

**Menkes v Board of Mgrs. of 561 5th St.
Condominium**

2022 NY Slip Op 30393(U)

February 2, 2022

Supreme Court, Kings County

Docket Number: Index No. 524496/2020

Judge: Wayne P. Saitta

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 29 of the Supreme Court of the State of New York, held in and for the County of Kings, at 360 Adams Street, Brooklyn, New York, on 2nd the day of February, 2022.

P R E S E N T:

Hon. Wayne P. Saitta, Justice.

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JASON R. MENKES and CHRISTINA D. NENOV,

Plaintiff,

Index No. 524496/2020

-against-

BOARD OF MANAGERS OF 561 5TH STREET CONDOMINIUM, RICHARD R. PURTICH, LEN PATTERSON SMALL, TRACY BRESLIN, KIRSTIN A. PURTICH, all individually and as members of Defendant Board of Managers,

Defendants,

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DECISION AND ORDER MS #1

The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	<u>28, 34, 40, 44-45, 59, 63</u>
Answering Affidavit (Affirmation) _____	<u>60-62</u>
Reply Affidavit (Affirmation) _____	<u>65</u>
Supplemental Affidavit (Affirmation) _____	<u>84, 87, 91-92</u>
Pleadings – Exhibits _____	<u>29-33, 35-39, 41-43, 85-86, 88-89</u>
Stipulations – Minutes _____	
Filed Papers _____	

This action was commenced by Plaintiffs, as two owners of a condominium, against Defendant BOARD OF MANAGERS of 561 5th STREET CONDOMINIUM (Defendant BOARD) and individual members of Defendant BOARD for alleged water damage to Plaintiffs premises, lack of proper maintenance, and asserted breach of the various fiduciary duties by Defendant BOARD.

Defendant TRACY BRESLIN, moves for an Order pursuant to CPLR § 7503(a) compelling Plaintiffs and Defendants to arbitrate all issues and claims set forth in Plaintiffs' Amended Complaint. The other Defendants join in support of the motion to compel arbitration.

Plaintiffs are the owners of Unit 2 in the condominium building located at 561 5th Street, Brooklyn, NY (the "Condominium") and commenced this action to compel the Condominium Board to make repairs to the common elements of the building.

The individual Defendants are owners of one unit in the Condominium and are members of Defendant BOARD of MANAGERS of 561 5th which operates the Condominium.

Defendants argue that arbitration is required by Article XIV of the Condominium's Amended By-Laws, or, alternatively, under Article XIII of the Condominium's original By-Laws.

The Amended By-Laws do not apply to this action because it was commenced before the amendment was enacted and the original By-Laws do not require arbitration.

Plaintiffs commenced this action on December 8, 2020, by filing a Summons with Notice. On December 12, 2020, at a special meeting of the Condominium's unit owners, the unit owners, by a vote of three units to one unit, adopted the "Amended By-Laws of 561 5th Street Condominium" (the "Amended By-Laws"). Plaintiffs filed their Complaint on March 24, 2021 and an Amended Complaint on June 22, 2021.

Defendants' argument that filing a summons with notice before the adoption of the Amended By-Laws does not relieve Plaintiff of the obligation to arbitrate because a summons with notice is not a pleading, is misplaced. Defendants cite the matter of *Petrova v. Investors Capital*, 24 Misc 3d 977 (Sup Ct, Kings County 2009), however that

case did not state that an action is not deemed commenced until a pleading is filed, but only that a motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state of cause of action is premature until a pleading is filed.

While a summons with notice is not a pleading, it is sufficient to commence an action (CPLR § 304).

Therefore, this action is governed by the 2004 By-Laws of 561 5th Street Condominium” (the “2004 By-Laws”) not the post commencement amendment.

The Court must turn to whether the 2004 By-Laws require arbitration of the dispute between these parties.

Defendants rely on under Article XIII in the 2004 By-Laws. However, on its face, the arbitration clause does not define which matters are to be arbitrated but rather how matters are to be arbitrated. The Article XIII states, in pertinent part:

Section 1. Procedure:

Any matter required or permitted to be determined by arbitration pursuant to the terms of the Condominium documents shall be submitted for resolution by a single arbitrator in a proceeding held in New York City, New York in accordance with the then existing rules of the American Arbitration Association or any successor organization thereto. In the event that the American Arbitration Association shall not then be in existence and has no successor organization, any such arbitration shall be held in New York City, New York before one arbitrator appointed, upon the application of any party by the Real Estate Board of New York.

The clause refers to matters required or permitted to be determined or resolved by arbitration pursuant to other Condominium documents. However, there is no other section in the 2004 By-Laws that requires any matter to be arbitrated. Defendants have not provided any Condominium documents to provide that owners are required to arbitrate disputes with the Condominium Board or Board members.


[O]n a motion to compel or stay arbitration, a court must determine, “in the first instance . . . whether parties have agreed to submit their disputes to arbitration and, if so, whether the disputes generally come within the scope of their arbitration agreement” (*Revis v. Schwartz*, 192 AD3d 127, 134 [2d Dept 2020]). “When deciding whether the parties agreed to arbitrate a certain matter . . . courts generally . . . should apply ordinary state-law principles that govern the formation of contracts” (*id.*).

In the absence of any specific provision clearly requiring a unit owner to arbitrate their disputes with the Condominium, the Court cannot interpret the By-Laws to require it.

WHEREFORE, it is ORDERED that Defendant TRACY BRESLIN’s motion to compel arbitration is denied

This constitutes the decision and order of the Court.

ENTER,



J.S.C.