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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN J.S.C.
Justice

PART 11

Index Number : 104849/2009
WHITE, BARBARA A.
vs.
GILBERT, ELISA
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

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 is determined in accordance with the annexed decision and order.

FILED
AUG 02 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: July 24, 2012

_____, J.S.C.
HON. JOAN A. MADDEN
J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
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 11

----------X

BARBARA WHITE,

INDEX NO. 104849/09

Plaintiff,

-against-

ELISA GILBERT, KAREN GREEN, STEFFANY MARTZ, PHILLIP J. SIMMS, JOHN HOPLEY, JACQUELINE WEINSTEIN, JAMES SLABE, ROBERT MIELE, MID-83 HOUSE CORP., ALAN B. GORELICK and SAPARN REALTY, INC.,

Defendants.

----------X

JOAN A. MADDEN, J.:

In this action, the shareholder and proprietary lessee of a cooperative apartment seeks damages and injunctive relief against the cooperative corporation which owns the buildings, its managing agent, and the individual members of its board of directors. Defendants collectively are moving for an order pursuant to CPLR 3212 granting summary judgment dismissing the complaint in its entirety. Plaintiff pro se opposes the motion.[1]

The following facts are based on deposition testimony and documentary evidence, including e-mail and letter correspondence, and minutes from board of directors' meetings. In 2002, plaintiff Barbara White rented unit 5-F at 50 East 82rd Street from the previous shareholder, and in 2005 she purchased the shares to the unit. Defendant Mid-83 House Corp. is the cooperative corporation which owns the buildings located at 48-50 East 83rd Street in

[1]Although plaintiff was originally represented by counsel when she commenced this action in 2009, she was pro se when she filed her papers in opposition to defendants' motion in October 2011. It appears that she subsequently retained new counsel, as a Consent to Change Attorney was filed on December 7, 2011, substituting the firm Wolf Haldenstein Adler Freeman & Herz as plaintiff's counsel.

Manhattan, defendant Saparn Realty, Inc. is the managing agent, defendant Alan B. Gorelick is employed by Saparn Realty, and defendants Elisa Gilbert, Karen Green, Steffany Martz, Phillip J. Simms, John Hopley, Jacqueline Weinstein, James Slabe and Robert Miele are members of the cooperative's board of directors (the "Board"). Plaintiff testified that she served as a member of the board of directors from 2006 through June 2009.

In June 2007, plaintiff e-mailed managing agent Gorelick and Board Vice President John Hopley, inquiring whether she needed to submit an alteration application and a deposit for work in her bathroom. A series of e-mails document that a disagreement arose as to the answer to plaintiff's question, and further confusion may have arisen because plaintiff was out of the country when the Board met on June 19, 2007. The minutes from that meeting report that plaintiff was requesting that she not be required to submit an alteration agreement and the $1000 deposit for 'bathroom work," and a motion was passed by "majority vote" to require both the alteration agreement and the $1000 deposit. Emails from early July indicate that before leaving for London, plaintiff provided the managing agent with an alterations "application," even though she believed she was already "was given permission by email from John Hopley and Karen Green to work on the tiling in my bathroom." It is not disputed that plaintiff subsequently provided the $1000 deposit.

In early July 2007, an issue arose as to the disposal of bags of debris from the work in plaintiff's bathroom. Plaintiff's contractor had not removed the bags, and plaintiff believed she could dispose of them herself with the household trash from the building. After receiving emails from board members, plaintiff received a letter from the managing agent dated July 20, 2007, advising that she was being fined $100 for violating the Alterations Agreement and the House

Rules, because her "contractor left bags of rubble from the work that was done in your apartment in the household trash area in front of the building. . . . As you are aware the alteration requirements specifically state that all debris must be carted away. It cannot be stored in the building or left for building staff to discard, nor left on the street for sanitation to pick up." At her deposition, plaintiff testified that the Board also fined her $100 in 2006 for "not recycling."

At the November 7, 2007 meeting, the Board addressed the procedures for imposing fines on shareholders. The minutes from that meeting report as follows:

> There was a discussion over the procedures for levying fines on tenants. In the past if a violation was brought to the attention of an Officer of the Board the fine was imposed through the Managing Agent. The tenant could pay the fine or appeal the matter to the Board. A motion was made to change the procedure to provide that the first action would be a notice to the tenant that a violation of the house rules was being alleged. The Board would then vote on the imposition of the fine at the next meeting. The person being fined could dispute the imposition of the fine at that time. This procedure would not apply to late fees and indisputable violations. The motion was seconded and the Board voted to approve the new procedure.

The minutes further state that "Barbara White asked about her fine for placing construction in front of the building for the city pick up. The House Rules prohibit the placing of construction in front of the buildings even though the City may collect certain construction materials. A motion was made to let the fine stand. The motion was seconded and passed by the Board."

At her deposition, plaintiff testified about the November 7, 2007 Board meeting, explaining that she remembered

> bringing up the fact that several of my neighbors – all of who were board members at that time . . . had been over the previous summer doing different work in their apartments. I verbatim had said, I don't believe anyone should be charged, but if you are going to hold me accountable and if you are going to harass me and make me an example, then we must treat all shareholders equally. I asked them only to treat all shareholders equally and be held to the same rules, the

> same alteration agreements, the same house rules. . . . I was told that they did not want to discuss that. . . . I was told that Jim Slabe had work that was not okayed in some other context by Alan Gorelick. I am not sure, I guess it was on the subject of fines. He [Gorelick] interrupted me or cut me off when I had mentioned Eliza Gilbert's cupboard work and he said that was cosmetic. . . . I brought up the fact that I was fined for trash violations. House rule violation which I didn't feel I deserved and that was one of the reasons I wanted to appeal to the board, that we should put in place proper charges of who was allowed to be fined by whom and under what circumstances so people didn't take issues into their own hand and perhaps cause Mr. Gorelick to make one judgment or another based on what they thought should be happening . . . .There was no procedure [by which fines were imposed] that I could tell you. I happen to know that Steffany Martz seemed to be behind the scenes deciding, probably Steffany Martz, possibly Alan Gorelick deciding who would be fined without any real sort of procedures. And I asked my colleagues to be aware and to put in place some process and we did in that meeting. They voted to hold my tile disposal fine in place which I disagreed with. . . . A very fine that several other people should have been fined for that year.

It is undisputed that in April 2008, plaintiff removed appliances and cabinets from her kitchen without obtaining prior approval from the Board. As a result, managing agent Gorelick sent plaintiff an email dated April 3, 2008, demanding that she "stop all alteration work in your apartment immediately," as she was in violation of the house rules for not completing an alteration agreement and requesting Board approval, and "you have interfered with the contractor that the Board hired to renovate the halls." The cooperative's attorney sent plaintiff a Notice to Cure dated April 4, 2008, advising that "you are currently making unauthorized alterations . . . in violation of paragraph 29 of the [Proprietary] Lease," and to "immediately cease and desist all work in the Apartment." The notice "prohibited" plaintiff from performing any work in the apartment until an inspection was conducted and she complied with the cooperative's alteration policy, which included the submission of plans and an alteration agreement, and obtaining the cooperative's written consent for the proposed work. The notice warned that "[f]ailure to comply with this demand constitutes a default under the [Proprietary] Lease." In May 2008, the

Board fined plaintiff $100 for removing her kitchen appliances and cabinets without prior Board approval.

In July 2008, plaintiff requested Board approval to install a washing machine. A July 21, 2008 email from Gorelick to the Board members, advised that plaintiff's alteration agreement was incomplete and did not include the cooperative's deposit of $1,000. On July 23, 2008, board member James Slabe sent plaintiff an email apologizing "for yelling at you during the meeting," explaining that "I was getting frustrated at Steffany's attempt to hold you to a higher standard in submitting a completed Alteration Agreement with all pertinent documents and checks, etc. before board approval could be given. You correctly responded that you could not sign contracts, purchase the washer/dryer, etc. until you had board approval beforehand and wanted to be treated like everyone else."

As reflected in the July 31, 2008 minutes, the Board approved her request "contingent on receipt of a completed Alteration Agreement and a $1000.00 deposit." When plaintiff provided Gorelick with the completed alteration agreement and the $1000 check, she requested that he not cash the check. It appears that Gorelick initially informed plaintiff that he intended to deposit her check, but later decided to hold onto it. At her deposition, plaintiff testified that Gorelick "dragged his feet" in reviewing her application, and that she believed checks given by other shareholders were not cashed. On September 18, 2008, the Board voted to adopt a rule that the cashing of "damage deposit" checks submitted with alteration agreements, is at the sole discretion of the managing agent. That same day, plaintiff's attorney wrote a letter to the cooperative's attorney, advising that plaintiff had stopped payment on her $1000 check for the "damage deposit," and that she had given him a check for $1000 "representing" the damage

deposit, which he placed in his escrow account. The letter further advised the cooperative's attorney to "please inform your client . . . that the Board's repeated unfair treatment and harassment of my client [Barbara White] will no longer be countenanced."

In February 2009, plaintiff requested Board approval to install new flooring. On March 2, 2009, plaintiff sent an email to the Board members expressing her "concern" that "we have not been treating shareholders in an equal manner," and objecting that the Board "is attempting to pass off legal bills to me that are not appropriate charges." By letter dated March 3, 2009, managing agent Gorelick informed plaintiff that the Board had approved her request "provided you bring your account current. There is an outstanding balance of legal fees incurred by the cooperative on your behalf in the total amount of $1,263.05 (copies included). Until this balance is paid you may not continue your alteration."

On March 26, 2010, plaintiff's attorney wrote to managing agent Gorelick enclosing a check from plaintiff in the amount of $1,477.60, which "represents payment in full for purported legal fees assessed against Ms. White in connection with her application to install a floor in her apartment. Please be advised that the enclosed check is being paid on account and without prejudice and that the payment of said sum shall in no way prejudice, or constitute a waiver of, any rights or remedies available to Barbara While. In addition, Ms. White hereby reserves all rights and remedies available to her whether at law or in equity."

Plaintiff commenced the instant action in April 2009, asserting four causes of action against all defendants. While the complaint is not a model of clarity, the first cause of action asserts a claim for unequal treatment, alleging that the members of the board of directors have "discriminated" against plaintiff, harassed her and "not treated" her "in the same manner as all

the other shareholders of the Cooperative" in violation of their "fiduciary duty . . . to treat all shareholders equally." The first cause of action also alleges that defendants "prohibited and prevented" plaintiff from renovating her apartment "without any basis or justification"; violated New York City fire and building codes/regulations "to the detriment of Plaintiff's life, heath, welfare and safety"; and "improperly imposed fines and/or penalties" on her without "any basis or justification." The first cause of action seeks an injunction "compelling, directing and ordering" defendants to "enforce . . . the By-Laws and House Rules in a non-discriminatory manner and to treat the Plaintiff in the same manner as all other shareholders of the Cooperative."

The second cause of action seeks compensatory damages in the sum of $500,000, alleging that the conduct set forth in the first cause of action "has substantially interfered with Plaintiff's rights, comforts and/or Plaintiff's use, enjoyment and occupancy" of her apartment.

The third cause of action asserts that defendants "have not acted in good faith and have committed wholly independent torts directed at Plaintiff for pecuniary gain for themselves," alleging that the board of directors "have induced the Cooperative to breach the By-Laws and House Rules," and that defendants "have engaged in acts outside the scope of their duties as agents, officers and/or directors of the Cooperative." The third cause of action also alleges that individual defendants Gilbert, Green, Martz, Simms, Hopley, Weinstein, Slabe, Miele and Gorelick "have failed to perform the duties imposed upon them as agents, officers, directors and/or members of the Board of Directors of the Cooperative as they have failed to fulfill their duties and obligations placed upon them by law; failed to act honestly with respect to the affairs of the Cooperative; tortiously interfered with Plaintiff's rights as a shareholder in the Cooperative

to the detriment of Plaintiff; have acted solely for their own personal gain and/or interest . . . so as to cause the Cooperative to dissipate its assets (including monies incurred by the Cooperative for the payment of unwarranted attorneys fees)." Plaintiff alleges she has been damaged by the foregoing, and seeks compensatory and punitive damages in amounts "to be determined at trial."

The fourth cause of action seeks an award of attorney's fees pursuant to Real Property Law § 234.

Defendants answered asserting 15 affirmative defenses, including failure to state a cause of action, documentary evidence, failure to sustain damages, bad faith, unconscionable conduct, unclean hands, waiver, estoppel, the business judgment rule, laches and failure to mitigate. Defendants are now moving for summary judgment dismissing the complaint in its entirety, on the following grounds: 1) plaintiff's allegations are conclusory, speculative, and without support in the undisputed documentary and testimonial record; 2) the board of directors' decisions with respect to plaintiff's requests for alterations and the related fines imposed on her, fall within the protection of the business judgment rule; 3) plaintiff lacks standing to raise any issues as to alleged fire and building code violations; and 4) with respect to the claims against the eight individual board members, plaintiff has not alleged with specificity independent tortious acts by each individual defendant.

In opposing defendants' motion, plaintiff contends that the testimonial record, email correspondence and Board meeting minutes establish that genuine issues of fact exist as to whether defendants breached their fiduciary duties, breached the proprietary lease and house rules, violated the by-laws, treated plaintiff and other shareholders unequally, and acted in bad faith.

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." Winegrad v. New York University Medical Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Contrary to defendants' assertion, the business judgment rule does not provide a complete defense as a matter of law. Under section 501(c) of the Business Corporation Law, each share issued by a corporation "shall be equal to every other share of the same class." In accordance with that provision, a cooperative corporation is required to treat all shareholders of the same class of stock equally, and the failure to do so is sufficient to overcome the protections afforded under the business judgment rule. See Bregman v. 111 Tenants Corp, ___ AD3d ___, 943 NYS2d 100 (1st Dept 2012); 124 Holdings, Inc v. Spring Street Apartment Corp, 73 AD3d 499 (1st Dept 2010); Peacock v. Herald Square Loft Corp, 67 AD3d 442 (1st Dept 2009); Wapnick v. Seven Park Ave Corp, 240 AD2d 245 (1st Dept 1997). The business judgment doctrine likewise does not apply when the board of a cooperative corporation acts outside the scope of its authority. See Levandusky v. One Fifth Ave Apartment Corp, 75 NY2d 530 (1990); Wirth v. Chambers-Greenwich Tenants Corp, 87 AD3d 470 (1st Dept 2011).

Here, plaintiff's deposition testimony and the supporting documents are sufficient to establish that genuine issues of fact exist as to her claim against the cooperative corporation for unequal treatment in violation of BCL § 501(c). At her deposition, plaintiff detailed instances

where the Board allegedly treated her differently from other shareholders by imposing fines on her for house rule violations, by cashing her renovations deposit check, by "blocking" her work, and by requiring her to reimburse the cooperative's legal fees as a condition to approving her request to install new flooring.

As explained above, plaintiff's undisputed evidence shows that the Board fined her in 2006 for not recycling, in 2007 for improperly disposing of debris from work in her bathroom, and in 2008 for removing the kitchen appliances and cabinets without prior Board approval. Plaintiff testified that the Board did not fine other shareholders, including Board members, who had violated the house rules. When asked to identify such persons, plaintiff testified that John Hopley had guests in his apartment who were not recycling properly, and Phil Simms had a tenant who "was not recycling properly and was leaving trash out on the sidewalk not properly put in the receptacles." Plaintiff submits an email dated August 7, 2007 from Karen Green to Phil Simms, inquiring whether he was in touch with his tenant regarding "recycling and garbage," and noting that the tenant had said "her housekeeper was responsible for most of her violations." Plaintiff also testified that "Jacqueline Weinstein reported in an e-mail that a contractor had left windows with nails sticking out in their trash walkway," and "someone was scratched"; she believed it was Mr. Slabe's contractor.

Plaintiff further testified that in August 2007, the tenant in Mr. Simms apartment had complained that Karen Green's air conditioner was leaking and the dripping was "keeping her awake." Ms. Green's August 7, 2007 email shows that she responded by advising that she did not intend to replace the air conditioner, she would continue using it "as needed," and suggested that the tenant move the air conditioner to another window, or cover it with foam or carpet.

Plaintiff maintains that Ms. Green's leaking air conditioner violated House Rule No. 1, which requires shareholders to keep their air conditioners in good repair, and states that "no tenant will permit any such device to leak or to make noise which disturbs or interferes with the rights, comfort and convenience of other tenants."

As additional examples of shareholders allegedly not fined for house rule violations, plaintiff testified that Mr. Slabe "did work on his terrace on some drains" in November 2007 without "permission"; Phil Simms had a stove delivered in 2007 or 2008, and she did not know if he had "permission"; Eliza Gilbert removed her kitchen cupboards without an alterations agreement; and in December 2008 when Jacqueline Weinstein was having work done, "a very large cart [was] left smack in the middle of the door as you walk in the doorways by her plumbers overnight." In her affidavit, plaintiff further states that in the "rare instance" when another shareholder was fined for a house rule violation, the Board did not have their attorney draft a letter advising that the shareholder was in default of the proprietary lease. Plaintiff explains that on April 18, 2008, Mr. Cantor was fined for a house rule violation when he replaced a window "without proper permission," but two weeks earlier she was fined for removing her appliances, which defendants' attorney "labeled" as a violation of the proprietary lease and "accused her of being in default of the lease."

With respect to cashing plaintiff's damage deposit check, plaintiff submits an email dated January 29, 2009 from managing agent Gorelick to Elisa Gilbert, in which Gorelick essentially acknowledges that he did not deposit other shareholders' checks:

> This all started last summer when Barbara requested permission for this alteration. She sent the $1000 check and said not to deposit it as she was out of town and could not cover it at that point. At least that was my understanding. I told her it

> had to be a good check. Then all the nonsense about being discriminated against came up because *somehow she found out that I did not deposit other security checks*. The reason for that is that she was the only one in recent history that violated rules about alterations and I thought we should have a good check on hand. She told me not to deposit the check and she sent a check to her attorney [emphasis added].

Plaintiff has also established that genuine issues of fact exist as to her claim that the Board had no authority in March 2009 when it conditioned its approval of her request to install new flooring, on her payment of the cooperative's legal fees. The following language governing attorney's fees is found paragraph 37 of the proprietary lease:

> If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense in performing action which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorney's fees and disbursements, shall be paid by the Lessee to the Lessor, on demand as additional rent.

By its clear and express terms the foregoing provision limits plaintiff's obligation to pay the cooperative's legal fees to three distinct circumstances where the cooperative corporation has: 1) performed an action plaintiff was required to perform; 2) instituted an action or proceeding against plaintiff based upon her default under the proprietary lease; and 2) defended or asserted a counterclaim in an action or proceeding brought by plaintiff. See Jackson v. Westminster House Owners Inc, 52 AD3d 404 (1st Dept 2008); Dupuis v. 424 E77th Owners Corp, 32 AD3d 720 (1st Dept 2006); Mogulescu v. 255 W98th St Owners Corp, 135 AD2d 32 (1st Dept 1988), app dism 73 NY2d 801 (1989) (all involving an identical or nearly identical attorney's fee clause as Paragraph 37).

Conceding that the legal fees demanded from plaintiff in March 2009 were not "litigation related," defendants contend that under paragraph 37, the cooperative corporation is entitled to reimbursement for legal fees incurred due to a shareholder's default under the proprietary lease. Defendants' contention conflicts with the express terms of paragraph 37 which applies to *actions or proceedings* commenced as a result of a shareholder's default, and not to a default alone. See Gray v. Hilltop Village Cooperative #Three, Inc, 50 AD3d 739 (2nd Dept 2008). Defendants point to no other attorney's fees clause in the proprietary lease, by-laws or house rules which gives them a right to attorney's fees based solely on a shareholder's default. A contractual provision assuming an obligation to indemnify a party for attorneys' fees "must be strictly construed to avoid reading into it a duty which the parties did not intend to be assumed." Hooper Assoc, Ltd v AGS Computers, Inc, 74 NY2d 487, 491 (1989); accord Spodek v Neiss, 86 AD3d 561, 561 (2nd Dept 2011). Thus, since the legal fees for which the Board sought reimbursement in March 2009 were not incurred in an action or proceeding, the Board exceeded its authority and violated paragraph 37 when it required plaintiff to pay those fees as a condition to approving her alteration request. See Dupuis v. 424 E77th Owners Corp, supra.

Based upon the foregoing, defendants' motion for summary judgment is denied to the extent the first and second causes of action assert claims against the cooperative corporation for unequal treatment in violation of BCL § 501(c), and for unauthorized action in violation of paragraph 37 of the proprietary lease.[2]

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[2]To the extent plaintiff additionally argues that issues of fact exist as to whether the Board unreasonably withheld its consent to her alterations requests, and whether the Board breached the implied duty of good faith and fair dealing, those issues are subsumed in the claims for unequal treatment and unauthorized action.

Defendants' motion, however, is granted to the extent the first and second causes of action allege a breach of fiduciary duty by the cooperative corporation. "It is black letter law that 'a corporation does not owe fiduciary duties to its members or shareholders.'" Stalker v. Stewart Tenants Corp, 93 AD3d 550 (1st Dept 2012) (quoting Hyman v. New York Stock Exchange, 46 AD3d 335 [1st Dept 2007]); accord Fletcher v. Dakota, Inc, ___ AD3d ___, 2012 WL 2532149 (1st Dept 2012). However, to the extent plaintiff alleges a breach of fiduciary duty by the cooperative corporation based on unequal treatment, those allegations will be deemed as limited to the unequal treatment claim.

Turning to the clams against the eight individual members of the Board, plaintiff has failed to demonstrate that genuine issues of fact exist so as to impose liability on those defendants. To subject Board members to personal liability, plaintiff must establish that each individual defendant engaged in tortious conduct outside his or her role as a Board member. See Fletcher v. Dakota, Inc, supra. "[P]articipation in a breach of contract will typically not give rise to individual director liability." Id. Plaintiff has not identified specific tortious acts by any individual Board member to support the bare and conclusory allegations in the complaint. At best, plaintiff relies on conduct that falls squarely within their roles as Board members, which is not actionable. Defendants therefore are entitled to summary judgment dismissing the complaint in its entirety as against the eight individual board members.

Finally, plaintiff individually lacks standing to maintain claims based on purported fire and building code violations in the common areas of the building (involving access to the fire escape/roof area of the building, and inspection of the building's sprinkler system), and the board's decisions as to the cooperative's finances. Since such claims involve injury to the

corporation, they can only be asserted derivatively on behalf of the corporation. See Levandusky v. One Fifth Avenue Apartment Corp, supra; SantiEsteban v. Crowder, 92 AD3d 544 (1st Dept 2012 (shareholders' derivative action against directors of cooperative corporation, alleging breach of fiduciary duty, conversion and waste based on directors paying themselves unauthorized salaries). Plaintiff 's reliance on the doctrine of futility to excuse the pre-suit requirement for a demand on a corporation to initiate a derivative action, is unavailing, as such doctrine cannot not cure the fact that plaintiff individually lacks standing to assert any derivative claims to which such doctrine might apply. See e.g. Marx v. Akers, 88 NY2d 189 (1986) (determination in a shareholder derivation action as to whether the doctrine of futility excuses pre-suit demand); Matter of Ominocom Group Inc Shareholder Derivative Litigation, 43 AD3d 766 (1st Dept 2007) (determination in a shareholder derivation action as to whether the doctrine of futility is applicable). Thus, those portions of the first, second and third causes of action based on alleged violations of building and fire codes/regulations, and on the Board's decisions as to financial matters, are dismissed.[3]

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted only to the extent of dismissing the complaint in its entirety as against defendants Elisa Gilbert, Karen Green, Steffany Martz, Phillip J. Simms, John Hopley, Jacqueline Weinstein, James Slabe and Robert Miele; dismissing the breach of fiduciary duty claim in its entirety; and dismissing the portions of the

[3]The court declines to address the issues raised for the first time in plaintiff's opposition papers as to her right to inspect the records of the cooperative corporation, and her attempt to assert other derivative claims. Plaintiff's application at oral argument for leave to amend the complaint is denied without prejudice to an application by formal motion on notice for such relief.

first, second and third causes of action based on alleged violations of building and fire codes/regulations, and on the Board's decisions as to financial matters; and it is further

ORDERED that the motion is all other respects is denied and the balance of the action shall continue; and it is further

ORDERED the remaining parties are directed to appear for the pretrial conference previously scheduled for August 30, 2012 at 2:30 p.m., in Part 11, Room 351, 60 Centre Street.

DATED: July 24, 2012

ENTER:

J.S.C.
HON. JOAN A. MADDEN
J.S.C.

FILED
AUG 02 2012
NEW YORK
COUNTY CLERK'S OFFICE