

**Schmidt v Board of Directors of Duane Owners, Inc.**

2023 NY Slip Op 33294(U)

September 20, 2023

Supreme Court, New York County

Docket Number: Index No. 651435/2023

Judge: Suzanne J. Adams

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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. SUZANNE J. ADAMS PART 39TR**

*Justice*

-----X  
FRED SCHMIDT, INDEX NO. 651435/2023  
Plaintiff, MOTION DATE 09/18/2023,  
 MOTION DATE 09/18/2023  
- v - MOTION SEQ. NO. 002 003

THE BOARD OF DIRECTORS OF DUANE OWNERS,  
INC., DUANE OWNERS, INC.,

Defendant

**DECISION + ORDER ON  
MOTION**

MARGARET L. BOODY

Nominal Defendant

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 48, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 62, 63, 64, 65

were read on this motion to/for DISMISS

The following e-filed documents, listed by NYSCEF document number (Motion 003) 45, 46, 47, 49, 51, 61

were read on this motion to/for DISMISS

Upon the foregoing documents, and oral argument having been heard by the court on September 18, 2023,

Plaintiff in this matter is the proprietary lessee and owner of 500 shares out of a total of 2,000 shares in defendant DUANE OWNERS, INC.'s (hereinafter referred to as the "Co-op") which owns, in part, the cond-op building located at 150-152 Duane Street in Manhattan (the "Building"). The Building is five stories and consists of a residential unit split into eight cooperative apartments on the second through fifth floors, a single commercial unit, and certain common areas which includes approximately 4,000 square feet of roof space. Nominal defendant MARGARET L. BOODY a/k/a MEAGAN BOODY (hereinafter referred to as "Boody") is a

proprietary lessee and shareholder of the Corporation who occupies a penthouse apartment in the Building. In March 2001, Boody entered into a 25-year lease to occupy 977 square feet, or approximately 24%, of the roof. This lease will expire on February 28, 2026.

On March 3, 2023, defendant THE BOARD OF DIRECTORS OF DUANE OWNERS, INC. (hereinafter referred to as the "Board") the Corporation's board of directors, unanimously voted to amend the Corporation's original by-laws. Pertinent to this matter is Article II, Section 8, of the original by-laws, which required 100% of outstanding shares to approve, *inter alia*, a change in rights pertaining to the Building's roof. The amended by-laws now provide, in Article III, Section 8(b)(ii), that only 51% of outstanding shares are necessary to approve a sale and/or transfer of the roof space. On March 8, 2023, the Board sent notice of a special shareholders' meeting to the Corporation's shareholders to vote on entering into a 25-year extension to Boody's roof lease. At the special meeting, which was held on March 22, 2023, 53.5% of the outstanding shares voted in favor of entering the lease extension.

Immediately prior to the special meeting, plaintiff moved by order to show cause for a temporary restraining order and preliminary injunction to enjoin the Board from holding the special meeting, implementing any shareholder approval to lease the roof space at issue, and encumbering the Corporation's interest in the roof and/or changing rights to the roof space. By order dated March 22, 2023, Hon. Jennifer Schecter, as the Ex Parte Judge, denied the temporary restraining order and scheduled oral argument on the remainder of the motion for March 30, 2023.

This court's order dated March 31, 2023, denied plaintiff's motion in the entirety.

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see*, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine

only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law [cite omitted].” *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994). Under CPLR 3211(a)(7), the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one. *Leon*, 84 N.Y.2d at 88 (citing *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977)).

The defendants the Board, the Co-op and Boody’s, moving papers all set forth evidence sufficient to meet the burden of entitlement to dismissal of plaintiff’s Complaint by way of documentary evidence that resolved all factual issues and claims as a matter of law. In opposition, the plaintiff recites arguments that were previously decided by the court. The clear and unambiguous wording of the Co-op’s original by-laws allowed for the Board to amend the original by-laws by majority decision. This was properly done.

ORDERED that the defendants, THE BOARD OF DIRECTORS OF DUANE OWNERS, INC. (hereinafter referred to as the “Board”) and DUANE OWNERS, INC.’s (hereinafter referred to as the “Co-op”) motion seeking an Order: (a) pursuant to CPLR Rule 3211(a)(1), and (7), dismissing the complaint, with prejudice; and (b) declaring that the Board’s actions in amending the Co-op’s By-Laws, holding a shareholder meeting and entering into the roof lease extension with defendant Boody are valid and enforceable, is granted in the entirety; and it is further

ORDERED that the defendant MARGARET L. BOODY a/k/a MEAGAN BOODY’s (hereinafter referred to as “Boody”) motion seeking an Order pursuant to CPLR Rule 3211(a)(1), and (7), dismissing the complaint, is granted in the entirety; and it is further

ORDERED that plaintiff’s complaint is dismissed with prejudice; and it is further

ORDERED that plaintiff's application for attorneys' fees is denied.



9/20/2023

DATE

SUZANNE J. ADAMS, J.S.C.

CHECK ONE:

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CASE DISPOSED  
 GRANTED  DENIED  
 SETTLE ORDER  
 INCLUDES TRANSFER/REASSIGN

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NON-FINAL DISPOSITION  
 GRANTED IN PART  
 SUBMIT ORDER  
 FIDUCIARY APPOINTMENT

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OTHER  
 REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: