

**Board of Mgrs. of the Alfred Condominium v Miller**

2022 NY Slip Op 31217(U)

April 6, 2022

Supreme Court, New York County

Docket Number: Index No. 653433/2020

Judge: Nancy M. Bannon

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. NANCY BANNON PART 42**

*Justice*

-----X

THE BOARD OF MANAGERS OF THE ALFRED  
CONDOMINIUM

Plaintiff,

- v -

JAMES MILLER,

Defendant.

-----X

INDEX NO. 653433/2020

MOTION DATE 11-3-21

MOTION SEQ. NO. 002

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 47, 48, 49 were read on this motion to/for DISMISSAL.

**BACKGROUND**

This is an action by a condominium board seeking injunctive relief and money damages for the defendant tenant’s allegedly unauthorized renovations to his residential unit, including the removal of a wall and installation of fixtures that exceed the scope of the parties’ alteration agreement without board approval.<sup>1</sup> The plaintiff asserts that defendant failed to comply with the condominium’s alteration policy, its by-laws and the parties’ alteration agreement, and alleges three causes of action – (1) breach of the by-laws, seeking to enjoin and direct the defendant to correct, repair and remedy the unauthorized or unlawful alterations to the unit; (2) breach of the alteration agreement, seeking the same relief, and (3) breach of the alteration agreement, seeking money damages for the cost of legal, architectural and engineering fees and expenses incurred by the condominium.

<sup>1</sup> In two prior actions commenced in this court, the parties, including individual board member of the plaintiff, assert claims sounding in, *inter alia*, nuisance, harassment, defamation and breach of fiduciary duty in regard to building maintenance and governance – *Miller v Michael Graff et al* (655232/18) and *The Board of Managers of the Alfred Condominium, etc. v Miller*, (154867/19). Those actions are pending before other Justices.

In his initial answer, the defendant asserted five affirmative defenses and two counterclaims seeking declaratory relief. In the first counterclaim in his initial answer, the defendant sought a declaration “that the subject renovations ... are in accordance with plaintiff’s requirements and the applicable law, codes and regulations.” By the second counterclaim in the initial answer the defendant sought a declaration that “plaintiff has waived, and in all events, is estopped, from objecting to the subject renovations.” The defendant maintained that the plaintiff improperly engaged in “selective enforcement” of the requirements.

By an order dated December 29, 2020, granted a motion by the plaintiff to dismiss the defendant’s counterclaims (MOT SEQ 001). That motion was unopposed. By an order dated February 1, 2020, the court vacated that order, upon stipulation by the parties to allow the defendant to file an amended answer.

The defendant’s amended answer, filed January 27, 2021, contains five affirmative defenses and four counterclaims for declaratory relief. The affirmative defenses as alleged are (1) the complaint fails to state a cause of action, (2) waiver, (3) equitable estoppel, (4) selective enforcement and (5) retaliation.

The first counterclaim in the amended answer is essentially identical to that in the first answer, again asserting that the renovations were done in accordance with the plaintiff’s requirements and seeking a judgment so declaring. In his second counterclaim, the defendant seeks a declaration that “because of plaintiff’s breach of their fiduciary obligation and other illegal actions, they are barred from bringing claims against plaintiff [sic] in connection with his renovations.” The defendant again asserts that the plaintiff selectively enforced the condominium rules against him in retaliation for commencing a prior action against the condominium and that this action and the plaintiff’s prior action against him were brought in bad faith and without legal basis. The third and fourth counterclaims track the second counterclaim in the initial answer in seeking declarations that “plaintiff is estopped from objecting to plaintiff’s

[sic] renovations” and that “plaintiff has waived any objections it may have been legally entitled to make to said renovations.”

The plaintiff now moves to dismiss all four counterclaims pursuant to CPLR 3211(a)(1), (4) and (7) and CPLR 3013 (MOT SEQ 002). The defendant opposes the motion. The motion is granted to the extent that the second, third and fourth counterclaims are dismissed.

### DISCUSSION

The plaintiff alleges that the first counterclaim must be dismissed as it is redundant of the claims asserted in the complaint in this action and, therefore, there is a prior action pending (CPLR 3211[a][4]). The plaintiff is correct in observing that its own claims and this counterclaim center on whether the defendant complied with or breached the condominium’s alteration policy, its by-laws and/or the alteration agreement. However, the relief sought by the defendant on the first counterclaim is a declaration that he complied with all of the plaintiff’s such requirements and the agreement while the complaint seeks a finding that the defendant did not comply but breached the by-laws and/or alteration agreement and seeks a mandatory injunction requiring the defendant to correct, repair and remedy the unauthorized or unlawful alterations. Nor does the plaintiff provide any persuasive authority for its view that the prior action pending doctrine is applicable within the same action. Therefore, the defendant’s first counterclaim is not subject to dismissal under CPLR 3211(a)(4). The plaintiff’s additional arguments for dismissal of this counterclaim have been considered and rejected.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court’s role is “to determine whether [the] pleadings state a cause of action.” 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-152 (2002). To determine whether a claim adequately states a cause of action, the court must “liberally construe” it, accept the facts alleged in it as true, accord it “the benefit of every possible favorable inference” (id. at 152: see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013];

Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory. See Hurrell-Harring v State of New York, 15 NY3d 8 (2010); Leon v Martinez, 84 NY2d 83 (1994). As correctly argued by the plaintiff, even applying this liberal standard, the second counterclaim fails to state a cause of action. To state a claim for breach of fiduciary duty, a plaintiff must allege that (1) the defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages as a result of that misconduct. See Besen v Farhadian, 195 AD3d 548 (1<sup>st</sup> Dept. 2021); Burry v Madison Park Owner LLC, 84 AD3d 699, 699-700 (1<sup>st</sup> Dept. 2011). No such duty, misconduct or consequent damages are asserted in the defendant's pleading. The defendant merely complains of the plaintiff's enforcement of the condominium's by-laws and the parties' alteration agreement as against him and avers, without factual support, that the same by-laws and requirements are not also enforced against other unit owners. Nor are the merits of any prior action before this court. Thus, the second counterclaim must be dismissed pursuant to CPLR 3211(a)(7), 3013 and 3016(b). To the extent that the defendant is attempting to assert a defense of unclean hands, that is not one of the affirmative defenses in the amended answer.

Similarly, the third and fourth counterclaims, estoppel and waiver, may also be properly asserted as defenses, as they are in the defendant's amended answer, but they do not constitute any cause of action against the plaintiff. See CPLR 3018(b). The court does not address the merits of any asserted defenses as the plaintiff does not seek their dismissal.

Finally, the defendant's request for dismissal of the complaint for failure to state a cause of action (CPLR 3211[a][7]) requires a motion. See CPLR 2215.

### CONCLUSION

Accordingly, and upon the foregoing papers, it is

ORDERED that the plaintiff's motion is to dismiss the defendant's counterclaims in the amended answer is granted to the extent that the second, third and fourth counterclaims are dismissed, and the motion is otherwise denied, and it is further

ORDERED that the parties shall proceed with and complete discovery as per this court's status conference order dated March 10, 2022, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.

4/6/2022  
DATE

  
NANCY M. BANNON, J.S.C.  
HON. NANCY M. BANNON

CHECK ONE:

CASE DISPOSED  
GRANTED

DENIED

NON-FINAL DISPOSITION  
GRANTED IN PART

OTHER