

**Frankel v Board of Mgrs. of the 392 Central Park W.
Condominium**

2023 NY Slip Op 30403(U)

February 6, 2023

Supreme Court, New York County

Docket Number: Index No. 654501/2017

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SABRINA KRAUS PART 57TR

Justice

-----X

KEVIN FRANKEL,

Plaintiff,

- v -

BOARD OF MANAGERS OF THE 392 CENTRAL PARK
WEST CONDOMINIUM, SCOT GLEASON, JOHN
FLEMING, ROBIN KELLY, NAOMI HOLOCH, JANET
SMITH, JANISE POTICHA, PATRICIA WILLIAMS, TOM
BRENNAN, JOHN DOES AND JANE DOES, THE 392
CENTRAL PARK WEST CONDOMINIUM,

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 006) 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147

were read on this motion to/for

DISMISS

**DECISION + ORDER ON
MOTION**

BACKGROUND

Plaintiff commenced this action to challenge the election and conduct of the Condominium Board of 392 Central Park West.

PENDING MOTION

Defendants now move for an order:

Pursuant to CPLR §2201 staying the fact-finding hearing before J.H.O. Diego M. Santiago currently scheduled to commence on March 1, 2023; and

Pursuant to CPLR §3211(a)(3) and/or §3212 dismissing all the remaining causes of action in Plaintiff's Amended Verified Complaint.

Plaintiff failed to file opposition papers. The order to show cause was returnable on February 6, 2023. Plaintiff's counsel appeared on the return date, and acknowledged no opposition papers had been filed. Plaintiff's counsel further acknowledged his client had moved

to California and he was uncertain as to whether his client wanted to proceed with this action. Finally, plaintiff's counsel asked for an adjournment of the motion from the court, for the first time at argument because his client had been "sick" and counsel had been preoccupied with other matters. The application for an adjournment was denied by the court after giving counsel an opportunity to elaborate on the nature of his client's illness and how that impacted his ability to prepare opposition papers, which explanation was not provided.

The motion is granted on default for the reasons stated below.

ALLEGED FACTS

Plaintiff is a former condominium unit owner of the 392 Central Park West Condominium. He sold his Condo Unit 12K, located at 392 Central Park West, New York, NY 10025 on or around 8/3/22. Plaintiff moved cross-country to California and is currently a partner in a law firm based in San Francisco.

This lawsuit has been litigated for the past 5 ½ years with extensive motion practice narrowing the scope of the remaining claims. Prior decisions from this court and the First Department establish that plaintiff has two extant claims: (a) in the 1st cause of action of the Amended Complaint, a direct claim, that he was denied the right to inspect the Condo's books and records, specifically the unredacted ballots for the 2017 Board election; and (b) in the 3rd cause of action in the Amended Complaint, a derivative claim, for a challenge to the outcome of the 2017 Board election. In the Condominium Defendants 3/18/20 response to plaintiff's demand for discovery and inspection, unredacted ballots were made available for attorneys' eyes' only inspection at the office of the undersigned, but Plaintiff's counsel did not avail himself of this opportunity. Defendants assert that these documents remain available for inspection at their attorneys' office pursuant to CPLR §3120(1)(i).

On 10/23/20, Plaintiff filed his motion for partial summary judgment on the 1st cause of action for books and records in the Amended Complaint. 4 days later, the Condominium held its annual meeting and Board election on 10/27/20, which mooted the plaintiff's 2017 Board election challenge in the 3rd cause of action in the Amended Complaint. A duly appointed inspector of the election, Judith Buissereth, certified the election results, establishing that Thomas Brennan and John Fleming were reelected to the Board and that a new Board member, Sandra Wells, was elected. Brennan and Fleming were previously elected to the Board in the challenged 2017 Board election.

DISCUSSION

Pursuant to CPLR §3212(b), summary judgment is warranted if “upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the Court as a matter of law in directing judgment in favor of any party.” A party moving for summary judgment must make a *prima facie* showing of entitlement to the judgment as a matter of law, which requires the submission of sufficient evidence that no genuine triable issues of fact exist in the case. Once this showing has been made, however, the burden shifts to the party opposing the motion, to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact. *See Alvarez v. Prospect Hospital*, 68 N.Y.2d 320 (1986); and *Zuckerman v. City of New York*, 49 N.Y.2d 557 (1980). “The failure to make such *prima facie* showing requires denial of the motion, regardless of the sufficiency of any opposing papers.” *Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851 (1985).

The Plaintiff No Longer Has Standing to Continue the Action

The only remaining claim for books and records is in connection with Plaintiff's challenge of the 2017 Board election. It is well settled that an action may not proceed in the

absence of standing. *See Stark v. Goldberg*, 297 A.D.2d 203 (1st Dept. 2002). The Court of Appeals has held that plaintiff must have “an actual legal stake in the matter being adjudicated – ensures that the party seeking review has some concrete interest in prosecuting this action.” *See Silver v. Pataki*, 96 N.Y.2d 532 (2001). *See also Saratoga County Chamber of Commerce, Inc. v. Pataki*, 100 N.Y.2d 801, at 812 (2003). Specifically, regarding a plaintiff’s individual right to inspection of books, records and documents, the First Department has held that a petitioner is “not entitled to inspect respondent’s corporate documents since he was no longer a shareholder.” *See Orenstein v. Snow Becker Krauss P.C.*, 103 A.D.3d 512 (1st Dept. 2013) *citing to Matter of Rosenberg v. Steinberg-Kass*, 6 A.D.2d 685 (1st Dept. 1958). Moreover, in *Orenstein, supra*, the Court noted that the right to inspect books and records pursuant to BCL §624, is a right provided “only to current shareholders.”

As Plaintiff has sold his Unit and disposed of his interest in the Condominium, he no longer has any present stake or interest in the matter and is no longer entitled to inspect the Condo’s books and records. Consequently, Plaintiff’s 1st individual cause of action in the Amended Complaint for books and records is dismissed.

As far as the challenge to the 2017 Board Election, BCL §626 provides the following: “(a) An action may be brought in the right of a domestic or foreign corporation to procure judgment in its favor, by a holder of shares or of voting trust certificates of the corporation or of a beneficial interest in such shares or certificates. (b) In any such action, it shall be made to appear that the plaintiff is such a holder at the time of bringing the action and that he was such a holder at the time of transaction of which he complains, or that his shares or his interest therein devolved upon him by operation of law.” *Id.* A derivative action is brought by a shareholder, individual with voting trust certificates in the corporation or individual with a beneficial interest

in such shares/certificates. *See Marx v. Akers*, 88 N.Y.2d 189 (1996). In a derivative action, “the primary cause of action belongs to the corporation; [and] recovery must enure the benefit of the corporation.” *See Isaac v. Marcus*, 258 N.Y.257 (1932). “The standing of a shareholders is based on the fact that . . . he [or she] is defending his [or her] own interests as well as those of the corporation.” *See Tenney v. Rosenthal*, 6 N.Y.2d 204 (1959). When a plaintiff voluntarily disposes of the stock, their rights as a shareholder cease and interest in the litigation is terminated. “Being a stranger to the corporation, the former stockowner lacks standing to institute or continue the suit.” *See Independent Inv. Protective League v. Time, Inc.*, 50 N.Y.2d 259 (1980). *See also Tenney, supra*; and *Harounian v. Harounian* 198 A.D.3d 734 (2d Dept. 2021). Accordingly, a shareholder must maintain current interest/status throughout the pendency of the derivative action – at the time of the transaction, at the time of trial and at the time of entry of judgment, or the cause of action will abate. *See Independent Inv. Protective League v. Time, Inc.*, 50 N.Y.2d 259 (1980). *See also Jacobs v. Cartalemi*, 156 A.D.3d 605 (2d Dept. 2017).

As Plaintiff sold his Unit, he no longer has standing to the challenge to the 2017 Board election, which in any event was also mooted by the 2020 Board election. Consequently Plaintiff’s 3rd derivative cause of action in the Amended Complaint challenging the 2017 Board election is dismissed.

Finally, the court notes that where litigation is commenced to set aside previously held election results, the action becomes moot if a new election is subsequently held as regularly scheduled. *Sahid v. 1065 Park Ave.*, 140 A.D.3d 521, 521 (1st Dept. 2016). Since Plaintiff’s challenge to the 2017 Board election is moot, there is no longer a need to “verify that all ballots were properly tabulated” during the 2017 Board election. This is a further basis for dismissal of Plaintiff’s 3rd derivative cause of action in the Amended Complaint.

WHEREFORE it is hereby:

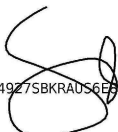
ORDERED that defendants' motion is granted on default and this action is dismissed in its entirety as against Defendants and the Clerk is directed to enter judgment accordingly in favor of Defendants; and it is further

ORDERED that, within 20 days from entry of this order, Defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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 any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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2/6/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:

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| <input type="checkbox"/> | GRANTED IN PART | | |
| <input type="checkbox"/> | SUBMIT ORDER | | |
| <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> | REFERENCE |

APPLICATION:

CHECK IF APPROPRIATE: