

<b>Edouard v 32083 Owners Corp.</b>
2022 NY Slip Op 32265(U)
July 12, 2022
Supreme Court, New York County
Docket Number: Index No. 101154/2020
Judge: Laurence Love
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. LAURENCE LOVE PART 63M**

*Justice*

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ALPHONSE EDOUARD,

Plaintiff,

- v -

32083 OWNERS CORP., ERIC SCHMUTTER, DAWN  
ANDERSON, PEARL SCHMUTTER, PEARL S.  
SCHMUTTER TRUST, ANNA GUILIANO, JOSEPH PIAZZA,  
MARTYN PIAZZA, LAUREN PERSICHETTI, CATHLEEN  
TOBIN, MARK ANDERSON,

Defendants.

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**INDEX NO.** 101154/2020  
**MOTION DATE** 04/01/2022  
**MOTION SEQ. NO.** 007

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 007) 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 109, 110, 111, 112, 113, 114, 115

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

The following read on Defendant – 32083 Owners Corp.’s motion to dismiss, per CPLR 3211(a)(1) and CPLR 3211(a)(7); and Defendants – Eric Schmutter, Lauren Persichetti, and Dawn Anderson’s motion to dismiss, per CPLR 3211(a)(1) and CPLR 3211(a)(7).

This litigation involves a residential cooperative corporation at 320 East 83rd Street, New York, New York. Pro – se Plaintiff is a cooperative shareholder and proprietary lessee of Apartment 4C.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

On a motion to dismiss based upon documentary evidence, defendant must present evidence which “utterly refutes” plaintiff’s allegations and establishes a defense as a matter of law (see *Goshen v. Mut. Life Ins. Co.*, 98 N.Y.2d 314 [2002]).

When considering a motion to dismiss under CPLR 3211(a)(7), a court must accept the factual allegations of the pleadings as true, affording the non-moving party the benefit of every possible favorable inference and determining “only whether the facts as alleged fit within any cognizable legal theory” (see *D.K. Prop., Inc. v. Natl. Union Fire Ins. Co. of Pittsburgh*, 168 A.D.3d 505; *Weil Gotshal & Manges LLP v. Fashion Boutique of Short Hills, Inc.*, 10 A.D.3d 267 [1st Dept. 2004]).

The affirmation of 32083 Owners Corp. affirms, “documentary evidence shows that the pro se Plaintiff’s Complaint essentially seeks relief as against different parties herein, and Plaintiff fails to state any causes of action as against Defendant Corporation. Moreover, Plaintiff has continually failed to comply with the Court’s decision and order dated August 9, 2021, in filing amended Complaint and to date, at least two versions have since been rejected by the Clerk’s office” (see NYSCEF Doc. No. 68 Par. 2).

The affirmation of Eric Schmutter, Dawn Anderson, and Lauren Persichetti affirms, “Eric Schmutter is not the trustee of the Pearl S. Schmutter Trust, the sponsor, nor a shareholder or owner of unsold shares, personally; and Dawn Anderson and Lauren Persichetti are no longer board members of the corporation and are not subject to liability of either cause of action pled by Plaintiff. Moreover, Plaintiff has continually failed to comply with the Court’s decision and order dated August 9, 2021, in filing amended Complaint and to date, at least two versions have since been rejected by the Clerk’s office” (see NYSCEF Doc. No. 77 Par. 2).

Eric Schmutter, Dawn Anderson, and Lauren Persichetti submit affidavits (see NYSCEF Doc. Nos. 79 – 81).

Plaintiff's affirmation in opposition, "Plaintiff has not performed discovery and cannot confirm the validity of the trust provided to the court that Mr. Schmutter did not have authority. Mrs. Anderson claims she is no longer a board member but fails to provide any supporting documentation. Ms. Persichetti was a board member and did file amendments with the Attorney general office (sic) and was fully aware of what the obligations of sponsors were since she fulfilled them while on the board. Plaintiff has filed the amended caption and was instructed that he could not add additional information to the complaint" (see NYSCEF Doc. No. 84 P. 13, 14).

Defendant 32083 Owners Corp.'s Reply states, "(i) Plaintiff has continually failed to file an amended complaint in compliance with the Court's prior Amended Decision dated August 9, 2021, (ii) the original Complaint remains the only operative Complaint, (iii) Plaintiff's Complaint seeks relief as against the Sponsor and not Defendant Corporation, (iv) Defendant Corporation owes no fiduciary duty to Plaintiff as a shareholder, and that (v) Plaintiff's claims as against the Defendant Corporation are barred in light of the Business Judgment Rule" (see NYSCEF Doc. No. 109 Par. 2).

Pro – se Plaintiff fails to state causes of action against Defendant Corporation – 32083 Owners Corp.; and named Defendants – Eric Schmutter, Dawn Anderson, and Lauren Persichetti provide affidavits to this Court providing how dismissal is warranted. Further, pro – se Plaintiff has not complied with this Court's August 9, 2021 Decision to file an amended complaint. As almost a full calendar year has gone by, this court has given substantial time for pro – se Plaintiff to file an amended complaint or seek counsel for that matter.


ORDERED that the motion of defendants 32083 Owners Corp., and Eric Schmutter, Dawn Anderson, and Lauren Persichetti to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119), who are directed to mark the court’s records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and 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](http://www.nycourts.gov/supctmanh)).

<p><u>7/12/2022</u> DATE</p>			 LAURENCE LOVE, J.S.C.
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/> GRANTED IN PART
	<input type="checkbox"/>	DENIED	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE