

Miller v Board of Mgrs. of the Alfred Condomium

2023 NY Slip Op 32062(U)

June 22, 2023

Supreme Court, New York County

Docket Number: Index No. 153764/2022

Judge: Mary V. Rosado

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

PRESENT: HON. MARY V. ROSADO PART 33M

Justice

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JAMES MILLER, INDEX NO. 153764/2022
MOTION DATE 11/29/2022
MOTION SEQ. NO. 001

Plaintiff,

- v -

THE BOARD OF MANAGERS OF THE ALFRED
CONDOMIUM, MICHAEL LECLERE, EDWARD WOOD,
DOROTHY VERMEER, ANDREW HAGUE, MARY
FEDERICO, JAMIE HANDWERKER, MITCHEL LICHTMAN,
ULYSSES SCARPIDIS, ROGER SZAJNGARTEN, BOARD
OF TRUSTEES AND MANAGING AGENT, HALSTEAD
MANAGEMENT

**DECISION + ORDER ON
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47 were read on this motion to/for DISMISS.

Upon the foregoing documents, and after oral argument, which took place on March 21, 2023, where Ethan Kobre, Esq. appeared on behalf of Plaintiff James Miller (“Plaintiff”) and Maria Boboris, Esq. appeared on behalf of all Defendants, the Defendants’ motion to dismiss pursuant to CPLR §§ 3211(a)(1), (a)(5), and (a)(7) is granted in part and denied in part.

I. Background

This is a dispute between Plaintiff and members of the Board of the Alfred Condominium for alleged breaches of fiduciary duty and conversion of rent payments. This is the latest chapter in a saga spanning multiple lawsuits beginning in 2018, and appeals to the First Department.

The disputes between Plaintiff and Defendants were first brought by Plaintiff in October of 2018 (*see Miller v the Alfred Condominium Association, et. al.*, Sup. Ct., New York Co., Index No.: 655232/2018) (the “Prior Action”). The Complaint contained a litany of allegations, including

(1) the failure to timely approve plans to renovate Plaintiff's apartment; (2) maintaining the gym in the building over 70 degrees Fahrenheit and the pool temperature at over 80 degrees Fahrenheit; (3) acquiescing in building employees accepting bribes; (4) allowing sidewalk cracks in front of the building; (5) allowing a "valuable tree" in front of the building to be cut down; (6) allowing building employees to park their personal vehicles in front of the building; (7) failing to install handicap approved curbs, and (8) failing to address "fumes" coming from Fordham University and nearby restaurants.¹ In the Prior Case, Defendants moved to dismiss Plaintiff's Complaint. That relief was ultimately granted, without prejudice, by Justice Barry Ostrager in a Decision and Order dated June 10, 2019. Justice Ostrager also granted Plaintiff leave to file an amended complaint. Plaintiff filed an amended complaint. Defendants moved to dismiss the amended complaint. On January 16, 2020, by Decision and Order of Justice Ostrager, Plaintiff's Third Amended Complaint was dismissed with prejudice.

Shortly thereafter, on July 28, 2020, Defendants initiated an action against Plaintiff alleging that Plaintiff made unauthorized alterations to his apartment (*see Board of Managers of the Alfred Condominium v James Miller*) (the "Alterations Action"). In that action, Plaintiff filed counterclaims. Defendants moved to dismiss the counterclaims in the Alterations Action on November 30, 2020. On April 11, 2022, Justice Bannon dismissed the second, third, and fourth counterclaims.

Plaintiff appealed those decisions. In a Decision and Order dated February 8, 2022, the First Department modified Justice Ostrager's Decisions and Order to reinstate Plaintiff's breach of fiduciary duty claims alleging bad faith in cancelling Plaintiff's gym membership and allowing petitions against him but not for him to be posted (*see Board of Managers of Alfred Condominium*

¹ For the sake of brevity, this is not an exhaustive list of all of Plaintiff's allegations in the Prior Action. For a review of Plaintiff's entire original Complaint in the Prior Action, *see* NYSCEF Doc. 7.

v Miller, 202 AD3d 467 [1st Dept 2022]). The remainder of Justice Ostrager’s Decision and Order was affirmed.

Thereafter, this action was commenced via summons and complaint by Plaintiff on May 2, 2022 (NYSCEF Doc. 2). The Complaint in this action alleges that Defendants have breached fiduciary duties by allowing the building to receive a “D” energy efficiency rating in 2021 from the NYC Department of Buildings (*id.* at ¶ 21). Plaintiff alleges that Michael Leclere, who is the president of the board, was the architect of the building and was guilty of malpractice (*id.*). It is alleged that Leclere and other members of the Board have tried to “cover up” the structural problems and refused to take appropriate actions, legal or otherwise, to have Leclere held responsible for failure to correct the structural problems (*id.*). Plaintiff alleges that rather than instituting a building-wide project, Defendants allowed each unit owner in the building to replace old gaskets and seals around their doors and windows, which has caused further energy loss (*id.* at ¶ 23).

Plaintiff claims Defendants breached a fiduciary duty by failing to accept free trees from the NYC Parks Department in or about 2018 (*id.* at ¶ 25). Plaintiff alleges a breach of fiduciary duty out of a failure to enforce a no smoking policy (*id.* at ¶¶ 28-31). He alleges that Defendants failed to correct fire doors on the stairways in the building, and failed to install bioluminescent strips, markers, and signage in the stairways (*id.* at ¶¶ 32-40). Plaintiff alleges that Defendants breached a fiduciary duty by failing to give a videotape to the NYPD about an incident where someone piled dog feces on Plaintiff’s bicycle (*id.* at ¶¶ 41-44). He also alleges that Defendants have allowed management employees to sell illegal drugs to residents and drug users who live elsewhere (*id.* at ¶¶ 45-50). He complains a fiduciary duty has been breached by allowing employees to park in front of the building (*id.* at ¶¶ 55-59). He also claims breach of fiduciary duty

arising out of mold growing on the building façade (*id.* at ¶¶ 51-54). He alleges there exist unsafe conditions around a health club and pool, because the pool deck is wet and slippery (*id.* at ¶¶ 60-62). He alleges a dangerous condition in the elevator but does not say what the dangerous condition is (*id.* at ¶¶ 67-69). He claims that the superintendent, Hubaldo Rodriguez, is taking bribes to facilitate renovations or other services (*id.* at ¶¶ 73-79).

Plaintiff claims Defendants have engaged in a conflict of interest since Monica Monalo, who is the wife of Defendant Andrew Hague, claims she is the “building’s realtor” (*id.* at ¶ 70). He also alleges that Monalo is employed by Defendant Halstead, the managing agent of the condominium (*id.*). He also alleges there exist inoperable fire sprinklers because they were painted over (*id.* at ¶¶ 80-83). He claims that curbs near the condominium were illegally painted yellow (*id.* at ¶¶ 84-88). He alleges Defendants are not enforcing NYC or OSHA safety regulations (*id.* at ¶¶ 89-94). Plaintiff claims emergency fire alarms do not all work as intended (*id.* at ¶¶ 95-99). He alleges the building lacks emergency lighting in the hallways (*id.* at ¶¶ 100-102). Finally, he alleges a breach of fiduciary duty arising out of the failure to disclose the amount of legal fees and related costs incurred by Defendants in their prior litigations with Plaintiff (*id.* at ¶¶ 103-108).

Plaintiff alleges he has demanded that these alleged breaches of fiduciary duty be corrected in numerous correspondences, in previous lawsuits, and at annual or information meetings, but Defendants have responded only with hostility (*id.* at ¶¶ 109-119). Plaintiff alleges that based on past experiences; any further demand would be futile (*id.* at ¶ 120).

Plaintiff alleges as a second cause of action conversion (*id.* at ¶¶ 121-131). Plaintiff alleges he has leased his unit with the Board’s approval, yet the Board directed Plaintiff’s tenants to pay rent to the Board rather than to Plaintiff (*id.*).

On September 16, 2022, Defendants filed the instant motion to dismiss (NYSCEF Doc. 3). Defendants provide various arguments for dismissal (NYSCEF Doc. 28). Defendants argue *res judicata* applies to all of Plaintiff's derivative claims. Defendants also argue that Plaintiff impermissibly mingles direct and derivative claims, and that no breach of fiduciary duty claim can be maintained against Defendant Halstead. Defendants further argue that the allegations fail to plead with particularity that each of the challenged decisions were outside the scope of the Board's authority, did not serve a legitimate corporate purpose, or were made in bad faith. Defendants claim documentary evidence warrants dismissing the second cause of action. Defendants seek sanctions against Plaintiff for his duplicative claims, despite being dismissed in the Prior Action and their dismissal being affirmed on appeal.

On November 23, 2022, Plaintiff submitted opposition (NYSCEF Doc. 34). Plaintiff argues that the claims are not barred by *res judicata* because numerous allegations did not exist at the time of the Prior Action. Plaintiff also argues the business judgment rule does not preclude his claims here. Plaintiff further claims a breach of fiduciary duty can be brought against Halstead. Plaintiff argues the documentary evidence does not refute the conversion claim. Finally, Plaintiff stresses it should not be sanctioned because the claims are not wholly duplicative.

II. Discussion

A. Motion to Dismiss based on CPLR 3211 § (a)(5)

The Court first addresses the branch of Defendants' motion to dismiss based on CPLR 3211 § (a)(5). This branch of Defendants' motion is granted in part.

Under the doctrine of *res judicata*, a final adjudication of a claim precludes relitigating that claim and all claims arising out of the same transaction or series of transactions by a party (*Martinez v JRL Food Corp.*, 194 AD3d 488 [1st Dept 2021]). Put another way, even if there are

new allegations set forth in a complaint, if a prior action is dismissed on the merits, and contains identical parties, if the new allegations are connected to the same transaction or occurrence as the prior dismissed action, the claims will be barred by *res judicata* (*Gropper v 200 Fifth Owner LLC*, 151 AD3d 635 [1st Dept 2017]; *Jericho Group, Ltd. v Mid-Town Development Ltd. Partnership*, 129 AD3d 561 [1st Dept 2015]). The doctrine of *res judicata* protects judicial economy, and fairness to the parties to mandate, at a certain point, the end to litigation (*Howard Carr Companies, Inc. v Cumberland Farms, Inc.*, 456 F.Supp.3d 462 [NDNY 2020]; *Overview Books, LLC v U.S.*, 755 F.Supp.2d 409 [EDNY 2010]; *Reilly v Reid*, 45 NY2d 24 [1978]). It also forwards the public policy of establishing certainty in legal relations (*Ferring B.V. v Serenity Pharmaceuticals, LLC*, 391 F.Supp.3d 265 [SDNY 2019]).

Justice Ostrager already dismissed many of Plaintiff's alleged breach of fiduciary duty claims against Defendants, which was mainly affirmed by the First Department (*see Board of Managers of Alfred Condominium v Miller*, 202 AD3d 467 [1st Dept 2022]). The second cause of action in the Prior Action alleged breach of fiduciary duty related to (a) employees accepting bribes; (b) that there exists a conflict of interest due to Defendant Hague's wife, Monica Manalo, working for Halstead; (c) Defendants' failure to replace trees; (d) allowing employees to park their cars in front of the building; (e) failure to maintain the pool area in a safe manner; (f) failure to fix fire doors; (g) illegally painting the curb, and (h) failing to install bioluminescent strips; (i) the dog feces incident; (j) the fire sprinklers and violations of fire laws and rules; (k); mold; (l) building window complaints, (m) employees parked cars, and (n) government citations and fines are all identical to allegations in the present proceeding, and their prior dismissal was already affirmed by the First Department (*id.* at 468-469). The prior dismissals, affirmed on appeal, also mandate in this case dismissal of the allegations pertaining to "failure to enforce safety regulations"; "DOB

Violations in the Elevator,” and “Consequences of Illegal conditions in the Building.” Therefore, all of these claims are dismissed pursuant to *res judicata*.

Plaintiff also previously complained about structural problems in the building, including holes in the structure, and complained that there was no action taken to correct the holes in the building. He further alleged in the Prior Action that Defendant Leclere was the architect during construction and has known about the holes in the structure of the building. He complained that residents of the building were suffering from cold air blowing through the holes. This was listed in Plaintiffs’ tenth cause of action, which was dismissed in the Prior Action, and whose dismissal was affirmed by the First Department. While worded slightly differently in this action, they are in substance the same. Indeed, in the instant action, Plaintiff again complains that Leclere was the architect during construction, and that Leclere and other board members have failed to correct the structural problems. As these allegations arise out of the same transaction as the allegations in the Prior Action, they are barred pursuant to *res judicata*. The Court has considered Plaintiffs’ arguments as to why these alleged breaches of fiduciary duty are not barred by *res judicata* and finds them unavailing.

Because the aforementioned alleged breaches of fiduciary duty are barred by *res judicata*, the Court need not reach Defendants’ other arguments as to why these allegations should be dismissed. The only new allegations which are not barred by *res judicata* are Plaintiff’s second cause of action for conversion, and the alleged breaches of fiduciary duties related to (a) failure to enforce a no smoking policy; (b) allowing employees to sell illegal drugs in the building; and (c) failing to disclose the costs incurred by Defendants in their prior litigations with Plaintiff.

B. Motion to Dismiss Pursuant to CPLR 3211(a)(7)

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determine only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

Defendants argue that plaintiff has failed to satisfy the pleading requirements of the business judgment rule, which warrants dismissal of the remaining allegations in his first cause of action. The business judgment rule requires that a court defer to a board's determination if the board acts for the purposes of the corporation, within the scope of its authority, and in good faith (*40 W. 67th Street Corp. v Pullman*, 100 NY2d 147 [2003]; *Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530 [1990]). Absent allegations of discrimination, self-dealing, or misconduct, directors are presumed to be acting in good faith and in the exercise of honest judgment in the furtherance of the condominium's interests (*Young v 101 Old Mamaroneck Road Owners Corp.*, 211 AD3d 771, 775 [2d Dept 2022]; *Parker v Marglin*, 56 AD3d 374, 374 [1st Dept 2008]).

Plaintiff has failed to plead Defendant Board and the individual board member defendants have acted in self-dealing, discrimination, or misconduct in failing to enforce the no-smoking

policy. Indeed, as it relates to that allegation, it is only alleged that the “Defendants failed and refused, on several occasions...to enforce [the] No Smoking Policy” (NYSCEF Doc. 1 at ¶ 29). However, Plaintiff’s mere disagreement with the Board’s alleged non-enforcement of the no smoking policy on these few occasions is not enough to overcome the business judgment rule, especially where there are no allegations involving self-dealing, discrimination, or misconduct. Therefore, the allegations related to enforcement of the no-smoking policy are dismissed.

However, the remaining claims are not barred by the business judgment rule. As this is a motion to dismiss, and the Court must accept all allegations as true and give the non-movant the benefit of all favorable inferences, the allegations regarding the non-disclosure of legal fees survives. In New York, shareholders have a right to inspect corporate records for a relevant and valid purpose (*see Pomerance v McGrath*, 143 AD3d 443 [1st Dept 2016]). While Plaintiff does not explicitly say what his purpose in seeking information regarding the legal fees incurred in litigation against him, giving him the benefit of all favorable inferences, the Court infers there is a valid purpose behind such request. Accepting the allegations as true, as this Court must, it is unclear why Plaintiff and other owners have disclosed this information. Therefore, this alleged breach of fiduciary duty cannot be dismissed based on the business judgment rule. The same can be said for the allegations regarding an “illegal drug trade” being operated with the Board’s acquiescence. Accepting Plaintiff’s allegations as true, and granting him the benefit of all favorable inferences, allowing an illegal drug trade to flow out of the building, thereby causing non-resident drug users to come into the building to buy drugs, sufficiently alleges misconduct to survive a pre-answer motion to dismiss business judgment rule challenge.

Although Defendants argue that these claims are improper because they impermissibly mingle direct and derivative claims, the Court disagrees. Indeed, it is alleged that Defendants have

not disclosed the legal fees to anyone, despite multiple owners requesting this information, and that Plaintiff has brought this action so that detailed information regarding the legal fees can be provided to everyone. Moreover, Plaintiff alleges he has brought the claim regarding the alleged illegal drug trade because it jeopardizes the safety of the building (*see* NYSCEF Doc. 1 at ¶ 48). Nowhere is it alleged that Plaintiff has brought these actions for the direct benefit of himself.

While these breaches of fiduciary duty claims survive, they must be dismissed against all individual board member defendants (*see Jarmuth v Leonard*, 187 AD3d 407, 407 [1st Dept 2020]). As it relates to the non-disclosure of legal fees and the alleged illegal drug trade, there are no allegations that the individual defendants acted tortiously other than in their capacity as board members, so the claims against them are dismissed (*id.* citing *Brasseur v Speranza*, 21 AD3d 297, 298 [1st Dept 2005]; *Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500 [1st Dept 2018]).

The breach of fiduciary duty claim regarding the disclosure of legal fees against Halstead is dismissed, since it is not specifically alleged that Defendant Halstead has engaged in any misconduct related to this breach (*see Poloik v Norsel Realties*, 138 AD3d 493, 495 [1st Dept 2016]). However, accepting the allegations as true, and giving Plaintiff the benefit of all favorable inferences, which flow from the Complaint, the breach of fiduciary duty claim related to an alleged illegal drug trade survives against Halstead. It is alleged that employees of the Condominium, who very well may be Halstead employees, are engaged in the illegal drug trade, and that Halstead has done nothing to stop or curb the drug trade despite having knowledge of it. These are issues which cannot be resolved on a motion to dismiss, and therefore this claim survives against Halstead.

C. Second Cause of Action and CPLR 3211(a)(1)

Defendants assert that the second cause of action alleging conversion of rental income is barred by the documentary evidence. A motion to dismiss based on documentary evidence

pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Defendants argue that documentary evidence provides that they had the authority to recover rents to satisfy Plaintiff's unpaid common charges. The documentary evidence reflects there was a lien placed on Plaintiff's unit for unpaid common charges on September 8, 2020 (*see* NYSCEF Doc. 17). The ledger, and a letter dated April 20, 2021, all show that Plaintiff was in substantial arrears for failure to pay common charges, assessments, late charges, and legal fees (*see* NYSCEF Doc. 18 and 24). The Lease provided Defendants with the authority to collect rent payments to satisfy Plaintiff's arrears (*see* NYSCEF Doc. 25). Another letter dated February 24, 2022, reflects that once Plaintiff became current, his tenants were directed to again pay rent to Plaintiff (NYSCEF Doc. 20). Based on the documentary evidence, it is established that Defendants had authority to collect rent from Plaintiff's tenants to satisfy Plaintiff's arrears to the Condominium. Therefore, Plaintiff's conversion claim fails, and the second cause of action is dismissed. Because some of Plaintiff's claims survive, and this action cannot yet be deemed frivolous, the Court denies Defendants' motion seeking sanctions.

Accordingly, it is hereby,

ORDERED that Defendants' motion to dismiss is granted in part and denied in part; and it is further

ORDERED that Defendants' motion to dismiss is denied solely to the extent that Plaintiff's allegations in its first cause of action alleging a breach of fiduciary duty due to the non-disclosure of legal fees survives only against the Board, and the alleged breach of fiduciary duty due to acquiescence in allowing an alleged illegal drug trade survives only against the Board and Halstead; and it is further

ORDERED that Defendants' motion to dismiss is otherwise granted, and the remainder of the Complaint is dismissed; and it is further

ORDERED that Defendants' motion for sanctions is denied; and it is further

ORDERED that the parties are directed to appear for an in-person preliminary conference with the Court on July 12, 2023 at 9:30 a.m. in Room 442, 60 Centre Street, New York, New York. If the parties agree to a proposed order prior to the conference, the parties may submit the proposed preliminary conference order to the Court via e-mail at SFC-Part33-Clerk@nycourts.gov, which may obviate the need to appear for the preliminary conference; and it is further

ORDERED that within ten days of entry, counsel for Defendants shall serve a copy of this Decision and Order, with notice of entry, on Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

<u>6/22/2023</u> DATE	<u>Mary V Rosado Jsc</u> HON. MARY V. ROSADO, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input checked="" type="checkbox"/>	GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER
	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE