

<b>Harari v Jamesman Realty Corp.</b>
2023 NY Slip Op 34094(U)
November 15, 2023
Supreme Court, New York County
Docket Number: Index No. 655055/2022
Judge: Lyle E. Frank
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

<b>PRESENT: <u>HON. LYLE E. FRANK</u></b> <div style="text-align: right;"><i>Justice</i></div> <p>-----X</p> <p>UZI HARARI, POOI FONG LEONG</p> <p style="text-align: center;">Plaintiff,</p> <p style="text-align: center;">- v -</p> <p>JAMESMAN REALTY CORP., JAMES MANOLATOS,</p> <p style="text-align: center;">Defendant.</p> <p>-----X</p>	<table border="0" style="width: 100%;"> <tr> <td style="width: 50%;"><b>PART</b></td> <td style="width: 50%; text-align: right;"><b>11M</b></td> </tr> <tr> <td><b>INDEX NO.</b></td> <td style="text-align: right;"><u>655055/2022</u></td> </tr> <tr> <td><b>MOTION DATE</b></td> <td style="text-align: right;"><u>08/28/2023</u></td> </tr> <tr> <td><b>MOTION SEQ. NO.</b></td> <td style="text-align: right;"><u>002</u></td> </tr> </table> <p style="text-align: center;"><b>DECISION + ORDER ON MOTION</b></p>	<b>PART</b>	<b>11M</b>	<b>INDEX NO.</b>	<u>655055/2022</u>	<b>MOTION DATE</b>	<u>08/28/2023</u>	<b>MOTION SEQ. NO.</b>	<u>002</u>
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The following e-filed documents, listed by NYSCEF document number (Motion 002) 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105 were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the defendants' motion to dismiss is granted in part.

## Background

Plaintiffs UZI HARARI and POOI FONG LEONG are shareholders of the cooperative 334 East 54 Owners Corp, the corporate entity for the housing cooperative located at 334 East 54<sup>th</sup> Street, New York, NY. Defendant JAMESMAN REALTY CORP. is the managing agent of the cooperative. JAMES MANOLATOS is the director and officer of the cooperative as well as the sole officer of JAMESMAN REALTY CORP.

Plaintiffs are both residents of the building and shareholders of the corporation. Plaintiffs allege Defendants failed to comply with the corporation's bylaws by failing to hold annual mandatory shareholder meetings and failing to notify the shareholders of the corporation's cash balances. Plaintiffs further allege that the Defendants have mismanaged the corporation, neglected to perform their management duties and caused waste of corporate assets as a result. Plaintiffs brought both direct and derivative claims against Defendants, claiming breach of

fiduciary duty, breach of contract, breach of the bylaws, and seeking injunctive relief to prevent the Defendants from managing the corporation moving forward.

Defendants previously moved to dismiss Plaintiffs' complaint arguing Plaintiff improperly commingled the direct and derivative actions and further that the allegations were rebutted by the documentary evidence. By its July 5, 2023, order, the Court found Plaintiff's complaint was insufficiently pled and dismissed with leave to amend. NYSCEF Doc. No. 53. Plaintiff subsequently submitted its amended complaint. Defendant now moves to dismiss again, arguing Plaintiffs' amended complaint remains insufficiently pled, in that it continues to commingle its derivative and individual claims and lacks specificity in its allegations.

### Standard of Review

When considering a motion to dismiss based upon CPLR § 3211(a)(7), the court must accept the alleged facts as true, accord the plaintiff the benefit of every possible favorable inference, and determine whether the facts alleged fit into any cognizable legal theory. *See Leon v. Martinez*, 84 N.Y.2d 83 (1994). With respect to CPLR§3211(a)(1), a motion to dismiss on the ground that the action is barred by documentary evidence may be appropriately granted only where the documentary evidence utterly refutes a plaintiff's factual allegations, and conclusively establishes a defense as a matter of law. *See Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 327 (2002).

### Discussion

#### **I. Derivative Standing under B.C.L. §626(a)**

Defendants assert Plaintiffs do not have standing to assert a derivative claim on behalf of the corporation. Defendants argue Plaintiffs are unfit to fairly and adequately represent the interest of the cooperative and its collective shareholders due to their personal hostility towards

the defendants, debt to the cooperative and breach of their proprietary leases. In response, Plaintiffs argue that in order to disqualify plaintiffs, the Defendants must show that the relationship between the Plaintiffs and Defendants is so acrimonious or emotional that plaintiff cannot act as an adequate representative for a company and assert Defendants have not made such a showing here.

In support of its position, Defendants directs the Court to *Hubshman v. 1010 tenants Corp* and *Gilbert v. Kalikow*. In *Hubshman*, where plaintiff sued a cooperative's corporate entity both directly and derivatively, the Court found that despite being a shareholder in the cooperative, Plaintiff was not a suitable representative for a derivative action. *Hubshman v. 1010 Tenants Corp.*, 2012 N.Y. Misc. LEXIS 4590 [2012]. The Court found plaintiff to be an unfit representative due to her long history of disagreements with the cooperative board and other tenants. *Id.*

Here, the Court agrees with Plaintiff that *Hubshman* is distinguishable. First, and most significantly, the *Hubshman* decision was decided on a motion for summary judgement, not a motion to dismiss. As such, the parties in *Hubshman* presented significant factual evidence to support their claims of animus and hostility by the plaintiff. Here, without discovery, the Court cannot find solely based on Defendants' assertions that Plaintiffs have the sort of animus described in *Hubshman*, nor conclusively that Plaintiffs cannot represent the needs of the corporation. Additionally, that the plaintiffs have direct claims against the defendants here in addition to their derivative claims cannot alone disqualify Plaintiffs as derivative representatives. It would be illogical to find that because a shareholder disputes the actions of a member of the board and the management company, they are unfit to file a derivative suit, as it would follow

that if one thought there was mismanagement, they may believe this mismanagement is harming the corporation.

Moreover, the next case Defendant relies on, *Gilbert v. Kalikow*, is similarly distinguishable. *Gilbert*, again decided on summary judgement, involved a very specific set of facts that are inapplicable in the present case. For instance, in *Gilbert*, the plaintiff and defendant were former father and son in laws and former business partners litigating against each other in four separate actions. *Gilbert v. Kalikow*, 272 A.D.2d 63 [2000]. Based on substantive evidence, the Court found that the plaintiff and defendant were “manifestly hostile to each other on a personal level.” *Id.* That is a specific set of facts not applicable here and regardless, here on a motion to dismiss, the Court does not have sufficient evidence with which to make such a determination.

Therefore, the Court finds that at this early stage and with all favorable inferences going to Plaintiffs, Defendants have not made a showing that Plaintiffs are inappropriate representatives for this derivative suit.

## **II. Breach of Fiduciary Duty**

Defendants further argue Plaintiffs first and sixth causes of action for breach of fiduciary duty must be dismissed they are pleaded without particularity, fail to meet the higher pleading standard required by CPLR 3016(b), fail to state a claim, attack decisions that are protected by the business judgment rule, and are refuted by documentary evidence.

The Court previously dismissed Plaintiff’s first cause of action for breach of fiduciary duty, finding that plaintiff had incorrectly comingled its individual and derivative claims. NYSCEF Doc. No. 53. Defendant now asserts that Plaintiffs’ amended complaint fails to cure its original defects. The Court disagrees.

