

**Real World Holdings LLC v 393 W. Broadway Corp.**

2023 NY Slip Op 34166(U)

November 28, 2023

Supreme Court, New York County

Docket Number: Index No. 160732/2015

Judge: Lyle E. Frank

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

**PRESENT: HON. LYLE E. FRANK PART 11M**

*Justice*

-----X

REAL WORLD HOLDINGS LLC,  
  
Plaintiff,

- v -

393 WEST BROADWAY CORPORATION, TIMOTHY  
CLARK, JOAN HARDIN, JAMES SCHAEUFELE,  
MARIACRISTINA PARRAVACINI, JOHN WOTOWICZ,  
JANE SINCLAIR, ANTHONY FAGLIONE,

Defendant.

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**INDEX NO.** 160732/2015

**MOTION DATE** 12/13/2021,  
05/31/2022,  
03/20/2023

**MOTION SEQ. NO.** 014 015 016

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 014) 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 449, 452, 501, 502, 503, 504, 505, 506, 507, 508, 512, 513

were read on this motion to/for SANCTIONS.

The following e-filed documents, listed by NYSCEF document number (Motion 015) 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 509, 510, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 542, 543, 544, 545, 546, 547, 583, 584, 585, 586, 587, 588, 589, 590, 591

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 016) 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572

were read on this motion to/for AMEND CAPTION/PLEADINGS.

Plaintiff, Real World Holdings LLC, and defendants, 393 West Broadway Corporation (“393 West Broadway Corp.”), Timothy Clark, Joan Hardin, James Schaufele, Mariacristina Parravicini, John Wotowicz, Jane Sinclair, and Anthony Faglione (the “Individual Defendants”) are disputing, *inter alia*, how Plaintiff uses its cooperative apartment (the “Apartment”)<sup>1</sup>. The

<sup>1</sup> The Court would like to thank Jason Lowe for his assistance in this matter.

Apartment is located in the building owned by 393 West Broadway Corp. and the Individual Defendants are, or were, members of the board.

Plaintiff argues that it has the right to make alterations to its apartment and that the Defendants have maliciously blocked Plaintiff from making alterations to the apartment. Defendants argue that the scope of alterations has changed multiple times and that Defendants have acted in good faith by approving alteration plans in the past.

Plaintiff has filed several amended pleadings and currently the operative pleading is the Supplemental and Fourth Amended Complaint (“FAC”). NYSCEF Doc. 256. Before the Court is Defendants’ motion for summary judgment wherein Defendants ask the Court to dismiss the 1st through 13th, 15th, and 20th through 23rd causes of action of the FAC (motion sequence number 15). Separately, Plaintiff has filed a motion to amend the FAC adding facts and causes of action Plaintiff states arose after the last pleading was filed (motion sequence number 16). Finally, Defendants have a motion for sanctions pending (motion sequence number 14). The Court previously issued an interim order, NYSCEF Doc. 452, regarding the sanctions motion and the parties made additional submissions pursuant to the interim order (NYSCEF Docs. 501-508, 512-514). This decision and order will address each of the above motions in turn.

### **Summary Judgment- Motion Seq. 015**

An application for summary judgment pursuant to CPLR § 3212 “must make a prima facie showing of entitlement to judgement as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact” (*Alvarez v Prospect Hosp.*, 68 N.Y.2d 320, 501 N.E.2d 572, 508 N.Y.S.2d 923 [1986]; see also *Zuckerman v. New York*, 49 N.Y.2d 557, 404 N.E.2d 718, 427 N.Y.S.2d 595 [1980]). “Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary

proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action.” *Id.* “[B]ald, conclusory assertions or speculation and '[a] shadowy semblance of an issue' are insufficient to defeat summary judgment.” (*Stonehill Capital Mgt. LLC v. Bank of the W.*, 28 N.Y.3d 439, 448, 45 N.Y.S.3d 864, 68 N.E.3d 683 [2016]). Courts have also recognized that summary judgment is a drastic remedy that deprives a litigant of his or her day in court. Therefore, the party opposing a motion for summary judgment is entitled to all favorable inferences that can be drawn from the evidence submitted.

***First, Second, and Sixth Causes of Action***

Though the FAC does not state the legal theory underlying the first and second causes of action, in opposition to this motion Plaintiff states that the first and second causes of action are seeking relief based on breach of contract. The first and second cause of action seek relief against 393 West Broadway Corp. and the Individual Defendants. Plaintiff presents no evidence that it is a party to any contract with the Individual Defendants. Even if Plaintiff can show that 393 West Broadway Corp. breached an agreement with it, “[a] director is not personally liable for a corporation's breach of an agreement merely by virtue of his or her decisions or actions that resulted in the corporation's promise being broken” (*Hixon v 12-14 E. 64th Owners Corp.*, 107 AD3d 546, 547 [1st Dept 2013]).

Defendants cite evidence that the alleged breach of contract by the Individual Defendants was their participation in board decisions. NYSCEF Doc. 499, pp. 99 – 103; pp. 115-116. Plaintiff fails to raise any other fact which would constitute a breach of contract by the Individual Defendants or a breach of duty of good faith and fair dealing by the Individual Defendants. Thus, the Court dismisses the first and second causes of action as it is asserted against the Individual Defendants.

With regards to the claims against 393 West Broadway Corp., the Proprietary Lease requires a tenant-shareholder to obtain permission from the corporation prior to making any alteration to their apartment. NYSCEF Doc. 459, Section 3.3.1. The Proprietary Lease specifically states that “There shall be no limitation on the right of the Board of Directors to grant or withhold consent for any reason or for no reason to any such alteration.” NYSCEF Doc. 459, Section 3.3.2. Thus, the explicit language of the Proprietary Lease precludes a simple breach of contract cause of action.

However, every contract has an implied covenant of good faith and fair dealing. Pursuant to that covenant of good faith and fair dealing, “even an explicitly discretionary contract right may not be exercised in bad faith so as to frustrate the other party's right to the benefit under the agreement” (*Richbell Info. Servs. v Jupiter Partners, L.P.*, 309 AD2d 288, 302 [1st Dept 2003]). Plaintiffs have raised factual issues as to whether 393 West Broadway Corp. has used its discretion regarding alterations in a manner to frustrate the Plaintiff’s right to the benefit they bargained for. The sixth cause of action asserts a breach of the duty of good faith and fair dealing against 393 West Broadway Corp.

Thus, though the Court grants summary judgment dismissing the first and second causes of action for breach of contract, the Court declines to grant summary judgment on the sixth cause of action as there is an issue of fact as to whether 393 West Broadway Corp. has breached its duty of good faith and fair dealing.

### ***Third and Fourth Causes of Action***

The third and fourth causes of action are for a breach of fiduciary duty by the Individual Defendants. In opposition to this motion, Plaintiffs fail to present evidence that the Individual Defendants acted in any way that was outside of their duties as board members of 393 West

Broadway Corp. A cause of action for breach of fiduciary duty against individual members of a cooperative board must be dismissed where there is no evidence that the individuals “acted tortiously other than in their capacity as board members[.]” (*Brasseur v Speranza*, 21 AD3d 297, 298 [1st Dept 2005]). Thus, the third and fourth causes of action for breach of fiduciary duty are dismissed.

#### ***Fifth Cause of Action***

The fifth cause of action alleges 393 West Broadway Corp. breached the proprietary lease by interfering with Plaintiff’s quiet enjoyment of the Apartment. 393 West Broadway Corp. argues that this cause of action must be dismissed because there is no evidence of any wrongful act by 393 West Broadway Corp. As is discussed above, this Court finds that there is an issue of fact as to whether 393 West Broadway Corp. breached its duty of good faith and fair dealing. Plaintiff has also submitted evidence that it is not occupying the Apartment. Hence, there is an issue of fact as to whether 393 West Broadway Corp. has committed a wrongful act causing Plaintiff to be constructively evicted from the Apartment. Therefore, the Court denies Plaintiff’s motion for summary judgment with respect to the fifth cause of action.

#### ***Seventh, Eighth, Ninth, and Tenth Causes of Action***

Defendants argue that the seventh and eighth causes of action have already been resolved by a previous decision and order at NYSCEF Doc. 356. However, that decision and order specifically states it is not the final decision on the issues it addresses. *See* NYSCEF Doc. 356, FN 11. Further, Plaintiff raises issues of fact regarding whether there has been compliance with the previous order preventing a finding that these claims are moot and should be dismissed.

Plaintiff previously moved for summary judgment seeking a determination as to who was responsible for paying for the cost of replacement of the roof. The ninth cause of action

acknowledges that summary judgment has already been granted for that cause of action. Further, the partial summary judgment motion resolved the issue of who was to pay for the replacement of the roof, which is the subject of the tenth cause of action. Thus, both causes of action, the ninth and tenth, are no longer at issue in this action.

### ***Eleventh, Twelfth, and Thirteenth Causes of Action***

The eleventh, twelfth, and thirteenth causes of action address 393 West Broadway Corp.'s alleged improper entry into Plaintiff's apartment. The parties submitted additional briefing on this subject, NYSCEF Docs. 583-591, which makes it clear that there are factual issues that prevent the Court from granting summary judgment on these causes of action at this time.

### ***Fifteenth Cause of Action***

The fifteenth cause of action is a conversion cause of action asserted against all parties. "A cause of action for conversion cannot be predicated on a mere breach of contract." (*Fesseha v TD Waterhouse Inv. Servs.*, 305 AD2d 268, 269 [1st Dept 2003]). Though Plaintiff argues that the conversion claim is separate from the breach of contract, Plaintiff fails to point to any "independent facts sufficient to give rise to tort liability." (*Id.* quoting *Yeterian v Heather Mills N.V.*, 183 A.D.2d 493, 494, 583 N.Y.S.2d 439 [1992]). Thus, the conversion claim is duplicative of the breach of contract claim and is dismissed.

### ***Twentieth and Twenty-First Causes of Action***

The twentieth and twenty-first causes of action allege that the resurfacing of a private area of the cooperative's rooftop which belongs to Plaintiff was resurfaced improperly and that improper resurfacing is the Defendants' fault. Defendants fail to tender sufficient evidence to demonstrate the absence of any material issues of fact for these causes of action. Thus,

Defendants' motion for summary judgment on the twentieth and twenty first causes of action is denied.

***Twenty-Second and Twenty-Third Causes of Action***

The twenty-second and twenty-third causes of action allege that the Defendants improperly performed repairs to the roof of the cooperative causing water infiltration and damage to Plaintiff's apartment. Defendants argue that there is no evidence of damage due to the water infiltration and thus summary judgment is appropriate. In opposition, Plaintiff submits evidence of water damage. *See* NYSCEF Doc. 518, paragraph 41; NYSCEF Doc. 528. Therefore, there is an issue of material fact regarding whether the water infiltration caused damages and the court denies summary judgment on the twenty-second and twenty-third causes of action.

**Motion to Amend -Motion Seq. 016**

Plaintiff moves to amend the FAC. Leave to amend a pleading should be freely given "as a matter of discretion in the absence of prejudice or surprise," (*Stroock & Stroock & Lavan v. Beltramini*, 157 A.D.2d 590, 591, 550 N.Y.S.2d 337 [1st Dept 1990] [citations omitted]), unless the proposed amendment is "palpably improper or insufficient as a matter of law," (*McGhee v Odell*, 96 A.D.3d 449, 946 N.Y.S.2d 134 [1st Dept 2012] [citations omitted]).

Defendants claim prejudice based on the lack of discovery and delay. "Mere delay is insufficient to defeat a motion for leave to amend. Prejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position'" (*Kocourek v Booz Allen Hamilton Inc.*, 85 AD3d 502, 504 [1st Dept 2011][internal quotations and citations omitted]). If Defendants have been prejudiced in the preparation of their case by the lack of discovery regarding the new allegations

and causes of action, that prejudice can be ameliorated by allowing Defendants to conduct further limited discovery. (*Cardozo v Midway Motor Hotel*, 251 AD2d 442, 443, 675 N.Y.S.2d 548 [2d Dep't 1998] [leave to amend properly granted "while permitting the defendant to conduct additional discovery"]; *Fogal v Steinfeld*, 163 Misc 2d 497, 504-506, 620 N.Y.S.2d 875 [Sup Ct, NY County 1994]).

Thus, Plaintiff's motion to amend is granted and Defendant shall be permitted limited additional discovery on the new allegations and claims raised in the amended pleading in accordance with the schedule set out in this Order. Permission to file the Fourth Amended Complaint shall not be construed as reviving any cause of action that has been dismissed by this decision and order.

#### **Motion for Sanctions-Motion Seq. 014**

The previous order of this Court partially granted Plaintiff's motion for sanction and directed Plaintiff to provide a "submission of every document included in Dia's production where it can clearly be established that the document was in the possession and control of Defendants (e.g., an email on which a Defendant was copied) and thus should have been, but was not, produced by Defendants." NYSCEF Doc. 452. Rather than submit the documents the Order required the Plaintiff to submit, Plaintiff submitted a list of documents. Defendants, however, contests that the list of documents Plaintiff submitted were in the possession and control of Defendants. Since Plaintiff did not follow the requirements of the interim order, the Court cannot determine the amount of sanctions and therefore denies setting an amount for sanctions.

Accordingly, it is hereby

ORDERED that Defendant’s motion for summary judgment is partially granted in that the first, second, third, fourth, and fifteenth causes of action are dismissed, and the motion is otherwise denied; and it is further

ORDERED that Plaintiff’s motion to amend is granted; and it is further

ORDERED that Plaintiff shall file its Supplemental and Fifth Amended Complaint within 7 days of the entry of this order; and it is further


ORDERED Defendant shall respond to the Supplemental and Fifth Amended Complaint within 20 days of its filing; and it is further

ORDERED that the Defendant shall have until December 17, 2023, to serve discovery demands limited to the new allegations and causes of action; and it is further

ORDERED that Plaintiff shall respond to those discovery demands on or before January 16, 2024; and it is further

ORDERED that the parties shall meet and confer regarding any disputes regarding the discovery and the parties shall appear on January 22, 2024, for a conference regarding the discovery and to set a schedule for any summary judgment motions regarding the new claims; and it is further

ORDERED that the motion for sanctions is denied.

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LYLE E. FRANK, J.S.C.

11/28/2023  
DATE

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT <input type="checkbox"/> REFERENCE