

**Murphy v Board of Mgrs. of Brooklyn Villas  
Condominium**

2021 NY Slip Op 33845(U)

April 9, 2021

Supreme Court, Kings County

Docket Number: Index No. 520036/2017

Judge: Devin P. Cohen

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Supreme Court of the State of New York  
County of Kings

Index Number 520036/2017  
Seq # 009 & 010

Part 91

**DECISION/ORDER**

Recitation, as required by CPLR §2219 (a), of the papers considered in the review of this Motion

SHIMERE MURPHY,

Plaintiff,

against

THE BOARD OF MANAGERS OF BROOKLYN VILLAS  
CONDOMINIUM, BROOKLYN VILLAS CONDOMINIUM,  
BROOKLYN VILLAS, LLC, BROOKLYN VILLAS LP,  
HAROLD WEISMAN, ISAAC DEUTSCH, CHAYA DEUTSCH  
AND CARL CALLER,

Defendants.

**Papers**

Numbered	
Notice of Motion and Affidavits Annexed.....	<u>1, 2</u>
Order to Show Cause and Affidavits Annexed...	<u>2, 3</u>
Answering Affidavits.....	<u>3</u>
Replying Affidavits.....	_____
Exhibits.....	_____
Other .....	_____

Upon the foregoing papers<sup>1</sup>, defendant Board of Managers of Brooklyn Villas Condominium’s (“the Board”) motion for summary judgment (Seq. 009) and plaintiff’s cross-motion to amend and to compel (Seq. 010) are decided as follows:

Plaintiff commenced this action for damages against defendants concerning a trip-and-fall accident that occurred on November 19, 2014, on the sidewalk adjacent to property located at 22 Juliana Place, Brooklyn, New York. The Board of Managers seeks summary judgment to dismiss plaintiff’s claims against it.

On a motion for summary judgment, the moving party bears the initial burden of making a prima facie showing that there are no triable issues of material fact (*Giuffrida v Citibank*, 100 NY2d 72, 81 [2003]). Once a prima facie showing has been established, the burden shifts to the non-moving party to rebut the movant’s showing such that a trial of the action is required (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]).

<sup>1</sup> This court will not consider plaintiff’s reply papers in further support of his cross-motion, as such papers are not authorized by CPLR 2214.

As an initial matter, the Board fails to attach a copy of all of the pleadings. This alone warrants denial of the Board's motion (*Rivera v City of New York*, 173 AD3d 790, 791 [2d Dept 2019]). Nevertheless, I will address the merits of the Board's motion.

The Board argues that, as an unincorporated association, it cannot be sued (*Pascual v Rustic Woods Homeowners Ass'n, Inc.*, 134 AD3d 1006, 1006[2d Dept 2015]; 2834-2838 *Brighton 3rd St. Condominium v Bazinian*, 66 Misc 3d 143[A], 2020 NY Slip Op 50180[U], \*1 [App Term, 2d, 11th and 13th Jud Dists 2020]). Instead, the president and/or treasurer of the board must be the named defendants (*Pascual*, 134 AD3d at 1006, citing General Associations Law § 13).

This motion is the Board's second request for summary judgment. By motion, filed on August 5, 2019, the Board requested summary judgment on the same basis. The motion was adjourned on consent of the parties and, thereafter, administratively adjourned due to the Covid-19 pandemic. By order, dated July 22, 2020, I denied the motion as premature because plaintiff needed discovery to respond to the motion. Indeed, shortly thereafter, the court (Colon, J.) set deadlines for the depositions of the parties. Only three months after my order denying the Board's first motion for summary judgment, the Board moves again for summary judgment on the same basis.

Although no one with personal knowledge of the Board's legal status as an unincorporated association submits any admissible evidence of such, plaintiff does not appear to dispute this point. Instead, plaintiff cross-moves to amend the complaint to add the president and treasurer as named defendants. However, it does not know these names of these individuals and so it seeks an order compelling the Board of Managers to identify them. Plaintiff explained that he deposed Abe Friedman, the principal of All Care Management ("ACM"), who defendant

produced for deposition as its representative. ACM manages the subject property (Abe Friedman EBT at 8). Plaintiff claims that Abe Friedman did not provide the identities of the president or the treasurer of the Board.

The Board argues that plaintiff may not amend the complaint to add the president or treasurer because, the Board claims, plaintiff served the instant summons and complaint upon the Board through Mayer Friedman, who plaintiff previously sued for the same claims and who the court previously dismissed. The Board of Managers refers to an action titled *Shimere Murphy v Brooklyn Villas LLC, Mayer Friedman, and Carl Caller*, Index No. 505266/2016, in which plaintiff sued those defendants for damages caused by a trip-and-fall accident on the same day and sidewalk adjacent to the same property as in the instant action. By order dated June 12, 2017, the court (Wooten, J.) dismissed Mr. Friedman from the suit.

The Board of Managers relies upon the decision in *Martin v Curran* (303 NY 276 [1951]) to argue that all members of an unincorporated association must be liable for the association to be held liable. The Court of Appeals further recognized that an unincorporated association “is not an artificial person, and has no existence independent of its members” (*Martin*, 303 NY at 280). The Board further claims that, because Mr. Friedman is a member of the Board (Soloveichik affirmation at ¶ 7), and plaintiff’s claims against him were previously dismissed, that none of the members or officers of the Board may be sued. Notably, Mr. Friedman has never submitted an affidavit in this action attesting to his role with the Board. Nevertheless, the Board argues that because Mr. Friedman was previously dismissed, plaintiff cannot amend his complaint to name the Board’s officers, such as the president or treasurer.

Interestingly, in the prior action, counsel for Mr. Friedman argued that Mr. Friedman, who apparently was named as the chairman of the Board of Managers of Brooklyn Villas

Condominium in a document from 2003, should not be held liable for plaintiff's accident because Mr. Friedman was not an owner of the property. Although Mr. Friedman did not himself submit an affidavit in support of the motion, counsel further sought to distance Mr. Friedman from this prior action by claiming that Mr. Friedman was not an occupant of the subject property, nor did he have any control over it.

The court acknowledges that the Board and Mr. Friedman are separate parties, and this court does not hold that the Board is estopped from making arguments about Mr. Friedman that are contrary to Mr. Friedman's arguments about himself. However, based on these contrary positions, neither of which were supported by admissible evidence, there appear to be questions of fact about Mr. Friedman's role with the Board. Additionally, to the extent that counsel seeks to draw a distinction between Mr. Friedman as an individual and Mr. Friedman as a Board representative, New York law does not recognize such a distinction when it comes to unincorporated associations (*Martin*, 303 NY at 280).

The Board further argues that service of process upon the Board through Mr. Friedman deprives this court of jurisdiction because Mr. Friedman is neither the president nor the treasurer. Mr. Friedman's role with the Board is not clear. In any event, because the Board did not raise this defense in its answer or by a motion to dismiss pursuant to CPLR 3211, the defense is waived (*Wells Fargo Bank, N.A. v Abakporo*, 186 AD3d 652, 653 [2d Dept 2020]).

Turning to plaintiff's motion to amend, plaintiff seeks to add the president and treasurer of the Board as defendants. However, plaintiff does not know their identities and seeks an order compelling the Board to provide them. The Board will identify the names of the president and treasurer within 30 days. Once plaintiff has the names of these officers, it may move to amend the complaint to add them as defendants.


Plaintiff also seeks to amend the complaint to add ACM, based on Abe Friedman’s testimony that he visited the subject premises at least once per month and inspected the sidewalks (Abe Friedman EBT at 10, 15). Leave to amend a pleading should be granted unless the proposed amendment is without merit or the opposing party would be prejudiced (*Mannino v Wells Fargo Home Mtge., Inc.*, 155 AD3d 860, 862 [2d Dept 2017]). Here, the statute of limitations for plaintiff’s negligence claim is three years (*Castle Oil Corp. v Thompson Pension Empl. Plans, Inc.*, 299 AD2d 513, 515 [2d Dept 2002]). Thus, the statute expired on November 19, 2017.

Plaintiff does not sufficiently establish that plaintiff’s proposed claim against ACM would relate back to the date of the original filing. While the proposed claims arose out of the same occurrence as the original claims, and it is conceivable that ACM is united in interest with The Board, plaintiff did not establish that ACM “knew or should have known that, but for a mistake by the plaintiff as to the identity of the proper parties, the action would have been commenced against [it] as well” (*Petruzzi v Purow*, 180 AD3d 1083, 1084 [2d Dept 2020]).

For the reasons stated above, defendant’s motion for summary judgment is denied. Plaintiff’s motion is granted to the extent that defendant shall provide the names of its president and treasurer within 30 days.

This constitutes the decision and order of the court.

April 9, 2021  
DATE

  
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DEVIN P. COHEN  
Justice of the Supreme Court

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