SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LOUIS L. NOCK **PART** IAS MOTION 38EFM

Justice

----------X

OLIVER BAILLY and NOELLE BAILLY,

Plaintiffs,

- v -

22321 OWNERS CORP., ANTHONY WOLFF, SANDRINE FRANCE, JOEL GOLDSTEIN, PRITHI GOWDA, JUN HIERHOLZER, TEMILY-MARK WEINER, JAMES MURRAY, and "JOHN DOE" and "JANE DOE," individually, and as members of the Board of Directors of 22321 Owners Corp.,

Defendants.

----------X

INDEX NO. 160055/2018

MOTION DATE 03/28/2019

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

LOUIS L. NOCK, J.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is ordered that defendants' motion to dismiss pursuant to CPLR 3211(a)(1), (7), and CPLR 3016(b), is decided as follows:

THE ESSENTIAL ALLEGATIONS OF THE COMPLAINT[1]

Since November 15, 2017, plaintiffs have been the proprietary lessees of an apartment bearing the address 223 West 21st Street, Apt. 3G, New York, New York (the "Apartment"), pursuant to a proprietary lease between them and defendant 22321 Owners Corp. ("Owners"), a cooperative corporation owning the residential building bearing the address 223 West 21st Street, New York, New York. Plaintiffs are shareholders in Owners. The remaining defendants, who are also shareholders of Owners, are members of the Board of Directors of Owners (Verified

[1] Taken as true for purposes of that prong of the motion predicated on CPLR 3211(a)(7) (*e.g., Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172 [1st Dept 2004]).

Complaint, NYSCEF Doc. No. 1 [the "Complaint"], at 4 n 1, ¶¶ 11, 12). The proprietary lease contains the following provision, titled "Alterations":

> 21. (a) The Lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not be unreasonably withheld or delayed, make in the apartment or building, . . . any alteration, enclosure, or addition, or any alteration of or addition to, the water, gas, or steam risers or pipes, heating or air-conditioning system or units, electrical conduits, wiring, or outlets, plumbing fixtures, inter-communication or alarm system, or any other installation or facility in the apartment or building. . . .

Plaintiffs, and their infant child, have not yet been able to move into the Apartment, and plaintiffs have been economically burdened to carry its costs along with the costs of their present abode, due to the prolonged absence of written consent from Owners to what the complaint describes as "a straight-forward renovation project" of the Apartment, submitted to Owners' managing agent for approval in February 2018 and supplemented in March and May of that year (Complaint ¶ 34; *see id.*, ¶¶ 35, 40, 42, 47). The gist of the complaint is that such prolonged absence of written consent by Owners constitutes a breach by Owners of the above-quoted contractual provision requiring Owners to not unreasonably withhold or delay such consent. The individual defendants are sued on account of their collective status as members of the Board of Directors of Owners, alleged, by virtue of said absence of consent, to have:

> engaged in a course of wrongful conduct and/or malfeasance in which they have (i) treated Plaintiffs unequally and unfairly in connection with the approval of the Renovation Project, (ii) failed to act in the bests [sic][2] of the Co-op's shareholders due to their wrongful conduct in connection with the Renovation Project, (iii) failed to act with the utmost loyalty and care in connection with the Renovation Project.

(*Id.*, ¶ 111.)

The foregoing basic gist of the complaint is embellished by various alleged details of communications back and forth among plaintiffs on the one hand, and defendants on the other, regarding the sufficiency and adequacy of plaintiffs' renovation plans. As to the allegation of

[2] Assumed to have been intended to read "best interests" of the Co-op's shareholders, etc.

unequal treatment, the complaint alleges that defendant Anthony Wolff, "without any objection or impediment from the Board, was allowed to combine two apartments, which work requires extensive renovations (and invasive work in the Building, which affects other shareholders)" and which was "significantly more extensive and intrusive than the [plaintiffs'] Renovation Project . . . ." (Complaint ¶ 131).

The complaint also contains embellishments in particular reference to defendant Wolff. It makes reference to an unrelated prior action commenced by a different proprietary lessee of Owners in the same building – one, Samantha Black, represented by plaintiffs' counsel in the instant action – against Owners, Wolff, and other shareholders, "which involved analogous facts to the facts" in the instant action (Complaint ¶ 23). That action was titled *Black, et al. v 22321 Owners Corp., et al.* (index No. 105448/2009 [Sup Ct NY County]) (the "Other Action").

As in the instant action, the Other Action sought "a declaratory judgment and damages predicated upon the defendants' willful and malicious actions in blocking the plaintiff's good-faith efforts to perform certain lawful alteration work to her apartment, and in unreasonably delaying and withholding consent to the plaintiff's alteration work" (Complaint ¶ 24). The Other Action resulted in a post-trial money judgment for the plaintiffs therein in an amount of $800,000.00 plus other charges, so determined after a Referee's Hearing on damages, and in accord with a substantive transcribed decision and order issued by Hon. Shlomo Hagler of this court, from the bench, on December 24, 2013 (NYSCEF Doc. No. 22 [the "Other Action Decision"]. *See, id.*, at 49-51; *see, also*, Complaint ¶ 25).[3] Justice Hagler in that case found that: "The board explicitly agreed to allow plaintiffs to proceed in deference to Black's plea that the imminent birth of her child made it necessary to commence the renovations as soon as possible

[3] The trial in the Other Action lasted for eleven days (*see*, Other Action Decision at 30).

and because the renovations . . . were quite modest in scope" (Other Action Decision at 32). Justice Hagler found that to be in direct conflict with Wolff's trial assertion that no such consent was given (*id.*, at 31-32), which Justice Hagler found to be incredible (*id.*, at 32-33).

Justice Hagler also found that the plaintiffs in that case were treated unequally and unfairly, as compared with the renovation project of another shareholder "who also happens to be the key director in the co-op" (Other Action Decision at 44), and as compared with the renovation project of Wolff himself involving his combining of two apartments (*id.*, at 44-45). Justice Hagler found such unequal and unfair treatment in that case to constitute breaches of fiduciary duty on the part of Owners, and on the part of Wolff in light of his particularly direct involvement in the matters underlying the facts of that case (*id.*, at 45; *see also, id., passim*). The claims against the remaining shareholders named as defendants in that case were dismissed (*id.*, at 45).

The complaint in the instant action makes a clear attempt to cast Owners and Wolff in the same light as that found to be the case – after an eleven-day trial – in the Other Action (*see*, Complaint ¶¶ 23-32).

The complaint in the instant action asserts thirteen causes of action, sounding variously in breach of fiduciary duties, breach of proprietary lease, and negligence; and seeks compensatory and punitive damages along with an award of attorneys' fees, as well as a corresponding declaration of malfeasance on the part of all defendants.

DISCUSSION

The Complaint Does Not Confuse Direct and Derivative Claims:

Defendants argue that the entire complaint ought to be dismissed on the ground that it asserts, as individual claims on behalf of the plaintiffs, what are, in actuality, derivative claims requiring commencement of a shareholders' derivative suit. This court disagrees.

To be sure, the intermingling of derivative and individual claims would require dismissal of an entire complaint (*e.g., Abrams v Donati*, 66 NY2d 951 [1985], *rearg denied* 67 NY2d 758 [1986]; *Serino v Lipper*, 123 AD3d 34 [1st Dept 2014]). However, such circumstances involve claims which, while alleged by one particular shareholder, seek to challenge broad corporate managerial acts which adversely affect all shareholders alike, and which are shared, one and all, with the complaining shareholder (*see, e.g., Grika v McGraw*, 161 AD3d 450 [1st Dept 2018] [claiming, on behalf of all shareholders of McGraw Hill Financial, Inc., against its board's issuance of allegedly inaccurate credit ratings for corporate collateral debt obligations and mortgage-backed securities, defining such claims as those that "belong to and are brought on behalf of the corporation, rather than on behalf of (the shareholders) themselves," *id.*, at 451]; *SFR Holdings Ltd. v Rice*, 132 AD3d 424, 398-99 [1st Dept 2015] ["in determining whether plaintiffs' complaint alleges direct or derivative claims, the relevant analysis is '(w)ho suffered the alleged harm . . . (and) who would receive the benefit of any recovery or other remedy,'" and concluding that the subject claim was "properly brought as a direct claim, as the plaintiffs individually suffered the alleged harm and would benefit from any recovery"], *appeal dismissed* 27 NY3d 977 [2016]).

In the instant case, it is plain that plaintiffs are seeking individual relief that is exclusively limited to obtaining a go-ahead for the renovation project they have proposed in connection with

an apartment that is restricted in use to themselves alone, alleging an unreasonable withholding or delay of consent by the defendants. That relief, if granted, would inure solely to them, as opposed to a building-wide benefit that would be shared by all shareholders. Movants' counsel pays special attention to the sixth cause of action, asserted against the Board, for negligence in allowing Wolff to maintain managerial power even in the aftermath of the Other Action Decision. Movants' counsel argues that such a claim is derivative in nature, thereby triggering the rule of dismissal for intermingled individual and derivative claims. However, it is clear that plaintiffs are not seeking anything beyond the approval of their renovation project, irrespective of the way in which they alternatively plead the theory proffered in their sixth cause of action. The Appellate Division, First Department, provides the necessary guidance:

> Recognizing the difficulty in determining whether a claim is direct or derivative in the recent case of *Yudell v. Gilbert* (99 AD3d 108 [1st Dept 2012]), this court adopted the test developed by the Supreme Court of Delaware in *Tooley v. Donaldson, Lufkin & Jenrette, Inc.* (845 A2d 1031, 1039 [Del 2004]) as a common sense approach to resolving such issues. We held that the Delaware test is consistent with existing New York State law. In order to distinguish a derivative claim from a direct one, the court considers "(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders, individually)" (*Yudell*, 99 AD3d at 114, quoting *Tooley*, 845 A2d at 1033).

(*Serino, supra,* at 40.) Said counsel makes a similar argument with regard to what they consider to be pertinent aspects of the first and seventh through thirteenth causes of action which, just like the sixth cause of action, go no distance beyond seeking the bedrock relief plaintiffs seek in respect of the single, true, gravamen of this action – the obtainment of approval for their personal and individual renovation project. That, beyond cavil, is an individual – not derivative – claim. Applying the "common sense approach" quoted from the First Department above (*id.*), the totality of this action must be seen, realistically, as an individual action, by virtue of the nature of

the relief sought – relief centered solely upon plaintiffs' applied-for renovation of their apartment.

The motion to dismiss the complaint on grounds of commingling individual and derivative claims is, therefore, denied.

The Negligence Claim is Duplicative of Contractually-Based Claims:

Movants argue, correctly, that dismissal of the sixth cause of action, sounding in negligence, is warranted, as duplicative of the overall claims in this lawsuit predicated on an alleged breach by Owners and its Board (agents of Owners) of the proprietary lease obligation to not unreasonably withhold or delay consent to proprietary lessees' applications for apartment alterations (*see, generally, Dormitory Auth. v Samson Constr. Co.*, 30 NY3d 704 [2018]; *Board of Mgrs. v NW 124 LLC*, 116 AD3d 506 [1st Dept 2014]). Although the plaintiffs try to color their negligence claim as a purported challenge to the Board's ongoing retention of Wolff as an authoritative figure; as observed in the immediately preceding discussion, no relief is being sought beyond monetary (and declaratory) relief centered solely and exclusively on plaintiffs' need to go forward with their apartment renovation, which they applied for in early 2018.

Therefore, the sixth cause of action, for negligence, is dismissed, as duplicative.

There is No Independent Cause of Action for Punitive Damages:

Movants further argue, correctly, that dismissal of the third cause of action, sounding in "punitive damages," is warranted, because there is no cognizable cause of action for such relief, apart from the ability of any plaintiff to seek an award of punitive damages as an element of damages flowing from one or more cognizable causes of action (*see, generally, Jean v Chinitz*, 163 AD3d 497 [1st Dept 2018]; *Verdi v Dinowitz*, 161 AD3d 413 [1st Dept 2018]; *Mayes v UVI Holdings, Inc.*, 280 AD2d 153 [1st Dept 2001]; *Eckhaus v Eckhaus*, 107 AD2d 621 [1st Dept

1985]; *Steinberg v Monasch*, 85 AD2d 403 [1st Dept 1982]). That said, as mentioned directly above in this paragraph, plaintiffs are entitled to claim in for punitive damages, in an appropriate case, as a measure of damages. To the extent that plaintiffs may seek to amend their complaint to incorporate such measure of damages within the context of a specific substantive cause, or causes, of action, such leave is hereby granted. However, from a technical standpoint, the third cause of action, expressed as it is as a stand-alone cause of action for punitive damages, is dismissed, without prejudice to plaintiffs' ability to amend the complaint in this regard.

The Eighth through Thirteenth Causes of Action for Fiduciary Breach as to Each Individual Board Member Do Not Satisfy their Common Pleading Requirement to Allege Wrongs that are Specifically Extrinsic of their Collective Duty as a Corporate Board:

These causes of action purport to assert respective causes of action against each of the individual defendants – members of the Board of Directors of Owners – sounding in breach of fiduciary duty. Each of the causes alleges that the board member failed to constrain his or her colleague, Wolff, from wielding unfettered and improper control over the board vis-a-vis plaintiffs' alteration application (*see*, Complaint ¶¶ 218-79). However, none of these causes alleges an essential pleading requirement necessary to sustain fiduciary breach in this context; to wit, that the board member committed some tortious act that was independent of the acts taken by the board as a collective body (*see, Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500 [1st Dept 2018]; *Valyrakis v 346 W. 48th St. H.D.F.C.*, 161 AD3d 404 [1st Dept 2018]; *20 Pine St. Homeowners' Assn. v 20 Pine St., LLC*, 109 AD3d 733 [1st Dept 2013]). Yet again – we see causes of action being pleaded under a theory that, in actuality, is duplicative and redundant of the key theory of this entire action; to wit, breach of the proprietary lease's contractual duty on Owners (naturally stewarded by its Board of Directors) to not unreasonably withhold or delay consent to plaintiffs' alteration application. However the facts will bear out – whether they be in

the nature of direct decisions by the members to delay, or whether they be in the nature of relinquishment of board control to one overpowering member – the result is the same: a breach of Owners' (and its board's) performance duties under the proprietary lease.

Therefore, the eight through thirteenth causes of action are dismissed.

The Seventh Cause of Action for Fiduciary Breach as to Wolff Similarly Fails to Allege a Wrong that is Extrinsic of his Duty as a Corporate Board Member:

For reasons discussed in the immediately preceding section, the cause of action against Wolff for fiduciary breach similarly does not contain any allegations of wrongdoing that are extrinsic of Wolff's function as a member of the Board of Owners. While the court understands why this defendant is singled out from the other individual board members, due the allegations of particular conduct specifically attributed to Wolff, nothing is alleged, as to him, that could possibly be characterized as an act that was separate and apart from his function as a member of the board of Owners on the whole (*see, Hersh, supra; Valyrakis, supra; 20 Pine St., supra*). Therefore, the seventh cause of action is dismissed.[4]

The First Cause of Action Adequately Pleads as Against the Board of Directors of Owners:

Defendants purport to argue that the first cause of action, for fiduciary breach, which speaks in terms of "the Board's" fiduciary duties and alleged breach thereof (*see*, Complaint ¶¶ 107-34), should be dismissed because we do not find "the Board," named outright as such, in the caption of this action. Rather, we find Owners named; and we find its board members named "individually, and as members of the Board of Directors of" Owners. The argument goes

[4] Movants refer repeatedly to holdings rendered after trial in the Other Action, designed to direct this court in this unrelated matter toward pre-answer conclusions similar to those rendered in the Other Action. There is no assertion, of course, that those holdings rise to the level of collateral estoppel affecting this case, or that any other theory of *res judicata* applies here by virtue of said holdings. This court bases its within conclusions on the four corners of the pleading in this case, as tested by the objective standards treated herein, without reference to any holdings in the Other Action.

beyond placing form above substance because – as just noted – the caption, as well as the allegations of the first cause of action themselves – make plain that the Board of Owners is a party defendant in this case. The board, as a managerial body, is manifest in the naming of its members "individually, and as members of the Board of Directors" of Owners.

The motion to dismiss the first cause of action is, therefore, denied.

The Second Cause of Action for Declaratory and Injunctive Relief is Inappropriate in the Face of the Causes of Action Seeking Money Damages:

The second cause of action is one for a declaratory judgment that the Board "unreasonably delayed and refused to provide their consent to the Renovation Project" (Complaint ¶ 136), and seeks a judgment compelling the Board to "provide their consent to the Renovation Project" (*id.*, ¶ 152). However, defendants correctly observe that an action for declaratory relief seeking an equitable remedy is inappropriate where the action seeks money damages in redress of the alleged breach of the proprietary lease (*e.g., 204 Columbia Heights, LLC v Manheim*, 148 AD3d 59 [1st Dept], *appeal dismissed* 29 NY3d 1119 [2017]; *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50 [1st Dept 1988]). Therefore, the second cause of action is dismissed.

The Fourth and Fifth Causes of Action are Soundly Pleaded:

The fourth cause of action alleges breach of the proprietary lease by virtue of the ongoing delay in furnishing consent to the renovation, giving rise to compensatory damages; and the fifth cause of action concomitantly seeks an award of attorneys' fees pursuant to the proprietary lease. Plaintiffs' responsive papers on this motion have limited those causes to Owners alone – and not to all other defendants – reasoning that only Owners executed the proprietary lease with plaintiffs (*see*, Opposing Affirmation [NYSCEF Doc. No. 14] ¶ 84). No ground exists to dismiss these causes of action.

Conclusion:

For the foregoing reasons, it is

ORDERED that defendants' motion to dismiss the complaint is granted as to the second, sixth, and seventh through eighth causes of action, and, accordingly, they are dismissed; and it is further

ORDERED that defendants' motion to dismiss the complaint is granted as to the third cause of action, without prejudice to plaintiffs' right to replead the facts that would sustain a prayer for punitive damages as an element of damages, overall, but not as an independent cause of action; and it is further

ORDERED that defendants' motion to dismiss the complaint is denied as to the first, fourth, and fifth causes of action.

This shall constitute the decision and order of the court.

ENTER:

Louis L. Nock

1/2/2020
DATE

LOUIS L. NOCK, 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