SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** 38M

Justice

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PHILIPPE HOUZE and MARIE HOUZE, individually and derivatively on behalf of PENTHOUSE LOFT, LLC,

Plaintiffs,

- v -

ERIC ABERGEL,

Defendant,

- and -

PENTHOUSE LOFT LLC,

Nominal Defendant.

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INDEX NO. 653045/2021

MOTION DATE 06/14/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, and 38 were read on this motion to DISMISS.

LOUIS L. NOCK, J.

Upon the foregoing documents, it is hereby ordered that defendant's motion to dismiss the complaint pursuant to CPLR 3211, and for sanctions pursuant to 22 NYCRR 130-1.1, is determined as follows.

Background

In this corporate governance action, plaintiffs Philippe and Marie Houze ("plaintiffs"), members of Penthouse Loft LLC ("Penthouse"), assert six causes of action against defendant Eric Abergel ("defendant"), also a member of Penthouse: breach of fiduciary duty (first cause of action); waste of LLC's assets (second cause of action), accounting (third cause of action), injunctive relief and appointment of a receiver (fourth cause of action), unjust enrichment (fifth cause of action), and attorney's fees (sixth cause of action). Defendant now moves to dismiss the

complaint in favor of his earlier filed action, captioned *Abergel v Houze, et al.*, index No. 154160/2021 and presently pending before the court, pursuant to CPLR 3211(a)(4). Defendant also seeks sanctions against plaintiffs for having filed this action, pursuant to 22 NYCRR 130-1.1.

The parties are all members of Penthouse, which owns the shares of stock and proprietary lease for the cooperative apartment located at 515 Broadway, Apt. 6C, New York, New York (the "apartment") (NYSCEF Doc. No. 13, ¶ 25). The instant action, as well as *Abergel v Houze, et al.*, concern the apparent breakdown of the business relationship between the parties. Plaintiffs allege that defendant falsely accused them of stealing money from Penthouse's bank account, falsely claimed that Penthouse did not have any cash on hand to make distributions to its members after paying the operating expenses for the apartment, and has consistently refused to give plaintiffs access to Penthouse's books and records (*id.*, ¶¶ 28-35, 37). Plaintiffs say they have discovered numerous instances of defendant misappropriating Penthouse funds to pay unapproved or personal expenses (*id.*, ¶ 36[a-k]).

In response to defendant's allegations that plaintiffs had attempted to divert funds from Penthouse's bank account (*id.*, Exhibit A), plaintiffs asserted various complaints regarding the governance of Penthouse and demanded copies of certain of Penthouse's books and records (*id.*, Exhibit B). Shortly thereafter, on March 11, 2021 defendant purported to invoke the "buy/sell" provision contained in Penthouse's operating agreement, under which he offered plaintiffs a price for his share of Penthouse (*id.*, Exhibit C). If plaintiffs did not accept that offer, defendant asserted that they must consent to the sale of the apartment to a third-party, with the profits of the sale to be distributed as required by the operating agreement (*id.*). Plaintiffs did not provide an answer, instead claiming that defendant's invocation of the buy/sell provision was ineffective, as

defendant had not provided sufficient information regarding a potential sale and the amounts necessary to discharge the mortgage and various loans attached to the property (*id.*, Exhibit E). Plaintiffs again requested access to Penthouse's books and records, as well as additional documentation of the sales price, and the various expenses quoted by defendant (*id.*). Plaintiffs allege that defendant never provided any of the requested documentation or access (*id.*, ¶ 40).

Defendant was the first to file suit on April 29, 2021 (Index No. 154160/2021, NYSCEF Doc. No. 1). He alleged that plaintiffs, contrary to the operating agreement, were not willing to manage Penthouse jointly with him but were instead attempting to seize it for themselves (*id.*, ¶¶ 26-27). Plaintiffs also allegedly failed to contribute their share of capital calls necessary to pay operating expenses (*id.*, ¶¶ 20-25). Finally, he asserted that plaintiffs had to make a decision under the buy/sell provision, and their failure to do so was a breach of the operating agreement (*id.*, ¶¶ 28-21). Defendant asserted four causes of action: breach of contract; specific performance of the buy/sell provision; declaratory judgment; and injunctive relief (*id.*).

Plaintiffs commenced the instant action by filing a summons and complaint on May 7, 2021 (NYSCEF Doc. No. 1). Defendant appeared and now makes this pre-answer motion to dismiss the complaint pursuant to CPLR 3211(a)(4).

Standard of Review

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as alleged in the complaint as true, accord[ing] plaintiffs the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory" (*Id.* at 87-88). Ambiguous allegations must be resolved in plaintiff's favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). "The motion must be

denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration" (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

CPLR 3211(a)(4) provides that a complaint may be dismissed where "there is another action pending between the same parties for the same cause of action in any court of any state or the United States; the court need not dismiss upon this ground but may make such order as justice requires." The rule in New York is that "the court which has first taken jurisdiction is the one in which the matter should be determined and it is a violation of the rules of comity to interfere" (*Syncora Guar. Inc. v J.P. Morgan Sec. LLC*, 110 AD3d 87, 95 [1st Dept 2013] [internal citations omitted]). "When considering whether to dismiss a later filed action, courts will determine whether there is a sufficient identity of parties" (*id.* at 96 [internal quotation marks and citations omitted]). "[D]ismissal under CPLR 3211(a)(4) is not necessarily defeated by substantial, as opposed to complete, identity of parties" (*Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211, 213 [1st Dept 1990]). Further, "[i]t is not necessary that the precise legal theories presented in the first action also be presented in the second action . . . [t]he critical element is that both suits arise out of the same subject matter or series of alleged wrongs" (*Syncora Guar. Inc.*, 110 AD3d at 96 [internal quotation marks and citations omitted]). However, dismissal is improper where the prior action will not provide the plaintiff in the later filed action complete redress of rights (*U.S. Bank, N.A. v Deshuk-Flores*, 163 AD3d 603, 605 [2d Dept 2018]).

If dismissal is not warranted, or if "joint proceedings will serve judicial economy," the Court may consolidate the two actions rather than dismiss the second action (*Graev v Graev*, 219 AD2d 535, 535-36 [1st Dept 1995]). Consolidation is appropriate where, though there is lacking substantial identity of the parties, the parties are "closely related" and the subject matter of the claims overlap (*Michael v S.H. Galleries, Ltd.*, 101 AD2d 755, 755-56 [1st Dept 1984]). Whether to grant relief under CPLR 3211(a)(4), whether dismissal, consolidation, or otherwise, is within the discretion of the Court (*Silver v Whitney Partners LLC*, 130 AD3d 512, 514 [1st Dept 2015]).

Discussion

There is a substantial identity of parties between the instant action and *Abergel v Houze, et al.* Plaintiffs and defendant herein are plaintiff and defendants in the prior action. Further, at their most basic levels both lawsuits arise out of the same corporate governance disputes, namely the alleged failure to contribute to capital calls, the propriety of defendant's use of the buy/sell provision, and access to the organization's books and records. However, the courts have long held that the first-in-time rule should not be applied mechanically (*White Light Productions, Inc. v On the Scene Productions, Inc.*, 231 AD2d 90, 97 [1st Dept 1997]). Relevant to the court's consideration is the differing nature of the specific harms alleged, and to whom.

Plaintiffs herein allege the majority of their claims derivatively, accusing defendant of wasting Penthouse's assets and harming Penthouse rather than plaintiffs directly. By contrast, defendant's claims in the prior action are largely by way of breach of the operating agreement against plaintiffs directly, alleging that they failed to cooperate in the managing of the LLC and abide the provisions of the operating agreement. Moreover, Penthouse, a nominal defendant in this action, is not a party to the prior action. Defendant argues that the derivative claims are

insufficiently pled, as plaintiffs failed to plead that a demand on the managers of Penthouse would have been futile. Where members are asserted "to have equal interest in and control over" the company, however, the proper remedy is a derivative action, and demand futility need not be alleged where the equally controlling parties take actions in derogation of that equal interest and control (*Lester v Capo*, 2016 NY Slip Op 30214[U] [Sup Ct, New York County 2016], *citing Executive Leasing Co. v Leder*, 191 AD2d 199, 200 [1st Dept 1993]).

These differences between the two actions are sufficient to cause the court to refrain from granting dismissal of this action (*see Deshuk-Flores*, 163 AD3d 603, 605 [2d Dept 2018] [dismissal under CPLR 3211[a][4] inappropriate where "the plaintiff cannot obtain full redress of its rights in the 2009 action, to which the defendant, a record owner of the premises and a mortgagor, is no longer a party"]; *Sprecher v Thibodeau*, 148 AD3d 654, 656 [1st Dept 2017] ["Similarly, whereas the damages sought in the instant action are to plaintiff himself and his career, the damages sought in the related action are to the musical as a result of the investor's withdrawal of support"]).

Notwithstanding the foregoing, though: while dismissal of the instant action is not appropriate, it is clear that there is sufficient overlap of parties and claims that joint proceedings will serve judicial economy, and, therefore, proceeding with the two actions jointly is warranted (*Graev*, 219 AD2d at 535-36; *Michael*, 101 AD2d at 755-56).

Finally, defendant seeks sanctions against plaintiff pursuant to 22 NYCRR 130-1.1, which provides that a court may award costs and attorney's fees or impose financial sanctions on a party who engages in frivolous conduct. Frivolous conduct is defined as conduct "completely without merit in law . . . undertaken primarily to delay or prolong resolution of the litigation, or to harass or maliciously injure another: or [that] asserts material factual statements that are false"

(22 NYCRR 130-1.1[c]). The record before the court does not reflect that plaintiffs have engaged in frivolous conduct.

Accordingly, it is hereby

ORDERED that the motion is granted to the extent set forth hereinbelow; and it is, accordingly,

ORDERED that the above-captioned action shall be jointly tried with *Abergel v Houze, et al.*, Index No. 154160/2021, pending in this court, and discovery in both actions shall proceed jointly as well; and it is further

ORDERED that, within 30 days from entry of this order, counsel for plaintiff in *Abergel v Houze, et al.*, Index No. 154160/2021, shall file with the General Clerk's Office (60 Centre Street, Room 119) a copy of this order with notice of entry, together with, if a Request for Judicial Intervention ("RJI") has not yet been filed in that action, an RJI and shall pay the fee therefor, and the Clerk of the General Clerk's Office shall assign said action to the undersigned or reassign such action to the undersigned, as the case may be; and it is further

ORDERED that, upon payment of the appropriate calendar fees and the filing of notes of issue and certificates of readiness with the General Clerk's Office in each of the above actions, the Clerk of the General Clerk's Office shall place the aforesaid actions upon the trial calendar for a joint trial before the undersigned or other Justice of this court; and it is further

ORDERED that in both actions such filing with 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 defendant in the instant action is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that defendant's motion for sanctions pursuant to 22 NYCRR 130-1.1 is denied; and it is further,

ORDERED that counsel are directed to appear for a virtual preliminary conference via Microsoft Teams, on April 27, 2022, at 2:00 PM.

This constitutes the decision and order of the court.

ENTER:

Louis L Nock

3/28/2022
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE