

**140 Schermerhorn St. Prop. Owner LLC v Board of
Mgrs. of the Boerum Condominium**

2025 NY Slip Op 33694(U)

September 26, 2025

Supreme Court, New York County

Docket Number: Index No. 653368/2025

Judge: Nancy M. Bannon

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. NANCY M. BANNON PART 61M

Justice

-----X

140 SCHERMERHORN STREET PROPERTY OWNER
LLC, 71 SMITH STREET RETAIL LLC, FLANK INC., FLANK
71 SMITH LLC

Plaintiffs,

- v -

THE BOARD OF MANAGERS OF THE BOERUM
CONDOMINIUM,

Defendant.

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INDEX NO. 653368/2025
MOTION DATE 9-25-25
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 19, 21, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44

were read on this motion to/for STAY.

In this declaratory judgment action, the plaintiffs, former owners of a hotel and three commercial units in the Boerum Condominium, seek declarations that the condominium's By-laws, the Settlement and Release Agreement they entered with the defendant Board of Managers and subsequent sale of the units bars the Board's present common charge claim against them and bars arbitration of the claim as now demanded by the Board. The plaintiff moves pursuant to CPLR 7503(b) to stay the arbitration. The Board opposes the motion and cross-moves, pre-answer, pursuant to CPLR 3211(a)(1) and (a)(7) to dismiss the complaint. The plaintiffs oppose the cross-motion.

The parties' Settlement and Release Agreement, dated August 11, 2023, arose from unpaid common operating charges allegedly owed by the plaintiffs, who had disputed the condition of the common elements, the obligation to perform repairs and certain common and utility charges. The plaintiffs agreed to pay \$350,000.00 for a general release and subsequently sold the hotel and the three commercial units to non-party HB Propco LLC in November 2023. In regard to the sale, the defendant also executed an Estoppel Certificate and Agreement by which it certified that, to its knowledge, the plaintiffs had paid all fees and charges due in

connection with the condominium documents. Six months after the sale, by letter dated April 4, 2025, the defendant demanded that the plaintiffs pay \$1,045,337.00 in newly calculated ongoing utility charges. This action ensued.

In their complaint, the plaintiff seeks (1) a judgment declaring that under the terms of the By-Laws and Settlement and Release Agreement, and no longer being current unit owners, they are not obligated to pay the amounts now sought by the defendant and are not required to arbitrate the dispute, (2) a permanent stay of the arbitration and (3) contractual attorney's fees. By their motion, the plaintiff seeks to stay any arbitration pursuant to CPLR 7503(b) until a determination is made as to whether there was a valid agreement to arbitrate. The defendant's cross-motion to dismiss the complaint and is made upon CPLR 3211(a)(1), a defense founded in documentary evidence, and 3211(a)(7), failure to state a cause of action. Even though the cross-motion is not one to compel arbitration, the essence of the defendants' argument is that the Settlement and Release Agreement and By-laws allow it to seek payment from former unit owners and that the same documents require that such disputes must be arbitrated.

To be sure, courts have "repeatedly recognized New York's 'long and strong public policy favoring arbitration.'" Stark v Molod Sptiz DeSantis & Stark, P.C., 9 NY3d 59, 66 (2007) (*quoting* Matter of Smith Barney Shearson v Sacharow, 91 NY2d 39, 49 [1997]). Nonetheless, "a party will not be compelled to arbitrate ... absent evidence which affirmatively establishes that the parties expressly agreed to arbitrate their disputes. The agreement must be clear, explicit, and unequivocal." Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc., 115 AD3d 128, 132-133 (1st Dept. 2014) (*quoting* Matter of Waldron, 61 NY2d 181, 183 [1984]). That is not the case here. At best, the subject documents are ambiguous in regard to the plaintiffs' continuing financial obligations to the defendant and obligation to arbitrate. Furthermore, dismissal under CPLR 3211(a)(1) is warranted only where the documentary evidence submitted "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." Fortis Financial Services, LLC v Fimat Futures USA, 290 AD2d 383, 383 (1st Dept. 2002); *see* Amsterdam Hospitality Group, LLC v Marshall-Alan Assoc., Inc., 120 AD3d 431 (1st Dept. 2014). A document qualifies as "documentary evidence" only if: (1) it is "unambiguous"; (2) is of "undisputed authenticity"; and (3) its contents are "essentially undeniable." VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC, 171 AD3d 189 (1st Dept. 2019). Again, that is not the case here.

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action." 511 W. 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144, 151-52 (2002). To determine whether a pleading adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (id. at 152; see Romanello v Intesa Sanpaolo, S.p.A., 22 NY3d 881 [2013]; Simkin v Blank, 19 NY3d 46 [2012]), and determine only whether the facts as alleged fit within any cognizable legal theory (see Hurrell-Harring v State of New York, 15 NY3d 8 [2010]; Leon v Martinez, 84 NY2d 83 [1994]). Liberally construed, the complaint adequately pleads causes of action for declaratory and injunctive relief and for contractual attorney's fees.

More specifically, the Settlement and Release Agreement provides that upon payment of \$350,000.00 by the plaintiffs, the defendant would:

"release, acquit and forever discharge" the plaintiffs "and all of their respective present or former members, directors, partners, principals, officers, employees, agents, trustees, attorneys, lenders, insurers and reinsurers, parents, subsidiaries, affiliates, divisions, representatives, predecessors or successors, partnerships or corporations, and their respective heirs, executors, administrators, successors and assigns from any and all causes of actions, debts, sums of money, accounts, bonds, bills, covenants, contracts, controversies, promises, agreements, trespasses, variances, judgments, damages, costs, fees, executions, claims and demands whatsoever, at law or in equity, if any kind or character whatsoever, known or unknown, vested or contingent, suspected or unsuspected, in contract or in tort, including ... breach of contract." ...

The Agreement also includes a merger clause which provides in part that it "supersedes any and all prior agreements and understandings." The defendant's arguments to the contrary, including its assertions that there is a carve-out in the Settlement and Release Agreement allowing them to recoup unpaid common charges thereafter and even after the November 2023 sale of the subject property and to require arbitration of such claims under terms of the By-Laws, are unpersuasive and largely belied by the documents themselves.

This Settlement and Release Agreement is remarkably broad and its terms can quite reasonably be interpreted to release the plaintiffs, former owners, from the defendant's present claims against them. In contrast, the arbitration provisions in the By-Laws upon which the defendants rely, are limited. For example, Section 5.1(c) of the By-Laws states only that any

objection raised by a commercial unit owner of hotel unit owner as to the allocation by the Board of common charges amounts owners must be arbitrated if the Board cannot resolve it on their own. The defendant argues that a provision contained within Section 3 of the Agreement invokes Section 5.1(c) to require that plaintiffs Flank, Inc. and Flank 71 Smith LLC have an “ongoing obligation” under the By-Laws. This argument is a tortured reading of the documents. Even assuming that any former owners have any ongoing obligation, the plaintiffs are not presently disputing the Board’s allocation of charges among units. Rather, they are arguing that the Settlement and Release Agreement released them from any type of further obligation.

Moreover, the Settlement and Release Agreement was an arms-length transaction negotiated by sophisticated parties in order to avoid litigation. See generally W.W.W. Assocs., Inc. v Giancontieri, 77 NY2d 157 (1990). As such, any contemplated carve-out that may include the payments now sought by the defendant or a continuing requirement to arbitrate could have been expressly included among its terms but was not. Notably, the Agreement includes an attorney’s fees provision stating that if any party who resorts to legal action to enforce any of the rights pursuant to this Agreement, the prevailing party shall be entitled to recover its costs and expenses associated with such action. This counters the defendant’s argument that the parties had contemplated that all disputes be arbitrated.

Finally, “[p]ublic policy favors enforcement of stipulations of settlement. See McCoy v Feinman, 99 NY2d 295 (2002); Nieborak v W54-7 LLC, 203 AD3d 439 (1st Dept. 2022); Pruss v Infiniti of Manhattan, Inc., 180 AD3d 163 (1st Dept. 2020). Only where there is cause sufficient to invalidate a contract, such as fraud, collusion, mistake or accident, will a party be relieved from the consequences of a stipulation made during litigation.” Hallock v State of New York, 64 NY2d 224, 230 (1984); see also Hawkins v City of New York, 40 AD3d 327 (1st Dept. 2007); Hotel Cameron, Inc. v Purcell, *supra*; City of New York v 130/40 Essex St. Dev. Corp., 302 AD2d 292 (1st Dept. 2003). That has not been shown, or even alleged, here.

Upon the foregoing papers and after oral argument, it is

ORDERED that the plaintiffs’ motion to stay arbitration is granted and the AAA arbitration proceeding *captioned Board of Managers of The Boerum Condominium v 140 Schermerhorn Street Property Owner LLC, 71 Smith Street Retail LLC, Flank Inc. and Flank 71*

Smith LLC (Case Number 01-25-0002-2985) is hereby stayed until a further order of this court; and it is further

ORDERED that the defendant's cross-motion to dismiss the complaint is denied in its entirety, and it is further

ORDERED that the defendant shall answer the complaint within 30 days of the date of this order, and it is further

ORDERED that the Clerk shall mark the file accordingly.

This constitutes the Decision and Order of the court.


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

9/26/2025
DATE

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: