| **Board of Mgrs. of the 432 Park Condominium v 56th & Park (NY) Owner, LLC** |
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| 2022 NY Slip Op 33680(U) |
| October 24, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 655617/2021 |
| Judge: Melissa Crane |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. MELISSA A. CRANE** **PART** **60M**

*Justice*

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BOARD OF MANAGERS OF THE 432 PARK CONDOMINIUM, ON BEHALF OF THE INDIVIDUAL UNIT OWNERS AND THE COMMERCIAL UNIT OWNERS, BOARD OF MANAGERS OF THE COMMERCIAL SECTION OF THE 432 PARK CONDOMINIUM, BOARD OF MANAGERS OF THE RESIDENTIAL SECTION OF THE 432 PARK CONDOMINIUM, ON BEHALF OF THE INDIVIDUAL UNIT OWNERS,

Plaintiff,

- v -

56TH AND PARK (NY) OWNER, LLC,RYAN HARTER, HARRY MACKLOWE,

Defendant.

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**INDEX NO.** 655617/2021

**MOTION DATE** 08/31/2022

**MOTION SEQ. NO.** 004

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 51, 52, 53, 54, 55, 56, 57, 60, 81, 82, 83, 85, 89

were read on this motion to/for DISMISS.

Defendant Harry Macklowe ("Macklowe") has moved to dismiss the amended complaint's causes of action against him for breach of fiduciary duty pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7). For the following reasons, Macklowe's motion is denied.

## BACKGROUND

This action relates to a litany of alleged construction defects at a luxury condominium building located at 432 Park Avenue, New York, New York 10022 ("Building"). Plaintiffs are the Condominium Board, the Commercial Board, and the Residential Board of the Building. Plaintiffs allege that defendant Harry Macklowe and nonparty Macklowe Properties—a company allegedly controlled by Macklowe—purchased the property in 2006 and later sold it to Defendant 56th and Park (NY) Owner, LLC ("Sponsor"). Thereafter, Sponsor entered into a construction agreement

with nonparty Lend Lease (US) Construction LMB, Inc. ("Lend Lease") to construct the Building, and Macklowe, along with Macklowe Properties and McGraw Hudson, a wholly owned subsidiary of Macklowe Properties, allegedly supervised Lend Lease's construction (NYSCEF Doc. No. 83, ¶¶ 66-67, 145). Additionally, the Sponsor appointed Macklowe to serve on the Commercial Board—a two-person sub-board within the Condominium Board—from June 2016 through November 2020 (NYSCEF Doc. No. 83, ¶¶ 26, 30, 153).

Upon completion of the Building construction and the closing and occupancy of units in the Building, unit owners complained of numerous building defects, including flooding caused by leaks (NYSCEF Doc. No. 83, ¶¶ 82-83), excessive noise and vibration issues (NYSCEF Doc. No. 83, ¶¶ 85-87), and elevator malfunctions (NYSCEF Doc. No. 83, ¶¶ 92-94). Additionally, plaintiffs allege McGraw Hudson caused two separate arc flash explosions in 2019 and 2021. In particular, in 2019, Macklowe allegedly used McGraw Hudson to carry out an electrical upgrade and improperly "ordered the electrical subcontractor to perform the work while the electricity remained live," causing an arc flash explosion and power outage (NYSCEF Doc. No. 83, ¶¶ 149-152). In 2021, the Sponsor hired McGraw Hudson to address water infiltration issues, and contractors caused another arc flash explosion when they cut into an electrical cable while trying to remedy the issues (NYSCEF Doc. No. 83, ¶¶ 95-99).

Plaintiffs have alleged three causes of action, all asserting breach of fiduciary duty, against Macklowe. They claim that Macklowe owed a fiduciary duty to the unit owners as a member of the Condominium Board, but he violated that duty by utilizing his position to benefit his own businesses, failing to investigate, failing to remedy design problems, and failing to fix construction defects in the Building. Plaintiffs additionally claim that after the 2019 arc flash explosion, the Commercial Board "controlled by Macklowe" failed to seek coverage from McGraw Hudson's

insurance carrier and that, as a result, the building sustained damages that it would not have "but for Macklowe's deep conflict of interest as a member of the Condominium Board and Commercial Board" (NYSCEF Doc. No. 83, ¶¶ 155-156).

Macklowe has moved to dismiss the amended complaint pursuant to CPLR 3211(a)(1), (a)(5), and (a)(7). First, Macklowe argues that plaintiffs' breach of fiduciary duty causes of action are insufficient because the amended complaint fails to include allegations of individual wrongdoing separate from the board's collective actions (NYSCEF Doc. No. 60, pp. 2-3). Macklowe further argues that the claims are untimely because the Building defects were apparent in 2016, over three years prior to plaintiffs filing the complaint, and that, in any event, he was released from liability by an April 7, 2017 release agreement ("Release") (NYSCEF Doc. No. 60, pp. 4-5).

Plaintiffs respond that Macklowe may be held individually liable for a corporate tort if he participated in the tort or "directed, controlled, approved, or ratified the decision that led to the plaintiff's injury" (NYSCEF Doc. No. 81, p. 11 [citing *Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 (1st Dept 2012)]). Plaintiffs also respond that the claims are not untimely under the continuing wrong doctrine. Plaintiffs claim that Macklowe engaged in wrongful acts as late as March 2019, when Macklowe hired McGraw Hudson for electrical work, or November 2019, when the first of two arc flash explosions occurred (NYSCEF Doc. No. 81, pp. 17-18). Additionally, plaintiffs argue that the Release does not "conclusively" require dismissal under CPLR 3211(a)(1) because plaintiffs were not parties to it (NYSCEF Doc. No. 81, pp. 19-20).

## DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord [plaintiff] the benefit of every possible favorable inference,

and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carlson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]; *Marabyan v 511 West 179 Realty Corp.*, 165 AD3d 581, 582 [1st Dept 2018]). On a motion to dismiss under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). A motion to dismiss based on the expiration of a statute of limitations under CPLR 3211(a)(5) requires that the defendant meet the initial burden of "establishing, prima facie, that the time in which to sue has expired" (*New York City School Constr. Auth. v Ennead Architects, LLP*, 148 AD3d 618, 618 [1st Dept 2017]).

1. Statute of Limitations

In order to obtain dismissal of an action based on expiration of statute of limitations under CPLR 3211(a)(5), the movant must demonstrate "prima facie, that the time within which to commence the cause of action has expired" (*MTGLQ Investors, LP v Wozencraft*, 172 AD3d 644, 644 [1st Dept 2019]). If the movant succeeds, then the opposing party has the burden to "raise a question of fact as to whether the statute of limitations is inapplicable or whether the action was commenced within the statutory period" (*id.* at 645). The parties agree that a three-year limitations period applies in this action, pursuant to CPLR 214(4), because the plaintiffs seek monetary damages for their breach of fiduciary duty claims (*see* CPLR 214(4)*; IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 139 [2009] ["New York law does not provide a single statute of limitations for breach of fiduciary duty claims . . . Where the remedy sought is purely monetary in nature, courts construe the suit as alleging 'injury to property' within the meaning of CPLR 214 (4), which has a three-year limitations period."]).

Macklowe correctly argues that the statute of limitations has expired for plaintiff's claims based on Macklowe's alleged wrongful acts prior to September 23, 2018. Plaintiffs incorrectly assert that the continuing wrong doctrine applies to these claims.

The continuing wrong doctrine is an exception to the general rule that a claim accrues, and the statute of limitations period begins to run, when all factual circumstances necessary for the claim have occurred. Where there is "a series of continuing wrongs, the continuing wrong doctrine tolls the limitation period until the date of the commission of the last wrongful act" (*Palmeri v Willkie Farr & Gallagher LLP*, 156 AD3d 564, 568 [1st Dept 2017]). The continuing wrong doctrine applies in the limited circumstance in which "there is a series of independent, distinct wrongs rather than a single wrong that has continuing effects" (*Ganzi v Ganzi*, 183 AD3d 433, 434 [1st Dept 2020]). Where the alleged damages are merely "continuing consequential damages" of one tortious act, the doctrine is inapplicable (*see Henry v Bank of America*, 147 AD3d 599, 601 [1st Dept 2017] [citations and internal quotation marks omitted]; *Andresen v Guggenheim Partners, LLC*, 2020 WL 5209491, *5 [Sup Ct, NY Cty Sept 1, 2020] [finding that continuing wrong doctrine does not apply where defendants' alleged wrongful receipt of commissions merely represented consequential damages of the "same wrong committed in 2006 and 2007 in arranging to receive the commissions"]). Additionally, the continuing wrong doctrine does not apply where the party fails to specifically allege timely wrongs that are related to the earlier untimely wrongs (*see Mejia v TN 888 Eighth Ave. LLC Co.*, 169 AD3d 613, 614 [1st Dept 2019] [finding that the continuing wrong doctrine does not apply in employment discrimination case where plaintiff claimed she was exposed to discriminatory conduct until 2013 but failed to specifically allege incidents after 2009]).

Here, the continuing wrong doctrine does not apply. In support of their argument, the only specific wrong that plaintiffs reference as a breach of Macklowe's "continuing fiduciary duty" is his March 2019 decision to hire McGraw Hudson (which he owned) to undertake certain electrical work that resulted in an arc flash explosion (NYSCEF Doc. No. 81, p. 18). However, plaintiffs fail to connect Macklowe's alleged March 2019 decision to any specific prior wrongs. Thus, plaintiff's three breach of fiduciary duty claims against Macklowe (Counts 2, 4, and 6) are untimely to the extent they involve matters prior to September 23, 2018.

Plaintiffs' reliance on *CWCapital Cobalt VR Ltd. v CWCapital Invs. LLC* (195 AD3d 12 [1st Dept 2021]) is misplaced. In *CWCapital Cobalt*, the court found that the continuing wrong doctrine applied to claims against a collateral manager of commercial mortgage-backed securities based on the collateral manager's alleged failure to prevent malfeasance by the special servicer, finding that each time the collateral manager failed to act constituted a separate, actionable wrong (*id.* at 19). Here, unlike in *CWCapital Cobalt*, plaintiffs have not claimed that Macklowe was personally party to any agreement conferring a continuing duty to plaintiffs (*see id.*). Without such a clearly defined duty between these parties, and without plaintiff adequately alleging that Macklowe engaged in any specific independent wrongs against plaintiffs prior to September 23, 2018, the court is constrained to find that the limitations period was not tolled under the continuing wrong doctrine.

Accordingly, only plaintiffs' breach of fiduciary duty claims against Macklowe concerning matters that occurred after September 23, 2018 are not barred by the three-year statute of limitations. For example, to the extent that plaintiffs allege that that Macklowe improperly profited through hiring his own companies to do electrical work in 2019 and 2021 (NYSCEF Doc. No. 83, ¶¶ 147, 151) and improperly refused to utilize his companies' insurance to cover costs related to

the 2019 arc flash explosion (NYSCEF Doc. No. 83, ¶¶ 155-156), their claims are timely under the applicable statute of limitations.

2. Failure to State a Cause of Action for Breach of Fiduciary Duty

In order to plead a cause of action for breach of fiduciary duty, plaintiffs must allege that "(1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct" (*Besen v Farhadian*, 195 AD3d 548, 549-550 [1st Dept 2021] [citation and internal quotation marks omitted]). Individual members of a condominium board owe fiduciary duties to both the condominium and its unit owners (*Kaung v Board of Managers of Biltmore Towers Condominium Assn.*, 22 Misc 3d 854, 873-874 [Sup Ct, Westchester County Dec 10, 2008]). However, for a plaintiff to plead a cause of action against individual members of a condominium board, they are generally required to allege "individual wrongdoing by the members . . . separate and apart from their collective actions" taken on behalf of the board (*see Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500, 500 [1st Dept 2018]). Despite the general rule against individual liability for collective condominium board actions, a board member can be held individually liable where they are the "sole member" of the sponsor-controlled board and the board member either "participated" or "directed, controlled, approved, or ratified" the challenged decisions (*Bowery 263 Condominium Inc. v D.N.P. 336 Covenant Ave. LLC*, 169 AD3d 541, 542 [1st Dept 2019]). Board members can also be held individually liable where the board members acted in bad faith (*Orange Orch. Props. LLC v Gentry Unlimited, Inc.*, 191 AD3d 609, 610 [1st Dept 2021] [denying dismissal of breach of fiduciary duty claim against individual defendants where the cause of action alleged that the defendants "acted in bad faith by failing to cure illegal conditions and by intruding into plaintiffs' home"]).

Here, Macklowe failed to meet his burden to show that the amended complaint does not state a cause of action against him for breach of fiduciary duty. The amended complaint essentially alleges that: (1) Macklowe inappropriately funneled repair work to entities that he controlled in order to personally profit, (2) the business entities' work was flawed and led to the 2019 and 2021 arc flash explosions, and, (3) after the Building incurred costs relating to the 2019 arc flash explosion, Macklowe did not seek insurance coverage from McGraw Hudson. Not only did Macklowe sit on the two-person Commercial Board, he was also on the Condominium Board.

There are issues of fact and law regarding whether Macklowe exercised control over the sub-board to (1) award repair work on the Building to companies controlled by him and (2) subsequently decline to seek insurance coverage after the first arc flash explosion, or whether any such decisions were made in bad faith. In *Bowery 263 Condominium Inc. v D.N.P. 336 Covenant Ave. LLC* (169 AD3d 541, 542 [1st Dept 2019]), the First Department reversed the lower court's grant of summary judgment dismissing the plaintiff's breach of fiduciary duty cause of action against an individual who served as the "sole member" of the condominium board because defendants failed to establish that the individual served as sole member "only as a representative of the sponsor." While the Commercial Board here had two individuals rather than one, the distinction is not dispositive at this stage. In *Bowery 263*, the court reasoned that a member of a single-member board by necessity had to have "participated" in the challenged decisions because there was no one else who could have directed those decisions (*id.* at 542).

Here, given that the challenged decisions were made by a two-person board, there is, at least, an issue of fact regarding the degree to which Macklowe personally exercised control or otherwise "participated" in the alleged misconduct by the sub-board (*id.*). By extension, if Macklowe exercised control over the sub-board in awarding work to his own businesses or

declining to seek insurance coverage from McGraw Hudson's carrier, there are questions of fact and law as to whether those actions violated his fiduciary duties as a member of the sub-board (*see Shatz v Chertok*, 180 AD3d 609, 610 [1st Dept 2020] [declining to dismiss breach of fiduciary duty cause of action where, even though defendants had discretion in investment decisions, the complaint sufficiently alleged that they "exercised that discretion in bad faith and to self-deal"]). Therefore, Macklowe's motion to dismiss for failure to state a cause of action is denied.

Plaintiffs, in their opposition, argue that Macklowe is not entitled to the protection of the business judgment rule to insulate him from liability for his alleged wrongdoing (NYSCEF Doc. No. 81, pp. 9-10). Defendant asserts in reply that plaintiffs misconstrue his argument, and that he is not asserting a business judgment rule defense (NYSCEF Doc. No. 89, p. 3). To that extent, any business judgment argument is waived.

In any event, the business judgment rule would not insulate Macklowe from liability for the alleged wrongdoing (*cf. Board of Managers of 25 Charles Street Condominium v Seligson*, 85 AD3d 515, 516 [1st Dept 2011] [holding that judicial inquiry into a condominium board's actions is not permitted "absent a showing of discrimination, self-dealing or misconduct by board members"]). Conversely, where the complaint alleges that the directors failed to act in good faith, the business judgment rule does not require dismissal at the pre-answer stage (*see People v Moore*, 103 AD3d 592, 592 [1st Dept 2013] [affirming denial of motion to dismiss on the basis of the business judgment rule where the complaint was "replete with allegations that the directors did not act in good faith"]; *Ackerman v 305 East 40th Owners Corp.*, 189 AD2d 665, 666-667 [1st Dept 1993]). Plaintiffs allege in the amended complaint that Macklowe did, in fact, engage in self-dealing and other bad faith misconduct as a member of the board and sub-board at issue.

3. Release Agreement

Lastly, the Release does not bar plaintiffs' claims against Macklowe. A party seeking dismissal under CPLR 3211(a)(1) must provide documentary evidence that "utterly refute[s] the plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Chen v Romona Keveza Collection LLC*, 2022 WL 2923476, at *3 [1st Dept 2022] [citations and internal quotation marks omitted]). Where the document is ambiguous and "fails to resolve all factual issues as a matter of law," the motion to dismiss should be denied (*see Sirius XM Radio Inc. v XL Speciality Ins. Co.*, 987 NYS2d 324, 326 [1st Dept 2014] [denying motion to dismiss breach of contract claim where insurance policy was ambiguous as to notice requirement]). Here, Macklowe does not dispute that plaintiffs were not parties to the Release (*see* NYSCEF Doc. No. 54). The court cannot, at this stage, determine that the Release unambiguously binds the plaintiffs.

**CONCLUSION**

The court has considered the parties remaining contentions and finds them unavailing.

Accordingly, it is

**ORDERED** that defendant's motion to dismiss the amended complaint is granted to the extent that plaintiffs' Counts II, IV, and VI are dismissed against defendant Harry Macklowe to the extent that they concern matters pre-dating September 23, 2018 as barred by the applicable three-year statute of limitations; and it is further

**ORDERED** that the motion to dismiss is otherwise denied in its entirety; and it is further

**ORDERED** that defendant must answer the amended complaint within 20 days of the date the court e-files this decision and order on NYSCEF; and it is further

**ORDERED** that the parties must appear for a status conference by Microsoft Teams on 1/30/23 at 11:00 a.m.

10/24/2022
DATE

MELISSA CRANE, J.S.C.

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| 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 |