

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

2022 NY Slip Op 30394(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 the 2nd 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 #2

The following papers numbered on this motion:

NYSCEF Doc Numbers

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	46-47
Answering Affidavit (Affirmation) _____	66-68
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This action was commenced by Plaintiffs, against Defendant BOARD OF MANGERS 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.

Plaintiffs are the owners of Unit 2 in the condominium building located at 561 5<sup>th</sup> Street, Brooklyn, NY (the Condominium) and commenced this action to compel the Condominium Board to make repairs to the common elements of the building. Plaintiffs allege that Defendant BOARD has failed and refused to properly maintain and repair the common elements of the building thereby allowing water to infiltrate their Unit and render it uninhabitable. The individual Defendants are unit owners in the Condominium and are members of Defendant BOARD which operates the Condominium.

Defendants RICHARD R. PURTICH and KRISTIN A. PURTICH (Individual PURTICH Defendants) are owners of unit 3 and **move for an Order dismissing Plaintiffs' Amended Complaint** as to them individually pursuant to CPLR §3211(a)(7).

The individual PURTICH Defendants argue that all claims against them as individuals must be dismissed because **Plaintiffs' Amended Complaint does not allege any specific tortious acts** committed by them individually and instead groups them vaguely with acts allegedly taken as members of Defendant BOARD.

The Amended Complaint contains four causes of action. The first and second cause of action seeks injunctive relief and monetary damages based on breach of contract. That part of the motion seeking to dismiss the first and second causes of action against the individual PURTICH Defendants should be granted. Participation in a breach of contract by a board member does not give rise to individual director liability (*Hersh v. One Fifth Apartment Corp.*, 163 AD3d 500, [1<sup>st</sup> Dept 2018]; *Fletcher v Dakota*, 99 AD3d 43 [1<sup>st</sup> Dept 2012] quoting *Murtha v. Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]).

The third cause of action seeks monetary damages against the Defendant BOARD OF MANAGERS and the individual Defendants for breach of fiduciary duty to the Plaintiffs.

A breach of fiduciary duty claim does not lie against individual board members where there is no allegation of individual tortious action apart from their collective actions taken as a member of the board (*Hersh v. One Fifth Apartment Corp.*, 163 AD3d 500, [1st Dept 2018], quoting *20 Pine St. Homeowners Assn. v. 20 Pine St. LLC*, 109 AD3d 733, 735–736 [1st Dept 2013]; *Fletcher v. Dakota*, 99 AD3d 43 [1st Dept 2012]).

While individual Defendants as Board members are not liable for breach of their fiduciary duty for the failure of the Board to maintain the common areas of the building, the Amended Complaint does allege four specific instances of tortious conduct on the part of the individual PURTICH Defendants. First, Plaintiffs allege in the Amended Complaint that the individual PURTICH Defendants constructed a deck on the roof of their terrace which did not conform to the building code and caused damage to their unit directly below the terrace.

Second, Plaintiffs allege that Defendant RICHARD PURTICH individually wrongfully cancelled an appointment of a contractor that the BOARD had hired to remediate a mold **condition in Plaintiffs' unit.**

Third, Plaintiffs allege certain of the expenditures of the Condominium were unilaterally decided by PURTICH and reimbursed by the Board without being voted on at Board meetings.

Fourth, Plaintiffs allege that the individual PURTICH Defendants improperly denied them access to place a waterproof tarp over the rear wall of the building to prevent water infiltration into their unit.

These are sufficient specific allegations of independent tortious acts to make out a cause of action against the individual PURTRICH Defendants.

The fourth cause of action alleging various violations of corporate procedure and law was not pled against the individual PURTRICH Defendants, so it is not relevant to this motion.

By reason of the foregoing, the claims based on breach of contract cannot lie against the individual PURTRICH Defendants, and only the above-mentioned claims of tortious acts by the individual PURTRICH Defendants state a cause of action against them individually. As the individual PURTRICH Defendants are individually liable only for their alleged individual tortious acts, that part of motion that seeks to dismiss all claims prior to June 19, 2019 is moot.

Lastly, movants argue that Plaintiffs claim for **attorney's** fees should be dismissed as they are not entitled to **attorney's fees** either by law or under the By-Laws. Plaintiff did not put in any opposition on this point.

WHEREFORE it is hereby ORDERED that the First and Second causes of action are dismissed as to RICHARD R. PURTRICH individually and KRISTIN A. PURTRICH individually; and it is further

ORDERED that that part of the motion seeking to dismiss the Third cause of action against RICHARD R. PURTRICH individually and KRISTIN PURTRICH individually is denied; and it is further

**ORDERED that Plaintiffs' claim for attorney's** fees is dismissed, and it is further,

ORDERED, that the time for moving Defendants to answer the Amended Complaint is extended until ten days after service of notice of entry of this Order.

This constitutes the Decision and Order of the Court.

ENTER,



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J.S.C.