

**Gibson v Castillo**

2021 NY Slip Op 32114(U)

October 26, 2021

Supreme Court, New York County

Docket Number: Index No. 154827/2021

Judge: David B. Cohen

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN, J.S.C. PART 58

*Justice*

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INDEX NO. 154827/2021

CATHERINE GIBSON,

Plaintiff,

MOTION SEQ. NO. 004

- v -

JOSE CASTILLO, MARIA CASTILLO, 526 WEST 158TH  
STREET HOUSING DEVELOPMENT FUND CORP., and  
JOHN DOES 1-4,

**DECISION + ORDER ON  
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 22, 23, 30, 31, 32, 33, 34, 38

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE.

In this action sounding, inter alia, in breach of contract and housing discrimination, plaintiff *pro se* Catherine Gibson moves, pursuant to CPLR 1024, to amend the complaint to substitute Luis Cordero for defendant John Doe # 1. Defendants 526 West 158<sup>th</sup> Street Housing Development Fund Corp. (“the HDFC”) and John Does # 1-4 oppose the motion. After consideration of the parties’ contentions, as well as a review of the relevant statutes and case law, the motion is decided as follows.

**FACTUAL AND PROCEDURAL BACKGROUND**

This action, commenced on May 19, 2021, arises from plaintiff’s unsuccessful attempt to purchase a cooperative apartment at 526 West 158<sup>th</sup> Street in Manhattan (“the premises”). Doc. 1. In her complaint, plaintiff claimed that, in April 2021, she and defendants Maria and Jose Castillo entered into a contract for the purchase of an apartment at the premises but that the sale fell through due to a breach of contract by the Castillos (first cause of action), as well as tortious

interference with the contract by the HDFC (second cause of action), and racial discrimination against the African-American plaintiff by the HDFC and its board (third cause of action). Id. Plaintiff also sought an injunction directing that the apartment be sold to her (fourth cause of action). Id.

The HDFC and John Does 1-4 joined issue by their answer filed July 30, 2021. Doc. 21.

Plaintiff now moves, pursuant to CPLR 1024, to substitute Luis Cordero for John Doe # 1 on the ground that Cordero verified the answer filed by the HDFC and John Does # 1-4 as president of the HDFC. Docs. 22-23. Additionally, plaintiff asserts that “Cordero was one of the Board Members that made the decision to reject my application to purchase [the apartment] that was listed for sale when I paid the deposit and signed a purchase agreement with the seller.” Doc. 23 at par. 5.

In support of the motion, plaintiff submits an affidavit and a proposed amended complaint purporting to add a fifth cause of action sounding in racial discrimination against the board members individually. Doc. 35. The proposed amended complaint neither names Cordero in the caption nor alleges personal wrongdoing by him. Doc. 35.

In opposition, the HDFC and John Does # 1-4 argue that the motion must be denied because plaintiff alleges no specific wrongdoing by Cordero and, in any event, as board members, John Does # 1-4 are protected by the business judgment rule. Doc. 30 at par. 3.

In a “reply brief”, plaintiff argues, inter alia, that she must be permitted to amend the complaint to substitute Cordero as a defendant in place of John Doe # 1. Doc. 38.

### **LEGAL CONCLUSIONS**

CPLR 1024 allows a plaintiff to sue a defendant as “John Doe” where he or she has a cause of action against a defendant whose identity is unknown at the time an action is filed. “A

plaintiff may amend a complaint to reflect the true names of the defendants in question, but only where such parties were fairly apprised that they are the intended defendants and are not prejudiced thereby (*see ICD Group Intl. Ltd. v Achidov*, 284 AD2d 244 [1<sup>st</sup> Dept 2001]).” *Opiela v May Indus. Corp.*, 10 AD3d 340 [1<sup>st</sup> Dept 2004]). Here, since plaintiff alleges in her complaint that John Does # 1-4 are members of the board of the HDFC (Doc. 1), those defendants could reasonably have expected that they would be named as defendants herein. Additionally, since neither the HDFC nor John Does # 1-4 establish, or even assert, that they would be prejudiced if plaintiff were allowed to substitute Cordero for John Doe # 1 (*see Medina v City of New York*, 134 AD3d 433 [1<sup>st</sup> Dept 2015]), the motion is granted to the extent of substituting Luis Cordero as a defendant in place of John Doe # 1.

Although plaintiff purports to seek leave to amend the complaint to add a fifth cause of action sounding in racial discrimination against John Does # 1-4 (Doc. 35), she is not entitled to such relief since she failed to formally request the amendment of the complaint pursuant to CPLR 3025(b) in her notice of motion or “wherefore clause” (*see CPLR 2214[a]; Arriaga v Michael Laub Co.*, 233 AD2d 244, 245 [1<sup>st</sup> Dept 1996]). Therefore, the purported amended complaint (Doc. 35) is a nullity.

Although defendant relies, *inter alia*, on *Golden Ox Realty LLC v Board of Managers of Colden Garden Condominium, Inc.*, 2020 NY Slip Op 34188(U)(Sup Ct, New York County 2020 [Billings, J.]) in asserting that the motion should be denied, that case is distinguishable since the plaintiff in that matter did not seek relief pursuant to CPLR 1024.

Accordingly, it is hereby:

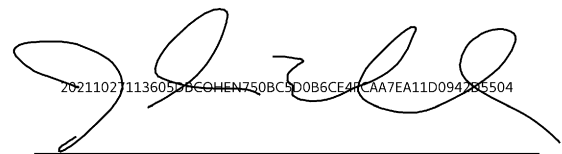
ORDERED that plaintiff’s motion is granted to the extent that Luis Cordero is hereby substituted as a defendant in place of defendant John Doe # 1 and, upon receipt of a copy of this order, the Clerk shall amend the caption by substituting “Luis Cordero” as a party defendant in place of “John Doe # 1”, and the motion is denied in all other respects; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order, with notice of entry, upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk’s Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)); and it is further

ORDERED that the parties are to appear for a preliminary conference via Microsoft Teams on November 29, 2021 at 4:00 p.m. unless they first complete a bar coded preliminary conference form (to be provided to the parties by the Part 58 Clerk) and email the same to the Part 58 Clerk at [SFC-Part58-Clerk@nycourts.gov](mailto:SFC-Part58-Clerk@nycourts.gov) at least two business days prior to the scheduled conference date.

10/26/2021  
DATE

  
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DAVID B. COHEN, J.S.C.

CHECK ONE:

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<input type="checkbox"/>	GRANTED		
<input type="checkbox"/>	SETTLE ORDER		
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<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: