

<b>Schachter v Kaminsky</b>
2012 NY Slip Op 33338(U)
July 27, 2012
Sup Ct, NY County
Docket Number: 102970/11
Judge: Eileen Bransten
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN BRANSTEN
Justice

PART 3

Index Number : 102970/2011
SCHACHTER, INDIVIDUALLY AND
vs.
KAMINSKY, EDWARD
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. 102970/11
MOTION DATE 8/03/12
MOTION SEQ. NO. 001

The following papers, numbered 1 to 3, were read on this motion to/for dismiss

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s) 1
Answering Affidavits — Exhibits No(s) 2
Replying Affidavits No(s) 3

Cross motion X
Upon the foregoing papers, it is ordered that this motion is

IS DECIDED
IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

Dated: 7-27-12

Eileen Bransten
HON. EILEEN BRANSTEN 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: IAS PART THREE

-----X

SOPHIA SCHACHTER, individually and on behalf  
of KAST REALTY, LLC,

Plaintiff,

-against-

Index No. 102970/11  
Motion Date: 02/03/12  
Motion Seq. No.: 001

EDWARD KAMINSKY, FIEBER  
MAINTENANCE AND MANAGEMENT CO.,  
INC., MILDRED KAMINSKY, RESIDUARY  
TRUST U/W I.Z. FIEBER, RHODA  
FIEBER INSURANCE TRUST F/B/O JOAN  
F. SCHAPIRO, R. FIEBER INSURANCE  
TRUST F/B/O RICHARD J. FIEBER,  
LILIAN GOLDBLATT FAMILY LP, and  
KAST REALTY, LLC,

Defendants.

-----X

BRANSTEN, J.

In motion sequence number 1, defendants Edward Kaminsky, Fieber Maintenance and Management Co., Inc. (“Fieber Management”), Mildred Kaminsky, Residuary Trust U/W of I.Z. Fieber, Rhoda Fieber Insurance Trust f/b/o Joan F. Schapiro and Kast Realty, LLC (“Kast Realty” or the “LLC”) (“Defendants”) move pursuant to CPLR 3211(a) (1), (3) and (7) to dismiss the complaint (“Complaint”) brought by plaintiff Sophia Schachter, individually and on behalf of Kast Realty, LLC (“Plaintiff”). Plaintiff cross-moves for leave to replead pursuant to CPLR 3025(b) if the court grants Defendants’ motion to dismiss.

### Background

Plaintiff and defendants Mildred Kaminsky, Residuary Trust U/W of I.Z. Fieber, Rhoda Fieber Insurance Trust f/b/o Joan F. Schapiro, R. Fieber Insurance Trust f/b/o Richard J. Fieber and Lillian Goldblatt family LP<sup>1</sup> (the “Kast Realty Defendants”) are members of Kast Realty, LLC. Complaint, ¶¶ 2-10. Kast Realty owns real estate and an apartment building located at 2500-24 Frisby Avenue, Bronx, New York (the “Bronx Property”). *Id.*, ¶ 3.

Defendants Edward Kaminsky and Fieber Management (the “Fieber Defendants”) are not members of Kast Realty. Fieber Management is the building manager for the Bronx Property. Complaint, ¶ 14. Edward Kaminsky is a shareholder, officer and director of Fieber Management. *Id.*, ¶ 11.

Plaintiff claims that each of the Kast Realty Defendants are somehow interested in Fieber Management. *Id.*, ¶ 15. Plaintiff contends the Kast Realty Defendants either have a pecuniary interest in Fieber Management or a familial relation to Fieber Management’s owners. *Id.* Plaintiff does not specify which Kast Realty Defendants have a pecuniary interest in Fieber Management. Additionally, Plaintiff does not specify how the Kast Realty Defendants and owners of Fieber Management are related.

Plaintiff alleges that the Kast Realty Defendants, as the managers of Kast Realty, breached duties owed to Kast Realty and violated New York Limited Liability Company Law § 411. Complaint, ¶¶ 40-64.

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<sup>1</sup> The parties stipulated to discontinue this action against defendants R. Fieber Insurance Trust f/b/o Richard J. Fieber and Lillian Goldblatt Family LP.

Plaintiff bases its seven causes of action on four alleged wrongs. First, Plaintiff alleges that the Kast Realty Defendants, using Kast Realty funds, made contributions to several of their “pet” charities without Plaintiff’s consent. Complaint, ¶ 49. Second, Plaintiff alleges that the Kast Defendants caused Kast Realty to pay management fees to Fieber Management. *Id.*, ¶ 47. Plaintiff contends that the Kast Realty Operating Agreement does not provide for management fees. Plaintiff argues that payment of such management fees constituted self-dealing because the Kast Defendants each have a pecuniary interest or familial relation to Fieber Management. *Id.*, ¶¶ 28-31. Third, Plaintiff claims that Edward Kaminsky caused Kast Realty to pay expenses for non-LLC purposes. Complaint, ¶ 34. Finally, Plaintiff alleges that Edward Kaminsky loaned \$100,000 belonging to Kast Realty to another Fieber Management building, not owned by Kast Realty. *Id.*, ¶ 36. Plaintiff contends that it had no knowledge and did not consent to any of these allegedly self-interested transactions. *Id.*, ¶¶ 26, 37, 47.

While Plaintiff brings this action individually and on behalf of Kast Realty, LLC, Plaintiff did not make a demand on the managers/members of the LLC to pursue this action in her stead prior to filing the Complaint. Plaintiff contends that such a demand would have been futile and should thus be excused. Complaint, ¶ 38.

Plaintiff’s Complaint alleges, based on the above: (1) breach of fiduciary duty against the Kast Realty Defendants; (2) violation of New York Limited Liability Company Law § 411 by the Kast Realty Defendants; (3) Aiding and abetting breach of fiduciary duty against the Fieber Defendants; (4) unjust enrichment against all defendants; (5) an accounting against

all defendants; (6) permanent injunction against all defendants; and (7) constructive trust against all defendants.

### Analysis

#### I. Standard of Law

On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. Under CPLR 3211 (a) (1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law. In assessing a motion under CPLR 3211 (a) (7), however, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint and the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one.

*Leon v. Martinez*, 84 N.Y.2d 83 (1994) (internal quotations and citations omitted); see also *Goshen v. Mutual Life Ins. Co. of New York*, 98 N.Y.2d 314, 326 (2002). In assessing a motion to dismiss under CPLR 3211 (a) (3), a dismissal is warranted if the plaintiff does not have legal capacity to sue. See CPLR 3211 (a) (3); see also *Omansky v. Lapidus & Smith, L.L.P.*, 273 A.D.2d 110, 111 (1st Dep't 2000) (dismissing causes of action where individual plaintiffs were without authority to sue on behalf of a partnership).

#### I. Derivative Claims and Making a Demand on the LLC

Although Plaintiff brings this action “individually and on behalf of Kast Realty, LLC,” its pleading and motion papers make clear that this action is brought solely as a derivative action on behalf of Kast Realty. See Complaint (each cause of action requesting

relief only for Kast Realty); *see also* Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to Dismiss and in Support of Cross-Motion for Leave to Replead, p. 7 (stating that "none of the causes of action assert[] an individual claim").

Shareholders of an LLC may sue derivatively on behalf of the LLC. *Tzolis v. Wolff*, 10 N.Y.3d 100 (2008). In doing so, a plaintiff shareholder must set forth in the Complaint an attempt it made to secure the initiation of such action by the managers of the company or the reasons for not making such effort. *Bansbach v. Zinn*, 1 N.Y.3d 1, 9 (2003).

The demand on a company's management may be excused as futile in three circumstances: (1) when a complaint alleges with particularity that a majority of the managers is interested in the challenged transaction, such interest may either be self-interest in the transaction at issue, or a loss of independence because a manager with no direct interest in a transaction is "controlled" by a self-interested director; (2) when a complaint alleges with particularity that the managers did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances; and (3) when a complaint alleges with particularity that the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment. *Bansbach*, 1 N.Y.3d at 9.

Plaintiff alleges that a demand on the managers/members to pursue this action in her stead would have been futile. Plaintiff so argues because she alleges that each of the members that manage Kast Realty either has a pecuniary interest in or a familial relation to Fieber Management. Complaint, ¶ 15. Plaintiff argues that the "[i]nterested

[m]embers/[m]anagers are still in control of the management, business and affairs of Kast Realty[.]” *Id.*, ¶ 38. Plaintiff contends that, even if the members/managers pursued this litigation on Kast Realty’s behalf, they would not prosecute the action in good faith because they are each somehow interested in Fieber Management. *Id.*

Defendants contend that Plaintiff has failed to plead futility of a demand on the managers. Defendants submit documentary evidence that they claim “conclusively proves that a majority of the company’s member-managers are disinterested [in Fieber Management].” Defendants’ Memorandum of Law in Support of Motion to Dismiss (“Defendants’ Memo”), p. 3. Defendants argue that only defendant Rhoda Fieber Insurance Trust f/b/o Joan F. Schapiro (“Rhoda Fieber Insurance Trust”) holds any interest in Fieber Management. *Id.* In support of this contention, Defendants submit four stockholder certificates for Fieber Management, one of which shows that defendant Rhoda Fieber Insurance Trust owns five shares of Fieber Management. *See* Affirmation of Edward Kaminsky, Ex. F.

Defendants argue that Plaintiff fails to allege that Rhoda Fieber Insurance Trust has any coercive powers over or otherwise controls the other members of Kast Realty. Defendants’ Memo, p. 4. Defendants cite to *Health-Loom Corp. v. Soho Plaza Corp.*, 209 A.D.2d 197 (1st Dep’t 1994) in support of their argument. The Appellate Division in *Health-Loom Corp.* held that conclusory allegations that two defendant directors of a corporation controlled the remaining directors was insufficient to state demand futility. *Health Loom Corp.*, 209 A.D.2d at 198. Defendants contend that Plaintiff’s allegation that each of the



defendants are somehow related to the others and interested in Fieber Management are here conclusory and, under *Health-Loom Corp.*, are insufficient to support a claim that demand on the managers would have been futile. Defendants thus argue Plaintiff's Complaint should be dismissed.

The court finds that Plaintiff has failed to plead with particularity that the Kast Realty Defendants are interested in Fieber Management, and thus has not established that a demand on the Kast Realty Defendants to initiate the action themselves would have been futile. *Bansbach*, 1 N.Y.3d at 9 (holding that a complaint must allege with particularity that a majority of the managers is interested in the challenged transaction or controlled by a self-interested director).

Plaintiff does not particularize either how the Defendants are related to one another or which of the Defendants hold an interest in Fieber Management. *See Health-Loom Corp.*, 209 A.D.2d at 198 (holding that allegations that two directors of a company have coercive powers over other directors on the board is insufficient to excuse the demand on the board); *see also Bansbach v. Zinn*, 258 A.D.2d 710, 713 (3d Dep't 1999) (holding that allegations of personal friendships amongst board members are insufficient to establish domination and control). There is no New York case law holding that a mere assertion of familial relationship amongst the majority of managers of a company excuses the demand requirement in a shareholder derivative suit. Plaintiff's complaint must therefore be dismissed.

## II. Plaintiff's Cross-Motion for Leave to Replead

Plaintiff argues, that if the court should find, as it has, that Plaintiff has failed to adequately plead its causes of action, that the court should grant Plaintiff leave to replead its Complaint. Defendants argue that the court must deny this motion because Plaintiffs failed to attach a proposed amended complaint to their moving papers. *See Haller v. Lopane*, 305 A.D. 2d 370, 372 (denying plaintiff's motion for leave to amend its complaint on the ground that plaintiff had not offered a reasonable excuse for delay in uncovering facts it sought to add to complaint and noting that plaintiff had also failed to submit a copy of proposed amended complaint).

It is fundamental that leave to amend a pleading should be freely granted, so long as there is no surprise or prejudice to the opposing party. *See CPLR 3025(b); Solomon Holding Corp. v. Golia*, 55 A.D.3d 507, 507 (1st Dep't 2008). Mere delay is insufficient to defeat a motion for leave to amend. *Sheppard v. Blitman/Atlas Bldg. Corp.*, 288 A.D.2d 33 (1st Dep't 2001). "Prejudice requires some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." *Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dep't 2007) quoting *Loomis v. Civetta Corinno Constr. Corp.*, 54 N.Y.2d 18, 23 (1981).

The court finds leave to replead is here appropriate. *See Balling v. Casabianca*, 285 A.D. 20, 21 (1st Dep't 1954) (granting defendants' motion to dismiss plaintiffs' derivative shareholder action against defendants for failure to show that demand on the board would be futile but allowing plaintiffs' leave to replead). The court does not find, nor do defendants

argue, that defendants will be prejudiced or surprised in any way by the court's granting Plaintiff leave to replead. Accordingly, Plaintiff's cross-motion to replead is granted.

**Order**

Accordingly it is hereby

**ORDERED** that defendants' motion to dismiss is granted and the complaint is dismissed; and it is further

**ORDERED** that plaintiff's motion for leave to replead is granted and plaintiff must serve an amended complaint within 30 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

**ORDERED** that, in the event that plaintiff fails to serve and file an amended complaint in conformity hereith within such a time, leave to replead shall be deemed denied, and the Clerk, upon service of a copy of this order with notice of entry and an affirmation/affidavit by defendants' counsel attesting to such non-compliance, is directed to enter judgment dismissing the action, with prejudice, and with costs and disbursements to defendants as taxed by the Clerk.

This constitutes the decision and order of the court.

Dated: New York, New York

July 27, 2012

ENTER:



Hon. Eileen Bransten, J.S.C.