

Rosenthal v Park Hill Tenants Corp.

2025 NY Slip Op 33614(U)

October 1, 2025

Supreme Court, New York County

Docket Number: Index No. 151576/2021

Judge: Paul A. Goetz

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

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

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SCOTT ROSENTHAL,

Plaintiff,

- v -

PARK HILL TENANTS CORP., BROWN HARRIS STEVENS
RESIDENTIAL MANAGEMENT LLC, DAVID KEKOVIC,
AND JOHN DOE AND JANE DOE, INDIVIDUALLY AND AS
MEMBERS OF THE BOARD OF DIRECTORS OF PARK
HILL TENANTS CORP.

Defendants.

INDEX NO.	151576/2021
MOTION DATE	03/03/2025
MOTION SEQ. NO.	001
DECISION + ORDER ON MOTION	

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 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

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

In this action arising from defendants’ alleged breach of their fiduciary duties to plaintiff in denying his application to renovate his apartment, defendants Park Hill Tenants Corp. and its board of directors and members of the board (collectively, the cooperative), Brown Harris Stevens Residential Management LLC (BHS, the property management company), and David Kekovic (the managing agent) move pursuant to CPLR §§ 3211(a)(1), (5), and (7) to dismiss the complaint, or, in the alternative, pursuant to CPLR § 3212 for summary judgment dismissing the complaint.

BACKGROUND¹

Plaintiff became the shareholder and proprietary lessee of apartment 8D in the cooperative building located at 1199 Park Avenue, New York, NY 10128 (the building) in 1999

¹ The facts are taken from plaintiff’s complaint.

(NYSCEF Doc No 4 ¶ 7). In 2012, plaintiff also became the shareholder and proprietary lessee of apartment 8C, with the intent of combining it with apartment 8D to form a single unit (the renovation project) (*id.* ¶¶ 7, 16, 19).

“In December 2013, Plaintiff, as the first step in obtaining Board approval for the Renovation Project, obtain[ed] plan approval from the NYC Dept of Buildings” (DOB) (*id.* ¶ 24). Plaintiff transmitted the approval to BHS “in February, 2014, along with the required Co-op Alteration Application for the Renovation Project [and] the approved, stamped, architectural drawings” (the initial application) (*id.*).

“[I]n June 2014, Plaintiff received a letter from Howard L Zimmerman Architects, ([HLZA]), the architect for the Defendants, who wanted additional documentation, including a Landmarks approval,” which plaintiff provided (*id.* ¶ 26). Three months later, plaintiff requested an update from defendants but received none (*id.* ¶ 27). On February 3, 2015, HLZA advised plaintiff that it had no objections to the work but that “actual approval of the proposed scope work and authorization to proceed with same lies solely within the purview of the Board” (*id.* ¶ 28; NYSCEF Doc No 56).

In July of 2015, “the Board ask[ed] Plaintiff to send a copy of construction insurance for the Renovation Project,” which plaintiff provided shortly thereafter (*id.* ¶ 29).

“Despite numerous requests for a status of Plaintiff’s application over the ensuing 5 months Defendants [did] not grant approval nor deny Plaintiff’s application” and “numerous inquiries” went unanswered (*id.* ¶ 30).

In December of 2015, BHS requested “another copy of the DOB approved plans and the room description” (which had already been submitted in plaintiff’s initial application) and a job cost estimate; plaintiff provided these documents as requested (*id.* ¶¶ 30-31). Plaintiff also

submitted “another Alteration Agreement with required Exhibits” and “proof of workers comp disability and Tenant Notices” (*id.*).

On January 4, 2016, the board asked plaintiff to resend copies of the tenant notices and provide confirmation that the notices had been sent; plaintiff did so (*id.* ¶ 35). Over the next few weeks, the board “ignore[ed] Plaintiff’s request for an update and [] start date for the project” (*id.* ¶ 35).

In February 2016, “the Board for the first time demand[ed] that Plaintiff remove a fireplace from the project,” which plaintiff agreed to do (*id.* ¶ 36). Plaintiff again requested a start date for the renovation project, but in response, “the Board proffered new objections” (*id.* ¶¶ 36-37).

For the next several months, HLZA, “at the Board’s behest, tie[d] up the Project [based on] the bathroom design” (*id.* ¶ 38). “In October 2016, Defendants denied Plaintiff’s [initial] application, and would not review again unless Plaintiff agreed to eliminate the addition of the bathroom, and get new plans from the DOB showing such bathroom was eliminated” (*id.*). Plaintiff submitted a new plan in November 2016 reflecting this change (*id.*).

“Due to the changes the Board was now demanding in order to approve the Renovation Project, the Plaintiff needed to file and have the Board sign a ‘Post Approval Application’ with the DOB” (*id.* ¶ 39). Plaintiff first requested the board’s signature on the post-approval application in April 2017, but did not receive same from the board until July of 2018 (*id.*).

“Throughout the year 2018-2019, Plaintiff repeatedly and diligently followed up with Management as to the status of the Application” but he “never received any concrete replies, only vague and cursory information about future meetings” (*id.* ¶ 40).

In June of 2020, Kekovic and BHS “request[ed] the approved version 2 of the DOB Plan,” which plaintiff provided (*id.* ¶ 41). “Plaintiff again asked Kekovic for a complete list of whatever the Board was waiting for, and a timeline for completion of the application review,” to which Kekovic replied that “the Application was behind other applications they were reviewing,” and that “Plaintiff’s request was being treated by Defendants as a ‘de novo’ project” which would be “review[ed] from scratch” (*id.* ¶¶ 41-42).

In sum, plaintiff alleges that “[e]ach time that Plaintiff would address an issue raised by Defendants, another issue [] would develop out of thin air, and Defendants would impose onerous and impossible conditions upon Plaintiff”; and “[i]n doing so, Defendants’ improperly withheld their consent to the Renovation Project, in breach of the Proprietary Lease, and moreover, failed to exercise the utmost loyalty and care to Plaintiff [as a shareholder] in breach of their fiduciary duties” (*id.* ¶¶ 50-51). Plaintiff’s causes of action include: (1) breach of fiduciary duties; (2) a declaratory judgment that the board unreasonably withheld their consent to the renovation project and must expeditiously provide their consent; (3) punitive damages; (4) breach of the proprietary lease; and (5) and award of attorneys’ fees.

DISCUSSION

Standard on the Motion

At the outset, the instant motion will be treated as a motion for summary judgment dismissing the complaint pursuant to CPLR § 3212, rather than a motion to dismiss pursuant to CPLR § 3211, because: defendants answered the complaint several years ago (NYSCEF Doc No 5); discovery was conducted and the note of issue has been filed (NYSCEF Doc No 36); defendants provided notice of their intent to pursue summary judgment (NYSCEF Doc No 40; CPLR § 3211[c] [the court “may treat [a] motion [to dismiss] as a motion for summary

judgment” where there is “adequate notice to the parties”); and “[t]he proof submitted by [] defendants on their motion and the proof submitted by” plaintiff in opposition “laid bare their proof and demonstrated that the parties were charting a summary judgment course” (*McNamee Constr. Corp. v City of New Rochelle*, 29 AD3d 544, 545 [2nd Dept 2006]; *Mihlovan v Grozavu*, 72 NY2d 506, 508 [1988]).

“It is well settled that ‘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’” (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). “Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers” (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985] [internal citations omitted]). “Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action” (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010], citing *Alvarez*, 68 NY2d at 342).

“The court’s function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility” (*Meridian Mgmt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined “in the light most favorable to the non-moving party” (*Schmidt v One New York Plaza Co.*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of

fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Breach of Fiduciary Duties & Breach of the Proprietary Lease

Plaintiff's first cause of action for breach of fiduciary duties fails as against BHS and Kekovic because plaintiff has not established that a fiduciary relationship exists between him and BHS and Kekovic (*Caprer v Nussbaum*, 36 AD3d 176, 191 [2nd Dept 2006] ["the managing agent is a fiduciary as to the condominium, but not as to the individual unit owners"]). Plaintiff's fourth cause of action for breach of the proprietary lease also fails as against BHS and Kekovic because plaintiff has not demonstrated that they were parties to the lease agreement.

As to the cooperative, defendants argue that plaintiff's causes of action for breach of fiduciary duties and breach of the proprietary lease are time-barred because plaintiff's claims "accrued on or about February 3, 2015 (at the earliest)," as that was the date "Defendants [allegedly] 'breached their fiduciary duties of loyalty and care' [and the proprietary lease] by failing to approve those plans accepted by their architect" (NYSCEF Doc No 42 [also arguing that a three-year statute of limitations applies to the breach of fiduciary claim, but that it would be time-barred under either a three- or six-year period]). Plaintiff opposes on the grounds that the statute of limitations was tolled by the continuous wrong doctrine, as plaintiff brought this action within "three (3) years after the last distinct wrong alleged in the Complaint," i.e., when defendants stated that they would review plaintiff's application from scratch on October 7, 2020, "seven years after Plaintiff first presented Defendants with the project" (NYSCEF Doc No 74).

Contrary to defendants' contention, plaintiff's causes of action are not based entirely on defendants' declining to approve the plans once HLZA stated that it had no objections in February of 2015; rather, plaintiff alleges that defendants breached their fiduciary duties and the

proprietary lease by stringing plaintiff along over the course of several years while raising new objections and generally delaying the approval process. Thus, plaintiff does not complain of “a single wrong that has continuing effects,” but rather “a series of independent, distinct wrongs” of repeated delays and denials, the last of which was communicated on October 7, 2020 (*Henry v Bank of Am.*, 147 AD3d 599, 601 [1st Dept 2017] [citation omitted]; *Butler v Gibbons*, 173 AD2d 352, 353 [1st Dept 1991] [“Plaintiff’s allegations clearly make out a continuing wrong, *i.e.*, [defendant’s] repeated and continuing failure to account and turn over proceeds earned from renting the properties since 1979. Thus, according to these allegations, a new cause of action accrued each time defendant collected the rents and kept them to himself”]). Therefore, plaintiff’s first and fourth causes of action as against the cooperative are not time-barred.

Defendants next argue that even if the claims are not time-barred, defendants’ actions are protected by the business judgment rule. Defendants assert that “Plaintiff does not allege, nor can he, that Defendants should not have relied upon the representations of the Building’s architect” that the application should be reviewed from scratch and “[a]s such, the Complaint does not allege or evince any facts that would support a finding that [defendants] acted without authority or in bad faith” (NYSCEF Doc No 42). Plaintiff argues that the business judgment rule does not apply because he alleged that “Defendants have engaged in numerous wrongful acts that clearly demonstrate discrimination and/or misconduct” (NYSCEF Doc No 74).

Plaintiff fails to adequately state the ways in which defendants discriminated against him or engaged in misconduct (NYSCEF Doc No 4 ¶¶ 53-55 [alleging without supporting facts that the cooperative engaged in “discriminatory and disparate treatment of Plaintiff” and that it “approved or ratified Management misconduct . . . [b]y burying their heads in the sand”]). However, “where [as here] a proprietary lease provides that a governing board’s actions in

giving consent to alterations to the ‘unit or building’ are to be reviewed under a reasonableness standard, the board’s actions are not protected by the business judgment rule” (*Perrault v Village Dunes Apt. Corp.*, 164 AD3d 847, 848 [2nd Dept 2018]). The proprietary lease provides: “The Lessee shall not [make alterations] without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld” (NYSCEF Doc No 78 ¶ 21[a]). Thus, it is defendants’ burden to demonstrate that they did not withhold consent unreasonably.

Defendants explain that on October 7, 2020, they followed their architect’s recommendation that the “plans should be reviewed and started from scratch” because “there had been a number of different filings with” the DOB over the years and “there had been numerous code and policy changes that occurred from Plaintiff’s original 2013 filing” with the DOB (NYSCEF Doc No 42). However, defendants do not explain the reasoning behind their withholding of consent on prior occasions, or why they allegedly raised objections and requested documents in a piecemeal fashion, resulting in further delays. Thus, issues of fact remain as to whether defendants’ “reason for denying plaintiff[’s] request[s] to [renovate his] apartment . . . [were] legitimately related to the welfare of the cooperative and therefore [that they had] a reasonable basis for withholding consent” (*West v 332 E. 84th Owners Corp.*, 68 AD3d 499, 500 [1st Dept 2009]).

Accordingly, the part of defendants’ motion for summary judgment seeking to dismiss plaintiff’s first cause of action for breach of fiduciary duties and fourth cause of action for breach of the proprietary lease will be granted as against BHS and Kekovic and denied as against the cooperative.

Declaratory Judgment

Defendants argue that plaintiff's second cause of action seeking a declaratory judgment that the cooperative (i) violated ¶ 21(a) of the proprietary lease and (ii) must "expeditiously provide their consent to the Renovation Project" (NYSCEF Doc No 4 ¶ 101) is duplicative of his fourth cause of action for breach of the lease based on the same provision (NYSCEF Doc No 42). Plaintiff opposes, arguing that "his cause of action for declaratory judgment[] seeks a resolution to an actual judicial controversy [which] has no adequate remedy at law" (NYSCEF Doc No 74 [internal quotation marks omitted]). However, plaintiff elaborates that his "cause of action for declaratory judgment is a request for the Court to decide whether to uphold his interpretation of the Proprietary Lease, which claims that Defendants are not honoring their contractual obligations" (*id.*). Therefore, plaintiff's "claim for a declaratory judgment"—at least to the extent that he seeks a declaration that defendants breached the lease—is "duplicative of the breach of contract claim as it is based on the same allegations underpinning his contractual claims and seeks a declaration of the same rights and obligations arising under the agreement" (*Rabizadeh v 165 E 66, LLC*, 238 AD3d 575, 576 [1st Dept 2025]; *Upfront Megatainment, Inc. v Thiam*, 215 AD3d 576, 578 [1st Dept 2023]). To the extent that plaintiff seeks a declaratory judgment that the board must "expeditiously provide their consent to the Renovation Project," however, it is not duplicative as it requests equitable relief as opposed to the monetary relief plaintiff seeks on his breach of contract cause of action.

Accordingly, the part of defendants' motion for summary judgment seeking dismissal of plaintiff's second cause of action will be granted only to the extent that he seeks a declaratory judgment that defendants breached the proprietary lease.

Punitive Damages

As defendants note, “New York does not recognize an independent cause of action for punitive damages” (*Randi A. J. v Long Is. Surgi-Center*, 46 AD3d 74, 80 [2nd Dept 2007]).

Accordingly, the part of defendants’ motion for summary judgment seeking dismissal of plaintiff’s third cause of action for punitive damages will be granted.

Attorneys’ Fees

Finally, defendants failed to demonstrate their entitlement to summary judgment dismissing plaintiff’s fifth cause of action for attorneys’ fees because they did not address same in their motion.

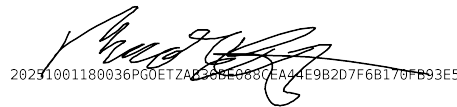
CONCLUSION

Based on the foregoing, it is

ORDERED that defendants’ motion for summary judgment dismissing the complaint is granted to the extent that:

- (i) Plaintiff’s first and fourth causes of action are dismissed as against defendants BHS and Kekovic;
- (ii) Plaintiff’s second cause of action is dismissed to the extent that plaintiff seeks a declaratory judgment that defendants breached ¶ 21(a) of the Proprietary Lease; and
- (iii) Plaintiff’s third cause of action for punitive damages is dismissed;

And the motion is otherwise denied.



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<u>10/1/2025</u> DATE			<u>PAUL A. GOETZ, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
	<input type="checkbox"/> GRANTED	<input checked="" type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> SETTLE ORDER	<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE