

Hartman v WVH Hous. Dev. Fund Corp.
2021 NY Slip Op 32148(U)
October 27, 2021
Supreme Court, New York County
Docket Number: 160227/2019
Judge: David B. Cohen
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**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. 160227/2019

NICHOLAS HARTMAN and TONI ALLOCCA,

Plaintiffs,

MOTION SEQ. NO. 001

- v -

WVH HOUSING DEVELOPMENT FUND CORPORATION,
THE BOARD OF DIRECTORS OF THE WVH HOUSING
DEVELOPMENT FUND CORPORATION, AKAM LIVING
SERVICES, INC., MAGGIE PISACANE, DANIEL
BENEDICT, HANNO DAMM, JULIA ROSNER, PHILIPP
ENGLIN, RIMA BLAIR, MARK MILSTEIN, JANE AND JOHN
DOES 1-10, ABC LLC 1-10, and XYZ INC. 1-10,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 55, 56, 57, 58, 59, 61, 62, 63, 64, 65, 66, 67, 69, 70, 71, 72

were read on this motion to/for

DISMISS

FACTUAL AND PROCEDURAL BACKGROUND

In 2006, the plaintiffs purchased shares of stock appurtenant to an apartment in defendant cooperative WVH Housing Development Fund Corporation (“WVH”). As part of that purchase, Plaintiffs and WVH entered into a Proprietary Lease Agreement, which set forth the terms of their relationship as well as the parties’ respective obligations.

Plaintiffs allege that they began to experience a series of problems with the apartment soon after the purchase was completed in 2007. Initially, the plaintiffs claim that they experienced difficulties and/or hardships because of elevated electromagnetic field (“EMF”) levels in the apartment. Compl. ¶39. In 2007, WVH retained an engineer who inspected the apartment and

recommended that measures be taken to reduce the EMF levels therein. See Affidavits of Plaintiffs Nicholas P. Hartman and Toni Allocca, dated December 15, 2020.

Approximately one year later, the apartment was re-inspected after the defendants had taken steps to try to eliminate the ETF levels in the apartment. Compl. ¶¶42-43. The inspector concluded that the overall levels had been reduced but advised that further action needed to be taken to reduce elevated levels present at certain locations within the apartment. Hartman Aff. at ¶16.

In or about 2007, Plaintiffs' observed that both of their dogs seemed ill and were behaving strangely. Compl. ¶¶45-46. Plaintiffs took the dogs to a veterinarian, who diagnosed them with bladder cancer and lymphoma. Id. at ¶47. In 2017, Plaintiffs' nine-year-old dog was diagnosed with bladder cancer and subsequently died. Id. at ¶48. A year later, another dog owned by Plaintiffs passed away from throat cancer and their cat died from lymphoma. Id. at ¶49. At that time, the Plaintiffs became extremely concerned about the safety of their apartment.

In 2017, Plaintiffs also began to notice strong and unbearable pungent odors throughout the apartment. They believed the odors could be attributable to mold and/or mildew. Compl. ¶51. The Plaintiffs claim that their daughter often became ill whenever she entered rooms in the apartment where the odors were particularly strong. Id. at ¶52. Plaintiffs also allege that they and their family members began to experience frequent illness and would experience symptoms such as vertigo, dizziness, headaches, lightheadedness, and other related issues. Ex. A, at ¶21; Compl. ¶53.

In 2018, Plaintiffs' kitchen plumbing draining stack completely collapsed, causing significant damage and forcing them to evacuate their apartment. Id. at ¶54. In their complaint, Plaintiffs claim that they have been unable to return. Id. at ¶¶54-56. As a result of all these issues

with their apartment, Plaintiffs and Defendants have become involved in a dispute as to the responsibility of Defendants to remedy the conditions in the apartment and compensate Plaintiffs for their damages. There have been several court proceedings regarding this dispute, including a Housing Part (HP) action in Housing Court as well as the captioned action.

In 2019, Plaintiffs had the unit inspected by two experts, both of whom issued reports regarding their findings. *Id.* at ¶24; see also Exhibits 3 and 4 to Hartman's Affidavit. Plaintiffs allege that the reports confirmed that EMF, radon, and other hazardous substances and materials infiltrated the apartment and have created an extremely dangerous condition that threatens their health. *Id.* at ¶24; Compl. ¶¶60-63; Ex. B, at ¶¶19-21. 26. As Plaintiffs allege, the high levels of radon and EMF were caused, *inter alia*, by: (i) Defendants' failure to provide proper moisture management systems in the building's exterior; (ii) Defendants' failure to use proper waste and storm systems in the unit and in the Complex overall; (iii) the presence of radioactive shields in the unit that were retroactively installed; and (iv) concrete slabs that were inadequately and improperly reinforced. Compl. ¶64. These 2019 reports are what Plaintiffs allege first placed them on notice as to the systematic and continuous nature of the hazardous conditions inside their apartment. Although Plaintiffs had believed that their issues had been caused by unrelated episodes of foul odors and various health problems, they now assert that the 2019 reports revealed an ongoing dangerous toxic condition attributable to negligence by Defendants. See Hartman Affidavit at ¶25. Plaintiffs allege that they filed this complaint less than nine months after they received the two expert reports. *Id.* at ¶¶28, 30.

The parties have been litigating their disputes in Supreme Court and Housing Court, and Plaintiffs also commenced an Article 78 proceeding in which Defendants were ordered to provide them with books and records, subject to the signing of a confidentiality order.

In their complaint, Plaintiffs assert twelve causes of action: 1) breach of contract; 2) negligence; 3) *res ipsa loquitur*; 4) defamation; 5) violations of the Housing Maintenance Code; 6) breach of warranty; 7) negligent construction; 8) misrepresentation; 9) breach of fiduciary duty; 10) declaratory judgment; 11) an order directing that Defendant turn over certain books and records to Plaintiff; and 12) a permanent injunction.

Defendants now move to dismiss the complaint asserting, *inter alia*, that: 1) Plaintiffs' claims are barred by the Statute of Limitations; 2) another action currently pending in the Housing Court between the parties, regarding the same issues, warrants dismissal under CPLR 3211(a)(4); 3) Plaintiffs are collaterally estopped from relitigating their alleged entitlement to unrestricted access to WVH's books and records by a prior decision in a prior Article 78 proceeding, warranting dismissal under CPLR 3211(a)(5); 4) Plaintiffs' Complaint fails to state a claim against the Board, the individual Board Members, and the Managing Agent, warranting dismissal under CPLR 3211(a)(7); 5) Plaintiffs' negligence claim is duplicative of its breach of contract claim; 6) Plaintiffs' contract, misrepresentation, defamation, breach of fiduciary duty, libel and slander claims are inadequately pleaded and insufficient as a matter of law; 7) Plaintiffs cannot establish the elements of *res ipsa loquitur* because the complaint itself alleges that Defendants did not have the material element of exclusive control; 8) Plaintiffs cannot establish breach of warranty of habitability since the exact same claim is being litigated in the Housing Court action; 9) Plaintiffs cannot establish defective construction because Defendants did not build the building; and 10) Plaintiffs assert no basis for declaratory or injunctive relief.

Statute of Limitations

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5), the movant bears the burden of establishing, *prime facie*, that the time in which plaintiff may sue has expired (*see Benn*

v Benn, 82 AD3d 548, 548 [1st Dept 2011]; *Barry v Cadman Towers, Inc.*, 136 AD3d 951, 952 [2d Dept 2016]). “In this regard, the defendant must establish, inter alia, when the cause of action accrued.” (*Barry*, 136 AD3d at 952). If the movant satisfies its burden, then the burden shifts to plaintiff to “raise a question of fact as to whether the statute of limitations was tolled or otherwise inapplicable, or whether the plaintiff actually commenced the action within the applicable limitations period.” *Id.* The court “must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff.” (*Benn*, 82 AD3d at 548). Moreover, “plaintiff’s submissions in response to the motion ‘must be given their most favorable intendment.’” (*Id.*, quoting *Arrington v New York Times Co.*, 55 NY2d 433,443 [1982], *cert. denied*, 459 U.S. 1146 [1983]). If a triable issue of fact is raised about the accrual of a statute of limitations, or whether same was tolled, a motion to dismiss must be denied (*see e.g., Texeria v BAB Nuclear Radiology, P.C.*, 43 AD3d 403, 405 [2d Dept 2007]).

The majority of Plaintiffs’ claims sound in negligence and assert that they were injured because of exposure to various toxic substances in their apartment, including mold and radon, as well as elevated EMF levels. Plaintiffs allege, inter alia, that these substances existed due to faulty and negligent construction by the defendants. The statute of limitations in toxic tort cases is governed by CPLR 214-c, which provides for a three-year limitations period for actions to recover damages for injuries to person or property “caused by the latent effect of exposure to any substance or combination of substances, in any form, upon or within the body or upon or within property.” (CPLR 214-c[2]). That period is “computed from the date of discovery of the injury by the plaintiff or from the date when through the exercise of reasonable diligence such injury should have been discovered by the plaintiff, whichever is earlier.” (*id.*) Under the statute, discovery of the injury has been interpreted to mean when the injured party discovers the “primary condition on which

the claim is based.” (*MRI Broadway Rental v United States Min. Prods. Co.*, 92 NY2d 421, 429 [1998], quoting *Matter of New York County DES Litig. [Wetherill v Eli Lilly & Co.]*, 89 NY2d 506, 509 [1997]).

In many cases, the precise timing of the discovery of the primary condition upon which the claim is based is difficult to ascertain, particularly in the absence of significant discovery. The Court of Appeals has recognized that a claimant may experience early symptoms that are “too isolated or inconsequential to trigger the running of the statute of limitations under CPLR 214-c (2).” (*Wetherill*, 89 NY2d at 513 n.4). In cases where the primary conditions that form the basis of a plaintiff’s claim were clearly known and/or obvious more than three years prior to the commencement of an action, the action should be dismissed as time-barred.

While Defendants have pointed to the problems associated with the EMF levels in 2007, including the illnesses of two of Plaintiffs’ dogs, they have not established as a matter of law that these early symptoms were sufficiently consequential and/or continuous as to put them on notice of all the dangers they now claim are present in their apartment. To determine the question of when early symptoms are consequential enough to trigger the running of the statute of limitations, courts typically consider whether a plaintiff sought regular medical treatment or was limited in physical activities or missed time from work (*see Malone v Court W. Developers Inc.*, 139 AD3d 1154, 1155-56 [3d Dept 2016]; *Ward v Lincoln Elec. Co.*, 116 AD3d 558, 559 [1st Dept 2014]; *Cabrera v Picker Intl., Inc.*, 2 AD3d 308, 309 [1st Dept 2008]). In this case, there is no evidence that Plaintiffs or their children received medical treatment or missed time from work or school in 2007 or 2008. Plaintiffs allege that they and their daughter did not begin to experience any physical injury until late 2017 or in 2018. Furthermore, they allege that their original concerns about dangerous EMF levels in the unit were temporarily addressed by the remediation and subsequent

report of their expert, who indicated that EMF levels had substantially decreased. Other than the medical condition of their dogs, there is no indication of a physical injury to anyone during that time period. Thus, Defendants have failed to prove that Plaintiffs were on notice of the primary conditions upon which the negligence claims are based more than three years prior to the commencement of this action.¹

The same is true for the cause of action based on unbearable odors within the apartment, which Plaintiffs claim were caused by mold. Plaintiffs specifically allege that they began to smell those odors in or about October 2017. Compl. ¶51. Because Plaintiffs allege that the mold and hazardous substances in the apartment originated from the building next door and that the building's conditions have existed for more than a decade, Defendants assert that Plaintiffs' claims relating to the odors must be time-barred. However, Plaintiffs clearly alleges that any crack in the slab of Plaintiff's unit and subsequent seepage was not apparent until, at the earliest, October 2017, approximately ten years after Plaintiffs purchased their apartment. *Id.* at ¶¶ 38, 51, 66-72. The same applies to Plaintiffs' claims concerning the collapse of their kitchen drainage stack in 2018, since there are issues of fact concerning when the alleged damage became apparent (*see Naccarato v Sinnot*, 176 AD3d 1467, 1468 [3d Dept 2019]).

Plaintiffs' causes of action sounding in breach of contract, breach of warranty of habitability, and misrepresentation also have a six-year statute of limitations. (CPLR 213; *see also Roman v Emigrant Sav. Bank-Brooklyn/Queens*, 111 AD3d 692, 694 [2d Dept 2013]). Plaintiffs have demonstrated that there are issues of fact regarding when the alleged damages accrued for purposes of the statute of limitations, as well as when the damages became apparent and obvious

¹ Although not addressed by the parties, this Court also notes the possible application of the "two-injury rule", which would preclude dismissal at this time (*see Suffolk County Water Authority v Dow Chemical Co.*, 121 AD3d 50, 60-61 [2d Dept 2014]).

enough to act on. Accordingly, the branch of Defendants' motion seeking to dismiss these claims based on the statute of limitations is denied as well.

Claims Against The Board And/Or Its Individual Members

Defendants argue that the complaint fails to state a cognizable claim against the Board and its individual members. This Court agrees with Defendants regarding the claims against the individual board members. Reading the complaint in the light most favorable to Plaintiffs, there are no factual allegations which, if proven true at trial, would establish that any of the board members violated any duty to Plaintiffs or were in contractual privity with them as individuals. Even if the board members acted tortiously or breached a contract or the warranty of habitability, they cannot be liable under these theories since they acted solely on behalf of the board (*see Brasseur v Speranza*, 21 AD3d 297, 298 [1st Dept 2005]).

Defendants argue that their actions are protected from judicial scrutiny by the business judgment rule. The business judgment rule prohibits judicial inquiry into actions of corporate boards taken in good faith and for the furtherance of legitimate corporate purposes (*see Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 537-38 [1990]). Plaintiffs allege that the business judgment rule does not apply here because they allege that the board and/or the individual board members engaged in self-dealing and acted for the benefit of themselves as opposed to acting in the interests of the cooperative. However, Plaintiffs do not allege a single act of self-dealing or misconduct by any board member or the board, or any unauthorized or *ultra vires* conduct by any individual. Plaintiffs thus fail to state a cause of action against the board members or the board. Plaintiffs merely allege that the board and board members failed to remedy conditions in their apartment. The manner and extent of repairs, however, are within the scope of the board's authority, and thus shielded by the business judgment rule from review.

The same is true with regards to the claims against the managing agent, defendant Akam Living Services (“Akam”). Nothing in the complaint alleges acts of misconduct or self-dealing by Akam. Nor is there any indication that Akam acted in a manner independent from the cooperative. Accordingly, the claims against the board, the individual members of the board, and the managing agent are dismissed.

First Cause of Action – Breach of Contract

Plaintiffs allege that WVH breached the terms of its governing documents by failing to cure the hazardous conditions in their unit and/or by allowing hazardous conditions to permeate the unit and the complex. Compl. ¶¶ 102, 103. Defendants argue that these claims are vague, indefinite and do not sufficiently allege the specific provisions of the governing documents and/or contracts upon which liability is predicated. According to Defendants, the breach of contract claims in the complaint merely state that they violated the Housing Maintenance Code, echoing their complaint in Housing Court.

To state a valid claim for breach of contract, a complaint “must, inter alia, set forth the terms of the agreement upon which liability is predicated, either by express reference or by attaching a copy of the contract.” (*Chrysler Capital Corp. v Hilltop Egg Farms, Inc.*, 129 AD2d 927, 928 [3d Dept 1987]; *see Matter of Sud v Sud*, 211 AD2d 423, 424 [1st Dept 1995] [affirming dismissal of breach of contract claim due to “plaintiffs’ failure to allege, in nonconclusory language, as required, the essential terms of the parties’ purported contract, including the specific provisions of the contract upon which liability is predicated”]). Vague and conclusory allegations are insufficient to sustain a breach of contract action (*see Marino v Vunk*, 39 AD3d 339, 340 [1st Dept 2007]).

Plaintiffs allege that Defendants “breached their obligations under WVH’s governing documents by failing to ensure that the Unit and Complex are safe and free from any hazardous conditions that pose a health and safety risk . . .” (§104). Plaintiffs also allege that Defendants “breached their obligations under WVH’s governing documents by allowing the hazardous conditions to permeate throughout the Unit and Complex, stripping from Plaintiffs the use and enjoyment of their Unit (§103). Plaintiffs thus plead the same generic “hazardous conditions,” implying, perhaps, a breach of the warranty of habitability, but fail to cite to any specific provision in the governing documents or the proprietary lease that deals with hazardous conditions or Defendant’s failure to remove them. Nor are there any allegations of a violation of a specific provision of the proprietary lease, and Plaintiffs do not attach a copy of the lease to their complaint. Accordingly, the first cause of action for breach of contract fails to state a cause of action and is dismissed.

Second Cause of Action – Negligence

Defendants argue that the negligence cause of action must be dismissed as time-barred. As discussed above, an issue of fact exists as to when Plaintiffs’ negligence claims accrued and therefore this branch of the motion to dismiss must be denied at this time. Similarly, Defendants’ assertions that they neither caused nor created the alleged hazardous conditions or had actual or constructive notice of them only creates issues of fact which cannot be resolved before the completion of all discovery and/or trial. Finally, the negligence claims pleaded appear to be based on allegations that expand well beyond any contractual obligation and are therefore not merely duplicative of the Plaintiffs’ breach of contract claim. The Hartman Affidavit alleges that Defendants made negligent repairs to Plaintiffs’ unit, causing additional EMF, radon, mold, and other hazardous substances to enter the unit and cause Plaintiffs personal injury. Hartman Affid.

at ¶¶14, 23-28; Exs. 3, 4. Plaintiffs further allege that Defendants had a duty to remedy the dangerous condition of the property, but instead acted negligently and made the condition worse, causing them to suffer significant damages. Since Plaintiffs adequately state a cause of action for negligence, the branch of the motion seeking to dismiss the second cause of action is denied.

Third Cause of Action – *Res Ipsa Loquitur*

Defendants argue that Plaintiffs' invocation of *res ipsa loquitur* is inapplicable to this case and therefore the third cause of action must be dismissed. This Court agrees. Indeed, the doctrine is clearly inapplicable here since the presence of toxic mold, EMF, radon and/or other hazardous substances in the plaintiffs' apartment (1) was not necessarily attributable to any party's negligence and (2) was not caused by any instrumentality within the exclusive control of the defendants (*see Mejia v. Transit Authority*, 291 AD2d 225, 227 [1st Dept 2002]). Accordingly, the branch of the motion seeking to dismiss the third cause of action is granted.

Fourth Cause of Action – Defamation/Libel

Defendants argue that the fourth cause of action for defamation must be dismissed since it fails to state a cause of action. CPLR 3016(a) requires that, in an action for libel or slander, the complaint must set forth the exact defamatory words uttered by Defendants (*see Gardner v Alexander Rent-A-Car, Inc.*, 28 AD2d 667 [1st Dept 1967]). Here, Plaintiffs merely allege that Defendants communicated "intentional and purposeful messages and statements to the Complex community about untrue and defamatory information about Plaintiffs." (¶ 133). This is clearly insufficient. Plaintiffs seemingly acknowledge this, but then argue that the Hartman Affidavit's reference to a March 2019 email cures the insufficiency of the claim. However, nothing in the Hartman Affidavit or any references to e-mails in the complaint is sufficiently particular or less conclusory than the cited allegations. Further, the defendants are permitted to advise their

shareholders about ongoing litigation and even to state their legal positions regarding the same. Accordingly, the branch of the motion seeking to dismiss the fourth cause of action is granted.

Fifth and Sixth Causes of Action – Violations of the Housing Maintenance Code and Breach of the Warranty of Habitability

Defendants argue that these causes of action and/or the entire complaint must be dismissed pursuant to CPLR 3211(a)(4) on the ground that the previously commenced Housing Court proceeding involves the same subject matter and issues as this case. However, this argument is factually incorrect. In the HP proceeding in Housing Court, there is only jurisdiction to deal with violations of state and local laws concerning enforcement and maintenance of housing standards. The Housing Part cannot adjudicate tort or breach of warranty claims. Nor may it determine whether Defendants fraudulently misrepresented the conditions of the apartment to Plaintiffs. Dismissal based on the prior action would only be appropriate if the two actions were sufficiently similar and the relief sought is the same or substantially the same (*see White Light Productions, Inc. v. On The Scene Productions, Inc.*, 231 AD2d 90, 94 [1st Dept 1997]). That is not the case here, where the jurisdiction of the prior court is severely limited, and the relief sought in this action is much broader. While certain claims or defenses raised in this action may be precluded and/or rendered moot by the determinations of the Housing Court, that is not a ground upon which to dismiss this entire action. Upon a final determination of the Housing Court and the completion of discovery in this matter, the parties may make formal motions regarding any estoppel effect of the Housing Court determination on this action. At this time, however, the branch of the motion seeking to dismiss the fifth and sixth causes of action is denied as premature.

Seventh Cause of Action – Defective Construction

Plaintiffs allege that Defendants failed to properly construct and maintain the piping and subterranean infrastructure in a reasonably prudent and workmanlike manner. Compl. ¶152. They

also allege that Defendants failed to properly evaluate the piping and subterranean infrastructure and failed to supervise construction therein. *Id.* at ¶153. The defective construction, maintenance and oversight allegedly caused significant damage to the Unit and the Complex as a whole. *Id.* at ¶154.

Defendants correctly argue that they cannot be held liable under this cause of action because they were not responsible for the original construction of the complex. Plaintiffs merely allege that Defendants were responsible for the maintenance of the building's piping and interior infrastructure and that, upon information and belief, the piping and deteriorating slabs therein were replaced by Defendants at some point between May 2018 and time the Complaint was filed. *Id.* at ¶157. To the extent that this allegation states a cause of action, it is entirely duplicative of Plaintiffs' negligence claims. Accordingly, the branch of the motion seeking dismissal of the seventh cause of action is granted.

**Eighth Cause of Action – Fraudulent Misrepresentation and
Ninth Cause of Action – Breach of Fiduciary Duty**

Defendants argue that Plaintiff's misrepresentation claims are deficient as a matter of law. Plaintiffs allege that Defendants misrepresented to them that their unit was free of hazardous conditions. (¶ 157). This conclusory claim is insufficient to sustain a cause of action for fraud, which must be pleaded with particularity and must allege either a fiduciary relationship or a relationship of trust and confidence (*see* CPLR 3016[b]; *Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486 [2008]; *Cronos Group Ltd. v XComIP, LLC*, 156 AD3d 54 [1st Dept 2017]; *Basis Yield Alpha Fund (Master) v. Goldman Sachs Group, Inc.*, 115 AD3d 128 [1st Dept 2014])). No such allegations are pleaded here. Plaintiffs did not purchase the unit from Defendants and Plaintiffs fail to allege, or provide any details regarding, any specific misrepresentations or

misstatements by Defendants. Therefore, the branch of Defendants' motion seeking dismissal of the eighth cause of action for fraudulent misrepresentation is granted.

Similarly, the ninth cause of action for breach of fiduciary duty is dismissed because it fails to state a cause of action. There are no sufficiently detailed allegations in the complaint suggesting that Defendants breached any fiduciary duty to Plaintiffs. Prior to purchasing the unit, Plaintiffs were merely contract vendees and were owed no duty by WVH or its board members (*see Pesochinsky v 77 Bleecker St. Corp.*, 250 AD2d 494, 494-495 [1st Dept 1998]). With respect to Defendants' alleged failure to abate the conditions claimed after Plaintiffs became shareholders, these claims do not constitute a breach of a fiduciary duty and are merely duplicative of the cause of action for breach of contract and/or negligence (*see Andejo Corp. v South St. Seaport Ltd. Partnership*, 40 AD3d 407 [1st Dept 2007]; *see also Granirer v Bakery, Inc.*, 54 AD3d 269 [1st Dept 2008]). Accordingly, the ninth cause of action is dismissed.

Tenth Cause of Action Seeking Declaratory Relief and Twelfth Cause of Action Seeking Injunctive Relief

Plaintiffs' tenth cause of action (¶¶ 179-181), labeled "Declaratory Judgment", generically pleads "an actual and justiciable controversy exists between the parties," because Defendants denied the alleged hazardous conditions. Plaintiffs seeks a judgment declaring that Defendants are "harboring and propagating extremely hazardous and deadly conditions in the Complex." This cause of action is overbroad and unnecessary given Plaintiffs' other avenues for relief.

Finally, the twelfth cause of action (¶¶ 191-192), seeks "judgment against Defendants permanently enjoining and mandating the [b]oard and its members to carry out their duties." Again, this cause of action is overbroad and unnecessary to obtain the relief the plaintiffs are seeking. Accordingly, the tenth and twelfth causes of action are dismissed.

Eleventh Cause of Action – Claim for Books and Records

Plaintiffs' eleventh cause of action seeks books and records from WVH. Defendants argue that this cause of action is an impermissible attempt to relitigate a claim that was previously addressed in an Article 78 proceeding. This Court agrees. Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding (*see Ryan v New York Tel. Co.*, 62 NY2d 494, 500 [1984]). In a prior Article 78 proceeding, Plaintiffs sought to review Defendants' books and records, the same relief sought herein. The court in the prior proceeding determined that Plaintiffs were entitled to review the books and records but only upon signing an agreed upon confidentially agreement. That order has never been appealed or reargued and collaterally estops Plaintiffs from bringing the same claims here. To the extent that Plaintiffs believe that Defendants are not complying with the order issued in that proceeding, their remedy is to move to enforce the directive in that proceeding. The eleventh cause of action is thus dismissed.

Accordingly, it is hereby:

ORDERED that Defendants' motion to dismiss is granted to the extent that the first, third, fourth, seventh, eighth, ninth, tenth, eleventh and twelfth causes of action are dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that all claims asserted against the Board of Directors of the WVH Housing Development Fund Corporation, its individual board members, Maggie Piscane, Daniel Benedict, Hanno Damm, Julia Rosner, Philipp Englin, Rima Blair, and Mark Milstein, as well as against the managing agent, Akam Living Services, are dismissed, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the motion is otherwise denied; and it is further

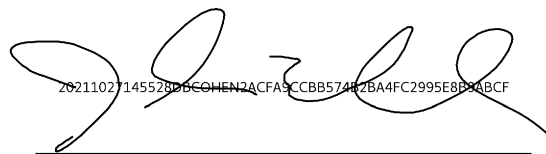
ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal of the aforementioned defendants, and that all future papers filed with the court bear the amended caption; 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); and it is further

ORDERED that the parties remaining in the action are to appear for a preliminary conference via Microsoft Teams on November 29, 2021 at 3:30 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 at least two business days prior to the scheduled conference date.



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DAVID B. COHEN, J.S.C.

10/27/2021
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE