties, involving substantial legal interests for which a declaration of rights will have some practical effect" (*Palm v Tuckahoe Union Free School Dist.,* 95 AD3d 1087 [2d Dept 2012], *affd as modified* 95 AD3d 1087 [2d Dept 2012], *quoting Chanos v MADAC, LLC,* 74 AD3d 1007, 1008 [2d Dept 2010]). This is because declaratory relief is limited to determining actual controversies between litigants (*Matter of Hearst Corp. v Clyne*, 50 NY2d 707 [1980]). A justiciable controversy involves a present, rather than hypothetical, contingent or remote, prejudice to the plaintiff. The dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination. A dispute matures into a justiciable controversy when a plaintiff receives direct, definitive notice that the defendant is repudiating his or her rights (*Zwarycz v Marnia Const., Inc.*, 102 AD3d 774, 776 [2d Dept 2013]). Here, the parties have a *bona fide* dispute as to whether the Platzner Stock and Transfer are void *ab initio*, with PKA and Soling making various claims against their being declared void *ab initio.* The fact that the Sponsor decided not to follow the Corporation's governing documents in transferring stock from the original issuance to the Platzners in 2003 (*see* discussion regarding BCL § 203[a]) *infra*) does not mean that the Cooperative is not entitled to a court declaration as to the rights and responsibilities of the parties.

Furthermore, PKA's Amended Complaint seeks money damages against the Cooperative on all six claims, each for at least $3 million, except for the sixth claim which seeks the value of the "Tax Deduction Damages" (as defined in the Amended Complaint). In the event this Court enters a declaratory judgment in the Cooperative's favor, these claims would be dismissed. Accordingly, the controversy before the Court plainly constitutes a real dispute between the parties.

BCL § 203(a) Is Not Applicable

PKA and Soling argue that BCL § 203(a) bars nullification of the Platzner stock. BCL § 203(a) provides:

> No act of a corporation and no transfer of real or personal property to or by a corporation, otherwise lawful, shall be invalid by reason of the fact that the corporation was without capacity or power to do such act or to make or receive such transfer.

They contend that "the undisputed admissible evidence shows Platzner acquired the Platzner Stock directly from the Cooperative" (PKA Mem. at 5, *citing* Affidavit of Harrin Platzner, sworn to on March 22, 2018 ["March 22 Platzner Aff."] [NYSCEF Doc. No. 106] at ¶ 2), in which Platzner averred that the Stock was issued to him and his wife by Park Knoll Owners, Inc. They also cite to an Affidavit of Soling, sworn to on December 6, 2018 ("December 6 Soling Aff.") (NYSCEF Doc. No. 126), in which he avers, as the general partner of PKA, that the Platzners did not acquire the Platzner Stock from PKA but purportedly acquired the Platzner Stock from the Corporation "in consideration for services rendered by Mr. Platzner to the Corporation in a foreclosure sale of stock held by a former resident of Park Knoll" (*id.* at ¶ 5).

PKA and Soling argue that the fact that Platzner Stock Certificates list "Park Knoll Owners, Inc." coupled with the fact that the Cooperative's stock lists the Platzners as owners of record of the Platzner Stock is *prima facie* evidence that the Platzners own the Stock and that it was purportedly issued by the Cooperative (PKA Mem. at 4-6).

BCL § 203(a), by its terms, is limited to instances where a corporation acts or transfers property. There is no dispute that the Platzners are listed as the owners of the void Stock -- the issue is whether the Cooperative acted or transferred the Stock to the Platzners.[9] In support of the Cooperative's argument that it neither acted nor participated in the Platzner Transfer and the Garage Spaces purportedly transferred in connection therewith were not the Cooperative's

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[9] The cases cited by PKA and Soling for the proposition that the "Certificates and stock book entry are prima facie evidence the Platzners own the Platzner Stock issued by Cooperative" are not relevant, as they merely stand for the proposition that possession of a stock certificate in one's name is *prima facie* evidence of ownership in a Cooperative (PKA Mem. at 5-6).

property, the Cooperative submits a Stock Receipts Page confirming that the Garage Spaces purportedly transferred were an "original issue" (*i.e.*, "Unsold Shares") from Sponsor PKA, who transferred them to Platzner. The Cooperative further provides an affidavit of an officer and director of the Cooperative who, with personal knowledge, avers that Exhibit P annexed to her affidavit are "copies of Stock Receipts Pages accompanying and evidencing share certificates numbers 603 and 604 in connection with the Platzner Transfers" (Conover Aff. Ex. P). The Cooperative also submits an affidavit of the Cooperative's transfer agent averring that his law firm took possession, custody and control of certain of the Cooperative's records concerning stock issued prior to the firm becoming the transfer agent in 2008 from Platzner International Group. These records include "a Stub Book consisting of *inter alia* stock receipt pages for issued stock certificates as well as unissued stock certificates and corresponding uncompleted stock receipt pages," which the transfer agent avers are maintained in the regular course of the Cooperative's business (Goldenberg Aff. at ¶¶ 1-6; *see* Coop. Mem. at 3-5, Coop. Reply Mem. at 7-9).

Here, in support of its motion, the Cooperative has provided admissible evidence in the form of authenticated Stock Receipts Pages confirming that the Platzner Stock was transferred as an "original issue" from "PKA" to Harrin and Crystal Platzner (Conover Aff. Ex. P). In opposition, PKA's and Soling's evidence consists of the stock certificates that are not conclusive of anything, and self-serving affidavits from Platzner and Soling without any supporting evidence that the shares were transferred to Platzner from the Cooperative in consideration for services rendered by Platzner to the Cooperation in a foreclosure sale of stock. This evidence is insufficient to create a triable issue of fact that the Cooperative transferred the stock to the Platzners.

Therefore, because BCL § 203(a) is only applicable to cases where a corporation acts or engages in conduct or where a corporation transfers its own property, and neither occurred in this case, PKA's and Soling's First Affirmative Defense shall be dismissed.

<u>The Counterclaim is Not Barred by the Claimed General Release or *Res Judicata*</u>

PKA and Soling argue that the Cooperative's Counterclaim is barred by the general release that it contends the Cooperative gave to Platzner in 2014 "with full knowledge the

Platzner Stock had been issued and the Platzners were shareholders of record in the Cooperative" (PKA Mem. at 16). They further contend that Soling has the right to assert this release defense "as the assignee and agent of Platzner" (*id.*). PKA and Soling also argue that *res judicata* bars the Cooperative's Counterclaim because they contend that the validity of the Platzner Stock was an adjudicated claim in the 2009 Action. They contend that the Cooperative had the opportunity to make the claim that the Platzner Stock is void because it violates the Contemporaneous Ownership Requirement of the Organizational Documents and instead "dismissed the 2009 Action with prejudice," so cannot now challenge the validity of the Platzner Stock in the Counterclaim[10] (PKA Mem. at 11-16).

To begin with, there is no basis for the Court to find that the 2009 Action bars the Cooperative's claims for the simple reason that at the time of the settlement of the 2009 Action, Crystal Platzner was alive and owned the Platzner Stock with Harrin Platzner and they had not assigned their Platzner Stock to Soling. As such, Crystal was a necessary party to the 2009 Action in order for *res judicata* to even be considered as a possible defense. Furthermore, the fact that Crystal was not a party to the settlement agreement also vitiates any ability for PKA and Soling to claim that the Cooperative released its Counterclaim as a result of the 2009 Settlement since Crystal would have had to have been made a party to the Settlement Agreement, which did not occur.

"[I]t is axiomatic that '[a] contract cannot bind a non-party unless the contract was signed by the party's agent, the contract was assigned to the party, or the signatory is in fact the "alter ego" of the party'" (*Arcadia Biosciences, Inc. v Vilmorin & CIE*, 2019 WL 324213 at * 5 [SD NY 2019], *quoting Globe Entertainment, Inc. v New York Tel. Co.*, 2000 WL 1672327 at *7 [SD NY 2000]). "The general rule is that a party may validly release only claims which belong to him or her, except where he or she acts in a representative capacity in behalf of the owner of the claim" (6C New York Forms Legal & Bus § 15:59, *citing Mangini v McClurg*, 24 NY2d 556

[10] As discussed above, PKA and Soling provided no proof of court approval of the settlement of the 2009 Action or of their stipulated dismissal of the Action as required by BCL § 626(d) and, therefore, because these actions were invalid, this fact alone would prevent the claimed dismissal from barring this action. However, as discussed below, *res judicata* does not bar the instant action in any event.

[1969]; *L&K Holding Corp. v Tropical Aquarium at Hicksville, Inc.*, 192 AD2d 643 [2d Dept 1993]; *Thailer v La Rocca*, 174 AD2d 731 [2d Dept 1991]; *Dedley v Kings Highwat Hosp. Ctr., Inc.*, 162 Misc 2d 444 [Sup Ct, Kings County 1994]; *Great Northern Assoc., Inc. v Continental Cas. Co.*, 192 AD2d 976 [3d Dept 1993]). Thus, "a third party is not bound by a release executed between others who are not authorized to contract for [it] in regard to the rights or claims involved" (19A NY Jur 2d Compromise, Accord and Release § 97, *citing Martin v Traver*, 19 AD2d 571 [3d Dept 1963]).

The PKA Parties' release defense has another major infirmity, which is that PKA and Soling have failed to produce a copy of the Cooperative's general release upon which they rely. Accordingly, there is no proof as to its existence or even its terms. Furthermore, even if they had produced the general release allegedly issued by the Cooperative to Platzner, they have not provided evidence to establish the release would be a bar to the Cooperative's Counterclaim. It is well settled that "[a]lthough the effect of a general release, in the absence of fraud or mutual mistake, cannot be limited or curtailed ... its meaning and coverage necessarily depend, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given. Certainly, a release may not be read to cover matters which the parties did not desire or intend to dispose of" (*Cahill v Regan*, 5 NY2d 292, 299 [1959]; *see also Burnside 711 LLC v Amerada Hess Corp.*, 109 AD3d 860, 861 [2d Dept 2013]; *Desiderio v Geico Gen. Ins. Co.*, 107 AD3d 662, 663 [2d Dept 2013]; *Wechsler v Diamond Sugar Co.*, 29 AD3d 681, 682 [2d Dept 2006]). Thus, "'[i]n construing a general release it is appropriate to look to the controversy being settled and purpose for which the release was executed ... [and] 'a release may not be read to cover matters that the parties did not desire or intend to dispose of'" (*Bugel v WPS Niagara Prop., Inc.*, 19 AD3d 1081 [4th Dept 2005]; *BB&S Treated Lumber Co. v Groundwater Tech., Inc.*, 256 AD2d 430 [2d Dept 1998], *lv dismissed* 93 NY2d 958 [1999]; *Humphrey & Vandervoort v C-Kitchens, Inc.*, 198 AD2d 840 [4th Dept 1993]; *Phoenix Assur. Co. of NY v C.A. Shea & Co.*, 237 AD2d 157 [1st Dept 1997]; *Senate Ins. Co. v Ezick*, 279 AD2d 746 [3d Dept 2011]).

Here, the claims at issue that formed the basis of the settlement of the 2009 Action were,

inter alia claims by: (1) the Cooperative for breach of contract by PKA in its failure to sell all of the Unsold Shares within 3 years of the closing; (2) PKA's refusal to transfer shares allocated to indoor garage or outdoor parking spaces in connection with its sale of co-ops to third parties, one of whom was the shareholder suing on behalf of himself and other shareholders similarly situated; and (3) the Cooperative and the shareholder's derivative claims of breach of fiduciary duty and fraud against PKA and Platzner based on their alleged self-dealing and waste of the Cooperative's assets. As PKA and Soling have failed to provide a copy of the release to support their affirmative defense, there is no basis for the Court to hold that the Cooperative released its right to assert the Counterclaim by the settlement in the 2009 Action. Furthermore, the Settlement Agreement itself does not indicate what the language of the general release was to include and merely states that "PKO and all defendants, except Sponsor, shall exchange general releases to be held in escrow" (NYSCEF Doc. No. 148 at ¶ 11).

Moreover, the 2009 Action was a shareholder derivative suit.[11] Business Corporation

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[11]In their Memorandum of Law, the PKA and Soling contend that "[t]he 2009 Action was not a derivative shareholder's action pursuant to BCL § 626. The Complaint did not invoke BCL § 626 nor were there any allegations that an unsuccessful effort had been made to have the Cooperative's Board of Directors bring the 2009 Action. The only individual shareholder to the 2009 Action never sought or obtained class action certification for the 2009 Action pursuant to CPLR 902." The Court finds PKA and Soling's assertions to be without merit. First, a review of the Complaint in the 2009 reveals both direct claims by the Cooperative against the Sponsor (PKA) and Platzner for failure to pay maintenance fees and breach of contract against PKA for its failure sell the unsold shares it acquired within three years of the closing date as required by the Offering Plan. The Complaint also alleges derivative type claims based on Platzner's and PKA's breach of fiduciary duties and the 13th cause of action alleges a fraud cause of action against Platzner and Platzner International Group, Ltd. (an affiliate of Platzner and PKA) and seeks to hold them jointly and severally liable to the Cooperative and the named shareholder (Ballasedis) acting on behalf of all the other shareholders of the Cooperative. These are all classic derivative claims and there is no need to specifically cite BCL § 626 for the action to be derivative in nature. Nor did the named shareholder have to seek class action certification before BCL 626(d)'s requirement is invoked (*Derosiers v Perry Ellis Menswear*, 30 NY3d 488 [2017]; *Avena v Ford Motor Co.,* 85 AD2d 149 [1st Dept 1982]). Finally, as the Cooperative was also a named Plaintiff and because at that point, the Cooperative had wrested control of the Cooperative's Board of Directors from the majority of the Board being Sponsor-controlled (i.e., in March 2008), the Cooperative and the shareholders were aligned in their quest to obtain relief against PKA and Platzner (among others) for their various alleged transgressions and therefore, the lack of allegations concerning demand on the Board is irrelevant. And in any event,

Law § 626(d) provides that "[s]uch action shall not be discontinued, compromised or settled, without the approval of the court having jurisdiction of the action." Although PKA and Soling submit a stipulation of discontinuance of the 2009 Action, they do not assert that the court approved settlement of the 2009 Action or its dismissal (Soling Aff. Ex. B). This Court has reviewed the court's official record in the 2009 Action and takes judicial notice of the fact that no court approval of that settlement is contained therein. Therefore, absent court approval, any conditions set forth in the Settlement Agreement, including any terms requiring general releases, would not be binding on the parties (*Culligan Soft Water Co. v Clayton Dubilier & Rice, LLC,* 55 Misc 3d 1115, 1118 [Sup Ct, NY County 2017]; *Mokhiber on behalf of Ford Motor Co. v Cohn*, 783 F2d 26 [2d Cir 1986]; *Wolf v Barkes*, 348 F2d 994 [2d Cir 1965], *cert denied* 382 US 941 [1965]; *Kahn v Kaskel*, 367 F Supp 784 [SD NY 1973]).

Further, there is no basis for a *res judicata* bar to the Cooperative's Counterclaim. The doctrine of *res judicata* "prohibits a party from re-litigating any claim which could have been or which should have been litigated in a prior proceeding .... Pursuant to the doctrine of *res judicata*, 'once a claim is brought to a final conclusion, all other claims [or defenses] arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (*Coliseum Towers Assoc.,* 217 AD2d at 389-390, *quoting O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *see also Ippolito v TJC Dev., LLC*, 83 AD3d 57 [2d Dept 2011]). Thus, *res judicata* "forecloses a party from relitigating a cause of action that was the subject matter of a former lawsuit, or from raising issues or defenses that might have been litigated in the first suit" (*Newtown Garment Carriers, Inc. v Consolidated Carriers Corp.*, 250 AD2d 482, 483 [1st Dept 1998]). "The doctrine is based on the principle that a 'judgment in one action is conclusive in a later one ... *when the two causes of action have such a measure of identity* that a different judgment in the second would destroy or impair the rights or interests established by the first'" (*Singleton Mgt., Inc. v Compere*, 243 243 AD2d 213,

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Defendants did not seek dismissal of the Complaint on that ground so any claim as to the deficiency of the derivative claims were waived. Finally review of the Complaint reveals that none of the claims asserted had anything to do with the Platzner Stock or the Platzner Transaction.

215 [1st Dept 1998], *quoting Schuykill Fuel Corp. v Nieberg Realty Corp.*, 250 NY 304, 306-307 [1929]). Ordinarily, a stipulation of discontinuance based on a settlement could "'have res judicata effect in future litigation on the *same cause*,'"; here, *res judicata* has no relevance since the causes of action in the 2009 Action are not the same or identical to the Counterclaim asserted in this action (*Singleton*, 243 AD3d at 383-384, *quoting* Practice Commentaries, McKinney's Cons. Laws of N.Y. Book 7B CPLR C3217:15 at 736). Nor does the Counterclaim arise from the same factual grouping or transactions underlying the 2009 Action.

"In determining whether a factual grouping constitutes a transaction for res judicata purposes, a court must apply a pragmatic test and analyze how the facts are related as to time, space, origin or motivation, whether they form a convenient trial unit, and whether treating them as a unit conforms to the parties' expectations or business understanding" (*Matter of Asch,* 164 AD3d 787, 789 [2d Dept 2018]; *see also Coliseum Towers Assoc. v County of Nassau,* 217 AD2d 387, 390 [2d Dept 1996]).

Here *res judicata* does not apply because the Cooperative's causes of action in the 2009 Action were entirely unrelated to the Counterclaim in this action (which seeks to invalidate the Platzner Stock transfer as void *ab initio*) and do not arise out of the same factual grouping or transactions underlying the 2009 Action. The 2009 Action's complaint shows that the Cooperative's claims related to PKA's alleged breach and failure to sell parking spaces, while the Counterclaim alleges that PKA sold parking spaces that failed to meet the Contemporaneous Ownership Requirement. The relief requested is also different -- the 2009 Action sought damages from PKA due to its failure to sell Unsold Shares allocated to garage and parking spaces and the Cooperative's Counterclaim seeks a declaration concerning the legitimacy of the shares purportedly issued in connection with the Platzner Transfer. The two actions seek different types of relief and require different types of proof and therefore do not constitute a convenient trial unit such that this action would be barred by *res judicata.*

Based on the foregoing, in opposition to the Cooperative's presentation of evidence establishing *prima facie* its right to summary judgment on its Counterclaim, the PKA Parties have failed to submit evidence raising a triable issue of fact concerning their affirmative defenses of *res judicata* and release.

PKA's and Soling's Affirmative Defenses of Estoppel, Waiver, and Ratification Fail

With respect to the PKA Parties' defense of ratification, New York Courts have long held that there is no ratification of a void contract (*Dickinson v City of Poughkeepsie,* 75 NY 65, 74 [1878]; *Molloy v City of New Rochelle,* 110 AD 895, 896 [2d Dept 1905]; *Beltway 7 & Properties, Ltd. v Blackrock Realty Advisers, Inc.,* 167 AD3d 100, 108 [1st Dept 2018] [distinguishing between agreements that are void and those that are merely voidable and therefore capable of ratification]; *see also Nusbaum v Nusbaum,* 280 AD 315, 316 [1st Dept 1952] [same]). Therefore, as the Platzner Transfers and Stock are void *ab initio,* there can be no ratification as a matter of law.

PKA and Soling also argue that the doctrine of equitable estoppel applies to transactions that would otherwise be void *ab initio* and that the Cooperative has "affirmed" the Validity of the Platzner Stock by its conduct since 2003, including failing to question the legitimacy of the Platzner Stock before this action was filed (PKA Mem. at 8-10).

A necessary element of equitable estoppel is detrimental reliance (*Fisk Bldg. Assoc. LLC v Shimazaki II, Inc.,* 76 AD3d 468, 469 [1st Dept 2010]). "The party asserting estoppel must show with respect to himself: (1) lack of knowledge of the true facts; (2) reliance upon the conduct of the party estopped; and (3) a prejudicial change in his position" (*First Union Nat. Bank v Tecklenburg,* 2 AD3d 575, 577 [2d Dept 2003]). The doctrine of estoppel "is imposed by law in the interest fairness to prevent the enforcement of rights which would work fraud or injustice upon the person against whom enforcement is sought *(Fundamental Portfolio Advisors, LLC v Tocqueville Asset Mgt. L.P., 7* NY3d 96, 106 [2006]). For the defense of estoppel to apply, the party against whom enforcement is sought must have "in justifiable reliance upon the opposing parties' words or conduct ... been misled into acting upon the belief that such enforcement would not be sought ... In the absence of evidence that a party was misled by another's conduct or that the party significantly and justifiably relied on that conduct to its disadvantage, an essential element of estoppel [is] lacking" (*id.* at 106-107). A waiver is "the voluntary abandonment or relinquishment of a known right, which, except for such waiver, the party would have enjoyed" *P & D Cards and Gifts, Inc. v Matejka,* 150 AD2d 660, 662 [2d Dept 1989]).

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Here, because the PKA Parties have failed to submit an affidavit from Platzner attesting to his lack of knowledge that the Platzner Transaction was void *ab inititio* based on, *inter alia*, it being violative of the Coopertive Certificate of Incorporation, and to the prejudice he suffered based on his reliance on the Cooperative's misleading him into believing that the Platzner Stock was valid, the PKA Parties have failed to submit evidence raising a triable issue of fact as to their defense of estoppel. And PKA and Soling have also failed to provide any evidence to support the Cooperative's voluntary abandonment and relinquishment of its right to challenge Platzner's status as a shareholder which, except for such waiver, the Cooperative would have enjoyed. Soling has not (nor could he) claimed that he was prejudiced because at the time he purchased the Platzner Stock, he was well aware that the Cooperative viewed the Platzner Stock a nullity. Further, since PKA holds no rights to the invalid Platzner Stock, it has no basis to contend that it was prejudiced by the Cooperative's acceptance of Platzner's vote or monthly payments. Based on the foregoing, in opposition to the Cooperative's submission of evidence establishing its *prima facie* entitlement to summary judgment on its Counterclaim, the PKA Parties have failed to submit evidence creating a triable issue of material fact as to their affirmative defenses of waiver and estoppel (*Tuscan/Lehigh Dairies, Inc. v Beyer Farms, Inc.*, 136 AD3d 799 [2d Dept 2016]; *CBG Principals Realty Assoc. v Triple Nickle Foods No. 2, Inc.*, 256 AD2d 296 [2d Dept 1998]).

The Statute of Limitations/Laches Do Not Bar the Counterclaim

PKA and Soling argue that the statute of limitations for the relief sought in the Counterclaim has expired and that BCL § 203(a) bars nullification of the Platzner Stock. However, the statute of limitations does not apply to bar actions where the underlying document is void *ab initio* (*A & Z Empire, Inc. v Shima,* 170 AD3d 628, 628 [1st Dept 2019]). A statute of limitations "does not make an agreement that was void at its inception valid by the mere passage of time" (*Riverside Syndicate, Inc. v Munroe,* 10 NY3d 18, 20 [2008]; *see also Faison v Lewis,* 25 NY3d 220, 222 [2015] [it is "well-settled that a forged deed is void ab initio, meaning a legal nullity at its inception" and therefore the statute of limitations does not foreclose claims]). As discussed above, BCL § 203(a) has no applicability to the instant action. Therefore, the Cooperative's Counterclaim is not barred by the statute of limitations. Furthermore, since PKA

and Soling have no statute of limitations defense, their defense based on laches likewise fails (*Gonzalez v Chalpin,* 159 AD2d 553 [2d Dept 1990], *affd* 77 NY2d 74 [1990]; *Columbus Trust Co. v Campolo,* 110 AD2d 616 [2d Dept 1985], *affd* 66 NY2d 701 [1985]). Based on the foregoing, the Court shall grant this branch of the Cooperative's motion seeking the dismissal of the PKA Parties' defenses of waiver and estoppel. And for the same reasons, the branches of the PKA Parties' motion seeking dismissal of the Counterclaim based on statute of limitations and laches shall be denied.

Any Amended Offering Plan Does Not Modify the Certificate of Incorporation

According to PKA and Soling, on or about July 11, 2018, PKA submitted a 26th Amendment to the Offering Plan to the New York Attorney General and that, on or about July 17, 2018, the New York Attorney General accepted the Amendment for filing. Therefore, they argue, the "ownership of the Platzner Stock Certificates by Platzner or his assignee Soling does not contravene the Offering Plan as amended" (PKA Ans. at ¶¶ 30-32; Soling Ans.¶¶ 30-32).

However, this Amendment is incapable of altering, amending, or modifying the Cooperative's Certificate of Incorporation, which makes the Platzner Transfer void *ab initio* given that the transfers were not made to an existing proprietary lessee or in connection with the execution of a proprietary lease. Furthermore, by failing to oppose this branch of the Cooperative's motion in its answering papers, the Cooperative is entitled to the branch of its motion seeking dismissal of this affirmative defense.

Platzner is Not a Party to a Proprietary Lease

PKA and Soling contend that, because Platzner "is not and never has been a party to any proprietary lease" the "terms of the Proprietary Lease are not binding on Platzner or his assignee, Soling" (PKA Ans. at ¶¶ 33-34; Soling Ans.¶¶ 33-34). This defense presupposes that the Cooperative's Counterclaim rests on the Platzner Transfer being void based on its violation of the requirements of the Proprietary Lease. Here, the Platzner Transfer is being invalidated based on it violating the Certificate of Incorporation. Accordingly, this defense is insufficient to create a triable issue of fact.

The Cooperative Has Stated a Claim

PKA and Soling's final affirmative defense is that the Counterclaim fails to state a claim.

It is well-settled that "[a]s to the . . . defense alleging that the plaintiff failed to state a cause of action, the principle appears to have become accepted that such a defense may be dismissed only if all the other affirmative defenses are found to be legally insufficient" (*Raine v Allied Artists Productions, Inc.*, 63 AD2d 914, 915 [1st Dept 1978]).

The Cooperative has demonstrated the legal insufficiencies of all the affirmative defenses interposed by PKA and Soling, and therefore, the PKA Parties' Ninth Affirmative Defense, alleging only a purported failure to state a claim for which relief may be granted, must be dismissed. Furthermore, as the Court is granting the Cooperative's motion for summary judgment on its Counterclaim, it is evident that it has stated a claim.

Based on the foregoing, the Cooperative's motion for summary judgment on its Counterclaim for a declaratory judgment declaring the Platzner Transfer and purported Platzner Stock issued in connection therewith as null and void *ab initio* shall be granted in its entirety. The issued share certificates, being violative of the Cooperative's Certificate of Incorporation, must be deemed a legal nullity and were never entitled to legal effect (i.e., the assignment to Soling is also a nullity). Furthermore, because the PKA's Parties' Amended Complaint rests and relies entirely on the validity and enforceability of the void Platzner Transfer, the PKA Parties' Amended Complaint shall be dismissed.

CONCLUSION

The Court has considered the following papers in connection with these motions:

1) Notice of Motion dated September 9, 2019;
2) Affirmation of Jerry A. Weiss, Esq. dated September 9, 2019, together with the exhibits annexed thereto;
3) Affidavit of Peg Conover sworn to on September 9, 2019, together with the exhibits annexed thereto;
4) Memorandum of Law in Support of Motion dated September 9, 2019;
5) Affirmation of Eddy Salcedo dated September 27, 2019, together with exhibit annexed thereto;
6) Notice of Cross-Motion dated October 28, 2019;
7) Affidavit of Cevin Soling, sworn to on October 15, 2019, together with exhibits annexed thereto;
8) Affirmation of W. James MacNaughton, Esq. dated October 28, 2019, together with the exhibits annexed thereto;

9) Memorandum of Law in Opposition to Motion and in Support of Cross-Motion dated October 28, 2019;
10) Reply Affirmation of Jeffrey A. Weiss in Further Support of Motion for Summary Judgment and in Opposition to Cross-Motion, dated November 15, 2019;
11) Affidavit of Ira Goldenberg, sworn to on November 5, 2019 together with exhibits annexed thereto; and
12) Reply Memorandum of Law in Opposition to Cross-Motion and in Further Support of Motion, dated November 15, 2019.

Based upon the foregoing papers, and for the reasons set forth above, it is hereby

ORDERED that the motion by Defendant Park Knoll Owners, Inc. (the "Cooperative") for an order: (1) pursuant to CPLR 3212 granting the Cooperative summary judgment on its Counterclaim for the issuance of a declaration declaring that the May 13, 2003 transfer to Harrin and Crystal Platzner of one hundred (100) shares of Cooperative stock allocated to Garages F-13 and F-14 is in violation of the Cooperative's certificate of incorporation, by-laws, proprietary lease and offering plan, and therefore invalid, null and void *ab initio*; (2) dismissing all of the affirmative defenses set forth in the Answers of Plaintiff-Counterclaim Defendant Park Knoll Associates and Counterclaim Defendant Cevin Soling; (3) dismissing PKA's First Amended Complaint; and (4) entering default judgment against Counterclaim Defendant Harrin Platzner, is granted in its entirety; and it is further

ORDERED that the cross-motion by Plaintiff Park Knoll Associates and Counterclaim Defendant Cevin Soling for summary judgment and for leave to file Harrin Platzner's answer *nunc pro tunc* is denied in its entirety; and it is further

ORDERED, ADJUDGED AND DECREED that Defendant Park Knoll Owners, Inc. is entitled to a declaration, and the Court hereby declares, that the transfer on or about May 13, 2003 of one hundred (100) shares of Cooperative stock allocated to Garages F-13 and F-14 (the "Garage Stock") to Harrin and Crystal Platzner as well as the transfer in or about 2016 of the Garage Stock to Cevin Soling are in violation of the Cooperative's certificate of incorporation, by-laws, proprietary lease and offering plan, and therefore invalid, null and void *ab initio* and said transfers are invalid and ineffective against the Cooperative and any share certificates issued in connection with those invalid transfers are void; and it is further

ORDERED that the action is dismissed with prejudice.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, NY
March 22, 2020

ENTER:

HON. GRETCHEN WALSH, J.S.C.

ORDERED that the action is dismissed with prejudice.

The foregoing constitutes the Decision and Order of this Court.

Dated: White Plains, NY
March 22 , 2020

E N T E R:

HON. GRETCHEN WALSH, J.S.C.

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