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 05/01/2025, 05/12/2025, 07/03/2025

MOTION SEQ. NO. 010 011 012

DECISION + ORDER ON MOTION

HON. ANDREW BORROK:

The following e-filed documents, listed by NYSCEF document number (Motion 010) 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 333, 334, 335, 342
were read on this motion to/for DISCOVERY.

The following e-filed documents, listed by NYSCEF document number (Motion 011) 322, 323, 324, 325, 327, 328, 329, 330, 331, 332, 343
were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 336, 337, 338, 339, 340, 341, 344, 346
were read on this motion to/for DISCOVERY.

The plaintiffs in this case are not entitled to recover $4.5 million of damages that they did not incur. To wit, the settlement consideration paid to Parc 56 LLC (**Parc 56**) was for an injury caused to Parc 56 – not these plaintiffs or the Parc Vendome Condominium (the **PVC**) and these amounts were paid by the insurance company or the Board of Managers of PVC (the **Board of Managers**) to the victim (*i.e.*, Parc 56). The injury to PVC and these plaintiffs (reflectively) simply did not include these amounts. In fact, the record before the Court indicates that the damages to PVC and these plaintiffs (either directlty or reflectively) are limited to the amount of

legal fees incurred in connection with defending the Underlying Action (hereinafter defined) and an increase in insurance premiums (if any) resulting from the payment of the settlement amount.[1] Thus, the plaintiffs' arguments based on the applicability (or lack thereof) of the common law collateral source rule as to damages where they were indisputably not the victim and which they never had any entitlement are entirely irrelevant; nothing is being relied on by the defendants to reduce damages owed to the plaintiffs or PVC with respect to the $4.5 million settlement as this money is not the plaintiffs' or PVC's (*cf. Liciaga v New York City Tr. Auth.*, 231 AD3d 250, 257 [2d Dept 2024]; *Applehead Pictures LLC v Perelman*, 80 AD3d 181, 191 [1st Dept 2010]).

By way of background, this is a follow-on case from the case captioned *Parc 56 LLC v Board of Managers of the Parc Vendome Condominium, et al.*, Sup Ct, NY County, Index No. 653550/2021 (the **Underlying Action**), where the Appellate Division held:

> The motion court properly determined that defendant board was bound by the January 28, 2020 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 (s*ee e.g. Lerner u Neu.tmark & Co. Real Estate, Inc.*, 178 AD3d 418, 420 [1st Dept 2019]).
>
> Contrary to defendants' contention, the requirement in the easement between plaintiffs 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

[1] For completeness, the Court notes that it has not yet been briefed whether these damages are in fact recoverable by these plaintiffs under the governing documents and the plaintiffs do not seek these damages in the instant motion.

days. The motion court reasonably took into account that the parties continued to exchange comments on plaintiffs 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 [lst Dept 2015]).

The motion court also properly determined that the board improperly conflated the requirements relating to the work in plaintiffs predecessor's alteration agreement with plaintiffs 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 3o business days to exercise or waive its right offirst 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 plaintiffs 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 Creances 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 approve 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]).

(NYSCEF Doc. No. 334, Index No. 653550/2021).

By Decision and Order (NYSCEF Doc. No. 320 at 2, Index 653550/2021), dated November 28, 2022, this Court referred the issue of damages in the Underlying Action to be determined by a Special Referee.

Subsequently, this lawsuit was brought by the plaintiffs' other unit owners of PVC alleging that the defendant Board of Managers of PVC had breached their fiduciary duties based on their conduct that was the subject of the Underlying Action.

Previously, the plaintiffs in this case moved for summary judgment on the issue of liability, and the Court granted the plaintiffs' motion (Mtn. Seq. No. 003) on their cause of action sounding in breach of fiduciary duty (NYSCEF Doc. No. 285 at 16-17).[2]

Thereafter, the Underlying Action was settled by means of a settlement agreement (the **Settlement Agreement**; NYSCEF Doc. No. 235), dated April 8, 2025 pursuant to which, as relevant, among other things, Parc 56 was paid $4.5 million and PVC and the Board received an assignment of subrogation and malpractice claim to proceed against Attorney Elizabeth Schrero and the law firm Seyfarth Shaw (with which if successful, Parc 56 would receive additional compensation):

> 3. Parc 56 Settlement Terms. In full and final settlement of all claims of any and all kind whatsoever that were asserted or could have been asserted by Parc 56, the Board and/or Winston in the Parc 56 Action, the 2025 Action or otherwise, known and unknown, against each other:
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> (a) In settlement of the Parc 56 Action, ***the Board and Winston shall cause their insurance carrier(s) to pay Parc 56 the sum of $3,500,000.00*** (the "Parc 56 First Settlement Payment") within fifteen (15) days of the Effective Date of this Agreement. The Parc 56 First Settlement Payment shall be made either by check payable to "Parc 56, LLC" delivered to Parc 56's attorneys, Haynes and Boone, LLP (attn.: Justin R. Bonanno) or by wire pursuant to the wire transfer instructions attached as Exhibit B.
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> (b) In further settlement of the Parc 56 Action, ***the Board and Winston shall pay Parc 56 the sum of $1,000,000.00*** (the "Parc 56 Second Settlement Payment") within ninety (90) days of the Effective Date of this Agreement or sooner if possible.
>
> (c) In further settlement of the Asserted/Potential Claims, the Board and Winston shall pay Parc 56 the sum of $500,000.00 (the "Parc 56 Third Settlement Payment") within ten (10) days of the receipt of any funds (after legal fees) from a recovery from any subrogation and or malpractice/Claim (the "Seyfarth Claim") relating,

[2] For the avoidance of doubt, the plaintiffs did not move for summary judgment on the issue of damages because legal fees were continuing to accrue in the Underlying Action and the total damages in the Underlying Action had not yet been determined.

> among other things, to the Parc 56 Action, including but not limited to Elizabeth Schrero, and Seyfarth Shaw (the "Primary Subrogation Parties"), whether from a settlement, award, or any other payment. If the Board fails to pursue subrogation and or malpractice claims against any of the Primary Subrogation Parties, or if the Board shall voluntarily withdraw the action against any of the Primary Subrogation Parties, then the Parc 56 Third Settlement Payment shall become immediately due and payable. However, if the Board litigates its subrogation and or malpractice claims against the Primary Subrogation Parties to a decision or award or settlement that provides a recovery of less than the Parc 56 Third Settlement Payment, then at that time any portion of the Parc 56 Third Settlement Payment that exceeds such award or settlement shall be forgiven.

(NYSCEF Doc. No. 325 ¶¶ 3[a]-[c] [emphasis added]).

Now, the plaintiffs move for summary judgment as to the $4.5 million of damages paid to Parc 56 indicating that the Defendant Board Members should have to pay this money to them. Simply put, they are wrong. Neither the plaintiff nor PVC was ever owed this money and neither of them are out this money. Nothing in the record suggests that this is in any way damages caused by any injury to PVC or them. Thus, they simply do not meet their burden of entitlement to summary judgment (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]) and their motion is denied.[3] Indeed, on the record before the Court, the injury to PVC (and to them reflectively) is limited to the cost of the Underlying Action (*i.e.*, the legal fees) and any increase in insurance premiums (if any) occasioned solely by virtue of the payment of the settlement amount.[4] The defendants thus are not relying on any collateral source of funds as to these $4.5 million of damages with respect to these plaintiffs or PVC. Additionally, the Court notes that the plaintiffs' argument that a defense based on CPLR 4545 was waived is also not correct on this record because the settlement had not been achieved in the Underlying Action prior to issue in this case

[3] Nothing in the record even indicates any basis to find amounts available under the insurance policy have been reduced to pay any future occurrences.
[4] As discussed above, whether these amounts are recoverable is not briefed and is not the subject of the instant motion.

being joined. Lastly, the Court notes that the Appellate Division has indicated that in the context of determining the appropriate statute of limitations for a breach of fiduciary duty claim, claims for money damages are subject to a three-year statute of limitations because such claims are an "injury to property" (*Kaufman v Cohen*, 307 AD2d 113, 118 [1st Dept 2003]) such that pursuant to CPLR 4545[a] – a collateral source hearing would be required in any event to determine that "the plaintiff is legally entitled to the continued receipt of such collateral source." As discussed above, the record simply does not provide basis for a finding that the plaintiffs or PVC are in fact entitled to receipt of any portion of the collateral source.

As such, the motion is DENIED.

The motions (Mtn. Seq. Nos. 010 and 012) to compel are however granted to the extent that they seek information about the legal costs incurred and paid in connection with the Underlying Action and to the extent that the motions seek information as to any increase in premium occasioned solely by virtue of the settlement amount (*Matter of Kapon v Koch*, 23 NY3d 32, 38 [2014]). As discussed above, these amounts are relevant to any injury incurred by PVC or the plaintiffs (directly or reflectively).

The Court has considered the parties' remaining arguments and finds them unavailing.

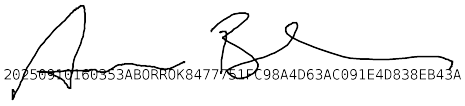
Accordingly, it is hereby

ORDERED that the plaintiffs' motion (Mtn. Seq. No. 011) for summary judgment is denied; and it is further

ORDERED that the plaintiffs' motions (Mtn. Seq. Nos. 010 and 012) to compel are granted solely to the extent set forth above; and it is further

ORDERED that the defendants will produce the documents requested within 30 days of this order; and it is hereby

ORDERED that the parties shall appear for a status conference on **November 6, 2025, at 11:45 a.m.**



9/10/2025
DATE

ANDREW BORROK, 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**