

**Gilbert v Winston**

2024 NY Slip Op 34088(U)

November 19, 2024

Supreme Court, New York County

Docket Number: Index No. 650374/2023

Judge: Andrew Borrok

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SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 53

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STEPHEN GILBERT, DINO MARCANTONIO, LIANA MOUNT, NEIL RIFKIND,

Plaintiff,

- v -

BRADFORD WINSTON, KARYN BECK, CURT GOLDMAN, ROBERT I. GOLDY, BARBARA HAYES, RICHARD HUNNINGS, RICHARD LEIBNER, ANITA MCDONAGH, SIGRID STROPNIK, PARC VENDOME CONDOMINIUM,

Defendant.

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**INDEX NO.** 650374/2023  
**MOTION DATE** 11/10/2023, 10/29/2024  
**MOTION SEQ. NO.** 003 009

**DECISION + ORDER ON MOTION**

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 112, 114, 134, 135, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 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, 280

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

The following e-filed documents, listed by NYSCEF document number (Motion 009) 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, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 281

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

Upon the foregoing documents, Stephen Gilbert, Liana Mount, and Neil Rifkind (the **Unit Owners**)’ motion for summary judgment (Mtn. Seq. No. 003) is GRANTED,<sup>1</sup> and the defendants’ motion for summary judgment (Mtn. Seq. No. 009) is DENIED.

<sup>1</sup> Dino Marcantonio voluntarily discontinued his claims (NYSCEF Doc. No. 171, at 8).  
**650374/2023 GILBERT, STEPHEN ET AL vs. WINSTON, BRADFORD ET AL**  
**Motion No. 003 009**

Reference is made to an underlying lawsuit (the **Underlying Lawsuit**) captioned *Parc 56 LLC v. Board of Managers of Park Vendome Condominium*, 217 AD3d 416, 419 [1st Dept 2023]). The facts were discussed extensively in the Underlying Lawsuit. Familiarity is presumed.

In the Underlying Lawsuit, the Appellate Division held that board's bad faith conduct and breaches of the condominium documents and the settlement agreement permeated the record warranting striking the defendants' answer:

Order, Supreme Court, New York County (Andrew S. Borrok, J.), entered on or about June 9, 2022, which, to the extent appealed from, granted plaintiff's motion for partial summary judgment to the extent of deeming the January 28, 2021 form alteration agreement to have been accepted by defendant Board of Managers of the Parc Vendome Condominium (the board) and found that the board had acted in bad faith, unanimously affirmed, with costs. Order, same court and Justice, entered on or about October 25, 2022, which, to the extent appealed from, granted defendants' motion for leave to reargue plaintiff's motion for partial summary judgment, and upon reargument, searched the record and granted summary judgment in plaintiff's favor, granted plaintiff's cross-motion to strike defendants' answer, denied defendants' motion to strike the complaint or compel discovery, and granted plaintiff's motion to hold defendants in civil contempt, unanimously modified, on the law, to deny plaintiff's motion for contempt, and otherwise affirmed, without costs. Appeal from the part of the aforementioned October 2022 order that denied nonparty Elizabeth Schrero, Esq.'s motion to quash a subpoena, unanimously dismissed, without costs, as moot.

The motion court properly determined that defendant board was bound by the January 28, 2021 alteration agreement signed by plaintiff. Contrary to defendants' contention that a writing signed by both parties is required, the condominium declaration article 18 (b), expressly states the opposite—that the board's failure to respond to plaintiff “within the stipulated time shall mean that there is no objection to the proposed modification or alteration.” Here, the alteration agreement was provided to plaintiff by the board's managing agent, plaintiff returned the signed agreement and requested that the prior owner's alteration fee be applied under the terms of the assignment of the rights and obligations for the unit, and the board reviewed the proposed alterations for several months before informing plaintiff that a different alteration agreement was required. By that point, however, the board had exceeded the time permitted to object under the declaration, and the alteration agreement was binding (*see e.g. Lerner v Newmark & Co. Real Estate, Inc.*, 178 AD3d 418, 420 [1st Dept 2019]).

Contrary to defendants' contention, the requirement in the easement between plaintiff's predecessor and the board that any alteration agreement must be approved by the board is

not violated because the January 28, 2021 alteration agreement was deemed approved under the declaration when defendants failed to object within 30 days. The motion court reasonably took into account that the parties continued to exchange comments on plaintiff's plans and specifications and properly deemed the November 4, 2021 plans and specifications as binding, as the board refused to respond to those documents until July 21, 2022, when its architects asserted for the first time that the New York City Department of Building (DOB) filings relating to the ministerial change in use set forth in the certificate of occupancy (CO) could not be filed until all of the plans and specifications had been approved, despite the board's approval of this exact same use in 2008. ***Defendants' bad faith in this regard is further underscored by the board's assertion that it has no obligation under the business judgment rule to agree to a ministerial change to the CO, despite the fact that the settlement agreement prohibits the board from unreasonably withholding its consent to approvals*** (see e.g. *Silver v Murray House Owners Corp.*, 126 AD3d 655, 655 [1st Dept 2015]).

The motion court also properly determined that the board improperly conflated the requirements relating to the work in plaintiff's predecessor's alteration agreement with plaintiff's proposed amendment to the CO, which the board's experts acknowledge could be accomplished by the board's consent to ministerial "no work" DOB filings, including the PW-1 form sought by plaintiff. ***The record reflects that this same change to the CO was already approved by the board in 2008 for plaintiff's predecessor.*** These facts also directly contradict the statement by defendants' counsel obfuscating the board's authority to consent to a change of the CO. That the material change in the alteration agreement sought by the board was a provision requiring plaintiff to cover all costs associated with the change in use, including building-wide upgrades to the grandfathered-in prior nonconforming conditions outside the health club unit, is indicia of the board's bad-faith position, as the court warned in its February 24, 2022 order. Thus, the motion court properly determined that the governing documents did not require plaintiff to indemnify the board for its costs, expenses, and attorneys' fees relating to the change in use in the CO, and none of the documents binding the parties required a blanket indemnification of every cost incurred as a result of the CO amendment.

The motion court also properly determined that ***the board violated the bylaws and the settlement agreement with plaintiff's predecessor by unreasonably withholding and delaying its waiver of the right of first refusal with respect to plaintiff's lease with its prospective tenant.*** Under article XIII, section 2 (C) (ii) of the bylaws, the board had 30 business days to exercise or waive its right of first refusal, or to seek additional information. The board raised numerous cavils to the form of lease presented by plaintiff, which arguably it was permitted to do, although these objections were not based on any good-faith interpretation of the declaration, bylaws, or any other agreements. What the board was not permitted to do, however, was to refuse to waive or exercise the right of first refusal well beyond the duration set forth in the bylaws based on its own unreasonable refusal to execute the documents to permit the ministerial change to the CO that its experts had already approved, and indeed, the board had approved for plaintiff's predecessor in 2008. Thus, the motion court correctly determined that the board's failure to act within the bylaw's timeframe constituted a waiver of its right of first refusal.

The court's finding of bad faith that warranted striking defendants' answer was conclusively established throughout the record (*see e.g. CDR Créances S.A.S. v Cohen*, 23 NY3d 307, 318 [2014]). As the motion court determined as early as February 2022, ***the board's refusal to consent to a change in the CO to a use that the board had approved in 2008 was unjustified, bad-faith conduct, and was further exacerbated when the board's attorney frivolously asserted that the board could not exercise or waive the right of first refusal until it decided whether or not to approve the change in the CO***, which it was refusing to do. ***In addition to the above frivolous legal positions***, the court properly determined that ***defendants misled the court by*** evasively denying the existence of plaintiff's predecessor's \$10,000 alteration fee, and ***by insisting that the obligations the board sought to impose on plaintiff were taken from the governing documents, when in fact, defendants took that language directly from a provision in an unadopted eighth amendment to the declaration***. That the board violated the express terms of the settlement agreement by refusing to allow plaintiff to install its HVAC unit on the roof is further indicia of bad faith. Thus, the court was warranted in striking defendants' answer, and upon granting defendants' motion for reargument, granting summary judgment to plaintiff (*see* CPLR 3212 [b]).

We modify, however, to deny plaintiff's motion for contempt, as it does not appear that defendants were unequivocally ordered to sign the PW-1 form in the February 2022 rulings or in the June 2022 order. Although the June 2022 order expressly determined that the January 28, 2021 alteration agreement was binding upon the parties, the order contained no "unequivocal mandate" that defendants take any particular action (*see e.g. El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]).

Because we find that the award of summary judgment disposing of the action in plaintiff's favor was proper, the appeal by nonparty Schrero seeking to reverse that part of the October 25, 2022 order denying her motion to quash the subpoena ad testificandum served on her is moot, as is defendants' appeal of that part of the order seeking to compel discovery or for sanctions against plaintiff (*see e.g. Matter of Verdugo*, 202 AD3d 451, 452 [1st Dept 2022]).

(*Parc 56, LLC v Bd. of Managers of Parc Vendome Condominium*, 217 AD3d 416, 419 [1st Dept 2023] [emphasis added]).

As relevant, and as set forth above, among other things, the Underlying Lawsuit involved the board's bad faith attempt to require the Parc 56, LLC owner (the **Unit Owner**) to agree to certain obligations which they falsely claimed were required by certain "governing documents" when in

fact they were not (as discussed in the Underlying Lawsuit and below). To wit, the board had circulated an eighth amendment to the condominium declaration (*see, e.g.*, Index No. 653550/2021, NYSCEF Doc. Nos. 227 and 229-231) which contained the requirements that the board attempted to hoist on the Unit Owner, but which the unit owners had previously not approved. This they concealed from the Unit Owner and the Court. They also concealed other things too like the whereabouts of the Alterations Fee.

Now, in this lawsuit, the unit owners seek to have the board members pay for the costs and damages caused by their many bad faith breaches of fiduciary duty and to prevent them from imposing those costs and damages on the plaintiff unit owners through assessment or otherwise.

To establish a breach of fiduciary duty, the plaintiff must demonstrate (i) the existence of a fiduciary duty, (ii) misconduct by the other party, and (iii) damages caused by that misconduct (*Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]).

It is beyond dispute that (i) the defendant board members owed fiduciary duties to the condominium and the unit owner plaintiffs (*Caprer v Nussbaum*, 36 AD3d 176, 189 [2d Dept 2006]), and (ii) the cost incurred in the many frivolous positions taken (a) in the Underlying Lawsuit (including but not limited to both the costs in defending the Underlying Lawsuit and the damages actually awarded) and (b) with the Unit Owner otherwise damaged the unit owner plaintiffs.

In support of its motion, the plaintiff unit owners argue that the defendant board members are collaterally estopped from relitigating their breach of fiduciary duties (*Buechel v Bain*, 97 NY2d 295, 304 [2001]). In their opposition papers, the defendant board members (many of whom adduced affidavits in the Underlying Lawsuit [*see, e.g.*, NYSCEF Doc. Nos. 71, 72, 74, 76, 79], sent out letters or otherwise individually approved of or participated in the condominium's tort) attempt to distance themselves from the actions that they took, participated in, or otherwise ratified, arguing that their participation in the action taken by the board cannot be attributed to them individually as a basis to impose liability on them and that they are not collaterally estopped from relitigating the propriety of their conduct. More specifically, as to their conduct, some say they did not go to board meetings (that they either should have gone to or otherwise were required to do appropriate due diligence about to ensure that they exercised due care) or that they relied on advice of counsel (*see* NYSCEF Doc. Nos. 273-278) and that the unit owner plaintiffs should have to pay for their frivolous, unauthorized and unlawful conduct. As discussed below, they are not right.

As the Court of Appeals has observed:

The equitable doctrine of collateral estoppel is grounded in the facts and realities of a particular litigation, rather than rigid rules. Collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue raised in a prior action or proceeding and decided against that party or those in privity (*Ryan v. New York Tel. Co.*, 62 NY2d 494, 500). The policies underlying its application are avoiding relitigation of a decided issue and the possibility of an inconsistent result (*D'Arata v. New York Cent. Mut. Fire Ins. Co.*, 77 NY2d 659, 664). Two requirements must be met before collateral estoppel can be invoked. There must be an identity of issue which has necessarily been decided in the prior action and is decisive of the present action, and there must have been a full and fair opportunity to contest the decision now said to be controlling (*see, Gilberg v. Barbieri*, 53 NY2d 285, 291). The litigant seeking the benefit of collateral estoppel must demonstrate that the decisive issue was necessarily decided in the prior action against a party to be precluded from relitigating the issue bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior

determination. The doctrine, however, is a flexible one, and the enumeration of these elements is intended merely as a framework, not a substitute, for case-by-case analysis of the facts and realities. "In the end, the fundamental inquiry is whether relitigation should be permitted in a particular case in light of fairness to the parties, conservation of the resources of the court and the litigants, and the societal interests in consistent and accurate results. No rigid rules are possible, because even these factors may vary in relative importance depending on the nature of the proceedings" (*see, Staatsburg Water Co. v. Staatsburg Fire Dist.*, 72 NY2d 147, 153 [citations omitted]).

(*Buechel*, 97 NY2d at 304). Applying these principles, the defendants are barred from now once again litigating whether they acted in good faith or otherwise breached their fiduciary duties in the manner in which they conducted themselves in the Underlying Lawsuit and with respect to the Unit Owner.

*Tuper v. Tuper*, 34 AD3d 1280, 1282 (4th Dept 2006) and the other cases relied upon by the defendants do not suggest a different result. In *Tuper*, co-trustee of the Tuper Living Trust Patricia Tuper asserted the affirmative defense of breach of fiduciary duty in a lawsuit brought by co-trustee of the Tuper Living Trust (and her ex-husband) Kenneth Tuper where certain breach of fiduciary duty and breach of contract claims were brought. The Tupers had been married and during the course of their marriage they had acquired certain real estate and deeded that real estate to a trust and agreed pursuant to a certain agreement that the real estate would be jointly held. Before the trustee lawsuit was brought, Ms. Tuper had brought a lawsuit as an individual against Mr. Tuper seeking a divorce and partition. In that action, she moved for partition of the real estate and the trial court granted her motion for summary judgment and denied Mr. Tuper's cross-motion for dismissal. On appeal, the Appellate Division affirmed. In response to the judgment, Ms. Tuper brought a motion seeking enforcement and Mr. Tuper cross-moved to amend his answer to assert certain defenses and counterclaims including that she breached her fiduciary duties as a co-trustee. The trial court denied the cross-motion. Mr. Tuper

did not appeal. Subsequently, Mr. Tuper as co-trustee sued alleging breach of fiduciary duty. The trial court granted Ms. Tuper's motion to dismiss based on the affirmative defenses of res judicata and collateral estoppel. The Appellate Division reversed, reasoning (i) the partition action involved Ms. Tuper in her individual capacity and the instant action involved alleged breaches in as her capacity as trustee, (ii) because the partition action involved her individually and not as trustee where the interests were not represented in their prior action, she as trustee was not a "party in privity" with her personal lawsuit against her ex-husband (indeed her interests conflicted), and (iii) the denial of the cross-motion to amend was not an adjudication on the merits on the issue of the alleged breaches.

The case in front of this Court and the Underlying Lawsuit does not present the same dichotomy of identity, lack of commonality of interest and lack of adjudication on the merits on the same or similar causes of action. The Underlying Lawsuit put the defendant board members' conduct directly at issue in front of this Court (including on the motions for summary judgment and on the motions seeking reargument) when it found that the board had acted without authority (in violation of the condominium governing documents and in breach of the settlement agreement), in bad faith and in a manner in which the unit owners had expressly not approved. Thus, *Tuper* is inapposite and application of the doctrine of collateral estoppel is appropriate.

Even if the defendants were not collaterally estopped from relitigating the issue as to their conduct, the plaintiffs in this case would nonetheless be entitled to summary judgment on the record before the Court.

On a motion for summary judgment, the movant 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 issue of fact (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). Failure to make such a showing requires a denial of the motion, regardless of the sufficiency of the opposing papers (*id.*). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish the existence of material issues of fact requiring trial (*id.*).

It is bedrock that individual board members may be held liable where they have participated in the corporation's tort or otherwise acted in bad faith in the discharge of their duties (*Fletcher v Dakota, Inc.* 99 AD3d 43 [1st Dept 2012]; *Tahari v 860 Fifth Ave. Corp.*, 214 AD3d 491[1st Dept 2023] [holding that the breach of fiduciary duty claim against Chin Dussich and Joseph Dussich was properly stated in overcoming the business judgment rule because the defendants were alleged to have not acted in good faith and in furtherance of proper corporate purpose]; *Graham v 420 E. 72nd Tenants Corp.*, 168 AD3d 568, 568 [1st Dept 2019] [holding that because the complaint did not allege individual defendant's participation in the board's wrongdoing, no claim can be asserted against the individual defendants]).

The record before the Court and the findings of fact and the affidavits adduced in the Underlying Lawsuit (including the many examples discussed by the Appellate Division) which these defendants participated in or otherwise ratified establish multiple bad faith breaches of fiduciary duty by these defendant board members.

Indeed, the extent of the Board's breach and bad faith was partially described in Mr. Davis's affidavit offered in the Underlying Lawsuit. In particular, with respect to the proposed Eighth Amendment and governing documents charade, Mr. Davis explained:

10. As the Court is well aware, one of the key issues with respect to the Board's refusal to acknowledge that the January 28, 2021 Alteration Agreement was binding was that it did not contain any obligation requiring Parc 56 to broadly absorb the cost for building-wide common element improvements that the DOB might require even if those improvements have nothing to do with Parc 56's Unit, its particular desired use, or the amendment of the CO. (*See, e.g.*, NYSCEF#126 at 2). Plaintiff had repeatedly confirmed that it (i) is bound by the terms of the 2016 Alteration Agreement and Easement Agreement (NYSCEF#158 ¶ 58; NYSCEF#140 at ¶¶ 14-15); and (ii) "will comply with every single one of its obligations under the Condominium Documents without offset or limitation of any kind, at its sole expense," but disagreed with Defendants' willfully overbroad interpretation of the Governing Documents and would not agree to "take on the extra-contractual obligations demanded by the Board as a condition to the Board's approval of the change of use, which Plaintiff is clearly entitled to under the Settlement Agreement and Condominium Documents." (NYSCEF#7 at ¶ 56; NYSCEF#60 at ¶ 54).
11. Defendants and their counsel have insisted from the beginning of this dispute that Parc 56 broadly agree to absorb costs having nothing to do with its Unit, its particular use, or the Change in the CO. (*See, e.g.*, Ms. Schrero's March 16, 2021 letter (NYSCEF#69); Ms. Schrero's April 20, 2021 letter (NYSCEF#72 ¶¶ 2(a) and (c)). Defendants continued to insist that Plaintiff broadly absorb these costs throughout this lawsuit. *See, e.g.*, Board's Proposed Alteration Agreements (NYSCEF#131 at ¶ 2.2.17(a); NYSCEF#146 at ¶ 2.2.14(k)). Defendants and their counsel have repeatedly represented to this Court that these were "**clear**" "existing obligations" under the Declaration and By-Laws, the 2016 Alteration Agreement, and the Easement Agreement.
12. Throughout her Affidavit dated February 21, 2022 (NYSCEF#130), Ms. Schrero represented that this was a "clear obligation" under the Governing Documents. (*Id.* ¶¶ 6-7, 44). According to Ms. Schrero: "each and every condition outlined in [her March 16, 2021] PW-1 Letter **contained terms that Plaintiff is already bound to adhere to under the Governing Documents and binding agreements.**" (NYSCEF#130 ¶ 13; emphasis added). Ms. Schrero also represented that "the conditions set forth [in her April 20, 2021 letter] **are consistent with Plaintiff's existing obligations.**" (*Id.* ¶ 16; emphasis added). Ms. Schrero further conceded that she prepared the Board's proposed new alteration agreement, which she contended contained "**terms . . . taken from the prior agreements**" and that:

. . . Plaintiff's main gripe was the Board's insistence that Plaintiff "take on the obligation to pay for building-wide common element improvements that the Department of Buildings might require as a by-product of the proposed change of use and redevelopment of the Health Club unit." (Meister Seelig Letter, dated

December 27, 2021, annexed hereto as Exhibit B) (emphasis added). **This is precisely the issue that arose in initial discussions with Plaintiff back in March and April 2021. The impact may be minimal or great, but it is the Unit Owner’s responsibility to pay for.** (Id. ¶¶ 35-37; emphasis added).

13. Mr. Winston also represented to the Court in his Affidavit dated October 20, 2021 (NYSCEF #109) that: “the Governing Documents and contractual agreements that are binding upon Plaintiff **require** that it cover the costs of **any** impacts to the building that result from its proposed change of use and proposed amendment of the CO. Contrary to Plaintiff’s contentions, the Board has only requested that Plaintiff accept those **existing obligations.**” (*id.* ¶ 8; emphasis added); see also *id.* ¶¶ 10, 62, 72-73).
14. As noted above, the Board initially argued to this Court that the basis for its position that Parc 56 was broadly “obligated” to absorb costs having nothing to do with its Unit, its particular use, or the Change in the CO stemmed from the provisions in the Seventh Amendment (drafted by its counsel, Ms. Schrero) governing future responsibilities in the event that the Unit was to be converted to New Residential Units (which Parc 56 is concededly not doing, and which are thus, not applicable). (NYSCEF#32 ¶¶31-34). What we have recently uncovered is unequivocal evidence that the Board and its counsel, Ms. Schrero, KNEW the existing Condominium Documents did not require a unit owner to pay for unrelated common area improvements. We know this because we uncovered an attempt by the Board and Ms. Schrero back in 2017 to have this concept and clearer language included in a Proposed Eighth Amendment to the Condominium Declaration that failed to get adopted by the Unit Owners!
15. Through a deep search of the Condominium’s Building Link online document repository for all Unit Owners that I recently conducted, I discovered shocking new evidence – that was never produced by Defendants in discovery or disclosed in any of their numerous Court filings – that **not only did the broad alleged “existing obligation” to absorb all costs for common element improvements even if those improvements, have nothing to do with Parc 56’s Unit, that Winston and Schrero represented to the Court were “clear” not exist, but that years earlier they had expressly attempted to amend the Declaration and By-Laws to “clarify” these “obligations”, and that the proposed amendment was never adopted by the necessary super-majority of the Unit Owners despite the efforts of Mr. Winston, the Board, and Ms. Schrero.**
16. Specifically, Parc 56 has now learned that in 2017 Defendants and their counsel, Ms. Schrero, prepared and proposed that the Unit Owners vote to adopt an “Eighth Amendment to Declaration of Condominium” (the “Proposed Eighth Amendment”) for the purpose of making certain “clarifications” to the Declaration and By-Laws “designed to protect the Condominium **by clarifying key definitions and responsibilities**, thereby reducing the likelihood of disputes regarding obligations, **and fairly allocating costs and expenses to Unit Owners who cause those costs or expenses to be incurred.**” See letter dated June 17, 2021 Mr. Winston sent to all of the Unit Owners regarding the Proposed Eighth Amendment I found on the Condominium’s Building Link online document repository for all Unit Owners attached as **Exhibit A** (emphasis added).

17. According to Mr. Winston's June 17, 2021 letter to the Unit Owners, the Board's "Proposition" to amend the Declaration and By-Laws:

. . . clarifies certain provisions in the Declaration and Bylaws relating to definitions of "common elements", "limited common elements", **the parties responsible to maintain, repair and alter common elements and limited common elements and the parties responsible to pay the costs and expenses for such maintenance, repair and alteration work.** It also clarifies what is privately owned and used. **The proposed proposition explicitly provides for a special allocation and apportionment to a unit owner of any expenses incurred or suffered by the Association as a result of or in connection with a change in use or manner of use, reconfiguration or "major reconstruction" of a unit or the individual common elements appurtenant to a unit.** Further, the proposed proposition supplements the existing By-laws to explicitly provide certain requirements to be followed by an owner to alter or repair a unit or the appurtenant individual common elements of a unit **and sets forth certain obligations to be paid and performed as a result of such alterations or repairs.** (Exhibit A; emphasis added).

18. As referenced in Winston's letter, at a "May 31, 2017 Town Hall Meeting, an informative presentation was delivered that explained in laymen's language the two propositions that comprise the Eighth Amendment." A true and correct copy of the Board's "Proposed Eighth Amendment to the Declaration of PVC Town Hall Meeting Presentations" dated May 31, 2017 I located on the Condominium's Building Link online document repository for all Unit Owners is attached as Exhibit B. That presentation contained a "Proposition 1" denominated "Clarifications" and included the following proposed "clarification" to the Condominium Documents:

(See Exhibit B at p. 6).

19. I also located the Proposed Eighth Amendment on the Condominium's Building Link online document repository for all Unit Owners, a true and correct copy of which is attached as BU. The Proposed Eighth Amendment states that the "primary purposes of this Eighth Amendment are to", inter alia:

- i. "amend the Declaration to **clarify**: . . . (ii-3) the Unit Owner or Unit Owners responsible to pay the "Costs and Expenses" to Maintain, Repair and Alter the Common Elements and the Limited Common Elements in accordance with the By-Laws";
- ii. "amend and supplement the By-Laws to provide for certain requirements to be followed by an "Owner" to Alter or Repair such Owner's Unit or its appurtenant "Individual Common Elements" and certain obligations to be paid and/or performed, resulting therefrom; and

- iii. “to amend the Declaration and By-Laws to specially allocate and apportion to a Unit Owner any expense incurred or suffered by the Board as a result of, or in connection with, a change in use, or manner of use, or the reconfiguration or a “Major Reconstruction” of such Owner’s Unit or to the Individual Common Elements appurtenant to such Owner’s Unit”. (**Exhibit C** at pp. 1-2; emphasis added).
20. The Proposed Eighth Amendment also contained a Section 9, denominated “**Changes in Use or Major Reconstruction of a Unit,**” which stated that:
- If as a result of a change in use or manner of use, or a Major Reconstruction, of a Unit, the Board shall incur or suffer a new or additional expense, then such new or additional expense shall be specially allocated and assessed to such Unit in accordance with RPL §339-m.** The special assessment shall constitute common charges and shall be payable to the Board within 10 days after a reasonably detailed written demand is given to such Owner accompanied by supporting statements or invoices. In the event of nonpayment thereof, the Board shall have all of the same rights and remedies as in the case of nonpayment of common charges, as more fully provided in the Amended Declaration. Nothing contained herein shall be construed to permit an Owner to change the use or manner of use, or to perform a Major Reconstruction, of such Owner’s Unit, or any of its Facilities, or any other Work that requires the issuance of a Work Permit, without obtaining the prior written consent of the Board, as required by the Amended Declaration or this Amendment. (**Exhibit C** at § 9; emphasis added).
21. Shockingly, upon reviewing the Proposed Eighth Amendment and comparing it to Ms. Schrero’s April 20, 2021 letter, I observed that the sentence bolded in Section 9 above was one of the exact same obligations that Ms. Schrero attempted to condition the Board’s approval of the amendment of the CO on in her April 20, 2021 letter. That letter included the following “obligation”: “**All costs and expenses attributable to or arising from the HC Child Care/Class Rooms Conversion of the Unit or the amendment of the C of O,** including (but not limited to) any additional costs and expenses to the Condominium, the Board or other Unit Owners, **shall be specially allocated and apportioned to you [Plaintiff] as owner of the Unit as provided in Real Property Law § 339-m.**” (NYSCEF#72 ¶ 2(C); emphasis added).
22. I also located a November 3, 2017 news bulletin titled the “Parc Vendome News” noting that the Proposed Eighth Amendment did not pass at the June 28, 2017 Annual Meeting because there was not a quorum present; the June meeting was “continued” to November 8, 2017; and although the Board had a “quorum for the continued June meeting . . . there have not been enough proxies submitted to reach the 2/3 majority needed to decide the proposed Propositions in Amendment 8 to the Declaration and By-Laws.” A true and correct copy of the November 3, 2017 “Parc Vendome News” bulletin I located on the Condominium’s Building Link online document repository for all Unit Owners is attached as **Exhibit D.**

23. The Board thus advised the Unit Owners that “there likely will be a motion to further adjourn and continue the meeting to a later date in order to provide more time for soliciting votes on the Amendment.” (**Exhibit D**). Ultimately, the Proposed Eighth Amendment never passed.
24. If, as Defendants and Schrero falsely represented in each of their affidavits to the Court, there was a “clear” “existing obligation” under the Condominium Documents requiring Parc 56 to broadly absorb all costs for common element improvements even if those improvements have nothing to do with Parc 56’s Unit, its particular desired use, or the amendment of the CO, there would have been no need to seek to “clarify” and amend the Declaration and By-Laws to include those very obligations in the 2017 Proposed Eighth Amendment. Any possible ambiguity (and there was none) would have to go “against the drafter” and one does not need to go through the significant time and expense of preparing and attempting to pass an amended declaration to “clarify” things that are already “clear.”
25. This evidence proves that the entire narrative that Defendants were merely trying to get Plaintiff to take on “clear” “existing obligations” was completely untrue, and provides context to Defendants’ motives all along. They long wanted these rights; failed in their attempt to get them; and still attempted to do indirectly what their failed attempt to amend the Condominium Documents did not allow them to do directly.
26. The Board and Ms. Schrero wanted the outcome that would have come from the passage of the Proposed Eighth Amendment even though it did not pass. While the existence of the Settlement Agreement provided critical comfort to Plaintiff in convincing it to purchase the Unit, had the Proposed Eighth Amendment passed, it is likely we might not have purchased the Unit at all. Therefore, trying to enforce the provisions of the Proposed Eighth Amendment despite the fact that it did not pass is beyond the pale.
27. It is shocking that Defendants never disclosed these documents or their failed attempt to pass the Proposed Eighth Amendment to Plaintiff or the Court. It is critical to note, that the same “players” are on the field here; Mr. Winston himself wrote that letter to the Unit Owners in 2017 and Ms. Schrero drafted that Proposed Eighth Amendment. It is literally incomprehensible that these individuals didn’t remember this attempted/failed amendment and the fact that entire blocks of text from it were surreptitiously inserted into the agreements they tried to force us to sign makes it likely that they took the language directly from that failed document. It is even more shocking that at the same time Defendants and their counsel falsely represented to the Court that Parc 56 was bound by these “obligations,” Defendants knew that they had failed to pass the Proposed Eighth Amendment. This evidence underscores the Defendants’ bad faith. In fact, bad faith is not even an adequate term. This is dishonesty and a display of a lack of ethics on a preposterous scale.
28. As discussed in the accompanying Memorandum of Law, to the extent the Court were to grant reargument, it should not only adhere to its prior Decision but it should amend the

Decision to bolster the bad faith finding against Defendants in light of this newly unearthed evidence.

(Index. No. 653550/2021, NYSCEF Doc. No. 227 ¶¶ 10-28 [emphasis in original]). The record in the Underlying Lawsuit was replete with other evidence. For example, and separate from the concealed Eighth Amendment which had never been adopted (Index No. 653550/2021, NYSCEF Doc. Nos. 229-231), the board was aware of the Settlement Agreement (Bradford Winston signed it) and received the Milrose report (Index No. 653550/2021, NYSCEF Doc. No. 115) and thus knew that the impact of the proposed use would not cause substantial issue. Nevertheless, they made the use (notwithstanding the Settlement Agreement and the prior execution of the PW1) and its impact an issue for the Unit Owner. The defendants' involvement in the corporate tort is firmly established by the affidavits they adduced, their participation in the Underlying Lawsuit, their authorization of letters sent to Mr. Davis on behalf of the entire board, including among other letters and correspondence, an April 28, 2021, letter signed by Anita McDonagh (Index No. 653550/2021, NYSCEF Doc. No. 75). Thus, the plaintiffs more than meet their *Alvarez* burden demonstrating their entitlement to judgment as a matter of law.

In their opposition papers, the defendants fail to raise a triable issue of fact for trial as to why the plaintiffs in this case should be compelled to pay for costs associated with their attempt to hoist legal requirements on the Unit Owner that the unit owners had previously rejected and thus told them not to impose when the unit owners did not approve the Eighth Amendment or as to their multiple breaches of the condominium declaration, by-laws, the settlement agreement, their concealment and misrepresentation as to the location of the alterations fee or any of the other false and frivolous positions previously taken. The settlement negotiating position advice

documents also do not create an issue of fact.<sup>2</sup> Nor do the demonstrably false communications that they sent (which the defendant board members admit that they approved sending [*see*, Robert Goldy (NYSCEF Doc. No. 176 ¶ 46 and NYSCEF Doc. Nos. 203 and 216)]) indicating, among other things, there was no obligation to sign the PW-1 for the Unit Owner or to amend the C of O for the proposed use without having the Unit Owner agree to that which was in the Eight Amendment which the unit owners had not approved.<sup>3</sup> As has already been adjudicated in the Underlying Lawsuit, and as discussed above, the board (and its members) knew this was false. This was a breach of fiduciary duty. Violating the Settlement Agreement with respect to the HVAC also was a breach of fiduciary duty by the defendants. Finally, the Court notes that making false statements to the unit owners (which they did) and misleading the Court too was a breach of fiduciary duty.<sup>4</sup>

Thus, both the costs incurred in defending the Underlying Lawsuit and the damages assessed are properly borne by these defendant board members and summary judgment is appropriate. No trial is warranted.

Accordingly, the Unit Owners are entitled to summary judgment on their first through ninth causes of action, alleging breach of fiduciary duty as to each defendant board member and the defendant board member's motion for summary judgment (Mtn. Seq. No. 009) is denied.

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<sup>2</sup> Indeed, a review of the correspondence adduced by the defendants further highlights their participation and ratification of the bad faith positions taken.

<sup>3</sup> As discussed in the Underlying Lawsuit, this use had previously been approved.

<sup>4</sup> The board members made numerous other misstatements (*see e.g.* Index No. 653550/2021, NYSCEF Doc. Nos. 18, 39).

In the Underlying Lawsuit, the damages were referred to a JHO to hear and determine. As to liability, the plaintiffs may submit judgment immediately. As to damages, the plaintiff may submit judgment when the JHO’s determination is rendered which judgment shall include all costs determined by the JHO and all legal costs incurred in defending the Underlying Lawsuit (which legal costs the board authorized).

The Court has considered the parties’ remaining arguments and found them unavailing.

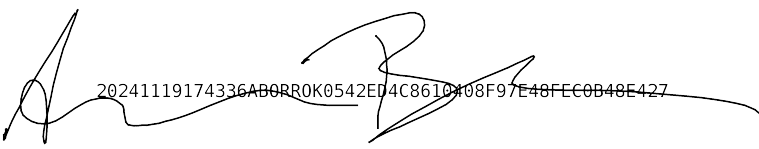
Accordingly, it is hereby

ORDERED that the Unit Owners’ motion for summary judgment (Mtn. Seq. No. 003) is granted; and it is further

ORDERED that the defendants’ motion for summary judgment (Mtn. Seq. No. 009) is denied; and it is further

ORDERED that the plaintiff may submit judgment when the JHO’s determination is rendered which judgment shall include all costs determined by the JHO and all legal costs incurred in defending the Underlying Lawsuit.

11/19/2024  
DATE

  
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ANDREW BORROK, J.S.C.

CHECK ONE:  CASE DISPOSED  NON-FINAL DISPOSITION  
 GRANTED  DENIED  GRANTED IN PART  OTHER

APPLICATION:

CHECK IF APPROPRIATE:

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

SUBMIT ORDER

FIDUCIARY APPOINTMENT

REFERENCE