

Edouard v Board of Directors of 32083 Owners Corp.

2025 NY Slip Op 34714(U)

December 10, 2025

Supreme Court, New York County

Docket Number: Index No. 652834/2024

Judge: Nicholas W. Moyne

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
COUNTY OF NEW YORK: PART 41M

-----X

ALPHONSE EDOUARD,

Plaintiff,

- v -

THE BOARD OF DIRECTORS OF 32083 OWNERS
CORP., PAM SCHWARTZ, BLANCA QIN, 32083
OWNERS CORP., ERIC SCHMUTTER, PEARL
SCHMUTTER, 32083 OWNERS CORP.

Defendant.

INDEX NO. 652834/2024

MOTION DATE 08/09/2024,
09/09/2024,
11/04/2024

MOTION SEQ. NO. 001 002 003

**DECISION + ORDER ON
MOTION**

-----X

HON. NICHOLAS W. MOYNE:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 9, 10, 11, 12, 13, 14, 15, 16, 17, 22, 26, 30

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 28, 29

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 32, 33, 34, 35, 36, 37, 38, 39, 40, 42, 43, 44

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

This matter comes before the Court on three separate motions to dismiss the Complaint filed by Plaintiff Alphonse Edouard ("Plaintiff"). The moving defendants are (1) The Board of Directors of 32083 Owners Corp., Pam Schwartz, and Blanca Qin (collectively, the "Building Defendants"); (2) Eric Schmutter ("Schmutter"); and (3) Pearl Schmutter as Trustee of the 2015 Pearl Schmutter Revocable Trust (the "Trust"). Each motion seeks dismissal of the Complaint pursuant to various sections of New York's Civil Practice Law and Rules (CPLR).

This action, brought by Plaintiff both individually and derivatively on behalf of 32083 Owners Corp. (the "Cooperative"), alleges improper

corporate governance, breach of contract, and breach of fiduciary duty concerning the affairs of the residential cooperative located in New York County. Plaintiff, a shareholder in the Cooperative, contends that the defendants have engaged in mismanagement, neglected the building's physical condition, and violated the Cooperative's governing documents.

For the reasons that follow, the defendants' motions are granted in part and denied in part.

The plaintiff Alphonse Edouard is a shareholder and resident of the Cooperative. The defendants include the Cooperative's Board of Directors (the "Board"), its president and treasurer, individual director Eric Schmutter, and the Trust, which is a holder of unsold shares in the Cooperative. The rights and obligations of the parties are governed by several key documents, including the Cooperative's Bylaws (Ex. A to Complaint), the Offering Plan (Ex. B), and the House Rules (Ex. C).

The complaint alleges that the Board has been improperly constituted in violation of the Cooperative's governing documents. The Offering Plan expressly prohibits holders of unsold shares from designating and electing a majority of the Board (Complaint ¶ 34). Nevertheless, the plaintiff alleges that in 2020, holders of unsold shares elected all five members of the Board and that subsequent vacancies in 2021 were filled by appointments made indirectly by the holders of unsold shares (Complaint ¶¶ 148-150). The plaintiff thus contends that the Schmutter Trust, as a holder of unsold shares, has effectively designated and controlled the entire Board. Further, the Bylaws and House Rules impose residency requirements for a majority of directors, which the plaintiff alleges have been violated (Complaint ¶¶ 36-37). Finally, the plaintiff complains about what he alleges to be numerous instances of the Board's alleged failure to maintain the Cooperative's property and manage its affairs.

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 (*see 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 and accord it the benefit of every possible favorable inference (*see 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]).

The complaint asserts eight causes of action, brought by the plaintiff either individually or derivatively on behalf of the Cooperative. The first cause of action seeks a declaratory judgment that the current 2024 Board is unlawfully constituted, having been wholly elected or appointed by the holders of unsold shares, and that Eric Schmutter is ineligible to remain a director. The second cause of action seeks a declaratory judgment that the Offering Plan violates Part 18 and New York Regulations due to a failure to amend and account for the transfer of unsold shares to the Schmutter Trust, and seeks to compel the Board and the Trust to fulfill their required filing obligations. The third cause of action seeks relief for the denial of the plaintiff's statutory and common-law right to inspect the books and records of the Cooperative. The fourth cause of action alleges breach of contract against the Board and the Cooperative for failing to hold an annual meeting of shareholders for the election of directors since 2020. The fifth cause of action is against the Board for implementing an unlawful voting policy that violates the clear division of rights regarding Board elections between shareholders and holders of unsold shares, as established in the Bylaws and Offering Plan. The sixth cause of action alleges breach of fiduciary duty against the Board for imposing discriminatory special assessments against the Plaintiff, treating him unequally compared to other shareholders. The seventh cause of action alleges breach of fiduciary duty and mismanagement against the Board for waste and failure to perform duties related to building maintenance, ignoring catastrophic risks, and failing to pursue legal claims/settlements. The eighth cause of actions seeks attorney's fees pursuant to BCL § 626(e).

The Court will first address the defendants' threshold procedural arguments regarding the discontinuance of the Prior Action and res judicata, before turning to the substantive arguments for dismissal of the complaint's various causes of action.

Plaintiff commenced this action by filing a Summons and Complaint. The various defendants subsequently filed the instant motions to dismiss. The defendants argue, among other things, that this action is barred by the doctrines of res judicata and collateral estoppel due to a "Prior Action" (Index No. 101154/2020) that involved some of the same parties and issues. Plaintiff discontinued that Prior Action by filing a notice of discontinuance "without prejudice." Defendants argue that this action is

barred by res judicata and an allegedly improper discontinuance of the Prior Action. The Court finds this argument unpersuasive. Plaintiff discontinued the Prior Action by filing a notice that was expressly "without prejudice." As the plaintiff correctly argues, the Cooperative, as a party to the Prior Action, could have insisted upon a court order to discontinue pursuant to CPLR 3217(b) if it believed a discontinuance without prejudice would cause it harm. By not objecting at the time, the Cooperative waived its right to do so now. Furthermore, CPLR 3217(c) provides that a discontinuance by notice is without prejudice. Accordingly, the discontinuance of the Prior Action does not have a res judicata effect, and this defense is dismissed.

With regards to the first cause of action for a declaratory judgment, the plaintiff states a cognizable claim for a declaratory judgment. He alleges that holders of unsold shares elected or appointed the entire Board, in direct contravention of the Offering Plan's prohibition on such holders electing a majority of the Board (Complaint ¶¶ 148-150). Accepting these allegations as true, the plaintiff has stated a valid claim that the Board is improperly constituted. This cause of action survives the motion to dismiss.

The defendants argue that the plaintiff's second cause of action, which alleges that the Offering Plan is materially deficient, must be dismissed because it is preempted by the Martin Act (General Business Law § 352-c et seq.). This argument has merit.

The Martin Act grants the New York Attorney General exclusive jurisdiction to prosecute fraudulent or deceptive practices in the marketing of securities, including cooperative interests. The Court of Appeals has held that there is no implied private right of action for violations of the Martin Act's anti-fraud provisions. (*See CPC Int'l Inc. v. McKesson Corp.*, 70 NY2d 268, 276-277 [1987]). A plaintiff cannot, through artful pleading, press a claim based on alleged material omissions in an offering plan, as such wrongs are given over to the Attorney-General under the Martin Act. (*see Kralik v 239 E. 79th St. Owners Corp.*, 5 NY3d 54, 59 [2005]). Here, the plaintiff's second cause of action is premised entirely on the allegation that the Offering Plan omits material facts regarding the transfer of unsold shares to the Trust. This is precisely the type of claim that falls under the exclusive purview of the Attorney General. Accordingly, the second cause of Action constitutes an impermissible attempt to privately enforce the Martin Act and must be dismissed.

The Trust argues that Plaintiff's claims are time-barred. The applicable statute of limitations for a breach of contract claim is six years. CPLR 213(2). The Trust contends that any claim related to the Offering Plan arose either in 1980 upon its issuance or in 2003 when Plaintiff purchased his shares. Even assuming the claim accrued in 2016 upon the transfer of units to the Trust, the six-year statute would have expired in 2022.

This argument is persuasive as it relates to the now-dismissed second cause of action. However, it does not bar the plaintiff's other claims. The allegations concerning the Board's failure to hold annual meetings from 2021 to 2024, its ongoing failure to provide financial records, its recent imposition of a special assessment in 2023, and its continued neglect of the building's physical condition all describe alleged wrongs that fall squarely within the applicable limitations periods. Therefore, the statute of limitations defense does not warrant dismissal of the Complaint in its entirety.

The defendants do not challenge the third cause of action relating to books and records and thus it will be permitted to go forward. Regarding the fourth cause of action for breach of contract, the plaintiff has sufficiently pleaded several claims for breach of the Bylaws, which constitute a contract between the shareholders and the Cooperative. The allegations that the Board breached its contractual obligations by failing to hold annual meetings for four consecutive years (Complaint ¶¶ 208-211), refusing to provide required financial records upon request (¶¶ 55-56), and imposing special assessments that were not distributed proportionally to all shareholders (¶¶ 236-237) are specific and state a valid cause of action for breach of contract. These claims survive.

The defendants next challenge the plaintiff's standing under CPLR § 3211(a)(3) to bring claims in his individual capacity for damages to the Cooperative's common elements. This argument applies to the fifth, sixth and seventh causes of action in the complaint. The law is clear that while cooperative unit owners hold an undivided interest in the common elements as tenants-in-common, this right does not extend to allowing individual claims with respect to damages to the common elements (*see Caprer v Nussbaum*, 36 AD3d 176, 186 [2d Dept 2006]). An action for injury to common elements must be brought derivatively on behalf of the corporation or jointly by all shareholders.

The plaintiff's claims regarding damage from rotten trees, improper cable installations, and a leaking roof all concern harm to the common

elements of the Cooperative. To the extent the plaintiff seeks damages in his individual capacity for these wrongs, he lacks standing. However, these same allegations form the basis of his seventh cause of action, which is properly pleaded as a derivative claim on behalf of the Cooperative. Accordingly, any claims for individual damages related to common elements are dismissed, but the allegations may proceed as part of the derivative seventh cause of action.

The Building Defendants argue this claim is barred by the business judgment rule, which shields a board's decisions from judicial scrutiny when they are "taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. (*Levandusky v. One Fifth Ave. Apartments Corp.*, 75 NY2d 530, 537-38 [1990]). However, the business judgment rule does not protect a board that has abdicated its responsibilities or failed to act. The plaintiff's allegations paint a picture not of a board making poor decisions, but of a board making no decisions at all in the face of known, serious risks. The alleged failure to address completely rotten trees on the verge of collapse, to repair known water leaks, and to pursue claims against third-party vendors for property damage are sufficient at the pleading stage to support a claim of waste and an abdication of directorial duties. As such, pre-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate (see *Ackerman v. 305 E. 40th Owners Corp.*, 189 AD2d 665, 667 [1st Dept 1993]).

Furthermore, Plaintiff has adequately pleaded that a pre-suit demand on the Board would have been futile. Demand is excused where, as alleged here, a majority of the board is interested in the challenged transaction or is controlled by a self-interested director. Plaintiff alleges that the entire Board owes its position to the Schmutter Trust and represents its interests, creating a structural conflict that renders a demand futile (Complaint ¶ 143). Accordingly, the Seventh Cause of Action survives the motion to dismiss.

In summary, the Court finds that the plaintiff's action is not barred by the discontinuance of the Prior Action. However, the second cause of Action is dismissed as it is preempted by the Martin Act. Plaintiff's claims for damages in his individual capacity for harm to the Cooperative's common elements are also dismissed for lack of standing. The surviving causes of action are the First Cause of Action for a declaratory judgment, the third cause of action seeking the production of book and records, the various claims for breach of contract under the Bylaws (failure to hold

meetings, provide records, and impose proportional assessments), and the Seventh Cause of Action for a derivative breach of fiduciary duty against the Board.

Accordingly, the motion to dismiss is granted to the extent that the second, fifth and sixth causes of action are hereby dismissed. The motion is otherwise denied. The motion by Defendant Pearl Schmutter as Trustee of the 2015 Pearl Schmutter Revocable Trust is granted, as the only cause of action directed specifically at the Trust was the Second Cause of Action. The motions by the Building Defendants and Eric Schmutter are granted in part and denied in part.

Based on the foregoing, it is hereby

ORDERED that the motion to dismiss by Defendant Pearl Schmutter as Trustee of the 2015 Pearl Schmutter Revocable Trust is granted and the complaint is dismissed in its entirety as against said defendant; and it is further

ORDERED that the motion to dismiss by Defendant Eric Schmutter is granted in part to the extent that the second cause of action and any claims for damages in the plaintiff's individual capacity for harm to common elements are dismissed as against him, and the motion is otherwise denied; and it is further

ORDERED that the motion to dismiss by the Building Defendants (The Board of Directors of 32083 OWNERS CORP., Pam Schwartz, and Blanca Qin) is granted in part to the extent that the Second Cause of Action and any claims for damages in Plaintiff's individual capacity for harm to common elements are dismissed, and the motion is otherwise denied; and it is further

ORDERED that the remaining defendants shall file and serve an Answer to the surviving causes of action in the complaint within 20 days of service of a copy of this Order with notice of entry; and it is further

ORDERED that counsel for all remaining parties are directed to appear for a preliminary conference before this Court on March 19, 2026, at 10:30 a.m.



12/10/2025

DATE

NICHOLAS W. MOYNE, J.S.C.