SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

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SQUARE-ARCH REALTY CORP.,

Plaintiff,

- v -

ADELAIDE POLSINELLI and JAMES MONTERO,

Defendants.

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ADELAIDE POLSINELLI and JAMES MONTERO,

Defendants-Plaintiffs on the Counterclaims,

- v -

SQUARE-ARCH REALTY CORP., PHILIP COLTOFF, EMILY FOLPE, WILLIAM GREENBERG, DAVID PISCUSKAS, GERARD CACCAPOLO, ALLISON CARMEN and RICHARD COHEN,

Plaintiffs-Defendants on the Counterclaims.

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Index No.
153433/2014

DECISION and ORDER

Mot. Seq.
#001, #002

HON. EILEEN A. RAKOWER, J.S.C.

Plaintiff, Square-Arch Realty Corp. ("Plaintiff" or the "Co-op"), brings this action for injunctive, declaratory, and monetary relief against defendants, Adelaide Polsinelli ("Polsinelli") and James Montero ("Montero") (collectively, "Defendants" or "Owners"). Plaintiff is a cooperative housing corporation and

owner of the residential building located at 2 Fifth Avenue, New York, New York (the "Building"). This action arises out of Owners' incorporation of approximately thirty square feet of the Building's common hallway space (the "Common Hallway Space") into three adjacent apartments, units 8F, 8G, and 8H (collectively, the "Apartments"), for the purpose of combining the Apartments into a single, larger apartment ("Apartment 8F/G/H").

The Co-op commenced this action on April 9, 2014, by Summons with Notice. The Co-op filed a Verified Complaint on April 29, 2014. Owners interposed a Verified Answer to the Co-op's Verified Complaint with Counterclaims on June 20, 2014. On July 10, 2014, Owners filed an Amended Verified Answer to the Co-op's Complaint with Counterclaims, adding individuals, Philip Coltoff ("Coltoff"), Emily Folpe ("Folpe"), William Greenberg ("Greenberg"), David Piscuskas ("Piscuskas"), Gerard Caccapolo ("Caccapolo"), Allison Carmen ("Carmen"), and Richard Cohen ("Cohen") (collectively, the "Individual Directors") as additional counterclaim defendants on Owners' Counterclaims. The Individual Directors filed a Verified Reply to Owners' Counterclaims on September 9, 2014.

The Co-op and the Individual Directors (collectively, the "Replying Parties") now move (Mot. Seq. #001) for an Order, pursuant to CPLR § 3212, granting summary judgment against Owners on the first and second causes of action in the Co-op's Complaint and dismissing the first, second, third, and fourth Counterclaims interposed in Owners' Amended Answer; and, alternatively, pursuant to CPLR § 3025(b), granting leave to amend the Verified Reply to Counterclaims to interpose an additional affirmative defense of statute of limitations against Owners' second Counterclaim. In support, the Co-op and the Replying Parties submit: the affidavit of William Greenfield ("Greenfield"), the president of the Co-op's board of directors (the "Board"), dated December 9, 2014 and exhibits annexed thereto.

Owners oppose. In addition, Owners now move (Mot. Seq. #002) for an Order, pursuant to CPLR § 3212, granting summary judgment in favor of Owners and dismissing the Co-op's Complaint and awarding Owners partial summary judgment on Owners' first, second, and third Counterclaims; and, pursuant to Rule 130 of the Rules of the Chief Administrator, awarding sanctions. Owners submit: the affidavit of Polsinelli, dated February 22, 2015 and exhibits annexed thereto.

The Replying Parties oppose Owners' motion.

Oral argument was heard on Mot. Seq. #001 and #002. Thereafter, the parties engaged in protracted settlement discussions, which were ultimately unsuccessful, and the minutes from the Oral Argument on Mot. Seq. #001 and #002 were submitted to the Court.

I. Facts

The undisputed facts are as follows: Owners are Building residents and shareholders. At all periods relevant to the issues raised in this litigation, Rudin Management Company (the "Managing Agent") managed the Building. Jeffrey Steinman ("Steinman") was the Property Manager from the 1990's through some time in the year 2011. (Polsinelli Aff. ¶ 5).

In 1986, Polsinelli purchased shares and a proprietary lease appurtenant to apartments 4E and 8G in the Building. (*Id.* ¶ 6). In 1995, Polsinelli purchased shares and a proprietary lease appurtenant to apartment 8H (*Id.*). Owners performed renovations to combine 8G and 8H into a single, larger apartment ("Apartment 8G/H") that same year. (*Id.* ¶ 14). In 2000, Polisnelli purchased shares and a proprietary lease appurtenant to apartment 8F. (*Id.*). Polsinelli's husband, Montero, co-owns the shares allocated to apartment 8F. (*Id.*).

In 2000, Owners sought to renovate and combine 8F and 8G/H (collectively, the "Apartments") into a single dwelling unit. (*Id.* ¶ 7). Pursuant to the form proprietary lease (the "Proprietary Lease") for all three Apartments:

> 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, or on any roof, penthouse, terrace or balcony appurtenant thereto, 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, intercommunication or alarm system, or any other installation or facility in the apartment or building. The performance, by Lessee of any work in the apartment shall be in accordance with any applicable, rules and regulations of the Lessor and governmental agencies having

> jurisdiction thereof *and may not impinge on common areas of the building without Lessor's consent.*

(Pl's Ex. E. ¶ 21[a] [Proprietary Lease] [emphasis added]). The Proprietary Lease further provides:

> If the Lessor shall furnish to the Lessee any storage bins or space, the use of the laundry, or *any facility outside the apartment*, including but not limited to a television antenna, *the same shall be deemed to have been furnished gratuitously by the Lessor under a revocable license.*

(Pl's Ex. E ¶ 29[b] [Proprietary Lease] [emphasis added]).

By letter dated March 16, 2000, the Co-op, through Steinman, approved the "concept" of combining the Apartments[1]. (*Id.* ¶ 8; Defs.' Ex. B [March 16 Letter from Steinman]). Between March 2000 and May 2000, Owners provided Steinman with copies of the contract of sale for 8F, a form alteration agreement, and preliminary and final floor plans for the combination. (*Id.* ¶ 15; Defs.' Ex. G-I [contract of sale, form alteration agreement, and floor plans]). By letter dated May 16, 2000, Polsinelli sent Steinman a copy of a detailed original plan for the renovation of 8F. (*Id.* ¶ 16; Defs.' Ex. J p. 1-2 [renovation plan for apartment 8F]). That plan contains an inflated section, circling the approximately 6-foot portion of the hallway space that Owners wished to incorporate into the combined Apartment and requesting information about the cost of acquiring such space. (Defs.' Ex. J p. 2 [renovation plan for apartment 8F]).

On May 16, 2000, work commenced to combine and renovate the Apartments. (Polsinelli Aff. ¶ 16). Meanwhile, by fax dated July 11, 2000, Steinman asked Owners to quantify exactly how much hallway space was required to complete Owners' incorporation plan. (*Id.*; Defs.' Ex. K [July 11, 200 Fax from Steinman to

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[1] The March 16, 2000 letter states: "Please be advised that the Board of Directors of Square-Arch Realty Corp. has approved the concept of your combining Apartments 8-F and 8-G/H at 2 Fifth Avenue after you have purchased Apartment 8-F. Several other shareholders in the building, including past and present Board members, have already combined two or more apartments. Once you have closed on the new apartment final approval will be given after your plans have been reviewed and accepted by the Board and any necessary City agencies, you have completed the building standard Alteration Agreement and your contractor has met the necessary insurance requirements." (Defs.' Ex. B [March 16 Letter]).

Polsinelli]). Steinman's July 11, 2000 fax states: "[s]hare allocation will be based on exact space. You have to buy the shares @ $75 per share, then pay the additional maintenance each month." (*Id.*; Defs.' Ex. K [July 11, 200 Fax from Steinman to Polsinelli]).

By fax dated July 28, 2000, Polsinelli sent Owners' proposed plan for the inclusion of a portion of the hallway common to 8F/G to Steinman, and asked to be advised of the costs that Owners "would be incurring before you officially allocate the shares". (*Id.*; Defs.' Ex. M [July 28, 2000 fax from Polsinelli to Steinman]). By fax dated August 7, 2000, Steinman responded:

> 32 shares x $75 = $2,400
> Payment up front (one time).
> Maintenance would be increased
> $44.80 per month. OK?

(*Id.* [August 7, 2000 fax]).

Polsinelli avers that she accepted the terms contained in the August 7, 2000 fax from Steinman via telephone call with Steinman on August 8, 2000[2]. (Polsinelli Aff. ¶ 21). Polsinelli avers that she memorialized the agreement in a fax to Steinman that same day. (*Id.*; Defs.' Ex. N [August 8, 2000 fax to Steinman]). Polsinelli's August 8, 2000 fax to Steinman states:

> Thank you for your response. We accept your terms and would like to proceed.
> Would you prefer to direct debit the amount from our checking account or have us write you a check?
> What is the procedure for beginning the actual work?
> When can we begin?

(*Id.*). Polsinelli avers that she "authorized the Corporation to debit automatically the lump sum payment of $2,400.00" from Owners' checking account and received permission from Steinman to proceed with the renovation work to incorporate the Hallway Space "as soon as possible." (Polsinelli Aff. ¶ 21).

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[2] Owners submit a copy of a fax dated August 8, 2000 from Polsinelli to Steinman bearing the handwritten notation: "8/8 he called we had a phone handshake – will send paper work to me next wk I can start ASAP". (Defs.' Ex. N [August 8, 2000 fax from Polsinelli to Steinman]).

Owners began renovation work to incorporate the Hallway Space into the combined Apartments on September 5, 2000. (*Id.* ¶ 22). This work was completed on September 8, 2000. (*Id.*). However, no one-time payment of $2,400 was debited from Owners' checking account, no Hallway Shares were issued to Owners, and no closing respecting such shares took place. (*Id.* ¶¶ 24, 30). In addition, although Owners' monthly maintenance charges were debited from Owners' checking account, the amount of Owners' maintenance was not increased by $44.80 per month at any time following the combination. (*Id.* ¶ 24, 31).

Owners have resided, and continue to reside, in the combined Apartment 8F/G/H. Polsinelli served as a member of the Board from May 2000 to May 2011. (*Id.* ¶ 25). In 2008-2011, during the course of Polsinelli's tenure on the Board, the Board discovered that the Building's façade "required a massive replacement, at a cost exceeding $30 million dollars." (*Id.*). Polsinelli avers that, "shareholders were vocal in their shock and disgust over the enormity of the cost to replace the façade and the hefty assessments that all would be required to pay." (*Id.*). Polsinelli retired from the Board in May 2011, with an indemnity agreement (the "Indmnification Agreement") for any and all claims arising out of her service as a director[3]. (*Id.* ¶ 28; Defs.' Ex. P [Indemnification Agreement]).

On July 18, 2011, after Polsinelli's retirement from the Board, the Co-op's Board passed a resolution (the "Resolution") providing that, "any tenant/shareholder wishing to purchase shares of stock of the cooperative allocated to hallway space and to acquire a proprietary lease for such hallway space shall be required to pay the "fair market value" of the shares and the lease at the time such transaction takes place." (Greenberg Aff. ¶ 36; Pls.' Ex. G [Resolution]). Pursuant to the Resolution:

> The "fair market value" of the shares and the number of shares to be allocated to the hallway space shall be determined by an appraiser or a licensed real estate broker,

[3] The Indemnification Agreement provides, in relevant part: "if the Indemnitee was or is a party or is threatened to be made a party to any Proceeding by reason of his or her service as a director on the Board or arising therefrom, the Indemnitee shall be indemnified by the Company against all Expenses and Liabilities incurred or paid by title Indemnitee in connection with such Proceeding (referred, to herein as "Indemnifiable Expenses" and "Indemnifiable Liabilities," respectively, and collectively as "Indemnifiable Amounts"). The Company hereby agrees to indemnify Indemnitee to the fullest extent permitted by law, even if such indemnification is not specifically authorized by the other provisions of this Agreement or any other agreement, title Certificate, the Bylaws or by statute." (Defs.' Ex. P ¶ 2[a] [Indemnification Agreement]).

> who shall be selected and retained by the cooperative. For the purposes of this resolution, the "fair market value" shall mean the value of the shares and lease for the hallway area being purchased as if such hallway area were already incorporated into the apartment or apartments of the purchaser. All costs and expenses in connection with the sale of the shares and issuance of the proprietary lease for the hallway space (including, without limitation, the appraisal, the share allocation, the closing, transfer taxes (if any), tax on the issuance of shares, reasonable attorney's fees and disbursements and incorporation of the hallway area purchaser's apartment or apartments) shall be the responsibility of the purchaser of the shares.

(Pls.' Ex. G [Resolution]).

In the affidavit of Polsinelli, Polsinelli avers that she received an email from Steinman on July 19, 2011, the day after the Resolution was passed, asking Polsinelli to call Steinman. (Polsinelli Aff. ¶ 30). Polsinelli avers:

> I responded that I would call him and had a conversation with Mr. Steinman on July 20, 2011. During this conversation, Mr. Steinman advised me that . . . the Managing Agent had neglected to debit our account for the lump sum acquisition price of $2,400. Also, through an apparent oversight, the Corporation's transfer agent failed to issue a new proprietary lease or shares covering the combined Apartment and hallway space or schedule a closing.

(*Id.* ¶ 30). Polsinelli further avers that, "while the Managing Agent had debited [Owners'] account for the monthly maintenance during the eleven (11) years following [their] renovation and incorporation of the hallway into the Apartment, it apparently never debited [Owners'] bank account for the extra $44.80 monthly". (*Id.* ¶ 31).

Polsinelli avers that Steinman asked Polsinelli to issue a check for an amount representing the acquisition price for Hallway Shares, at the rate of $75 per share, as

well as "the maintenance they [the Co-op] failed to collect from December, 2000 to August 31, 2011." (*Id.*). Polsinelli avers:

> Mr. Steinman also stated that a closing would likely not be set until the following month. Although the form proprietary lease obligates shareholders to pay maintenance on additional shares at the same rate as other shareholders only "from and after" the date of issuance, I agreed to, and did, tender payment for the full sum requested [in order to bring payments current] through August 31, 2011.

(*Id.* ¶ 31; Defs.' Ex. R [email string between Steinman and Polsinelli and copy of check payable to "Square Arch" drawn on Polsinelli's account in the amount therein requested (the "July 2011 Check")]).

By letter dated July 22, 2011, the Co-op informed Owners that Steinman had advised the Co-op that Owners had not "properly" purchased the Hallway Space. (*Id.* ¶ 32; Defs.' Ex. S [July 22, 2011 letter]). The Co-op's July 22, 2011 letter to Owners also states that Steinman, "was not authorized to negotiate with . . . [Owners] for the sale of shares for the hallway space" and that the Board, "is reserving its rights in this matter, including, without limitation, the right to adjust the recently imposed assessment if additional shares are allocated to [Owners'] apartment." (Defs.' Ex. S [July 22, 2011 letter]).

By letter dated July 28, 2011, the Co-op notified Owners that the Co-op was returning Polsinelli's July 2011 Check. (*Id.* ¶ 33; Defs.' Ex. T [July 28, 2011 letter]). By letter dated August 22, 2011, the Co-op informed Owners that it was "still investigating the matter regarding the hallway space that you inappropriately incorporated into your apartments." (Defs.' Ex U [August 22, 2011 letter]). The Co-op's August 22, 2011 letter to Owners further states:

> The Board will notify you as soon as it completes its investigation and makes a decision on the matter. Please be advised that your assessment payment is due on or before September 1, 2011 based on the current shares allocated to your apartments. The board reserves the right to adjust the assessment in the event you acquire any

> shares for the hallway space and/or to collect arrears on account of use and occupancy, and maintenance charge assessments for the past use of the hallway space.

(*Id.*).

By letter dated October 20, 2011, the Co-op communicated to Owners a demand for payment in the amount of $101,505.27, "for [Owners'] use of the Hallway Space and for their acquisition of shares and a proprietary lease appurtenant to the hallway space between Apartments F, G, and H of the 8th floor of [the Building]." (*Id.* ¶ 40; Defs.' Ex. AA [October 20, 2011 letter]). The Co-op's October 20, 2011 letter to Owners provides a "breakdown of the amounts demanded" as follows:

> Acquisition of Proprietary Lease and 29 Shares....$54,000.00
> Use of the Hallway (December 2000 – October 2011)
> at $151 per month and 12% per annum.....$40,905.27
> Appraisal Fee.....$1,600.00
> Legal Fee.....$5,000.00
> Total.....$101,505.27

(Defs.' Ex. AA [October 20, 2011 letter]).

By letter dated January 24, 2012, the Co-op, via counsel, informed Owners that "[t]itle to the Apartments is impaired by both the failure to acquire the shares and a leasehold interest for the hallway space incorporated into the Apartments." (Defs.' Ex. FF [January 24, 2012 letter]). The January 24, 2012 letter also states:

> [Owners] are in violation of the Cooperative's alteration rules and the law insofar as there is no record to indicate that [Owners] made any (i) submissions of plans, alteration applications or alteration agreement for work approval of the work performed in combining the Apartments or efforts to obtain the approval of the work from the Board, (ii) filings with the Department of Buildings in connection with the combination of the Apartments or other work performed by [Owners] with respect to the Apartments.

(*Id.*).

By letter dated February 7, 2012, Owners submitted filing forms for the Department of Buildings ("DOB") and for the Landmarks Preservation Commission ("LPC"), along with supporting documents, to the Co-op for the Co-op's signature and review. (*Id.* ¶ 54; Defs.' Ex. GG [February 7, 2012 letter and supporting documents]). By letters dated February 9, 2012 and February 23, 2012, the Co-op rejected the DOB filing forms and returned the supporting documents to Owners. (*Id.* ¶ 55; Defs.' Ex. HH [February 9, 2012 and February 23, 2012 letters]).

On April 7, 2014, the Co-op served a notice to quit (the "Notice to Quit") directing Owners to quit and vacate the Hallway Space on or before April 25, 2014. (*Id.* ¶ 56; Defs.' Ex. II [Notice to Quit]). The Notice to Quit is executed by Individual Defendants in their respective capacities as members of the Board. On April 9, 2014, this litigation ensued.

II. Discussion

A. Legal standard on motion for summary judgment

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). Pursuant to CPLR § 3212(f), the court may deny a motion for summary judgment, "should it appear from affidavits submitted in opposition to the motion that facts essential to justify opposition may exist but cannot then be stated". (CPLR § 3212[f]).

B. Owners' claim for specific performance

Turning first to Owners' second counterclaim, for specific performance, Owners' second counterclaim seeks specific performance of the agreement to purchase Hallway Space in the year 2000 to compel the Co-op to issue Hallway Shares "at the price and per share cost agreed to in the year 2000". (Am. Ans. ¶ 110). The elements of a cause of action for specific performance of a contract are: "that the plaintiff substantially performed its contractual obligations and was willing and able to perform its remaining obligations, that defendant was able to convey the property, and that there was no adequate remedy at law." (*EMF Gen. Contr. Corp. v. Bisbee*, 6 A.D.3d 45, 51 [1st Dep't 2004], *citing*, *Piga v. Rubin*, 300 A.D.2d 68 [1st Dep't 2002]). In determining whether a contract exists, "the inquiry centers upon the parties' intent to be bound, i.e., whether there was a 'meeting of the minds' regarding the material terms of the transaction." (*Central Federal Sav., F.S.B. v. National Westminster Bank*, 176 A.D.2d 131, 132 [1st Dep't 1991]). In order to invoke "the power of law . . . to enforce a promise, it must be sufficiently certain and specific so that what was promised can be ascertained." (*Joseph Martin, Jr., Delicatessen, Inc. v. Schumacher*, 52 N.Y.2d 105, 109 [1981]). The issue of whether a contract exists "is generally one of law, properly determined on a motion for summary judgment." (*Central Federal Sav., F.S.B.*, 176 A.D.2d at 132).

A plaintiff seeking specific enforcement of a contract of sale must demonstrate that he or she was "ready, willing and able to perform . . . on the original law day or, if time was not of the essence, on a subsequent date fixed by the parties or within a reasonable time thereafter." (*Gindi v. Intertrade Internationale Ltd.*, 50 A.D.3d 575, 575 [1st Dep't 2008]). While the question of what constitutes a reasonable time to perform the plaintiff's remaining obligations is usually a question of fact, "where the facts are undisputed, what is a reasonable time becomes a question of law." (*Hegeman v. Bedford*, 5 A.D.3d 632, 632 [2d Dep't 2004]; *DiBartolo v Battery Place Assoc.*, 84 A.D.3d 474, 475 [1st Dep't 2011] ["As a matter of law, [the plaintiff's] unexplained delay in tendering performance is unreasonable".). The equitable remedy of specific performance "is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique." (*EMF Gen. Contr. Corp.*, 6 A.D.3d at 52).

The court has discretion to deny specific performance "as equity and justice seem to demand in the light of the circumstances of each case." (*EMF Gen. Contr. Corp.*, 6 A.D.3d at 52, *quoting* 91 N.Y. Jur. 2d, Real Property Sales and Exchanges § 204). In addition, a number of equitable defenses may defeat a claim for specific enforcement of a contract of sale. These defenses include serious unfairness, undue

hardship, and laches[4], or "unreasonable prejudicial delay." (*EMF Gen. Contr. Corp.*, 6 A.D.3d 45 at 52). However, "the court's discretion to grant or deny specific performance of a contract for the sale of realty is not unlimited; unless the court finds that granting a decree of specific performance would be a drastic or harsh remedy, or work injustice, the court must direct specific performance." (*Id.*, *quoting*, 91 N.Y. Jur. 2d, Real Property Sales and Exchanges § 204). Thus, a plaintiff's unconscionable delay in prosecuting its rights may constitute a ground for denying equitable relief when such delay prejudices the defendant. (*See EMF Gen. Contr. Corp.*, 6 A.D.3d at 53). On the other hand, an increase in market value of the property does not, without more, create an "injustice" or inequity sufficient to deny specific enforcement of a contract of sale. (*Id.* at 55).

A contract may be treated as abandoned "when one party acts in a manner inconsistent with the existence of the contract and the other party acquiesces in that behavior." (*EMF Gen. Contr. Corp.*, 6 A.D.3d at 49, *quoting Savitsky v. Sukenik*, 240 A.D.2d 557, 559 [1997]). In such a case, "the refusal of one party to perform his contract amounts to an abandonment of it, leaving the other party to his choice of remedies, but his assent to abandonment dissolves the contract so that he can neither sue for a breach nor compel specific performance." (*Id.*). To establish abandonment of a contract by conduct, "it must be shown that the conduct is mutual, positive, unequivocal, and inconsistent with the intent to be bound". (*Id.* at 49-50). In addition, a finding of abandonment requires "clear, affirmative conduct . . . that is entirely at odds with the contract." (*Id.*).

"An agent's power to bind his principal is coextensive with the principal's grant of authority." (*Federal Ins. Co. v. Diamond Kamvakis & Co.*, 144 A.D.2d 42, 45 [1st Dep't 1989], *quoting*, *Ford v. Unity Hospital*, 32 N.Y.2d 464, 472 [1973]; Restatement [Third] of Agency § 2.02 [Scope of Actual Authority]). In addition, "[a]pparent authority may exist in the absence of authority in fact, and, if established, may bind one to a third party with whom the purported agent had contracted even if . . . the third party is unable to carry the burden of proving that the agent actually had authority." (*Id.*). Apparent authority, like implied actual authority, depends on "verbal or other acts by a principal which reasonably give an appearance of authority to conduct the transaction, except that, in the case of implied actual authority, these must be brought home to the agent while, in the apparent authority situation, it is the

[4] As a general rule, two elements are necessary to a finding of laches: (1) lack of diligence by the party against whom the defense is asserted; and, (2) prejudice to the party asserting the defense. (*Costello v. United States*, 365 U.S. 265, 282 [1961]).

third party who must be aware of them." (*Id.*). In certain circumstances, a principal may be estopped from denying the existence or scope of an agency relationship. (*See Spectra Audio Research, Inc. v. 60-86 Madison Ave. Dist. Mgmt. Ass'n*, 267 A.D.2d 23, 24 [1st Dep't 1999] [finding lack of authority defense properly dismissed where corporation's president had apparent authority to enter into sublease on corporation's behalf and "in any event, [the corporation] is estopped from denying the validity of the sublease entered by reason of its subsequent six-month use and occupancy of the premises"]; Restatement [Third] of Agency §§ 2.05 [Estoppel to Deny Existence of Agency Relationship], 4.01 [Ratification]).

Here, it is undisputed that Owners incorporated the Hallway Space into the Apartments in 2000. It is further undisputed that no Hallway Shares were issued, and that neither the acquisition price for the Hallway Space, nor any additional maintenance amounts for Hallway Space, were debited from Owners' checking account. In addition, the Proprietary Lease does not include the Hallway Space in the demised premises. However, nothing in the Proprietary Lease or By-Laws prevents Building shareholders from acquiring common space from the Co-op, upon the Co-op's consent, so long as applicable government and regulatory requirements are met. (*See* Pl.'s Ex. E. ¶ 21[a] [Proprietary Lease]). Indeed, Owners present proof in admissible form demonstrating that the Co-op approved the sale of hallway shares for hallway space located outside 20FG and 6EFGH, respectively. (Polsinelli Aff. ¶¶ 46-47; Defs.' Ex. BB-CC).

Furthermore, Owners present proof in admissible form sufficient to demonstrate that Owners entered into an agreement with the Co-op to purchase Hallway Space in the year 2000. Owners show a written offer, contained in Steinman's August 7, 2000 fax to Polsinelli, to acquire 32 Hallway Shares from the Co-op at $75 per share, in exchange for a one-time payment in the amount of $2,400, as well as an additional maintenance increase in the amount of $44.80 per month for the Hallway Space. (Defs.' Ex. M). Owners provide proof in admissible form to show that Polsinelli accepted this offer on August 8, 2000, and that a meeting of the minds was formed with respect to material price terms of the transaction. (Defs.' Ex. N). In confirmation of this agreement, the record demonstrates that Owners expended resources and performed renovation work to incorporate the Hallway Space into the Apartments, and that Owners have had exclusive use of the Hallway Space since then. (Polsinelli Aff. ¶ 23 ["The hallway has been an integral part of the Apartment ever since we acquired it in the year 2000."]).

Owners provide proof in admissible form demonstrating that, upon accepting the above terms for the purchase of Hallway Shares in 2000, Owners authorized the Co-op to direct debit the one-time payment of $2,400 from Owners' checking account. (Polsinelli Aff. ¶ 21 ["I authorized the [Co-op] to debit automatically the lump sum payment of $2,400.00"]; *id.* ¶ 24 ["My husband and I went about our business, never thinking again for more than a decade about the lump sum payment of $2,400, a sum equal to approximately one month of our then maintenance charges, which I assumed had been debited, for the Hallway Shares."]). Polsinelli avers, and the Co-op does not dispute, that Owners' monthly maintenance charges for the Apartments had been paid by direct debit "for years". (*Id.* ¶ 21).

Owners' submissions also indicate that Steinman notified Owners of their payment failure in 2011, when Steinman advised Polsinelli that the Managing Agent had "neglected" to debit Owners' account for the Hallway Space and that the Hallway Shares had not been issued. (*Id.* ¶ 30). Owners provide proof in admissible form showing that Owners, at Steinman's behest, issued a check to the Co-op to correct the apparent payment failure. (*Id.* ¶ 31; Defs.' Ex. R [July 2011 email string between Steinman and Polsinelli regarding Steinman's 2011 payment request; July 2011 Check). In an email dated July 20, 2011 from Steinman to Polsinelli, Steinman sets forth the amounts requested to bring Owners' payments for Hallway Space current through August 2011 and states: "I'd like to be able to say a check . . . is in the mail…[sic]". (*Id.*).

In response to Owners' showing of an agreement to purchase Hallway Space in the year 2000, the Co-op argues that no binding and enforceable contract to purchase Hallway Space in the year 2000 exists. The Co-op argues that the agreement to purchase Hallway shares is not enforceable because Owners failed to obtain the Board's consent to incorporate Hallway Space into the Apartments as required under the Proprietary Lease. (*See* Pl's Ex. E. ¶ 21[a] [Proprietary Lease]). However, the Co-op fails to produce any evidence in admissible form sufficient to demonstrate that issues of fact exist as to whether the Board consented to the incorporation of Hallway Space into the Apartments. The Co-op does not point to any communication indicating that the Board did not approve Owners' plan to incorporate the Hallway Space. By contrast, Owners present written correspondence between Steinman and Polsinelli, in which Steinman states that Board "approved the concept" of Owners' combination. (Defs.' Ex. B). Owners also provide evidence of several communications between Steinman and Polsinelli regarding alteration procedures and schedules for the Combination. (*E.g.*, Defs.' Ex. F, Ex. H-I, Ex. M).

In addition, Polsinelli avers that the renovation work to incorporate the Hallway Space "was performed . . . under the supervision of the Managing Agent and Building superintendent." (Polsinelli Aff. ¶ 22). The Co-op does not submit any evidence to suggest that the Co-op was not informed of Owners' renovation work. Nor does the Co-op submit any proof in evidentiary form that the Co-op objected to Owners' renovation work while such work was underway. Thus, the Co-op fails to demonstrate that a triable issue of fact remains as to whether Owners obtained the Co-op's consent to incorporate the Hallway Space into the Apartments in 2000.

Similarly, the Co-op argues that the agreement to purchase Hallway shares is not enforceable because Owners failed to obtain permits in connection with the incorporation of Hallway Space, as required under the Proprietary Lease. (*See* Pl.'s Ex. E. ¶ 21[a] [Proprietary Lease]). However, the Co-op does not present any proof in admissible form of any permitting requirements that were not adequately complied with in connection with the incorporation of Hallway Space into the Apartments. In fact, Polsinelli avers that, "[i]n point of fact, it was the [Co-op's] policy at the time we combined/renovated 8F with 8G/H not to require shareholders to file plans with DOB for the work we contemplated, since it was largely cosmetic in nature." (Polsinelli Aff. ¶ 13). Along this vein, Polsinelli further avers:

> The [Co-op] did not require us to file plans with DOB during previous renovations we performed in 1995 to combine 8G and 8H, even though we demolished the kitchens in those apartments. Rather, we were asked to, and did, submit nothing other than (i) an alteration agreement; (ii) insurance certificates; (iii) indemnity agreements signed by our contractors; (iv) architectural plans; (v) evidence of Worker's Compensation/ Employer's liability coverage and (iv) notice to Patrick Pettit, the Building superintendent, and our neighbors, announcing the commencement of work. Based on those submissions, approval to perform the renovations was granted by the Corporation. These are the same documents submitted to the Corporation for the 8F renovation/ combination.

(Polsinelli Aff. ¶ 14; *see* Defs.' Ex. F [letters from Steinman dated June 23, 1994 and April 3, 1995, respectively, and form alteration agreement]).

Polsinelli further avers:

> The incorporation of the hallway space required only minor, cosmetic, work and no electrical work was performed. The work, which took all of four (4) days, was performed in accordance with the rules and under the supervision of the Managing Agent and Building superintendent. On August 31, 2000, we sent a notice to our 8th floor neighbors advising them that we estimated our renovation would be completed within a week, by September 8, 2000 . . . The work commenced on September 5 and was in fact completed on September 8, 2000.

(*Id.* ¶ 22; Defs.' Ex. O [notice of renovation]). The Co-op does not claim that the DOB issued any violations in connection with Owners' incorporation of Hallway Space into the Apartments. Nor does the Co-op provide any evidence in admissible form as to whether permits were required for similar renovations[5] in the Building. Therefore, the Co-op fails to demonstrate that a triable question of fact exists as to whether Owners failed to obtain applicable permits for the incorporation of Hallway Space into the Apartments in violation of the Proprietary Lease.

While the Co-op argues that, in any event, Steinman was not authorized to negotiate the sale of Hallway Space to Owners, the record is replete with Steinman's communications on behalf of the Board. (*See, e.g.*, Defs. Ex. G-J, M-N; *see also*, Polsinelli Aff. ¶ 5 ["The Managing Agent assisted the board of directors in most areas, including, without limitation, apartment renovations, transfers of stock and leases and the collection of monthly maintenance payments."]). In addition, the Co-op's By-Laws authorize the Managing Agent to resolve "any dispute" concerning the number of shares to be allocated in connection with the incorporation of common space into one or more of the apartments covered by any Proprietary Lease. (Defs.' Ex. LL, p. 11-12 Article 5, Section 4 [By-Laws]). The By-Laws provide that the Managing Agent's determination in this regard "shall be final and conclusive." (*Id.*). Thus, the Co-op fails to present evidence in admissible form sufficient to

[5] To the contrary, Polsinelli notes that the tenant of apartment 6EFGH acquired hallway space outside that apartment in 2013 and "did not file an application for a building permit with the DOB before incorporating the hallway space into her apartment". (Polsinelli Aff. ¶ 47, FN 7).

demonstrate that a triable issue of fact exists as to whether Steinman, as Managing Agent, did not have absolute authority to bind the Co-op, as principal, to the agreement to purchase Hallway Space in the year 2000.

The Co-op also argues that any terms or offer for Owners to purchase Hallway Shares in 2000 have lapsed, and are now barred by laches. However, under the circumstances of this case, where the record demonstrates that neither the Co-op nor Owners were advised of Owners' payment failure until 2011, the passage of time alone is insufficient to create a triable issue of fact as to whether Owners unreasonably delayed in asserting their right to performance under the agreement to purchase Hallway Space. Furthermore, to the extent that the Co-op believed that Owners had in fact properly purchased the Hallway Space, until 2011 when it came to the Board's attention that no Hallway Shares were issued to Owners, (*see* Defs.' Ex. S [July 22, 2011 letter]), the Co-op cannot now claim to be prejudiced by the delay.

Owners demonstrate—and the Co-op does not dispute—that the Co-op rejected Owners' attempt to resolve their apparent payment failure in 2011. The Co-op also does not dispute that the Co-op rejected DOB and LPC filing forms sent for signature in 2012. (*See* Defs.' Ex. GG-HH). Under the circumstances of this case, therefore, the Co-op's contention that the approximately eleven-year period after the incorporation of Hallway Space took place is not a reasonable time within which to close on Hallway Shares, is insufficient, without more, to raise a triable issue of fact respecting Owners' entitlement to specific performance of the agreement to purchase Hallway Space. (*See Piga v. Rubin*, 300 A.D.2d 68, 69 [1st Dep't 2002] [finding that defendant-seller failed to raise triable issue respecting plaintiffs-purchasers' entitlement to specific performance of a contract of sale, "Indeed, the record discloses that, for five years, defendant, in a prolonged attempt to deprive plaintiffs of their bargain, repeatedly frustrated the closing of the real estate transaction to which the parties had agreed."]).

C. The Co-op's claims for declaratory and injunctive relief and breach of the Proprietary Lease

As far as the Co-op's motion for summary judgment is concerned, CPLR § 3001 permits the court to render a declaratory judgment, "having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." (CPLR § 3001). In

addition, in order to obtain a permanent injunction, a plaintiff must show: (1) the violation of a right that is presently occurring or imminent; (2) that the plaintiff has no adequate remedy at law; (3) that serious and irreparable injury will result if the injunction is not granted; and, (4) that the equities are balanced in the plaintiff's favor. (*Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840 [2005]). "The elements of a breach of contract claim are formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage." (*Flomenbaum v. New York Univ.*, 2009 NY Slip Op 8975, *9 [1st Dep't 2009]).

The Co-op's claims for injunctive and declaratory relief and breach of the Proprietary Lease turn on the Co-op's contention that Owners' use of the Hallway Space is a revocable license. The Co-op seeks a judgment: (a) declaring that the Co-op has duly revoked Owners' permission to use the Hallway Space and enjoining Owners from any and all further use, or alternatively (b) ordering Owners to pay fair market value for the Hallway Space as required under the Resolution, together with use and occupancy for the Hallway Space beginning April 25, 2014. The Co-op claims contractual damages based on Owners' failure to turn over the Hallway Space to the Co-op pursuant to the Notice to Quit.

"A license is a personal, revocable and non-assignable privilege, conferred either by writing or parol, to do one or more acts upon land without possessing any interest therein." (*Greenwood L. & P. J. R. Co. v. New York & G. L. R. Co.*, 134 N.Y. 435, 440 [1892]). A landlord's actions in permitting tenants in a cooperative housing corporation to use areas in the building without objection may constitute a revocable license for such use. (*Gracie Terrace Apartment Corp. v. Goldstone*, 103 A.D.2d 699, 701 [1st Dep't 1984]; *Prospect Owners Corp. v. Sandmeyer*, 62 A.D.3d 601, 602 [1st Dep't 2009]). On the other hand, where space is expressly included in the shares allotted to an apartment, the tenant is entitled to exclusively use the space so designated. (*Prospect Owners Corp.*, 62 A.D.3d at 602 ["Whereas a license connotes use or occupancy of the grantor's premises, a lease grants exclusive possession of designated space to tenant, subject to rights specifically reserved by the lessor."] [internal citation omitted]; *Gracie Terrace Apartment Corp.*, 103 A.D.2d 699 at 701 [finding eastern portion of roof was allocated exclusively to penthouse occupants under proprietary lease, while occupants' use of southern portion of roof might constitute revocable license]).

"Although originally revocable at the will of the licensor, [a license] may become irrevocable through the expenditure of money by the licensee." (*Greenwood L. & P. J. R. Co.*, 134 N.Y. at 440). A "license to use the property . . . does not ripen into title by adverse possession." (*Joseph v. Whitcombe*, 279 A.D.2d 122, 126 [1st Dep't 2001]). Rather, to establish a claim of adverse possession, "the occupation of the property must be (1) hostile and under a claim of right (i.e., a reasonable basis for the belief that the subject property belongs to a particular party), (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for the statutory period (at least 10 years)." (*Estate of Becker v. Murtagh*, 19 N.Y.3d 75, 81 [2012]). In addition, "[s]ince New York law has long disfavored the acquisition of title by adverse possession, its elements must be proved by clear and convincing evidence." (*Joseph v. Whitcombe*, 279 A.D.2d 122, 126 [1st Dep't 2001]). The doctrine of adverse possession has been applied to co-operative apartments. (*David v. Abramson*, 2002 N.Y. Misc. LEXIS 2035, *4 [Sup. Ct. N.Y. Cnty. Jan. 3, 2002], *citing, Deering v 860 Fifth Ave. Corp.*, 220 A.D.2d 303, 304-05 [1st Dep't 1995]).

Here, the Co-op, fails to meet its burden to present proof in admissible form sufficient to establish a prima facie showing that Owners' use of the Hallway Space was a revocable license. Although the Co-op argues that Owners were "gratuitously furnished" with the Hallway Space as a "facility outside the apartment" pursuant to under a revocable license for purposes of paragraph 29(b) of the Proprietary Lease, (Pl's Ex. E ¶ 29[b]), this contention is belied by the agreement to purchase Hallway Space in the year 2000. In addition, the Co-op's October 20, 2011 letter to Owners expressly includes "amounts demanded" for Owners' use of the Hallway Space from December 2000 through October 2011. (Defs.' Ex. AA). The Co-op's demand for payment for the *entire period* of Owners' use of the Hallway Space, beginning in the year 2000, further demonstrates that the Co-op did not consider Owners' use to have been "gratuitously furnished" at any point during that time.

Furthermore, Owners demonstrate that Owners acquired a possessory interest in the Hallway Space pursuant to an agreement to purchase Hallway Space in the year 2000. As a result, Owners make a prima facie showing that Owners' use of such space was *not* a revocable license. In response, the Co-op fails to submit proof in admissible form to demonstrate that any triable question of fact remains regarding the nature of Owners' interest in the Hallway Space.

Accordingly, the Co-op fails to present proof in admissible form sufficient to meet the Co-op's burden to establish a prima facie showing that Owners used the

Hallway Space under a revocable license and the Co-op's motion for summary judgment fails.

D. Owners' counterclaims against Individual Directors

Turning now to Owners' counterclaims asserted against Individual Directors, the business judgment rule is the proper standard for judicial review of the actions of the directors of a cooperative corporation. (*Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 48 [1st Dep't 2012]). However, the business judgment rule only "prohibits judicial inquiry into [the] actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." (*Fletcher v. Dakota, Inc.*, 99 A.D.3d 43, 48 [1st Dep't 2012], *quoting*, *Levandusky v. One Fifth Ave. Apartment Corp.*, 75 N.Y.2d 530, 537-38 [1990]). Thus, the business judgment rule does not extend to "arbitrary or malicious decision making". (*Fletcher*, 99 A.D.3d at 48). Additionally, while a corporate officer may not be held liable for the corporation's wrongs simply because of her status as a corporate officer, "it has long been held by this Court that a corporate officer who participates in the commission of a tort may be held individually liable, . . . regardless of whether the corporate veil is pierced". (*Id.* at 49 [internal quotation marks omitted]; *Ramos v. 24 Cincinatus Corp.*, 104 A.D.3d 619, 620 [1st Dep't 2013]).

The elements of a cause of action for breach of fiduciary duty include: (1) the existence of a fiduciary relationship; (2) misconduct; and (3) damages caused by the misconduct. (*Armentano v. Paraco Gas Corp.*, 90 AD3d 683, 935 NYS2d 304 [2d Dep't 2011]). In an action for breach of fiduciary duty against individual members of the board of directors of a cooperative corporation, "a prima facie case of unequal stockholder treatment is made out where there is a departure from precisely uniform treatment of the stockholders and a resulting violation of their fiduciary obligation to treat stockholders fairly and evenly." (*Aronson v. Crane*, 145 A.D.2d 455, 456 [2d Dep't 1988]). "Although cooperatives have exceedingly broad discretion in admissions decisions . . . a cooperative corporation has a fiduciary duty to treat its shareholders fairly and evenly, and must discharge that duty with good faith and scrupulous honesty." (*Smolinsky v. 46 Rampasture Owners*, 230 A.D.2d 620, 621-22 [1st Dep't 1996]).

Owners argue that the Co-op and the Individual Directors targeted Owners for "harassment" and disparate treatment, as retaliation for Polsinelli's conduct as a member of the Board. Polsinielli avers: "[m]y service to the [Co-op] . . . resulted

[in] my being threatened, maligned and defamed by various factions who falsely and maliciously accused me of every bad act under the sun. The harassment continues to this day in the form of numerous other malicious acts, including the commencement of this lawsuit." (Polsinelli Aff. ¶ 27; *see id.* ¶ 32 ["Throughout the summer and fall of 2011, my husband and I began to receive letters and email messages from Board counsel, members of the Board and Mr. Steinman, in which I was accused of expropriating corporate property (during the time I was a member of the then-board of directors)"]; *see id.* ¶¶ 37, 51).

As evidence of disparate treatment, Polsinelli avers that the Co-op's October 20, 2011 letter to Owners demands an acquisition price for Hallway Shares which is "approximately 42 times the price [Owners] agreed to pay in 2000, and 20 times what other shareholders were required to pay before and after the Resolution was passed." (*Id.* ¶ 40). To this end, Owners submit documents indicating that on March 15, 2010, the Co-op closed on the sale of hallway space outside apartment 20FG for $269 per share, and that, on June 6, 2013 the Co-op closed on the sale of hallway space outside the apartment 6EFGH, for $147.00 per share.[6] Polsinelli also notes that one tenant who was permitted to acquire hallway space "did not file an application for a building permit with the DOB before incorporating the hallway space into her apartment, and the Managing Agent did not require a formal closing until more than one year later". (Polsinelli Aff. ¶ 47, FN 7).

Owners also contend that the Resolution was enacted purely as a means to demand an increased price for Hallway Shares from Owners. Owners argue that the Resolution exceeds the scope of Individual Directors' authority, and does not provide an adequate basis for the Co-op's current valuation demands. (*See, e.g.*, Polsinelli Aff. ¶ 42; Pl.'s Ex. S ["Value Letter"]).

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[6]Polsinelli avers that, "on March 15, 2010, the [Co-op] closed on the sale of hallway space outside apartment 20FG owned by Maria Huffman Forlie and Edward Forlie. The hallway space outside 20FG is almost double the size of the hallway space [Owners] incorporated into the Apartment. It measured about 52 square feet and was allocated 52 shares. Yet, the purchase price was just $14,000 or $269 per share." (Polsinelli Aff. ¶ 46; Defs.' Ex. BB [copy of search done on the website of the Office of the City Register, New York City Department of Finance, respecting Forlie sale]). Polsinelli avers that, "on June 6, 2013 a closing was held to consummate a sale by the [Co-op] to Abigail (Fields) Gerry of hallway space located outside her apartment 6EFGH, which she had incorporated into her apartment in March of 2012. In addition, the hallway space Ms. Fields purchased measures about 68 square feet and was allocated 68 shares, for which the [Co-op] charged Ms. Fields $10,000, or $147.00 per share and per square foot." (Polsinelli Aff. ¶ 47; Defs.' Ex. CC [copies of the listing of the sale of Ms. Fields' hallway space and Real Property Tax filings]).

Here, Owners raise triable issues of fact as to whether the Individual Directors acted in bad faith toward Owners, exceeded the scope of their respective authority, or singled out Owners for disparate treatment in violation of Individual Directors' fiduciary duty to treat shareholders fairly and evenly. (*See Allannic v. Levin*, 57 A.D.3d 443, 444 [1st Dep't 2008]). Accordingly, summary judgment on Owners' first and third counterclaims is not warranted at this time.

E. Owners' counterclaim for indemnification and attorneys' fees

The Indemnification Agreement indemnifies Polsinelli for liabilities arising out of Polsinelli's service as a member of the Board. (Defs.' Ex. P ¶ 2[a] [Indemnification Agreement]). Although the Co-op argues that the Co-op's instant claims against Polsinelli are solely addressed to Polsinelli's purported conduct as a shareholder, as discussed above, Owners adequately raise triable questions of fact as to whether the Co-op and Individual Defendants targeted Owners for disparate treatment or harassment based on Polsinelli's conduct in her capacity as a member of the Board.

Additionally, Owners raise triable questions of fact as to whether Owners have a reciprocal right to recover attorneys' fees under the Proprietary Lease. (*See* Pl.'s Ex. E ¶ 28 [Proprietary Lease]). Accordingly, summary judgment on Owners' fourth counterclaim not warranted at this time.

F. Amend Counterclaims

CPLR § 3025 permits a party to amend or supplement its pleading "by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." (CPLR § 3025[b]). Pursuant to CPLR § 3025(b), such "leave shall be freely given upon such terms as may be just including the granting of costs and continuances." (CPLR § 3025[b]; *Konrad v. 136 East 64th Street Corp.*, 246 A.D.2d 324, 325[1st Dep't 1998]). However, "[w]hen a proposed amendment to a pleading is devoid of merit, leave to amend should be denied so as to avoid needless, time-consuming litigation." (*Terminal Cent. v. Henry Modell & Co.*, 212 A.D.2d 213, 217 [1st Dep't 1995]).

Here, the Replying Parties seek to amend their Verified Reply to Counterclaims dated September 9, 2014, to interpose an additional affirmative

defense of the six-year statute of limitations against Owners' second counterclaim, for specific performance.

As the six-year statute of limitations is inapplicable to Owners' claim for specific performance, (*Beresovski v. Warszawski*, 28 N.Y.2d 419, 422 [1971]), the proposed amendment lacks merit. Therefore, that portion of the Replying Parties' motion seeking leave to amend the Verified Reply to Counterclaims is denied.

III. Conclusion

In sum, Owners meet their burden to establish a prima facie showing of entitlement to specific performance of the agreement to purchase Hallway Shares in the year 2000. In opposition, the Co-op fails to present proof in evidentiary form sufficient to demonstrate that a triable issue of fact exists respecting Owners' entitlement to specific performance.

However, issues of fact remain with respect to Owners' counterclaims for injunctive relief, breach of fiduciary duty, indemnification and attorneys' fees.

Finally, leave to amend the Verified Reply to Counterclaims to interpose an additional affirmative defense of the six-year statute of limitations against Owners' second counterclaim is not warranted.

Wherefore, it is hereby

ORDERED that the motion (Mot. Seq. #001) of the Replying Parties, Square-Arch Realty Corp., Philip Coltoff, Emily Folpe, William Greenberg, David Piscuskas, Gerard Caccapolo, Allison Carmen, and Richard Cohen, for summary judgment and leave to amend the Verified Reply to Counterclaims, is denied; and it is further

ORDERED that the motion (Mot. Seq. #002) of Owners, Adelaide Polsinelli and James Montero, for summary judgment, is granted only to the extent that the agreement to purchase Hallway Space in the year 2000 shall be specifically performed according to its terms and the Co-op, Square-Arch Realty Corp., is directed to issue 32 Hallway Shares for the Hallway Space to Owners, Adelaide Polsinelli and James Montero; and it is further

ORDERED that upon the issuance of Hallway Shares as hereinabove directed, Owners, Adelaide Polsinelli and James Montero, are directed the pay the amount of $2,400 (representing the agreed upon acquisition price of 32 Hallway Shares at $75 per share) plus the amount of $8153.60 (representing the agreed upon additional maintenance amount of $44.80 per month from 9/5/2000 to date), for a sum total amount of $10,553.60, to the Co-op, Square-Arch Realty Corp.; and it is further

ORDERED that the main action is hereby dismissed and the remaining first, third, and fourth Counterclaims asserted in Owners Adelaide Polsinelli and James Montero's Amended Verified Answer are severed and shall proceed.

This constitutes the decision and order of the court. All other relief requested is denied.

DATED: November 23 2015

NOV 23 2015

EILEEN A. RAKOWER, J.S.C.