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

**PRESENT:** **HON. MELISSA A. CRANE** **PART** **60M**

*Justice*

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NIKOLAI FRAITURE, ILONA FRAITURE

Plaintiff,

- v -

BOARD OF DIRECTORS OF 44 KING STREET, INC.,44 KING STREET, INC.,

Defendant.

----------X

**INDEX NO.** 655152/2021

**MOTION DATE** 01/02/2024, 01/02/2024

**MOTION SEQ. NO.** 004 005

**DECISION + ORDER ON MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 004) 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 190, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 278

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277

were read on this motion to/for JUDGMENT - SUMMARY.

This action involves a co-op board's alleged favoritism, "misconduct and self-dealing" at a residential cooperative building located at 44 King Street in New York. Plaintiffs Nikolai and Ilona Fraiture are shareholders of the co-op, 44 King Street, Inc. ("co-op"). They allege that the Board of Directors of 44 King Street, Inc. (the "board") permitted other shareholders – nonparties Toby Dodd and Julie de Pontbriand (the "Dodds") – to "maintain illegal accommodations" at the plaintiffs' and the co-op's expense (*see generally* Doc 1 [complaint]).

Plaintiffs assert in the complaint that the 44 King board "resolved to split the parlor floor unit into two units" in 1985. This resulted in a "parlor front unit" and a "parlor rear unit." Those units have separate proprietary leases. They allege that three "illegal openings" were created in

the parlor rear unit. The nonparty purchasers of the parlor rear entrance, the Dodds, agreed to remediate the illegal openings by December 2019 when they signed the January 2019 undertaking and agreement. However, plaintiffs contend that the Dodds "have frustrated any attempt to bring the Parlor Rear Unit into compliance and the Board refuses to take any concrete action against them." Thus, they allege that "the Co-op has been exposed . . . to enormous liability," and the "safety of the entire building [is] at risk" (Complaint, Doc 1, at pg 2-3). Plaintiffs allege that "the Board permitted the illegal openings to exist to benefit the owner of the Parlor Rear Unit (and the Vice President of the Board) at the expense of the Co-op and its shareholders" (*id.*, para 51).

## Background

*The Combined Units Spanning Two Co-operative Buildings*

According to defendants, the 42 King "Parlor Floor Unit" was combined with the 44 King "Rear Garden Unit" in the 1980s (Doc 138, para 17 [Arnold aff.]). Openings in the party wall were created to join those two units (*id.*). Each unit remains the property of its respective co-operative, and each has a separate proprietary lease. Thus, "the owners of the[se] combined units [are and] have been shareholders in both respective corporations" (*id.*). A 44 King board resolution, dated December 9, 1985, approved the division of the "Parlor Floor Apartment" and provided for the allocation the divided unit's shares in new proprietary leases (Doc 145 [12/9/85 minutes]). The minutes divided the original 44 King Parlor Floor unit into two units consisting of: (1) "Front (467 share), Kitchen, Bathroom, Living room and Bedroom (South Room)"; and (2) "Back (127 shares) that space and room south and east of the Bathroom and Bedroom (South Room) of the Parlor Floor Apartment, with the Garden belonging thereto" (*id.*). The "Back" unit is also referred to as the "Rear Garden Unit."

*The Dodds' Purchase of the Combined Units and the Undertaking and Agreement – December 2018 – Present*

In January 2019, after the Dodds purchased the rear garden apartment at 44 King in December 2018, the co-op and the Dodds entered into an Undertaking and Agreement (the "Undertaking") (Doc 147). In the Undertaking, the co-op approved the Dodds' purchase "on condition that the Seller and Purchaser execute and comply with the terms set forth in [the Undertaking]" (*id.*). Specifically, the co-op and the Dodds agreed:

> "1. On or before December 31, 2019, the Party Wall Opening (as defined in Paragraph 58 of the Contract) between the Premises and the adjacent building at 42 King Street, New York, New York, shall be permanently bricked up and closed off, utilizing materials with the same thickness and durability as contained in the existing Party Wall.
>
> 2. All alteration plans and specifications shall be submitted to and approved by the Corporation prior to the commencement of any work required to satisfy the conditions set forth in Paragraph 1, supra.
>
> 3. (a) Two casement windows installed by Seller on the western-facing wall of the Rear Garden Apartment must be replaced with standard sash windows consistent with all others in the building, within six (6) months of the date hereof.
>
> (b) Provided that Purchaser is diligently prosecuting the work required in Paragraphs I and 3 supra, the deadlines for completion shall be subject to reasonable extension for delays directly attributable to the Corporation or delays by the New York City Department of Buildings not caused by Purchaser"

(Doc 147 [Undertaking]).

In addition, they agreed that: the board would have the "right to verify that the [party wall] closure" has been sealed and not reopened (*id.*, para 4); seller [nonparty John Schley] and/or the Dodds would cause an unauthorized subtenant to depart (*id.*, para 5), and that the co-op could terminate the Dodds' proprietary lease if the Dodds failed to cure a default under paragraphs 1-3 of the Undertaking (*id.*, para 6 [a]).

In support of MS 04, defendants rely on the affidavit of nonparty Jonathan Arnold, a former board member (treasurer) at 44 King (Doc 138 [Arnold aff]). He explains that the rear garden unit at 44 King was physically combined with the first-floor unit at 42 King in the 1980s. Since then, "the owners of the combined units have been shareholders in both respective corporations" (*id.*, para 17). The Dodds purchased those units in 2019. Arnold also states that after the Dodds' purchase, the board worked "collaboratively with the Dodds" to close the openings pursuant to the Undertaking (*id.*, para 20). The co-op retained an architect, Steven Michael Peterson Studios, and the Dodds retained their own architect (R.A. Stinson & Assocs.), as well as a consulting firm (Milrose Consultants).

Arnold explains the delays in securing the Dodds' compliance with their Undertaking obligations as follows: (1) "No significant work towards drafting plans [to close the openings], let alone performing construction work, could be performed until the [Dodds'] subtenant vacated the space, which occurred in or around the Fall of 2019" (*id.*, para 21); (2) the "project was put on hold" "shortly after Plaintiffs became shareholders in July 2019" because "Plaintiffs and the Dodds explored the possibility of Plaintiffs purchasing the Parlor Floor Rear Unit (without the rights to the garden)" (*id.*, para 22); and (3) "The unique circumstances of combined properties owned by two separate corporations presented practical and legal issues, which were complex, unforeseen and/or required significant analysis from Peterson, [the co-op's general counsel, Margaret] Baisley and the Dodds' architects and coding consultants" (*id.*, para 23).

It is undisputed that the Dodds did not comply with the terms of the Undertaking by the December 2019 deadline. Defendants' submissions establish the following timeline of events:

- **1/4/20** - A shareholders meeting was held on January 4, 2020 (Doc 148 [1/4/20 minutes]). "New Business" discussed at the meeting included a "Plan for the Rear Garden Apartment" and the "Party wall openings" (*id.*, para 4). The Dodds "presented on their work over the past year" (*id.*).

- **6/1/20** - The shareholders discussed the Undertaking at a meeting on June 1, 2020 (Doc 149 [first 6/1/20 meeting minutes]). "Toby [Dodd] agreed to brick up all three wall openings between 42 and 44 King Street buildings…with the caveat 'as long as it is legally possible.' " The Dodds weer "working on point #3, bricking up the openings" "Jonathan [Arnold] stated to [the Dodds] that the wall must be bricked up as stated in the [Undertaking] Agreement, and that something needs to be filed this week." The board directed the Dodds to submit plans to comply with the Undertaking by 6/15/20 (*id.*).

- **6/1/20** – Plaintiff Nikolai was elected the board's new president, and plaintiff Ilona was elected as the board's new secretary. Toby Dodd was elected vice president and Arnold was elected treasurer (Doc 150 [second 6/1/20 meeting minutes]).

- **6/8/20** - The Dodds submitted plans to the board by email (Doc 151). This included the Dodds' three proposed options to "legalize" the rear garden unit at 44 King: (1) "Brick up the 3 openings" and recombine the rear unit with the Fraitures' unit [after selling the unit without the garden]; (2) seal the openings and install an egress door through the front parlor floor unit; and (3) seal two of the three openings and install a fire-rated door between the two tax properties [required easement] (*id.*).

- **9/25/20** – The board held a vote to approve the Dodds' plans (Doc 154). Toby recused himself from the vote and the plaintiffs declined to recuse themselves. The plans were not approved. There was "1 in favor (with conditions), 2 opposed." "However all voting Board members stated that it can be carried if conditions related to compliance with the Undertaking and Agreement are met."

- **9/27/20** – The board sent a letter to the Dodds asking them to "submit plans that address the issue of the permanent closure of the Party Wall openings in accordance with the [Undertaking] Agreement." The board expressed its need for strict compliance with the Undertaking, "including but not limited to the permanent closure of the Party Wall openings and complete separation of the premises of 42 King St from 44 King St including all MEP and HVAC" (*id.*).

Thereafter, the Dodds' submitted revised plans and the board was unable to agree to approve those plans. Notably, the plaintiffs composed the board's majority that voted against, at times against the recommendations of the board's attorney (*see e.g.* Doc 165 [2/2/21 email]).

The board's attorney wrote to plaintiff Ilona:

> "[B]oth professionals retained by the cooperative corporation have opined that the plans are ready to be filed. You cannot deem the advice of these professionals 'inadequate' simply because you do not like our determinations. . . . The corporation cannot interfere with the contract or prevent the work from taking place to close up the wall if the shareholders have complied with their obligations. Repeated objections and accusations do not serve to move this project forward. My advice to the Board is to approve the filing of these plans, subject to the

> inspections you seek after the work is performed. There is no reason for further delay"

(*id.*).

Thus, it is clear that the board took little action to secure the Dodds' compliance with the Undertaking prior to or immediately after the December 2019 deadline. There are no board minutes from 2019 in the record. Nevertheless, the board plainly took at least some steps to address the Dodds' obligations under the Undertaking beginning in January 2020 (Doc 148). The record also demonstrates that the plaintiffs joined the board in June 2020 as president and secretary (Doc 150). In May 2022, the court ordered the parties to submit the plans to the Department of Buildings ("DOB") by May 31, 2022 (Doc 169 [5/4/22 order]). Arnold states in his affidavit that the wall openings were closed on the 42 King side in October 2022 (Doc 138, para 54-55), but "the Dodds had to return to the [44 King] Board to seek approval for replacing the windows and the additional work in/around the Parlor Floor Rear Unit" (*id.*, para 55). The Dodds submitted plans for that work in November 2022 and January 2023, but "Plaintiffs rejected those plans" (*id.*, para 56). Around March 2023, after Arnold's term ended, "Plaintiffs and the Board member who replaced [Arnold] caused the Board to serve a notice of default on the Dodds, seeking to terminate their Proprietary Lease for the Parlor Floor Rear Unit" (*id.*, para 58).

*The Complaint*

Eventually, in 2021, plaintiffs commenced this action. They asserted the following causes of action in their complaint: (1) Breach of fiduciary duty against the board, derivatively; (2) Request for permanent injunction against the board, derivatively; (3) Breach of fiduciary duty against the board, individually; (4) Breach of warranty of habitability against the co-op, individually; (5) Constructive eviction against the co-op, individually; (6) Declaratory judgment

[re: signatory rights] against the board, individually; (7) Access to books and records under BCL 624, etc.; (8)Attorneys' fees against the board and the co-op under the BCL; and (9) Attorneys' fees under the plaintiffs' proprietary lease.

Now, after completing discovery, defendants move for summary judgment in MS 04, and plaintiffs move for partial summary judgment in MS 05. Both motions are opposed.

**Discussion**

"The proponent of a summary judgment motion must make *a prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Silverman v Perlbinder*, 307 AD2d 230, 230 [1st Dept 2003]). The court must view the facts "in the light most favorable to the non-moving party" (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 503 [2012] [internal quotation marks and citation omitted]). If movant meets this prima facie burden, the burden shifts to the non-moving party to furnish evidence in admissible form sufficient to raise a triable issue of fact (*Alvarez*, 68 NY2d at 324). The party opposing a motion for summary judgment must "produce evidentiary proof in admissible form" (*Stonehill Cap. Mgmt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]). Mere conclusions, expressions of hope, allegations, or assertions are insufficient to raise a triable issue of fact (*Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]).

**Part I: Defendants' motion for summary judgment (MS 04)**

Defendants move for summary judgment dismissing the complaint in its entirety. Plaintiffs oppose the motion.

1. Plaintiffs' breach of fiduciary duty claims

In their first cause of action, plaintiffs assert a derivative breach of fiduciary duty claim against the co-op board. They contend:

> "The Board breached its fiduciary duty to the Co-op and its shareholders by, inter alia, (a) permitting and condoning the construction of the three openings in the party wall between 42 and 44 King; (b) permitting and condoning the construction of the illegal terrace that extends across the lot line between 42 and 44 King; (c) failing to enforce the Agreement requiring the Dodds to remediate the illegal conditions caused by the party wall and maintain a permanent separation between 44 and 42 King Street; (d) failing to enforce numerous Board resolutions requiring the Dodds to remediate the illegal conditions caused by the party wall; and (e) failing to require the Dodds to remediate the additional illegal conditions that exist in the Parlor Rear Unit, including, but not limited to, the existence of the Wall, the existence of the terrace that extends across the lot line, and the potential extension of mechanical, electrical and plumbing lines across the lot line between 42 and 44 King"

(Complaint, Doc 139, para 135).

Plaintiffs assert that the co-op and its shareholders have "suffered damages in the form of . . . the deterioration of the value of 44 King" as a result of those purported fiduciary duty breaches (*id.*, para 137). According to the complaint, the "three openings . . . in the party wall between 42 and 44 King that separated the parlor floor unit in 44 King from the adjacent unit in 42 King" were created "[s]ometime prior to 1985," more than two decades before this case was filed (*id.*, para 39).

Plaintiffs also assert a direct breach of fiduciary claim against the board in their third cause of action. In support of the direct claim, plaintiffs allege:

> "The Board breached its fiduciary duty to Plaintiffs by . . . (a) permitting the aforementioned illegal and dangerous conditions to exist in the Parlor Rear Unit, which has prevented Plaintiffs from moving into their home, and (b) failing to separate the electric meter for the Parlor Rear Unit and the Parlor Front Unit. . . . . . As a result . . . Plaintiffs have suffered damages in the form of[] . . . the substantial carrying costs they incurred while being unable to occupy their home and the cost of any excess utilities charges chargeable to the Parlor Rear Unit"

(*id.*, para 151-152).

*a. Threshold matters*

Preliminarily, defendants argue that the fiduciary duty claims must be dismissed because (1) the board, as an entity independent from the cooperative itself, is not a proper defendant, and (2) because the cooperative does not owe a fiduciary duty to its shareholders. Plaintiffs assert both their direct and derivative breach of fiduciary duty claims against only the board, not against the co-op.

"[A] plaintiff claiming to be aggrieved by decisions of a co-op board may not sue the board itself as an entity" because a co-op board is not a "juridical entity distinct from the cooperative itself" (*Stromberg v East Riv. Hous. Corp.*, 2023 NY Slip Op 23409 [Sup Ct, NY County Dec. 26, 2023] [noting that a co-op board "is neither a natural person, a government instrumentality nor a business corporation" so "it may not be served under CPLR 308, CPLR 311, CPLR 312, or BCL § 306"]). Instead, plaintiffs may sue the cooperative entity itself, or the board members directly, if warranted (*see id.*, citing BCL § 720 [authorizing actions "against one or more directors or officers of a corporation"] and *Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 57 [1st Dept 2012] ["(I)ndividual board members may be validly sued for breach of fiduciary duty if the complaint pleads independent tortious acts on the part of those individual directors."]; *see also* 19A N.Y. Jur. 2d Condominiums, Etc. § 164 [noting co-op boards owe a duty of loyalty to the cooperative such that the board must act for the benefit of the residents collectively]).

Nevertheless, some New York courts have permitted breach of fiduciary duty claims to proceed against cooperative boards named as defendants in place of individually named board members (*see e.g. Dau v 16 Sutton Place Apt. Corp.*, 205 AD3d 533, 536 [1st Dept 2022] [dismissing breach of fiduciary duty claims against the cooperative but denying the motion to

dismiss fiduciary duty claims against the board of directors because "the complaint sufficiently alleges, . . . that plaintiff was subject to unequal treatment with respect to her terrace"]).

It is well settled that "[t]he directors of the co-op owe a fiduciary duty to [the co-op's] shareholders, requiring the directors to act solely in the best interests of the shareholders" (*Bryan v W. 81 St. Owners Corp.*, 186 AD2d 514, 515 [1st Dept 1992]; *see also Tahari v 860 Fifth Ave. Corp.*, 214 AD3d 491, 492 [1st Dept 2023] ["even assuming that the cause of action was addressed to the actions taken by the individual board member defendants (instead of the cooperative itself), it does not allege any individual wrongdoing by the members of the board separate and apart from their collective actions' taken in their capacity as board members."]; *Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500, 500 [1st Dept 2018] ["It is well-settled that a breach of fiduciary duty claim does not lie against individual cooperative board members where there is no allegation of 'individual wrongdoing by the members . . . separate and apart from their collective actions taken on behalf of the cooperative."] [internal quotation marks and citation omitted]).

In any event, these arguments are largely academic. The board did not object to service at the outset of this action, and defendants declined to move to dismiss the complaint at the pleading stage. Plaintiffs fiduciary duty claims may proceed to the extent that they concern the acts of individual board members, and to the extent that alleged breaches occurred within three years of plaintiff's filing the complaint. There is a three-year statute of limitations for claims for breach of fiduciary duty seeking money damages (CPLR 214 [4]; *see Romanoff v Romanoff*, 148 AD3d 614, 616 [1st Dept 2017]).

Finally, defendants suggest in passing that plaintiffs lack standing to challenge many of the board decisions in the complaint, and that plaintiffs "cannot be heard to complain about the

Openings" because they had, or should have had, notice of the openings before buying their units (Doc 171 at 7 [def's mem, MS 04]). While the court may be inclined to agree, defendants do not establish that plaintiffs lack standing or are estopped from asserting that the board breached fiduciary duties to the co-op or to the plaintiffs, individually. In fact, defendants cite no cases relating to plaintiffs' standing, and cite just one case for *caveat emptor* (*id.*, citing *Glazer v LoPreste*, 278 AD2d 198, 198-199 [2d Dept 2000] [dismissing a case where "plaintiffs sought damages allegedly resulting from their purchase of a home located across the street from the home of a convicted sex offender]).

*b. Business judgment rule*

Defendants next argue that the breach of fiduciary duty claims must be dismissed because the challenged decisions are protected by the business judgment rule ("BJR").

The business judgment rule "applies to decisions of residential-cooperative boards [and] requires a court to defer to board determinations '[s]o long as the board acts for the purpose of the cooperative, within the scope of its authority, and in good faith' " (*Weinstein v Board of Directors of 12282 Owners' Corp.*, 71 Misc 3d 1209(A) [Sup Ct, NY County 2021] [internal citations omitted] [second alteration in original]; *see also Jones v Surrey Co-op. Apartments, Inc.*, 263 AD2d 33, 36 [1st Dept 1999] ["without a showing of a breach of fiduciary duty to the corporation, judicial inquiry into the actions of corporate directors is prohibited, even though 'the results show that what [the directors] did was unwise or inexpedient' (internal citations omitted)]).

As discussed above, defendants assert that the delay in enforcing the Undertaking was due, at least initially, to: (1) removing the Dodds' subtenant ["No significant work towards drafting plans [to close the openings] . . . could be performed until the subtenant vacated the

space[] . . . in or around the Fall of 2019" (Doc 138, para 21 [Arnold aff.]); (2) the "project was put on hold" around "July 2019" because "Plaintiffs and the Dodds explored the possibility of Plaintiffs purchasing the Parlor Floor Rear Unit" (*id.*, para 22); and (3) the project presented "unique" and "complex" circumstances (*id.*, para 23).

Defendants have not established prima facie entitlement to summary judgment dismissing the breach of fiduciary duty claims. Defendants' submissions fail to eliminate all issues of fact regarding the period between the parties' execution of the Undertaking and the December 2019 compliance deadline. Indeed, defendants' submissions seem to establish that almost nothing was done in connection with the Dodds' obligations in the Undertaking until *after* that December 2019 deadline had passed (*see e.g.* Doc 148 [1/4/20 minutes] [noting that the Dodd's "presented on their work over the past year" for the first time on 1/4/20, after the December deadline]).

*c. Damages*

Defendants assert that plaintiffs' breach of fiduciary duty claims must be dismissed because plaintiffs cannot establish that they have sustained any actual damages as a result of the board's conduct. While the court is skeptical that plaintiffs will be able to prove damages at trial, defendants have not submitted sufficient proof to establish prima facie entitlement to summary judgment dismissing these two claims. With regard to the direct claim, defendants argue that the "Plaintiffs' unreasonable exercise of their [post-June 2020] control of the Board in refusing to approve the plans prevented the work from being done" (Def's mem supp, Doc 171 at 11). However, defendants do not eliminate all triable issues of fact as to damages that plaintiffs may have incurred before June 2020. Likewise, even if the Dodds' January 2021 and later plans would have resolved issues with the electrical and plumbing systems, defendants' evidence ignores damages that plaintiffs may have incurred prior to the Dodds' submission of plans.

Defendants' evidence, comprised mainly of Arnold's affidavit and documents post-dating the Undertaking's December 2019 deadline, are simply not enough.

Defendants also argue that the units are habitable because prior unit owners resided in them, and that there is "no merit to Plaintiffs' claim [] that the DOB would not have approved Plaintiffs' renovation plans until the Openings were closed" because "other shareholders performed alterations when the Openings existed" (Doc 171 at 11-12). That other shareholders resided in the units previously is not dispositive, and the fact that the Dodds' performed work on the 42 King side does not mean that plaintiffs' would have been able to perform work on the 44 King side. Even if defendants established their prima facie case with respect to these arguments, the plaintiffs raise triable issues of fact by submitting their architects' affidavits (Docs 230-231).

Accordingly, defendants' motion is denied with regard to the breach of fiduciary duty claims.

2. Plaintiffs' breach of warranty of habitability claim

A proprietary lease is entitled to the statutory protections of RPL § 235-b (1). RPL § 235-b (1) provides that:

> "In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants or residents are **fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety**. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warrants."

Defendants' submissions fail to eliminate all triable issues of fact with respect to this claim. Again, the court is skeptical that plaintiffs will be able to meet their burden of demonstrating that the units are unsafe or unusable at trial, but defendants have not met their

burden on this motion. There are at least issues of fact as to whether and to what extent the housing code violations may constitute a breach of the implied warranty of habitability.

3. Plaintiffs' constructive eviction claim

"A constructive eviction occurs when a tenant, though not physically barred from the area in question, is unable to use the area for the purpose intended. Where eviction is constructive, breach of the covenant of quiet enjoyment does not require a physical ouster. Rather, a showing of abandonment of the premises under pressure is sufficient" (*Dinicu v Groff Studios Corp.*, 257 AD2d 218, 224 [1st Dept 1999] [citations omitted]; *see also At The Bar, LLC v 622 W 47 LLC*, 2016 NY Slip Op 32439[U], *8-9 [Sup Ct, NY County 2016] ["Constructive eviction occurs when there is a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises."]).

Again, defendants have not established their prima facie entitlement to this claim. They do not dispute that plaintiffs have not performed planned renovation work and have not moved into their units. There are issues of fact as to whether and to what extent the housing code violations may constitute a dangerous condition that might extend to plaintiffs' constructive eviction claim. Further, the court disagrees with defendants that plaintiffs did not take possession of the units and, therefore, cannot be said to have abandoned them.

4. Plaintiffs' declaratory judgment claim

Defendants argue that the declaratory judgment claim seeking to name Nikolai a co-op bank signatory is moot because he is a signatory already. Plaintiffs confirm that Nikolai "was . . . awarded signatory rights on the Co-op's bank accounts after this litigation was initiated" (Doc 259). Although plaintiffs would be entitled to a declaratory judgment that Nikolai is entitled to

be a signatory, plaintiffs have not moved for summary judgment awarding them this declaration (*see* discussion of MS 05, *infra*). This claim is now dismissed as moot.

5. Plaintiffs' BCL § 624 claim

Defendants assert that plaintiffs' BCL § 624 claim seeking the co-op's books and records is moot because plaintiffs have obtained all existing books and records relating to the co-op through discovery. In a footnote in their opposition memorandum, plaintiffs assert that "numerous documents are still missing and as such, relief under BCL 624 is still needed" (Plaintiffs' mem opp, Doc 259 at 22 n7). In his affidavit, plaintiff Nikolai Fraiture states that "Plaintiffs never received access to any minutes for 1982-84, 1992, 1994-95, 1997-98, 2000, 2002-2009, and 2011-2013" (Doc 229, para 7). In reply, defendants contend that "those documents were not produced because they do not exist and/or are not in the [defendants'] possession," "[a]s Defendants represented in discovery" (Defendants' reply mem, Doc 278 at 13).

Obviously, plaintiffs are entitled to the co-op's books and records as shareholders and board members. To the extent that defendants have produced all of the books and records in their possession, the claim is moot. If not already done, defendants must serve *Jackson* affidavits explaining the circumstances surrounding any missing, lost, destroyed, or nonexistent books and records by June 3, 2024. Unless defendants fail to serve these *Jackson* affidavits, plaintiffs' BCL § 624 cause of action is dismissed.

6. Plaintiffs' permanent injunction claim

Defendants have not established prima facie entitlement to judgment as a matter of law dismissing the permanent injunction claim. There are issues of fact as to whether there are illegal or dangerous conditions at the building that cannot be resolved on this motion.

7. Plaintiffs' causes of action seeking attorneys' fees

The court declines to grant defendants' motion for summary judgment dismissing plaintiffs' request for attorneys' fees. Defendants' motion to dismiss the request for fees is premature.

**Part II: Plaintiffs' Motion for Partial Summary Judgment (MS 05)**

Plaintiffs move for partial summary judgment seeking: (1) judgment on liability for the breach of fiduciary duty claims; (2) judgment on liability for the breach of warranty of habitability claim; (3) an award of attorneys' fees in an amount to be determined; and (4) dismissal of defendants' affirmative defenses.

For the same reasons stated above in connection with defendants' motion, plaintiffs are not entitled to summary judgment on the issue of liability for their breach of fiduciary duty claims. Plaintiffs' submissions in support of this motion – specifically, Nikolai Fraiture's affidavit and the annexed exhibits -- do not eliminate all triable issues of fact as to whether plaintiffs have sustained damages as a result of the alleged breaches. Plaintiffs have also failed to establish that the challenged decisions are not entitled to deference under the business judgment rule, for example, by demonstrating that the decisions were made in bad faith. Even if plaintiffs had established their prima facie case, defendants' submissions would raise triable issues of fact, precluding summary judgment.

Notably, as discussed above, plaintiffs are barred from seeking damages as a result of alleged breaches occurring more than three years before this action was filed because there is a three-year statute of limitations for breach of fiduciary duty claims seeking money damages. Plaintiffs cannot make this case about the board's decisions in the 1980s.

Likewise, plaintiffs have not established their prima facie entitlement to judgment on liability for their breach of the implied warranty of habitability claim. There are issues of fact as to whether there is a dangerous condition that has actually prevented plaintiffs from residing in their units. Unlike their opposition to defendants' motion, plaintiffs did not submit their architects' affidavits in support of plaintiffs' partial summary judgment motion. In any event, even if plaintiffs had met their burden, defendants' submissions would raise an issue of fact.

Plaintiffs' motion is denied is with respect to attorneys' fees as that determination is premature at this juncture.

Finally, defendants' first affirmative defense for failure to state a cause of action is dismissed. Plaintiffs have stated a cause of action to the extent that these claims will proceed to trial. Moreover, defendants declined to move to dismiss at the pleading stage. However, the court declines to dismiss defendants' affirmative defenses.

**Part III: Conclusion**

For the reasons stated above, defendants' motion for summary judgment [MS 04] is granted in part and plaintiffs' sixth and seventh causes of action for a declaratory judgment and for books and records pursuant to BCL § 624 are dismissed. Defendants' motion is otherwise denied in all respects.

Plaintiffs' motion for partial summary judgment [MS 05] is granted in part to the extent that defendants' first affirmative defense is dismissed. Plaintiffs' motion is otherwise denied in all respects.

The court has considered the parties' remaining contentions and finds them unavailaing.

Accordingly, it is

ORDERED that Motion Seq. No. 04 is granted in part, and the sixth and seventh causes of action in the complaint are dismissed. Defendants' motion for summary judgment is otherwise denied; and it is further

ADJUDGED that plaintiffs are not entitled to a declaration stating that Nikolai Fraiture is entitled to signatory rights on the Co-op's accounts because he is already has those signatory rights; and it is further

ORDERED that Motion Seq. No. 05 is granted in part, and defendants' first affirmative defense is dismissed. Plaintiffs' partial summary judgment motion is otherwise denied; and it is further

ORDERED that there shall be no further motion practice without a pre-motion conference; and it is further

ORDERED that the parties must appear for a pretrial conference over Microsoft Teams on 6/5/24 at 12:00 p.m.

5/14/2024
DATE

MELISSA A. CRANE, J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | | CASE DISPOSED | | | X | NON-FINAL DISPOSITION | |
| | | GRANTED | | DENIED | X | GRANTED IN PART | OTHER |
| APPLICATION: | | SETTLE ORDER | | | | SUBMIT ORDER | |
| CHECK IF APPROPRIATE: | | INCLUDES TRANSFER/REASSIGN | | | | FIDUCIARY APPOINTMENT | REFERENCE |