

**Capacchione v 8 W. 13th St. Tenants Corp.**

2025 NY Slip Op 31130(U)

April 4, 2025

Supreme Court, New York County

Docket Number: Index No. 652895/2022

Judge: Mary V. Rosado

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

-----X

**INDEX NO. 652895/2022**

AGATHA CAPACCHIONE,

**MOTION DATE 05/30/2024**

Plaintiff,

**MOTION SEQ. NO. 002**

- v -

8 WEST 13TH STREET TENANTS CORPORATION, THE  
BOARD OF DIRECTORS OF 8 WEST 13TH STREET  
TENANTS CORPORATION

**DECISION + ORDER ON  
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 002) 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, and after a final submission date of January 13, 2025, Defendants 8 West 13<sup>th</sup> Street Tenants Corporation and the Board of Directors of 8 West 13<sup>th</sup> Street Tenants Corporation (“Defendants”) motion to dismiss Plaintiff’s Complaint is granted in part and denied in part.<sup>1</sup>

**I. Background**

Since 2008, Plaintiff has been a shareholder of the co-op at 8 West 13<sup>th</sup> Street, New York, New York (the “Building”) and has lived in Apartment 11 RW (the “Apartment”). In 2014, a skylight in the Apartment leaked and damaged the Apartment’s interior, requiring repairs. Plaintiff hired an engineer. Defendants reviewed the renovation plans prior to construction and allegedly signed and approved the plans in March of 2015. The plans were amended because more extensive

<sup>1</sup>The Court held a hearing on August 8, 2024, where Amber R. Will, Esq. and Y. David Scharf, Esq. appeared for Plaintiff, and Gil Santamarina, Esq. and Hillary A. Fraenkel, Esq., appeared for Defendants. At the hearing parties stated on the record there were discussions regarding settlement, so the Court adjourned the final submission date to allow the parties time to reach an amicable resolution. As that has not happened, the Court rules on the motion.

damage was found. The New York City Department of Buildings (“DOB”) approved the amended plans, and the Board allegedly reviewed and approved the amended plans in December of 2015.

According to Plaintiff, in April of 2016, the Board retained an auditor to review the renovation plans, and the Board issued a stop work order in May of 2016. The Board lifted the stop work order in June of 2016 after the Board’s questions regarding the renovation plans were answered, and the renovations were completed by the end of 2016. There was never any concern with the renovations until a prospective buyer of the Apartment approached Plaintiff in June of 2022, at which time Defendants informed Plaintiff that they had never approved Plaintiff’s installation of bi-fold windows. Plaintiff filed her Complaint on May 17, 2024, seeking declaratory judgment, damages for alleged breaches of fiduciary duty, tortious interference with contract, and slander of title. Now, Defendants seek pre-answer dismissal of Plaintiff’s Complaint.

## **II. Discussion**

### **A. Standard**

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

## B. Business Judgment Rule

Defendants' motion to dismiss Plaintiff's Complaint pursuant to the business judgment rule is denied. So long as the board of directors of a cooperative act within the scope of its authority and in good faith, the Court will not substitute its judgment for the board's (*Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 537-538 [1990]). However, a pre-answer motion to dismiss premised on the business judgment rule should not be granted where the pleadings allege bad faith (*534 East 11<sup>th</sup> Street Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541, 542 [1st Dept 2011] citing *Bryan v West 81 Street Owners Corp.*, 186 AD2d 514 [1st Dept 1992]).

Here, there are sufficient allegations of bad faith to overcome Defendants' motion to dismiss. Specifically, Plaintiff alleges she is facing disparate treatment as multiple other residents use their fire escapes to access the roof and have used the roof for personal enjoyment, even though Defendants specifically object to Plaintiff's renovations as allowing unauthorized access to the roof. The Court can further infer bad faith from the pleadings as there are allegations and e-mail correspondence indicating the Board approved Plaintiff's renovations. Accepting the facts alleged as true and granting Plaintiff all favorable inferences, the Board hired an auditor, issued a stop work order, and lifted the stop work order after Plaintiff provided answers to the auditor's questions – indicating the Board may have ratified the renovations. Plaintiff also swears in an affidavit in opposition to the motion that numerous board members visiting her Apartment from 2016 through 2022, had seen the bi-fold windows, and never objected to their existence. For purposes of a pre-answer motion to dismiss, this is sufficient to overcome the business judgment rule (*see also Dau v 16 Sutton Place Apartment Corp.*, 205 AD3d 533, 536 [1st Dept 2022]).

### **C. Declaratory Judgment/Injunction (First Cause of Action)**

Defendant's motion to dismiss Plaintiff's First Cause of Action seeking a declaration and injunctive relief requiring Defendants to proceed with accepting and reviewing applications for the sale of Plaintiff's Apartment "as-is" is denied. Defendants only argue for dismissal of Plaintiff's request for injunctive relief and do not make any particularized arguments for dismissing Plaintiff's allegations pertaining to declaratory relief.

At this juncture, Plaintiff has sufficiently stated a claim for injunctive relief (*Tahari v 860 Fifth Ave. Corp.*, 214 AD3d 491, 492 [1st Dept 2023]). Based on the allegations and record before the Court, it is likely that Plaintiff will be able to show that Defendants ratified her renovation plans based on knowledge obtained through formal and informal communications, and their acquiescence for many years to Plaintiff's renovations may constitute a waiver of any violation of Defendants' governing documents (*see, e.g. Board of Managers of Soho Greene Condominium v Clear, Bright & Famous LLC*, 106 A3d 462 [1st Dept 2013]; *Kiam v Park & 66<sup>th</sup> Corp.*, 66 AD3d 415, 516 [1st Dept 2009]; *980 Fifth Ave. Corp. v Smith*, 295 AD2d 133, 133-134 [1st Dept 2002]).

### **D. Breach of Fiduciary Duty (Second Cause of Action)**

Defendants' motion to dismiss Plaintiff's second cause of action alleging breach of fiduciary duty is denied. As previously discussed, Plaintiff's allegations of bad faith and disparate treatment are sufficient to withstand a motion to dismiss (*see, e.g. Barbour v Knecht*, 296 AD2d 218, 225 [1st Dept 2002]; *Ackerman v 305 E. 40<sup>th</sup> Owners Corp.*, 189 AD2d 665, 666-667 [1st Dept 1993]). Thus, this branch of Defendant's motion is denied.

### **E. Tortious Interference with a Contract (Third Cause of Action)**

Defendants' motion to dismiss Plaintiff's third cause of action alleging tortious interference with a contract is denied. Plaintiff adequately alleges the existence of various other contracts which

lapsed as a result of Defendants' refusal to process Plaintiff's prospective buyer's application, even though it is alleged that other shareholders advertised aspects of their apartments which were in contravention of governing documents and Defendants still processed those shareholders prospective buyer's applications. Reviewing the Complaint holistically and accepting Plaintiff's allegations as true, these allegations are sufficient to withstand a pre-answer motion to dismiss (*see, e.g. New Stadium LLC v Greenpoint-Goldman Corp.*, 44 AD3d 449, 450 [1st Dept 2007]; *see also Kravtsov v Thwaites Terrace House Owners Corp.*, 267 AD2d 154, 155 [1st Dept 1999]). Therefore, this branch of Defendants' motion is denied.

#### **F. Slander of Title (Fourth Cause of Action)**

Defendants' motion to dismiss Plaintiff's fourth cause of action alleging slander of title is denied. To plead slander of title, a Plaintiff must allege a false disparagement to title resulting in the impairment of the sale of that title (*Weiss v Lowenberg*, 95 AD3d 405 [1st Dept 2012]). Accepting the facts alleged as true, Plaintiff has alleged that Defendants falsely communicated to her prospective buyer that the Board had not approved certain alterations to the Apartment, indicating the Board would not approve the sale of the Apartment and allegedly causing Plaintiff's prospective buyer to back away from the deal.

At the heart of this dispute is whether the Board had previously approved the alterations to the Apartment, either expressly or implicitly. Considering this is a pre-answer motion to dismiss, the Board's allegedly false statement to a prospective buyer that it did not approve certain alterations to the Apartment is sufficient to state a claim for slander of title. Defendants' argument that shares in a cooperative building do not constitute real property for purposes of slander of title is without merit (*see, e.g. Damas v Biggs*, 157 AD3d 454 [1st Dept 2018]; *Chiang v Chang*, 137

AD2d 371, 376 [1st Dept 1988]). The Court makes no ruling on whether this cause of action may withstand a future dispositive motion on a more fully developed record.

Accordingly, it is hereby,

ORDERED that Defendants' motion to dismiss Plaintiff's Complaint is denied in its entirety; and it is further

ORDERED that within twenty days of entry of this Decision and Order, Defendants shall file an Answer to Plaintiff's Complaint, and it is further

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

ORDERED that the parties shall meet and confer immediately and submit a proposed preliminary conference order to the Court via e-mail at [SFC-Part33-Clerk@nycourts.gov](mailto:SFC-Part33-Clerk@nycourts.gov), but in no event shall the proposed preliminary conference order be submitted later than August 4th, 2025. If the parties have a serious discovery dispute requiring Court intervention, they shall appear for a preliminary conference at 9:30 a.m. on August 6, 2025 in Room 442, 60 Centre Street, New York, New York.

This constitutes the Decision and Order of the Court.

<u>4/4/2025</u> DATE			<u>Mary V Rosado JSC</u> HON. MARY V. ROSADO, J.S.C.
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> OTHER
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT
			<input type="checkbox"/> REFERENCE