The elements of a cause of action to recover damages for breach of fiduciary duty are the existence of a fiduciary relationship, misconduct by the defendant, and damages directly caused by the defendant's misconduct. *106 N. Broadway, LLC v Lawrence* 189 A.D.3d 733 [2020]. "A cause of action sounding in breach of fiduciary duty must be pleaded with particularity under CPLR 3016 (b)" *Id.*

The Court finds Plaintiffs first cause of action for breach of fiduciary duty is sufficiently pled. Although Defendants are correct that Plaintiffs' first cause of action is substantially similar to that of its original complaint, this alone is not determinative. The Court dismissed the previous cause of action because it comingled Plaintiffs' direct and derivative claims. Here Plaintiffs' amended complaint separates the claims and now asserts a separate cause of action for each direct and derivative claim. The Court finds that this is sufficient for the purposes of a notice pleading. Therefore, Plaintiffs' first cause of action for a derivative claim of breach of fiduciary duty survives Defendants' motion to dismiss.

However, the Court finds that Plaintiffs' sixth cause of action for breach of fiduciary duty individually against both Defendants must be dismissed with respect to Defendant Jameson Inc, the cooperatives management company. Here, Defendant is correct that in its July 2023 order, the Court previously held that Plaintiff could not individually assert a claim against Jameson Realty because the management company only owes a duty to the cooperative and owes no duty to plaintiff individually. See NYSCEF Doc. No. 53.

### **III. Breach of Contract**

Plaintiff's first complaint alleged two breach of contract actions. In its initial complaint Plaintiffs separately alleged breach of the bylaws and breach of contract. The Court dismissed Plaintiff's claim for breach of contract, reasoning Plaintiffs failed to refer to any specific

agreement and it was unclear if Plaintiffs were again referencing the bylaws or an alternative agreement. The Court also granted Defendants' motion to dismiss Plaintiffs claim for a breach of the bylaws, on the basis that the pleading impermissibly comingled the individual and derivative claims. However, the Court granted Plaintiff leave to amend.

Defendants argue Plaintiffs' amended complaint continues to improperly commingle its derivative and individual claims by basing them on common factual allegations. Defendant adds that Plaintiffs' claims are duplicative of one another. In opposition, Plaintiffs asserts that while the factual allegations may be comingled to the extent that they arise out of the same set of facts, the amended complaint separates the causes of actions and thus comports with the pleading requirements for derivative actions under New York Law.

The Court finds that Plaintiffs' amended complaint addresses the deficiencies found in the July 2023 order and cures them. Plaintiffs' amended complaint separates the individual and derivative claims into separate causes of action and identifies the contract allegedly breached as the Management Agreement between the corporation and Defendants. Moreover, Plaintiffs assert breach of contract solely as a derivative action. Additionally, the Court finds Plaintiffs have pled with the requisite specificity, as they have alleged Defendants breached their management agreement with the corporation by failing to perform their management duties provided for under the contract and that as a result the corporation has suffered damages. Therefore, the Court denies Defendants' motion to dismiss with respect to Plaintiffs' claim for breach of the bylaws and for breach of contract.

#### **IV. Injunctive Relief**


Defendants assert Plaintiffs' fifth cause of action is improper in that it seeks injunctive relief that is not available. Defendants argue that Plaintiffs' request for an order enjoining

Manolatos from acting or serving as an officer and/or director of the Corporation, and that a meeting of the shareholders be organized where “new members” be elected to serve as members of the Board infringes on the Cooperative shareholders’ rights. Defendant contests these actions are exercises of shareholder voting rights and board business judgments and outside the purview of the Court.

The Court finds that for the purposes of Plaintiff’s complaint, its claim for injunctive relief survives. Defendant has not supported its assertions that the injunctive relief sought is outside the power of this Court as a matter of law. Whether the Plaintiff is successful at obtaining the injunctive relief sought is not relevant for the purposes of this motion to dismiss. Therefore, Defendants’ motion to dismiss Plaintiffs’ claim for injunctive relief is denied. Accordingly, it is hereby,

ORDERED that the Plaintiffs’ sixth cause of action as to Defendant JAMESON REALTY CORP. is dismissed, and it is further;

ADJUDGED that the motion is denied with respect to Plaintiffs’ first, second, third, fourth, fifth and seventh causes of action.

<u>11/15/2023</u>							
DATE				LYLE E. FRANK, J.S.C.			
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