

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
Justice

PART 2

Index Number : 157621/2015
DOGWOOD RESIDENTIAL, LLC
vs
STABLE 49, LIMITED
Sequence Number : 003
AMEND

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for
Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).
Answering Affidavits — Exhibits No(s).
Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is resolved in accordance
with the attached ~~Order~~ Decision + Order,
dated December 17, 2018

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 12/17/18

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----x
DOGWOOD RESIDENTIAL, LLC and DAVID
BLUMENFELD,

DECISION AND ORDER

Index No. 157621/2015

Mot. Seq. 003

Plaintiffs,

-against-

STABLE 49, LIMITED,

Defendant.

-----x
Hon. Kathryn E. Freed:

The following documents efiled with NYSCEF were considered in determining this motion: 79-85, 87-107, and 110

Plaintiffs Dogwood Residential, LLC (Dogwood LLC) and David Blumenfeld (Blumenfeld) move for an order, pursuant to CPLR 3025 (b), granting them leave to amend their complaint to add various direct and derivative causes of action against the originally named defendant, the cooperative corporation, Stable 49, Limited (Stable). Plaintiffs further seek to add as defendants, in their capacities as members of Stable’s three-member board of directors (the Board), starting at some unspecified time in 2016 through January 10, 2018, proprietary lessees Kim Youngberg (Youngberg), Tewfic El-Sawy (El-Sawy), and Marianne Matanic (Matanic). In addition, plaintiffs seek to add as defendants, in their individual capacities, Damian Cavaleri (Cavaleri), who was, when this motion was made, a Stable officer, Youngberg, and El-Sawy, all three of whom are proprietary lessees of the building’s three duplex units, the lower levels of

which are in the building's cellar (cellar units).

Factual and Procedural Background

The facts underlying this action are set forth in this Court's decisions on motion seq. nos. 001 and 002 in this action, the Appellate Division First Department's determination of Stable's appeal of the latter decision (*see Dogwood Residential, LLC v Stable 49, Ltd.*, 159 AD3d 490 [1st Dept 2018]), and in this Court's decision on motion sequence nos. 002 and 003 in a related action commenced by plaintiffs, individually and derivatively, against Stable, Youngberg, Matanic, and El-Sawy, the latter three individually and as members of the Board, and against Cavaleri, individually (index no. 157117/2017) (the 2017 action),¹ which facts are deemed incorporated herein, and will be repeated and amplified only as is necessary. In deciding the instant motion, this Court will particularly rely on its analysis and conclusions set forth in its decision on the latter motion, which sought, and was granted, among other things, an order dismissing the amended 2017 complaint, which was nearly identical to the proposed newly-fashioned 42-page amended 2015 complaint that plaintiffs now seek to leave amend.

¹ The relevant documents relied upon in connection with motion sequence no. 003 in the 2017 action (motion to dismiss plaintiffs' amended 2017 complaint) are also submitted as exhibits on the instant motion, with the exception of several documents submitted by plaintiffs' counsel in the 2017 action in support of counsel's claim that the Board breached its fiduciary duties by its disparate treatment of Dogwood LLC by making repairs to units of those who were alleged Board members, and breached its fiduciary duty to Stable by hiring consultants to look into whether the cellar units could be legalized. *See* index no. 157117/2017, NYSCEF Doc. 101, Rosenberg affirmation in opposition to motion to dismiss amended 2017 complaint, with exhibits. In addition, this Court was advised on that motion that El-Sawy had resigned from the Board in January 2018 and that Cavaleri had replaced him. *Id.*, NYSCEF Doc. 111.

Discussion

Leave to amend a pleading is to be freely granted absent surprise or prejudice arising from such amendment, except where the proposed amended pleading is “palpably insufficient or patently devoid of merit.” *Y.A. v Conair Corp.*, 154 AD3d 611, 612 (1st Dept 2017).

In light of this Court’s decision dismissing, on substantive grounds, those parts of the amended 2017 complaint’s first and second causes of action that were alleged against any defendant, other than Stable, and given that the proposed first cause of action in the 2015 action, which seeks monetary damages based on Stable’s alleged breaches of the proprietary lease in failing to make repairs, injunctive relief compelling “[d]efendants” to make those repairs, and reciprocal attorneys’ fees, based on Stable’s breach of the lease, is virtually identical to, and a combination of, the amended 2017 complaint’s first and second causes of action, plaintiffs are granted leave to serve their proposed amended 2015 complaint’s first cause of action on behalf of Dogwood LLC and Blumenfeld and only against Stable, for the reasons stated in that decision, which did not dismiss the amended 2017 complaint’s first and second causes of action asserted on behalf of Dogwood LLC on substantive grounds. However, because this motion, unlike that in the 2017 action, is not one to dismiss, and because Stable did not, in seeking to dismiss the original 2015 complaint, contend that Blumenfeld was an improper party to any of the causes of action he asserted, including those that were reinstated upon renewal/reargument, and because on this motion, unlike on defendants’ motion to dismiss the amended 2017 complaint, Stable did not claim that Blumenfeld was an improper party to any of the proposed direct causes of action, this Court does not deny Blumenfeld leave to assert any proposed direct causes of action on that ground alone, at this juncture, although relief to Blumenfeld, as well as to Dogwood LLC, may be

denied on other grounds.

To the extent that the proposed first cause of action seeks reciprocal attorneys' fees, which are sought for a second time under the proposed eleventh cause of action, plaintiffs must choose under which cause of action such fees are sought. Any reciprocal attorneys' fees sought under the proposed eleventh cause of action must specify from which other direct causes of action such request for fees flows. If plaintiffs decide to assert a particular claim for reciprocal attorneys' fees, under their proposed eleventh cause of action, they must delete any redundant claim for such fees set forth under any other cause of action, which this Court grants plaintiffs leave to assert. Further, such reciprocal attorneys' fees may be sought solely from Stable, the only defendant or proposed defendant which was a party to the proprietary lease.

Plaintiffs' proposed second cause of action seeks damages and reciprocal attorneys' fees based on "[d]efendants" alleges breaches of proprietary lease paragraph 21 (a) (proposed amended 2015 complaint, ¶¶ 131-136), in that the Board, instead of reviewing Dogwood LLC's renovation plans in good faith, allegedly refused to consent to the plans or sign the necessary applications. This proposed cause of action is, along with its preliminary allegations (*id.*, ¶¶ 50-62), essentially a reiteration of the amended 2017 complaint's third cause of action. In light of the dismissal, on substantive grounds, of this cause of action in the amended 2017 complaint against all defendants except Stable, the branch of plaintiffs' motion, which seeks leave to amend its 2015 complaint to assert this cause of action, is granted only to the extent that plaintiffs may assert this cause of action against Stable. Stable did not oppose the assertion of this proposed cause of action against it on substantive grounds on either this motion or on the motion to dismiss the amended 2017 complaint's third cause of action. Nevertheless, plaintiffs must decide under which cause of

action their request for reciprocal attorneys' fees is being asserted and adjust the proposed amended 2015 complaint accordingly, as previously indicated.

Plaintiffs' proposed amended 2015 complaint's third cause of action, which seeks to compel the Board to approve Dogwood LLC's plans and execute various applications, is virtually identical to the amended 2017 complaint's fourth cause of action. Because that latter cause of action has been dismissed, leave to amend the 2015 complaint to add the proposed third cause of action is denied for the same reasons.

Similarly, the branch of plaintiffs' motion which seeks leave to amend the 2015 complaint to add a proposed fourth cause of action, sounding in breach of fiduciary duty, is denied. The factual allegations of this proposed cause of action and its demanded relief vary in some respects from the original 2015 complaint's breach of fiduciary duty cause of action, and this claim was evidently intended to supercede that cause of action.² The allegations of this proposed cause of action, including the relevant introductory allegations (proposed amended 2015 complaint, ¶¶ 112-116), are substantially identical to those underlying the amended 2017 complaint's fifth cause of action, which this Court has dismissed. In light of the grounds for that cause of action's dismissal in the 2017 action, this proposed reformulated cause of action does not assert a valid claim.

The branch of plaintiffs' motion which seeks leave to amend their 2015 complaint to add the proposed fifth cause of action, which requests a declaration that, to the extent that the occupancy agreement conflicts with the proprietary lease, it is null and void, violates Real

² Plaintiffs evidently recognized that certain allegations in the original 2015 complaint were problematic and could not sustain this cause of action. *See* This Court's decision on motion seq. nos. 002 and 003 in 2017 action, n 8 and n 11.

Property Law § 235-f and/or is against public policy, is denied. This proposed cause of action, including the prefatory allegations (proposed amended 2015 complaint, ¶¶ 26-29), is essentially the same as the amended 2017 complaint's sixth cause of action, which this Court has dismissed, except that the 2015 action's proposed fifth cause of action refers only to Lucas Blumenfeld's (Lucas) occupancy and omits any allegations about Max Blumenfeld (Max), because the proposed amended 2015 complaint was dated four months before the amended 2017 complaint, and before Lucas had moved out of the Apartment and Max had moved in. *See id.*, ¶¶ 66, 82, 117-119. For the same reasons that the amended 2017 complaint's sixth cause of action has been dismissed, this proposed fifth cause of action fails to state a valid claim.

As for the proposed sixth cause of action, sounding in breach of the warranty of habitability, given that this cause of action is, as is relevant, largely the same as the amended 2017 complaint's seventh cause of action, for the reasons that the latter cause of action has been dismissed, the proposed sixth cause of action cannot stand, since it fails to allege a viable breach of the warranty of habitability cause of action on plaintiffs' behalf. Thus, leave to amend the 2015 complaint to add the proposed sixth cause of action is denied.

Turning to plaintiffs' request for leave to amend the 2015 complaint to add the proposed derivative seventh through tenth causes of action, which relate to the cellar units, and the alleged uses of portions of the cellar levels of each such unit in violation of the building's certificate of occupancy and various statutes and regulations, this Court, in its decision dismissing the amended 2017 complaint's derivative causes of action, rejected Stable's claim that Dogwood LLC would be an inappropriate party to assert derivative claims on Stable's behalf because Dogwood LLC might attempt to use the derivative claims as leverage to improperly pressure Stable to approve

Dogwood LLC's renovation plans. For the same reason that this Court rejected that argument in the 2017 action, it is rejected herein. Regardless of whether Dogwood LLC's plans should be, and are, approved, the law requires, for the safety of the cellar units' occupants, that the building have a proper certificate of occupancy and that the building's units conform to it. Thus, the alleged illegalities, which have existed for approximately 30 years, cannot continue. Nonetheless, the branch of the motion which seeks leave to assert the proposed derivative causes of action in the form annexed to plaintiffs' motion is denied.

The proposed amended complaint's seventh, ninth, and tenth causes of action are virtually identical, respectively, to the amended 2017 complaint's eighth, tenth, and eleventh causes of action. The proposed eighth cause of action is similar to the amended 2017 complaint's ninth cause of action in that they both seek mandatory injunctive relief compelling the cellar units' proprietary lessees to provide access to their respective units by Department of Building (DOB) and Fire Department inspectors.

As indicated with respect to the amended 2017 complaint's derivative causes of action, and, as is applicable here, where it was again raised by defendant in opposition to plaintiffs' instant motion, Blumenfeld is not a proper party to any of the derivative causes of action because he is not a shareholder. Therefore, leave to serve an amended complaint asserting any derivative claims on Blumenfeld's behalf is denied. In addition, as with the amended 2017 complaint, the proposed amended 2015 complaint includes, as part of each derivative cause of action, all of the allegations relevant only to the individual causes of action which, as set forth in connection with the amended 2017 complaint, is impermissible. Accordingly, the derivative causes of action are improperly pleaded for that reason, and leave to serve the proposed amended 2015 complaint's

The proposed derivative seventh cause of action is largely the same as the amended 2017 complaint's eighth cause of action, which seeks a declaration that the cellar units violate Multiple Dwelling Law §§ 34 and 300 (6). Similarly, this proposed cause of action alleges that provisions of the Building, Fire, and Administrative Codes must be satisfied before a cellar level can be used for residential purposes, and that no permits, plans, or certificate of occupancy exist which authorize such use in any of the cellar units' cellar levels. Proposed amended 2015 complaint, ¶¶ 183-184. Therefore, this proposed cause of action assumes that the use of any of the cellar level rooms as bedrooms and as full bathrooms with bathing facilities, i.e., as residential living space, constitutes an illegal occupancy. *Id.*, ¶ 185. Additionally, like the amended 2017 complaint's eighth cause of action, this proposed cause of action seeks an order preliminarily and permanently enjoining Youngberg, El-Sawy, and Cavaleri from using the cellar level rooms of such units as residential space, including as bedrooms and full bathrooms. This cause of action further seeks an order compelling those units' proprietary lessees to restore each of their cellar units to comply with the certificate of occupancy as recreational space³ with a powder room. However, aside from the foregoing opposition alleged as to all of the derivative causes of action as a whole, Stable does not oppose this cause of action. Therefore, Dogwood LLC, alone, is granted leave to amend its 2015 complaint to assert this cause of action, deleting all allegations that are relevant solely to the direct causes of action and are otherwise irrelevant to this derivative cause of action, and deleting

³ According to the proprietary lease (¶ 7 [c] [h]) the cellar level of each cellar has a recreation room, but it also has a bedroom and a full bathroom, with bathing facilities, which is each unit's only bedroom and bathing facility.

derivative causes of action in the form annexed to plaintiffs' motion papers is denied on that

Blumenfeld as a party to this cause of action.

Dogwood LLC's request for leave to assert the proposed derivative eighth cause of action, which seeks a mandatory injunction compelling Youngberg, Cavaleri, and El-Sawy to grant access to their respective units to a DOB inspector, is also denied as moot, because, as noted with respect to defendants' motion to dismiss the amended 2017 complaint's ninth cause of action, those proprietary lessees have already granted access to their the cellar units, which have since been inspected, resulting in the issuance of a violation. To the extent that Dogwood LLC baldly speculates that the cellar unit shareholders might not cooperate with DOB or Fire Department inspectors in the future, Dogwood LLC is free to seek any legal relief to which it may be entitled if any cellar unit proprietary lessee unreasonably withholds its consent to any such required inspection.

The proposed derivative ninth cause of action, which purports to assert a common law ejectment cause of action under Real Property Actions and Proceedings Law § 601, alleges that those who reside in the cellar units, including the proprietary lessees, use and occupy the cellar levels of those units in ways that violate the certificate of occupancy, provisions of their leases, fire, health, safety, and zoning code provisions, and the relevant provisions of the Multiple Dwelling Law. *See* Proposed amended 2015 complaint, ¶¶ 200, 202, 203. This proposed cause of action seeks the same relief for basically the same reasons as set forth in the amended 2017 complaint's tenth cause of action. With respect to this proposed cause of action, plaintiff's concede, as they did in response to the motion to dismiss the amended 2017 complaint's tenth cause of action, that they do not actually seek to eject the cellar units' occupants from any portion of their cellar units that is being improperly used, but only "seek to eject the occupants from

utilizing the cellar areas” in any way that “is contrary to the [b]uilding’s C/O,” and assert that such occupants “may still lawfully use such areas as storage and/or ‘recreation rooms.’” Plaintiffs’ memo in reply at 21, n 14 (emphasis added). For the reasons set forth in dismissing the amended 2017 complaint’s tenth cause of action, leave to serve an amended complaint in the 2015 action to assert the proposed ninth cause of action is denied. In particular, Dogwood LLC does not seek to eject the occupants, even from those areas of the cellar levels that are improperly being used, but merely seeks to stop, i.e., enjoin the illegal uses of those areas that are contrary to the certificate of occupancy and various laws and codes, relief that is sought for the same reasons under the proposed seventh cause of action and is, thus, duplicative of a portion of that cause of action.

The branch of the motion which seeks leave to amend the 2015 complaint to add the proposed derivative tenth cause of action, which alleges breaches of fiduciary duty, is also denied for the same reasons that the amended 2017 complaint’s eleventh cause of action was dismissed, including, but not limited to, plaintiffs’ failures to meet the pleading specificity required by CPLR 3016 (b) and to allege any damages, much less damages allegedly caused by the Board’s inaction, as opposed to damages which are attributable to the sale of shares associated with nonconforming units and to Stable having issued proprietary leases for units each described in the proprietary lease as having a cellar level full bath and bedroom, which violates the building’s certificate of occupancy.

As for the proposed eleventh cause of action, as previously indicated, plaintiffs are granted leave to amend their 2015 complaint to add a cause of action for any reciprocal attorneys’ fees, indicating that this cause of action arises out of their proposed direct first and second causes of action or they may assert such claim directly under their proposed first and second causes of

action.

Finally, if there are any allegations relevant to the instant action's proposed first, second, seventh, or eleventh causes of action that were set forth in the now dismissed amended 2017 complaint which were relevant, respectively, to the 2017 complaint's corresponding first, second, third, eighth, or twelfth causes of action, and if plaintiffs wish to add those allegations to their proposed amended 2015 complaint, they are granted leave to do so.

Therefore, in light of the foregoing, it is hereby:

ORDERED that plaintiffs' motion for an order granting them leave to serve their proposed amended verified complaint is granted, in part, as follows: plaintiffs are granted leave to serve an amended complaint which includes the proposed first and second causes of action, in the form annexed to the moving papers, but alleged only against defendant Stable 49 Limited, deleting any other proposed defendant, and retaining the claim for reciprocal attorneys' fees in each of the first two proposed causes of action, or deleting those reciprocal attorneys' fees claims from those two causes of action and serving an amended complaint containing a separate cause of action for reciprocal attorneys' fees in the form annexed to their moving papers as the proposed eleventh cause of action, but indicating that such cause of action is against only Stable 49 Limited, deleting any other defendant from that cause of action, detailing the direct causes of action from which the claims for reciprocal attorneys' fees arise, and deleting the first paragraph (¶ 215) of that proposed eleventh cause of action, which incorporates every prior allegation of the proposed complaint, and replacing it with allegations that apply and are relevant to that cause of action; and it is further

ORDERED that plaintiff Dogwood Residential, LLC, alone, is granted leave to amend the 2015 complaint to assert on its behalf the proposed seventh cause of action in the form annexed to the moving papers, but deleting any other plaintiff from this cause of action, and deleting any allegations that are irrelevant to this cause of action, including any allegations that are relevant only to other causes of action; but leave for plaintiffs to serve an amended complaint in the form annexed to the moving papers is denied with respect to the proposed third, fourth, fifth, sixth, eighth, ninth, and tenth causes of action; and it is further

ORDERED that if there are any allegations that were set forth in plaintiffs' amended 2017 action's complaint (index no. 157117/2017) that were relevant to the amended 2017 complaint's first, second, third, eighth and/or twelfth causes of action, and are also relevant, respectively, to the corresponding proposed first, second, seventh, and/or eleventh causes of action in the instant action, but which allegations were not included in the proposed 2015 complaint, and plaintiffs wish to include any of those omitted allegations in the amended verified 2015 complaint, they are granted leave to do so; and it is further

ORDERED that, within 20 days from entry of this order, plaintiffs shall serve a copy of this order with notice of entry and the amended complaint in conformity herewith; and it is further

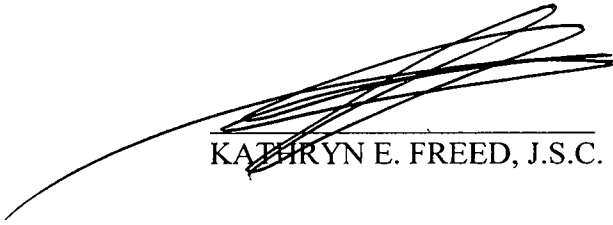
ORDERED that, within 20 days of service of the amended complaint, Stable 49, Limited all answer the amended complaint or otherwise respond to it; and it is further

ORDERED that counsel are directed to appear for a compliance conference at 280 Centre Street, Room 280, on March 12, 2019 at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: December 17, 2018

ENTER:



KATHRYN E. FREED, J.S.C.