

Rokof Assoc. v Village Place Corp.
2022 NY Slip Op 33909(U)
November 21, 2022
Supreme Court, New York County
Docket Number: Index No. 154737/2021
Judge: David B. Cohen
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID B. COHEN PART 58

Justice

-----X

INDEX NO. 154737/2021

ROKOF ASSOCIATES,

Plaintiff,

MOTION SEQ. NO. 001

- v -

VILLAGE PLACE CORP., BOARD OF DIRECTORS OF
VILLAGE PLACE CORP.

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25

were read on this motion to/for DISMISSAL.

In this hybrid special proceeding and plenary action, defendants Village Place Corp. (Village Place) and Board of Directors of Village Place Corp. (the Board) (together, defendants) move, pursuant to CPLR 3211 (a) (1), (3) and (7), 3016 (b) and 7804 (f), to dismiss the verified petition and complaint brought by plaintiff Rokof Associates.

Factual and Procedural Background

The following facts are drawn from the verified petition and complaint (the petition/complaint) unless otherwise noted and are assumed to be true for purposes of this motion. Village Place is a cooperative corporation which owns an apartment building located at 35 East 12th Street, also known as 48-50 East 13th Street, in Manhattan (NY St Cts Elec Filing [NYSCEF] Doc No. 1, petition/complaint ¶¶ 3 and 6). The Board is the elected board of directors for Village Place (*id.*, ¶ 4).

Plaintiff, a domestic partnership, was the sponsor of the conversion of the Building to cooperative ownership (*id.*, ¶¶ 2-3 and 5-6). According to the offering plan dated May 15, 1977

(the Offering Plan), plaintiff was comprised of two partners, Stanley R. Rosenberg (Stanley) and Absalom Kofman (Absalom)¹ (NYSCEF Doc No. 10, William J. Geller [Geller] affirmation, Ex B at 20). The Offering Plan provided that “Floors 1 and 2 of the Building are not being offered for sale. They are intended to be retained by the Sponsor as commercial space,” and that the “Sponsor has reserved for issuance to it the 350 shares comprising the store, second floor and certain of the cellar space in the buildings”² (*id.* at 8 and 18). The first and second floors were designated units 1 and 2, respectively (*id.* at 7). Paragraph 13 (F) states, in part, that:

“[a]nything to the contrary in the body of the Proprietary Lease notwithstanding, the provisions herein contained shall take precedence and apply to the lease agreement between Village Place Corp., the proprietary lessor, and Rokof Associates, or such other entity or person designated as the proprietary lessee ... of units 1 and 2, which comprise the ground and second floors of the Building ... and the designated and appurtenant cellar space”

(*id.* at 12).

A description of the site in the “Sponsor’s Statement of Present Building Condition” (the Building Report) states that “[t]he Street (1st) floor is built full on the lot except for a small courtyard on the East side trapazoidal [sic] in shape” (*id.* at 22). The courtyard (the Courtyard) is “at grade” (*id.* at 29). The report indicates that “[t]he first floor consists of a one room store” (*id.* at 31). The cellar is “one large storage room with smaller rooms for storage and the vaults which run out under both sidewalks” and contains “a boiler area, enclosed oil storage tank, [and] maintenance area” (*id.*). As for air conditioning, “[i]ndividual tenants have provided their own window air conditioners at various floors” (*id.* at 37).

According to the petition/complaint, plaintiff’s members retained the unsold shares and the proprietary lease for the northern portion of the first floor between the A and B Lines and the

¹ Other documents submitted in connection with the motion spell “Absalom” as “Absolom.”

² The Offering Plan states there were 180 shares per floor for the first and second floors (*id.* at 8).

appurtenant cellar-level spaces in the Building (NYSCEF Doc No. 1, ¶ 6). The preamble to the proprietary lease dated August 30, 1977 (the 1977 Lease) provided that plaintiff, as lessee, owned the 180 shares allocated to the “leased space,” defined as the “unit space known as First Floor located on the 1st Floor of the Building” (NYSCEF Doc No. 11, Geller affirmation, Ex at 5). The term for “the leased space, with the equipment therein, if any, and the appurtenances” ran from June 29, 1977 until December 31, 2027 (*id.*). The 1977 Lease set annual rent at “a sum equal to that proportion of such cash requirements for such year, which the number of shares allocated to the Leased Space bears to the total number of shares of the Lessor issued and outstanding, and in force, on the date of the determination of such cash requirements of the Lessor” (*id.* at 6). Paragraph 47 of the rider to the 1977 Lease provided that “notwithstanding anything hereinbefore set forth to the contrary, Lessee shall have the right to occupy and utilize the cellar space appurtenant to the First Floor,” and paragraph 50 specified that “the First Floor and the appurtenant cellar space may be occupied or utilized by Lessee for any business purpose permitted by law” (*id.* at 33) (block capitalization removed).

Stock certificate no. 33, dated May 2, 1983, reflected that “Absolom Kofman and Rena Kofman, Jt. Ten. as to an undivided 50%, and Stanley R. Rosenberg and Ruth Rosenberg, Jt. Ten. as to an undivided 50%” owned the 180 shares (NYSCEF Doc No. 12, Geller affirmation, Ex D at 2) (block capitalization removed).

The space described as “unit 1” in the Offering Plan was subsequently divided into two. The seventh amendment to the Offering Plan dated December 20, 1985 (the Seventh Amendment) read, in relevant part:

“1. Continuation of Offering. Pursuant to the Offering Plan, the shares allocated to the units located on the first floor and cellar of the Building, originally designated unit 1 in the Plan and hereby redesignated as Units 1A and 1B, (hereinafter referred to as a ‘Unit’

or ‘Units’ as the case may be) all as more fully described in paragraph 2 below, are presently held by Stanley and Ruth Rosenberg and Absalom and Rena Kofman (the ‘Offeror’) as holders of Unsold Shares and successors in interest to Rokof Associates, the Sponsor. The shares allocated Unit 1A are hereby offered for sale.

...

2. Allocation of Shares. Pursuant to the terms of the Plan, the Offeror has allocated 80 shares to Unit 1A and 100 shares to Unit 1B”

(NYSCEF Doc No. 13, Geller affirmation, Ex E at 2). The last page of the Seventh Amendment also identified Stanley and Ruth Rosenberg (Ruth) and Absalom and Rena Kofman (Rena) as the “Holders of Unsold Shares and Offerors Hereunder as Successors in interest to Rokof Associates, Sponsor” (*id.* at 7). The “Offerors” sold the shares allocated to Unit 1A to a religious corporation, B’Nai Israel of New York, and retained the 100 shares allocated to unit 1B (the Leased Premises or Unit 1B) for themselves (*id.* at 5 and 12).

Between 1986 and 2014, four additional transfers of title for the 100 shares allocated to Unit 1B were made and two proprietary leases were executed. Stock certificate no. 44 dated February 6, 1986 listed Absalom and Rena, as joint tenants with an undivided 50% share, and Stanley and Ruth, as joint tenants with an undivided 50% share, as the owners (NYSCEF Doc No. 12 at 4). Stock certificate no. 92, dated September 15, 2008, reflected that Absalom, Rena, Stanley and Ruth changed the form of ownership from a joint tenancy to a tenancy in common, with each couple owning an undivided 50% interest (*id.* at 3). Absalom, Rena, Stanley and Ruth, as lessees, then executed a proprietary lease dated September 15, 2008 (the 2008 Lease) for the “unit space known as Apartment 1-B located on the 1st Floor of the Building” for the period September 15, 2008 to December 31, 2047 (NYSCEF Doc No. 2, petition/complaint, Ex A at 7).

Stock certificate no. 104, dated March 28, 2014, listed “Absalom Kofman as to an Undivided 50%, and Stanley R. Rosenberg and Ruth Rosenberg, as TEN COM, as to an

undivided 50%” as the owners (*id.* at 8). Stock certificate no. 105, dated March 28, 2014, reflected that Joav Kofman (Joav) and Gil Kofman (Gil) assumed Absalom’s 50% share as tenants in common (*id.* at 10). Joav, Gil, Stanley and Ruth, as lessees, then executed a proprietary lease, dated March 28, 2014, for Unit 1B for the period March 28, 2014 to December 31, 2047 (the 2014 Lease) (NYSCEF Doc No. 14, Geller affirmation, Ex at 9). The 2014 Lease repeated the definition of the “leased space” from the preamble in the 2008 Lease (*id.*), with an amendment dated September 2, 2010 adding: “the rooms in the Building as partitioned on the date of the execution of this lease designated by the above stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the Leased Space” (*id.* at 2). The provision governing the calculation of rent remained unchanged from the 1977 Lease (*id.* at 10).

In 2018, Village Place sought to amend the form proprietary lease to authorize the Board to license portions of the Building’s roof to shareholders who wished to install air conditioning condensers to service their units (NYSCEF Doc No. 1, ¶ 10). The Board allegedly contacted plaintiff for its support in passing the amendment, representing that the amendment would not affect any area in the Building apart from the roof (*id.*, ¶ 11). By letter dated April 10, 2019, Village Place asked each shareholder to vote whether it was in favor of the proposed amendment (NYSCEF Doc No. 3, petition/complaint, Ex B at 3). By correspondence dated June 28, 2019, Village Place informed the shareholders that the amendment (the Roof Amendment) had passed (NYSCEF Doc No. 15, Geller affirmation, Ex G at 1). Plaintiff alleges the amendment would not have passed without its support (NYSCEF Doc No. 1, ¶ 11). At present, shareholders who

maintain a condenser on the Building's roof pay a \$125 monthly license fee as additional maintenance (*id.*, ¶ 12; NYSCEF Doc No. 15 at 1).

Plaintiff maintains that it has maintained two air conditioning condensers appurtenant to Unit 1B since at least 1994 (NYSCEF Doc No. 1, ¶ 7). The condensers are located in an outdoor concrete area at the cellar level immediately outside the exterior wall of the Leased Premises (*id.*). On March 1, 2020, Village Place charged plaintiff \$500 as “rent” for the two condensers (*id.*, ¶ 14). Plaintiff allegedly objected to the unauthorized charge, but Village Place refused to rescind it and has continued to charge plaintiff that same amount, plus late fees, every month thereafter (*id.*, ¶¶ 17-19).

On May 14, 2021, plaintiff commenced this action by filing the petition/complaint asserting five causes of action: (1) a determination, under article 78 of the CPLR, that the Board's decision to charge plaintiff “condenser rent” was unauthorized, unlawful, affected by an error of law and arbitrary and capricious; (2) breach of contract, since the condenser rent was charged in excess of the rent permissible under the 2014 Lease; (3) fraud; (4) breach of fiduciary duty; and (5) breach of the implied covenant of good faith and fair dealing. Plaintiff further alleges that the executive orders issued in response to the COVID-19 pandemic tolled the statute of limitations for filing a special proceeding from March 20, 2020 through November 3, 2020, and that “by agreement of the parties, the statute of limitations to file a proceeding to challenge the imposition of this fee was tolled from June 3, 2020 through April 30, 2021” (*id.*, ¶¶ 21-22).

In lieu of serving an answer, defendants move to dismiss the petition/complaint. Submitted in support of the motion are excerpts from the Offering Plan; the Seventh Amendment; the 1977 and 2014 Leases; the Roof Amendment; and stock certificates.

Plaintiff opposes the motion and proffers an affidavit from one of its members, Gil; two emails dated February 18 and February 21, 2020 from Village Place's managing agent for the Building; and a billing statement dated August 17, 2021.

Applicable Statutes

On a motion brought under CPLR 3211 (a) (7), this 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]). This Court need not extend such consideration to bare legal conclusions or claims that are contradicted by documentary evidence (*Myers v Schneiderman*, 30 NY3d 1, 11 [2017], *rearg denied* 30 NY3d 1009 [2017]). Dismissal is warranted where “the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery” (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Dismissal under CPLR 3211 (a) (1) is appropriate where the documentary evidence utterly refutes the plaintiff's claims and conclusively establishes a defense as a matter of law (*Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co., Inc.*, 37 NY3d 169, 175 [2021], *rearg denied* 37 NY3d 1020 [2021]). “A paper will qualify as ‘documentary evidence’ only if it satisfies the following criteria: (1) it is ‘unambiguous’; (2) it is of ‘undisputed authenticity’; and (3) its contents are ‘essentially undeniable’” (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019] [internal citation omitted]). Leases and offering plans are considered documentary evidence for purposes of CPLR 3211 (a) (1) (*see Philanthrope v Papa John's Pizza*, 191 AD3d 563, 563 [1st Dept 2021]; *Talbi v ZCWW Assoc.*, 179 AD2d 475, 476 [1st Dept 1992]),

CPLR 3211 (a) (3) allows a party to move to dismiss a complaint where the plaintiff “has not legal capacity to sue.”

Legal Conclusions

A. Standing

Defendants argue that plaintiff lacks standing to maintain the first and second causes of action because it is neither a named lessee nor a shareholder. Plaintiff counters that it has standing because CPLR 1025 allows a partnership to sue or be sued in the partnership’s name.

“The doctrine of standing is an element of the larger question of justiciability and is designed to ensure that a party seeking relief has a sufficiently cognizable stake in the outcome so as to present a court with a dispute that is capable of judicial resolution” (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006], *appeal dismissed* 8 NY3d 837 [2007]). For a plaintiff to have standing, it must have an “injury in fact – an actual legal stake in the matter being adjudicated” (*Society of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 772 [1991]). “On a pre-answer motion to dismiss for lack of standing, the burden lies with the defendant to establish prima facie that plaintiff has no standing to sue” (*Credit Suisse Fin. Corp. v Reskakis*, 139 AD3d 509, 510 [1st Dept 2016]). To defeat a motion brought under CPLR 3211 (a) (3), “the plaintiff has no burden of establishing its standing as a matter of law; rather, the motion will be defeated if the plaintiff’s submissions raise a question of fact as to its standing” (*Katz v Hampton Hills Assoc. Gen. Partnership*, 186 AD3d 688, 691 [2d Dept 2020] [internal quotation marks and citation omitted]).

“Where the plaintiff voluntarily disposes of the stock, his rights as a shareholder cease, and his interest in the litigation is terminated” (*Independent Inv. Protective League v Time, Inc.*, 50 NY2d 259, 263-264 [1980], *rearg denied* 50 NY2d 1059 [1980]; *Recine v Soil Solutions, Inc.*

63 AD3d 710, 711 [2d Dept 2009] [plaintiff lacked standing because he was no longer a shareholder when he commenced the action]). Defendants have established that the 2014 Lease and stock certificate no. 105 list Joav, Gil, Stanley and Ruth, not plaintiff, as the named lessees and shareholders for Unit 1B.

In response, Gil avers that “Rokof is named for the Rosenberg and Kofman families which have continuously operated this partnership and family business for more than 40 years” (NYSCEF Doc No. 21, Gil aff, ¶ 2). He adds that his father, Absalom, and Absalom’s business partner, Stanley, developed and sponsored the Building’s conversion, and that Absalom, Stanley and their wives were shareholders (*id.*, ¶ 3). As of 2014, Gil and his brother, Joav, each held a 25% interest in the shares allocated to Unit 1B as tenants in common, with Stanley and his wife, Ruth, holding 50% as joint tenants (*id.*). After Stanley passed away in 2019, Ruth became the owner of a 50% interest (*id.*). David Rosenberg (David) holds Ruth’s power of attorney (*id.*). Gil avers that “[a]ll of the shareholders collectively chose to do business as Plaintiff partnership” (*id.*).

Under Partnership Law § 10, “[a] partnership is an association of two or more persons to carry on as co-owners a business for profit.” Partnership property includes “[a]ll property originally brought into the partnership stock or subsequently acquired, by purchase or otherwise” (Partnership Law § 12 [1]). “[T]itle to real property of the partnership may be held in the name of one partner, in the names of some but not all of the partners, or in the names of all the partners” (*138-140 W. 32nd St. Assoc. LLC v 138-140 W. 32nd St. Assoc.*, 204 AD3d 489, 489 [1st Dept 2022], citing Partnership Law § 21). In addition, a lease executed by individual partners may constitute partnership property (*see Matter of City of New York*, 148 Misc 488, 490 [Sup Ct, NY County 1933], *affd* 239 App Div 775 [1st Dept 1933], *rearg denied* 239 App Div

827 [1st Dept 1933] [lease taken in the name of two individuals as tenants without referencing their partnership may be partnership property]; *Mulroy v Sessions*, 38 NYS2d 853, 856 [Sup Ct, NY County 1942] [leasehold purchased by partnership becomes partnership property]).

CPLR 1025 provides that “[t]wo or more persons conducting a business as a partnership may sue or be sued in the partnership name.” “[F]or purposes of pleading, a partnership is to be regarded as a legal entity” (*Riviera Congress Assoc. v Yassky*, 18 NY2d 540, 547 [1966] [internal quotation marks and citation omitted]). Here, Gil’s affidavit lacks any substantive averments concerning the nature of the partnership, including the terms of the partnership agreement or whether it was a written or oral agreement. Similarly, Gil has not adequately addressed the effect of Stanley’s death on the partnership (*see* Partnership Law § 62 [4] [death of any partner results in dissolution]; *Gross v Neiman*, 147 AD3d 505, 506 [1st Dept 2017] [partnership agreement provides for dissolution upon death of any partner]). Nevertheless, Gil’s affidavit is sufficient because, as noted above, plaintiff need not establish its standing as a matter of law.

The documents relied upon by defendants do not conclusively establish plaintiff’s lack of standing. Defendants correctly contend that, pursuant to Partnership Law § 11 (2), a joint tenancy or a tenancy in common “does not of itself establish a partnership,” and the stock certificates for Unit 1B reflect either a joint tenancy or tenancy in common form of ownership. The Seventh Amendment also identified Absalom, Rena, Stanley, and Ruth as plaintiff’s successors in interest. To be sure, plaintiff has not tendered any documentary evidence showing that the partnership owned Unit 1B (*see 138-140 W. 32nd St. Assoc. LLC*, 204 AD3d at 490 [property listed on partnership tax returns and testimony supported finding that the property had been treated as a partnership asset]; *Carr v Caputo*, 114 AD3d 62, 72 [1st Dept 2013], *lv dismissed* 23 NY3d 996 [2014] [granting summary judgment to the defendant where the plaintiff

failed to furnish “documentation or other evidence indicating that the partners intended, or the partnership was formed, to actually hold title to the building”]; *Vick v Albert*, 17 AD3d 255, 257 n [1st Dept 2005] [tax returns, ledgers and financial statements reflected partnership’s ownership of property]). However, even if property is taken in an individual’s name, “it may always be shown that property ... is in truth and in fact partnership property” (*Vick*, 17 AD3d at 256, quoting *Benham v Hein*, 50 AD2d 808, 809 [2d Dept 1975]). Plaintiff may rely on circumstantial evidence to show that the partnership owned property (*138-140 W. 32nd St. Assoc. LLC v 138-140 W. 32nd St. Assoc.*, 128 AD3d 548, 548 [1st Dept 2015]). And while the stock certificates make no reference to the existence of a partnership, “Estates, Powers and Trusts Law § 6-2.2 (a) negates the existence of a joint tenancy, but not ownership by a partnership” (*Vick v Albert*, 47 AD3d 482, 482 [1st Dept 2008], *lv denied* 10 NY3d 707 [2008]).

Bogoni v Friedlander (197 AD2d 281, 290 [1st Dept 1994]), cited by defendants in support of their contention that the documents do not “exclude the notion that plaintiff was a partner,” is inapposite. In *Bogoni*, a written joint venture agreement specifically recited that the parties owned real property as tenants in common and not as “co-owners of partnership property as tenants in partnership” (*id.*, citing Partnership Law § 51 [1]). Similarly, in *Carr*, the Court rejected the plaintiff’s contention that the partnership owned the building at issue because “nothing in the [partnership] agreement expressly provides that the partnership itself would hold the deed” (114 AD3d at 72). Significantly, the determinations in *Bogoni* and *Carr* were made after trial or on summary judgment, whereas the procedural posture of this litigation is different. At this early stage of the litigation, Gil’s affidavit is sufficient to raise an issue of fact regarding plaintiff’s standing. Accordingly, this Court is constrained to deny that branch of the motion seeking to dismiss the petition/complaint due to a lack of standing.

B. The First Cause of Action under CPLR 7803 and the Second Cause of Action for Breach of Contract

The first cause of action seeks to reverse the Board's determination to charge plaintiff condenser rent as unauthorized, unlawful, affected by an error of law and arbitrary and capricious under CPLR 7803 (NYSCEF Doc No. 1, ¶ 24). The second cause of action, for breach of contract, is grounded on the allegation that Village Place charged plaintiff condenser rent in excess of what is permissible under the 2014 Lease (*id.*, ¶ 32). A cause of action for breach of contract requires the existence of a valid contract, the plaintiff's performance, the defendant's breach and damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Defendants allege that the Courtyard is excluded from the description of Unit 1B under the 1977 Lease, the subsequent leases and the Offering Plan. Thus, they posit that plaintiff occupies the Courtyard pursuant to a revocable license and that the condenser rent is actually a fee for plaintiff's use of the Building's common space. Plaintiff responds that the condensers are explicitly included in the Leased Premises as part of the cellar and are appurtenances. In reply, defendants contend that neither the Courtyard nor the condensers are an appurtenance because the condensers are not essential to plaintiff's beneficial use of the unit.

These two causes of action turn on the interpretation of the Offering Plan and the proprietary leases since those documents govern the parties' relationship (*Fairmont Tenants Corp. v Braff*, 2017 NY Slip Op 32119[U], *8 [Sup Ct, NY County 2017], *affd* 162 AD3d 442, 442 [1st Dept 2018]; *1050 Fifth Ave. v May*, 247 AD2d 243, 243 [1st Dept 1998] [offering plan, building plans and proprietary lease control]). The Offering Plan provides that Units 1 and 2 are comprised of the ground and second floors at the Building and "the designated and appurtenant cellar space" (NYSCEF Doc No. 10 at 12). The 1977 Lease defined the Leased Premises as the

“unit space known as First Floor located on the 1st Floor of the Building,” and the accompanying rider granted the lessee “the right to occupy and utilize the cellar space appurtenant to the First Floor” (NYSCEF Doc No. 11 at 5 and 33). No mention is made of the Courtyard as being expressly included in the scope of the Leased Premises in the Offering Plan, the 1977 Lease or subsequent leases. Because these documents omit the Courtyard from the definition for Unit 1B, it appears that plaintiff holds a revocable license for the Courtyard (*see Fairmont Tenants Corp. v Braff*, 162 AD3d 442, 442 [1st Dept 2018]; *American Jewish Theatre v Roundabout Theatre Co.*, 203 AD2d 155, 156 [1st Dept 1994] [explaining that “a license connotes use or occupancy of the grantor’s premises ... [and] is cancellable at will, and without cause”]).

The petition/complaint, however, alleges that the condensers are appurtenant to the Leased Space and are located in the Courtyard appurtenant to the cellar (NYSCEF Doc No. 1, ¶ 7). “Appurtenances are incorporeal easements or rights and privileges which are essential or reasonably necessary to the full beneficial use and enjoyment of the property conveyed or leased” (1 Robert F. Dolan, *Rasch’s Landlord and Tenant—Summary Proceedings* § 7:5 [5th ed]). While “[a] lease need not refer to ‘appurtenances’ in order to pass them to the tenant” (*Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 268 [1st Dept 2009]), “the term ‘appurtenant’ in a lease agreement includes everything which is necessary and essential to the beneficial use and enjoyment of the thing leased or granted” (*Jasinski v City of New York*, 290 AD2d 237, 238-239 [1st Dept 2002] [internal quotation marks and citations omitted]). Mere convenience does not create an appurtenance (*see 23 E. 10 L.L.C. v Albert Apt. Corp.*, 91 AD3d 573, 574 [1st Dept 2012]). Thus, a loading dock or a sidewalk hatch used by the tenant in conducting its business constitutes an appurtenance (*see 441 Riv. Ave, Inc. v Foodfest Cash & Carry, Inc.*, 190 AD3d 447, 447-448 [1st Dept 2021]; *23 E. 10 L.L.C.*, 91

AD3d at 574), but roof space adjacent to a residential tenant's apartment does not (*see Prospect Owners Corp. v Sandmeyer*, 62 AD3d 601, 603 [1st Dept 2009], *lv denied* 13 NY3d 717 [2010]).

On this point, Gil avers that the condensers are “necessary to cool, filter, and circulate air through the leased premises to make them tenantable and usable, particularly in the summer months” (NYSCEF Doc No. 21, ¶ 5). The petition/complaint alleges that the condensers have been in place in the Courtyard since 1994, and that defendants did not object to their placement until 2020 (NYSCEF Doc No. 1, ¶ 13). The 1977 and 2008 Leases specifically permit the lessee to occupy and utilize the cellar space appurtenant to the first floor (NYSCEF Doc No. 11 at 33; NYSCEF Doc No. 2 at 35). The 2014 Lease refers to the “First Floor and the appurtenant cellar space” (NYSCEF Doc No. 14 at 35). The 2014 Lease specifies that rent shall be based upon the number of shares allocated to the Leased Premises, and plaintiff has alleged that the condensers and/or the Courtyard are appurtenances. Giving plaintiff the benefit of every favorable inference, the petition/complaint adequately pleads that the decision to charge plaintiff condenser rent may have been unauthorized under the terms of the 2014 Lease.

Defendants cite several cases to support their position that the Courtyard and the condensers are not appurtenances. However, the procedural postures of those cases differ and involve more developed records. For instance, *Second on Second Café, Inc.* involved the issuance of a mandatory preliminary injunction and the issue of whether an exhaust vent, which served the tenant's kitchen equipment and air conditioning unit, was an appurtenance (66 AD3d at 261-264). Although the Appellate Division reversed the IAS court's order allowing the tenant to relocate the air conditioning unit to the roof, it had the benefit of competing affidavits from the tenant's and owner's architects (*id.* at 275-276). *Wilfred Labs. v Fifty-Second St. Hotel Assoc.* (133 AD2d 320, 324 [1st Dept 1987], *lv dismissed* 71 NY2d 994 [1988]) involved a nonjury trial

to determine whether a tenant could claim a rent abatement for infringement based on air conditioning equipment installed by the owner. The determination in *Prospect Owners Corp.* that the part of the roof accessible from the tenants' apartment was not an appurtenance was made after a nonjury trial (62 AD3d at 602). In *Oberfest v 300 W. End Ave. Assoc.* (34 Misc 2d 963, 964-965 [Sup Ct, NY County 1962]), the court concluded that basement storage space was not an appurtenance, but that action involved a claim for specific performance. Importantly, on a motion to dismiss, “[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Thus, whether the condensers are necessary and essential is not a determination that can be made on this pre-answer motion to dismiss (*see Canal Rubber Supply Co. Inc. v 6 Greene Realty Owner, LLC*, 202 AD3d 616, 617 [1st Dept 2022] [issue of fact whether an auxiliary heat blower is an inessential item or an appurtenance]). Therefore, the motion, insofar as it seeks dismissal of the first and second causes of action, is denied.

C. The Third Cause of Action for Fraud

In the third cause of action, sounding in fraud, plaintiff alleges that the Board and its managing agent falsely represented that the Roof Amendment would not affect plaintiff or any other areas of the Building (NYSCEF Doc No. 1, ¶¶ 36 and 38). Defendants argue the third cause of action lacks particularity as required under CPLR 3016 (b) and is duplicative of the breach of contract claim. Plaintiff submits that it has adequately pleaded a claim for fraud.

A cause of action for fraud requires “a material misrepresentation of a fact, knowledge of its falsity, an intent to induce reliance, justifiable reliance by the plaintiff and damages” (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009]). Fraud claims are subject to a heightened pleading standard that requires the plaintiff to plead the circumstances

constituting the alleged fraud with particularity (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008], citing CPLR 3016 [b]). Vague, conclusory allegations will not suffice (*Dau v S16 Sutton Place Apt. Corp.*, 205 AD3d 533 [1st Dept 2022]). Here, the petition/complaint, as supplemented by Gil's affidavit, fails to "allege specific facts with respect to the time, place, or manner" the misrepresentations were allegedly made (*Riverbay Corp. v Thyssenkrupp N. El. Corp.*, 116 AD3d 487, 488 [1st Dept 2014]). Nor does the petition/complaint plead specific facts from which this Court can reasonably infer that the alleged misrepresentations were made with fraudulent intent (*see FNF Touring LLC v Transform Am. Corp.*, 111 AD3d 401, 402 [1st Dept 2013]). Thus, the motion is granted insofar as it seeks to dismiss the third cause of action.

D. The Fourth Cause of Action for Breach of Fiduciary Duty

The fourth cause of action alleges that each individual member of the Board and the Board as a whole owe plaintiff a fiduciary duty to treat shareholders fairly and consistently, and that the Board subjected plaintiff to adverse treatment by charging it a fee for the condenser equipment (NSYCEF Doc No. 1, ¶¶ 45-52). Additionally, plaintiff alleges in the petition/complaint that the Board permitted three unnamed members to "advance their personal agendas over and above the best interests of the corporation as a whole" and that these three unnamed members "object to Rokof's condensers not for any proper corporate reason, but because they personally find them unsightly or annoying" (*id.*, ¶ 53).

Defendants contend that this cause of action fails because plaintiff is not a shareholder and therefore lacks standing. Defendants further argue that the claim has not been pleaded with the particularity required by CPLR 3016 (b) and duplicates the deficient breach of contract

claim. Plaintiff asserts that it has standing, and that it can challenge the Board for actions taken by its members in bad faith.

“To state a claim 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” (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). It is well settled that a cooperative board owes a fiduciary duty to its shareholders (*Demas v 325 W. End Ave. Corp.*, 127 AD2d 476, 478 [1st Dept 1987]), and must treat all shareholders fairly and evenly (*Allanic v Levin*, 57 AD3d 443, 444 [1st Dept 2008]). An action taken by a cooperative board withstands judicial scrutiny if the “action is in furtherance of a legitimate purpose of the cooperative” (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 539 [1990] [applying the business judgment rule to actions taken by a residential cooperative corporation]). “So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board’s” (*id.* at 538), unless “the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith” (*40 W. 67th St. v Pullman*, 100 NY2d 147, 155 [2003]).

Here, the petition/complaint, as amplified by Gil’s affidavit, adequately pleads a cause of action for breach of fiduciary duty (*see e.g. Louise & Anne Abrons Found. v 29 E. 64th St. Corp.*, 297 AD2d 258, 261 [1st Dept 2002] [question of fact whether a “sublet fee was imposed in bad faith and meant to solely impact plaintiff”]). First, plaintiff has adequately alleged that it has standing, discussed *supra*. Next, the Board’s managing agent advised plaintiff that the Board had elected to charge plaintiff a “monthly licensing fee” for plaintiff’s use of the Courtyard, which, the Board maintained, was common space owned by Village Place (NYSCEF Doc No.

22, *Gil* aff, Ex 2 at 2). The Board charged plaintiff \$250 per condenser unit, which “is consistent with that being imposed on anyone from the residential coops who wants to put an HVAC condenser on the roof” (*id.*). Although an issue of fact exists whether the Courtyard or the condensers are an appurtenance, it is unclear why the Board chose to charge plaintiff a fee of \$250 per condenser when other shareholders were charged \$125 (*id.*; NYSCEF Doc No. 1, ¶ 52). Last, defendants have not cited any caselaw to support their contention that the Board cannot be sued. Thus, the motion is denied insofar as it seeks to dismiss the fourth cause of action.

E. The Fifth Cause of Action for Breach of the Implied Covenant of Good Faith and Fair Dealing

In the fifth cause of action, plaintiff alleges that defendants breached the implied covenant of good faith and fair dealing by deceiving it into supporting the Roof Amendment and then improperly using the amendment to levy unauthorized charges against plaintiff (NYSCEF Doc No. 1, ¶ 62). Plaintiff argues that the claims are not duplicative because it has alleged that defendants acted “deceitfully,” choosing to target plaintiff during the COVID-19 pandemic, when plaintiff’s tenants were unable to pay rent (NYSCEF Doc No. 24, plaintiff’s mem of law at 20).

The implied covenant of good faith and fair dealing in every contract “embraces a pledge that neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract” (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [internal quotation marks and citation omitted]). However, where claims for breach of contract and breach of the implied covenant of good faith and fair dealing arise out of the same facts and seek the same damages, the latter claim will be dismissed (*see 320 W. 115 Realty LLC v All Bldg. Constr. Corp.*, 194 AD3d 511, 512 [1st Dept 2021]). Contrary to plaintiff’s contention, the allegations pleaded in support of the fifth cause of

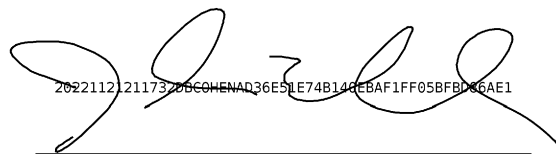
action are identical to those pleaded in the second cause of action for breach of contract. The allegation that defendants acted with deceit is also conclusory and unsupported by specific facts (see *Paulicopter-Cia. v Bank of Am., N.A.*, 182 AD3d 458, 459 [1st Dept 2020]). Plaintiff’s assertion that defendants unfairly targeted it during the COVID-19 pandemic is also unsupported. A February 18, 2020 email submitted by plaintiff indicates that the Building’s managing agent had informed plaintiff “a month or two ago” about the monthly licensing fee (NYSCEF Doc No. 22 at 1). Thus, the motion is granted insofar as it seeks to dismiss the fifth cause of action.

Accordingly, it is hereby:

ORDERED that the motion by defendants Village Place Corp. and Board of Directors of Village Place Corp. to dismiss the complaint (motion sequence no. 001) is granted to the extent of dismissing the third and fifth causes of action, and the third and fifth causes of action are dismissed, and the balance of the motion is otherwise denied; and it is further

ORDERED that the defendants Village Place Corp. and Board of Directors of Village Place Corp. shall serve an answer to the petition/complaint within 20 days after service of this order with written notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference via Microsoft Teams on January 24, 2023 at 12:30 p.m.



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DAVID B. COHEN, J.S.C.

11/21/2022

DATE

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART OTHER
SUBMIT ORDER
FIDUCIARY APPOINTMENT REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: