

Fordham Law School

FLASH: The Fordham Law Archive of Scholarship and History

[All Decisions](#)

[Housing Court Decisions Project](#)

2021-07-21

Makhnevich v. Board of Mgrs. of 2900 Ocean Condominium

Follow this and additional works at: https://ir.lawnet.fordham.edu/housing_court_all

Recommended Citation

"Makhnevich v. Board of Mgrs. of 2900 Ocean Condominium" (2021). *All Decisions*. 304.
https://ir.lawnet.fordham.edu/housing_court_all/304

This Housing Court Decision is brought to you for free and open access by the Housing Court Decisions Project at FLASH: The Fordham Law Archive of Scholarship and History. It has been accepted for inclusion in All Decisions by an authorized administrator of FLASH: The Fordham Law Archive of Scholarship and History. For more information, please contact tmelnick@law.fordham.edu.

[*1]

| |
|---|
| Makhnevich v Board of Mgrs. of 2900 Ocean Condominium |
| 2021 NY Slip Op 50679(U) |
| Decided on July 21, 2021 |
| Supreme Court, New York County |
| Lebovits, J. |
| Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431. |
| This opinion is uncorrected and will not be published in the printed Official Reports. |

Decided on July 21, 2021

Supreme Court, New York County

| |
|--|
| <p>Stacy Makhnevich, Plaintiff,</p> <p>against</p> <p>The Board of Managers of 2900 Ocean Condominium, RANDY SULZER, Defendant.</p> |
|--|

654508/2019

Stacy Makhnevich, Brooklyn, NY, plaintiff pro se.

Novick Edelstein Pomerantz, P.C., Yonkers, NY (Gregory S. Bougopoulos of counsel), and Boyd Richards Parker Colonnelli, P.L., New York, NY (Bryan Mazzola and Zachary A. Mason of counsel), for defendants.

Gerald Lebovits, J.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 53, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 126, 127, 138 were read on this motion to DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 131, 132, 134, 139

were read on this motion for LEAVE TO FILE.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 153, 154, 155, 156, 157 were read on this motion for DISCOVERY.

This action arises from a dispute about whether a condominium board violated its obligations to the owner of a unit in the condominium. The pro se plaintiff, Stacy Makhnevich, is a unit owner in the 2900 Ocean Condominium. Makhnevich has sued the condominium's Board of Managers and the Board's managing agent, Randy Sulzer. She raises claims on several theories relating to the Board's alleged failure to address repair-service requests to her condominium and its alleged overcharging of fees and penalties.

Makhnevich brought this action in August 2019. Defendants did not answer or move to dismiss. Makhnevich did not seek a default judgment. In July 2020, the Board moved in motion sequence 001 to vacate its default and to dismiss the action for lack of personal jurisdiction, or in the alternative to permit the Board to submit an answer (*See* NYSCEF No. 6). In September 2020, Sulzer moved in motion sequence 002 to dismiss the action on multiple grounds under CPLR 3211 (*see* NYSCEF No. 47); Makhnevich opposed Sulzer's motion and cross moved to strike certain asserted misstatements contained in Sulzer's papers (*see* NYSCEF No. 107). Makhnevich also moved in motion sequence 003 for leave to file a surreply to address asserted new arguments and misstatements in the Board's reply papers on motion sequence 001 (*See* NYSCEF Nos. 87, 88). While these motions were pending,

Makhnevich brought motion sequence 004, seeking to compel Sulzer to appear for a deposition. (*See* NYSCEF No. 141.)

Motion sequences 001, 002, 003, and 004 are consolidated here for disposition. The branch of the Board's motion seeking dismissal of the claims against it for lack of personal jurisdiction is granted; Makhnevich's motion for leave to file a surreply on that motion is denied as academic. Sulzer's motion to dismiss the claims against him is granted, and Makhnevich's cross-motion is denied. Makhnevich's motion to compel Sulzer's deposition is denied as academic. The action is dismissed as against all defendants.

DISCUSSION

I. The Board of Managers' Motion to Vacate Default Judgment and to Dismiss

On motion sequence 001, the Board of Managers move to vacate the Board's default under CPLR 5015 (a) (4) for lack of personal jurisdiction and to dismiss the action. As the Board acknowledges on reply, no default has been sought or entered against the Board. No basis exists, therefore, to vacate a default. Nonetheless, this court agrees with the Board that the court lacks personal jurisdiction over the Board. The branch of the Board's motion seeking dismissal under CPLR 3211 (a) (8) is granted.

The Board provides evidence, in the form of an affidavit of its president, that the Board is an unincorporated association. (*See* NYSCEF No. 7 at ¶ 2.) An unincorporated association may not be sued directly as an entity. (*See Pascual v Rustic Woods Homeowners Assn., Inc.*, 134 [*2]AD3d 1006, 1006 [2d Dept 2015].) Rather, a plaintiff who wishes to raise claims against an association must instead bring an action against the association's president or treasurer in that officer's representative capacity. (*See* General Associations Law § 13.) And, by the same token, the plaintiff must *serve* the association's president or treasurer (or their functional equivalents within the association). [\[FN1\]](#) (*See Fairstein v Benglas*, 2008 WL 8119897 [Sup Ct, Westchester County June 5, 2008]; *Gillardi v Country Village Heights Condominium (Group I)*, 118 Misc 2d 947, 948-949 [Sup Ct, Queens County 1983]; *League of Mut. Taxi Owners, Inc. v United Constr. Workers, Local 35*, 90 NYS 2d 288, 288-289 [Sup Ct, Bronx County 1949]; [accord *L & L Assoc. Holding Corp. v Charity United Baptist Church*, 34 Misc 3d 355](#), 57-58 [Dist Ct, Nassau County 2011].) Absent proper service, this court lacks personal jurisdiction over the Board.

Here, it is undisputed that Makhnevich did not serve the Board's president or its treasurer. Instead, she served the condominium's management company, treating it for these purposes as an agent of the Board. (See NYSCEF No. 2.) Such service does not satisfy the requirements of General Associations Law § 13. Nor does Makhnevich's pro se status excuse her from compliance with these requirements [\[FN2\]](#) (*See e.g. Jiggetts v MTA Metro-N. R.R.*, [121 AD3d 414](#), 415 [1st Dept 2014] [holding that petitioner's pro se status did not excuse jurisdictionally defective service].)

This court is not persuaded by Makhnevich's argument that the Board is, in fact, a corporation and therefore was properly served. Makhnevich relies only on a screenshot of what appears to be an online summary report of the building's registration with the New York City Department of Housing Preservation and Development. The summary report describes the owner of the building as a "corporation" called "2900 Ocean Avenue Condominium." [\[FN3\]](#) (See NYSCEF No. 27.) But the multiple-dwelling registration statement that the condominium filed with HPD, unlike corporate-organization forms filed with the New York Secretary of State, is not intended to constitute definitive information about the precise legal nature of the entity that owns the building. Its purpose is instead "to enable tenants and governmental authorities to readily contact owners or persons responsible for the operation of multiple dwellings." (*597 Prospect Ave LLC v Sylvester-Nored*, 2020 NY Slip Op 50030[U], at *4-*5 [Civ Ct, Bronx County Jan. 13, 2020], [\[*3\]](#) quoting *390 W. End Assocs. v Raiff*, 166 Misc 2d 730, 733 [App Term, 1st Dept 1995].) That an online summary of this registration statement lists the building as being owned by a corporation called "2900 Ocean Avenue Condominium" is not, standing alone, enough to create a factual question warranting a traverse hearing about whether the Board of Managers of the condominium is a corporation or an unincorporated association. [\[FN4\]](#)

This court thus lacks personal jurisdiction over defendant Board of Managers. The branch of the Board's motion seeking dismissal of Makhnevich's claims against it (motion sequence 001) is granted. Although Makhnevich has sought leave to file a surreply on that motion, none of the issues that she says she would address on a surreply go to the issue of service or personal jurisdiction, or would affect this court's conclusion on those points. Makhnevich's motion for leave to file (motion sequence 003) is denied as academic.

II. Sulzer's Motion to Dismiss

Defendant Sulzer also moves to dismiss (motion sequence 002). Makhnevich cross-moves, in effect, to strike certain matter from the papers in support of Sulzer's motion. The motion to dismiss is granted; the cross-motion to strike is denied.

As an initial matter, Makhnevich opposes Sulzer's motion on the ground that it was not filed timely. This court agrees that the motion is untimely. But Makhnevich did not move for a default judgment against Sulzer in the nearly seven months between the expiration of Sulzer's time to answer or move and the filing of Sulzer's motion to dismiss. Nor has Makhnevich shown that she was prejudiced by the delay of that motion. Given New York's strong public policy in favor of litigating cases on the merits, this court declines to deny the motion on timeliness grounds. (*See Silverio v City of New York*, 266 AD2d 129, 129 [1st Dept 1999].)

On the merits, this court concludes that Makhnevich's claims against Sulzer each fail to state a cause of action upon which relief can be granted [\[FN5\]](#)

Makhnevich's first cause of action sounds in negligence. As a managing agent of the condominium, Sulzer is an agent for a disclosed principal (namely the Board of Managers). Sulzer could thus be liable to Makhnevich only for "affirmative acts of negligence," as opposed to merely failing to take action. (*Newman v Upton, Cohen & Slamowitz*, 10 AD3d 491, 492 [1st Dept 2004], citing *Jones v Archibald*, 45 AD2d 532, 535 [1st Dept 1974].) An exception to this limitation would exist only when Sulzer was "in exclusive control of the building." (*McMahon v [*4] Cobblestone Lofts Condominium*, 161 AD3d 536, 537 [1st Dept 2018].) Makhnevich has not alleged either that Sulzer exclusively controlled the building or that Sulzer committed affirmative acts of negligence.

Makhnevich's second cause of action appears to sound in breach of fiduciary duty. But as managing agent, Sulzer owes a fiduciary duty only to the Board of Managers, rather than to individual unit owners with respect to their particular units. (*See Caprer v Nussbaum*, 36 AD3d 176, 192 [2d Dept 2006].) Nor does the complaint sufficiently allege that Sulzer aided and abetted the *Board's* breach of fiduciary duty. (*See Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005].)

The third cause of action is for breach of contract. But Makhneovich has not alleged that a contract existed between she and Sulzer. Sulzer is not, for example, a signatory to the condominium bylaws. Makhneovich's breach-of-contract allegations—for example, that needed repairs to her unit were not performed notwithstanding her consistent payment of maintenance fees—are more naturally read to assert the existence of a contract with the Board of Managers, not with Sulzer. And since Sulzer is an agent for a disclosed principal, she cannot be held liable under Makhneovich's contract with the Board absent "clear and explicit evidence" of Sulzer's intention "to substitute or superadd [her] personal liability for, or to, that of" the Board. (*Crimmins v Handler & Co.*, 249 AD2d 89, 91 [1st Dept 1998].) Makhneovich has not alleged any such an intention here.

Next, the complaint asserts a fraud claim against Sulzer. But the complaint does not plead with particularity that Sulzer knowingly made material misrepresentations of fact to Makhneovich to induce her reliance, thereby causing her injury. (*See* CPLR 3016 [b] [particularity requirement]; [Cohen Bros. Realty Corp. v Mapes](#), 181 AD3d 401, 403 [1st Dept 2020] [elements of fraud claim].) To the contrary, the only substantive paragraph of the complaint mentioning Sulzer refers in general terms to allegedly wrongful conduct of several different individuals occurring at different unspecified points in an unspecified period. (*See* NYSCEF No. 1 at ¶ 15.) That is not sufficient to state a fraud claim.

Finally, the complaint raises a General Business Law (GBL) § 349 claim. But stating a cause of action under GBL § 349 requires a plaintiff to allege that the defendant "has engaged in (1) consumer-oriented conduct, that is (2) materially misleading, and that (3) the plaintiff suffered injury as a result of the allegedly deceptive act or practice." ([See Plavin v Group Health Inc.](#), 35 NY3d 1, 9 [2020].) Here, Makhneovich has not alleged that Sulzer committed any acts that "have a broader impact on consumers at large," as opposed to affecting a limited number of residents of the 2900 Ocean condominium with respect to the particular circumstances of their condominium units. (*Id.*, quoting *Oswego Laborers' Local 214 Pension Fund v Marine Midland Bank*, 85 NY2d 20, 25 [1995].) No GBL § 349 claim lies under these circumstances.

The complaint thus fails to state a cause of action as against Sulzer. The court perceives no basis to strike the disputed statements in Sulzer's moving papers; nor are those statements relevant to this court's analysis of the motion. Makhneovich's cross-motion to strike is denied. Additionally, since Makhneovich's claims against Sulzer are subject to dismissal,

Makhnevich's [*5] motion to compel Sulzer's deposition with respect to those claims (motion sequence 004) fails as well.

Accordingly, for the foregoing reasons, it is hereby

ORDERED that the branch of the Board's motion seeking dismissal of Makhnevich's claims against the Board under CPLR 3211 (motion sequence 001) is granted; and it is further

ORDERED that Sulzer's motion under CPLR 3211 to dismiss Makhnevich's claims against her (motion sequence 002) is granted; and it is further

ORDERED that Makhnevich's cross-motion to strike matter from Sulzer's motion papers (motion sequence 002) is denied; and it is further

ORDERED that the action is dismissed, with one set of costs and disbursements to defendants to be taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that Makhnevich's motion for leave to file a surreply (motion sequence 003) is denied as academic; and it is further

ORDERED that Makhnevich's motion to compel Sulzer's deposition (motion sequence 004) is denied as academic; and it is further

ORDERED that defendant Board of Managers serve a copy of this order with notice of its entry on all parties and on the office of the County Clerk, which shall enter judgment accordingly.

DATE 7/21/2021

Footnotes

Footnote 1: Were service proper, Makhnevich's having named the Board of Managers itself as a defendant would be merely a correctable irregularity. (*See Montalvo v Bakery & Confectionery Workers Intl. Union of Am. Local No. 3, AFL-CIO*, 137 AD2d 506, 507-508 [2d Dept 1988].) Failure of service is a more fundamental defect.

Footnote 2: This court does not agree with the Board's argument that Makhnevich's service on the Board was also rendered jurisdictionally defective merely by her failure to file proof of service within the 20 days required by CPLR 308. (*See Lancaster v Kindor*, 98 AD2d 300, 306 [1st Dept 1984].)

Footnote 3: Makhnevich has not provided information to authenticate this screenshot—even, for example, when the screenshot was taken. (*Cf. Robles v Palazzolo Realty Corp.*, 66 AD3d 417, 418 [1st Dept 2009] [holding that "an unsworn printout of [an HPD] building registration summary report" was "incompetent hearsay" that could not raise a triable factual issue at summary judgment].)

Footnote 4: Makhnevich also relies on a provision of the condominium bylaws that directs "[a]ll notices required or desired to be given hereunder" to the Board to be sent to the Board's principal office, with a copy to the management company. (*See* NYSCEF No. 19 at 49 § 11.1.) By this section's own terms, though, it applies only to notices given under the by-laws—not to the initiating papers for a lawsuit.

Footnote 5: This court therefore does not reach Sulzer's argument that Makhnevich's claims against her are barred by the statute of limitations.

[Return to Decision List](#)