| **Dogwood Residential, LLC v Stable 49, Ltd.** |
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| 2016 NY Slip Op 32581(U) |
| December 19, 2016 |
| Supreme Court, New York County |
| Docket Number: 157621/15 |
| Judge: Kathryn E. Freed |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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DOGWOOD RESIDENTIAL, LLC and
DAVID BLUMENFELD,

Plaintiffs,

-against-

STABLE 49, LIMITED,

Defendant.

----------X

**DECISION/ORDER**

Index No. 157621/15
Mot. Seq. No. 002

**HON. KATHRYN E. FREED**:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

| PAPERS | NUMBERED |
|---|---|
| NOTICE OF MOTION | 1 |
| ROSENBERG AFFIRMATION IN SUPPORT | 2 (Exs. A-D) |
| BLUMENFELD AFFIDAVIT IN SUPPORT | 3 |
| APPENDIX I | 4 (Exs. A-M) |
| APPENDIX II | 5 (Exs. 1-11) |
| MEMORANDUM OF LAW IN SUPPORT | 6 |
| DEFENDANT'S CORRECTED MEMO. OF LAW IN OPP. | 7 |
| REPLY MEMO. OF LAW. | 8 |

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS DECIDED AS FOLLOWS:

In this action seeking, inter alia, damages for breach of a lease, plaintiffs Dogwood Residential, LLC and David Blumenfeld move, pursuant to CPLR 2221, seeking leave to renew and reargue the order of this Court dated April 11, 2016 which, inter alia, granted the motion by defendant Stable 49, Limited for summary judgment dismissing the complaint and, upon renewal and reargument: a) reinstating the eighth cause of action for breach of contract and the ninth cause of action (erroneously denominated in the complaint as the seventh cause of action) seeking

attorneys' fees; b) modifying the order so as to dismiss the fifth cause of action without prejudice and granting plaintiff leave to replead to add a defendant's Board of Directors as an additional defendant and to allege a claim for breach of fiduciary duty against that entity; and c) for such and further relief as this Court deems just and proper. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, this Court decides the motion as follows.

**FACTUAL AND PROCEDURAL BACKGROUND:**

On April 8, 2014, plaintiff Dogwood Residential, LLC, by its Managing Member, plaintiff David Blumenfeld, entered into a proprietary lease ("the lease") with defendant Stable 49, Limited, a cooperative corporation, for apartment 4/PH at 49-51 Downing Street, New York, New York ("the apartment"). Appx. I, at Ex. D. Concomitantly with the execution of the lease, the parties executed an occupancy agreement providing that the apartment was to be occupied exclusively by Blumenfeld and his immediate family or any subtenant approved by defendant and that any violation of the agreement would be deemed a default under the provisions of the lease. Appx. I, at Ex. E. In or about January, 2014, defendant sought written approval from Blumenfeld as to whether, if the sale were approved, he would dispute that the elevator and roof were his responsibility. Appx. II, at Ex. 4 to Youngberg Aff. In response, Blumenfeld advised defendant by email "I am willing to accept responsibility for the future if and when I become a member of the coop. The roof is somewhat tied to the what [sic] will be my proposed construction since correcting the current leaks will be resolved with my proposed plans, so in essence they are tied together." Id.

Paragraph 7 (c) of the lease provided, in pertinent part, as follows:

> The following description of the apartments sets forth exclusive areas which belong or are appurtenant to the respective apartments:
>
> g. [The apartment includes] the entire fourth floor, including the terrace at the north side, except the public stairwell. This unit includes a private entrance and vestibule at the west side on Downing Street. The apartment also includes a private elevator, elevator shaftway through the second and third floors, and the entire roof and all roof structures, except chimneys that service the other unit fireplaces. This unit also includes a storage space in the cellar, private garage at center of building on Downing Street, and a home office on the first floor.
>
> h. * * * The areas described above are all exclusive areas, and the [l]essees of the respective [a]partments shall have the exclusive use of and shall be solely responsible for the maintenance of such areas subject to the conditions and limitations set forth below:
>
> 1. [Defendant], its agents and the other [l]essees of the building shall have the use of these exclusive areas for the following purposes, subject to the following obligations:
>
> (a) Access for inspection, repair and maintenance purposes; to the extent that the same affect the repair and maintenance of the [b]uilding's structure (so long as the same is not necessitated, or deterioration accelerated by said [l]essees' use), which shall be the sole and only obligation of [defendant] with regard to such exclusive areas . . .

Appx. I, at Ex. D.

Paragraph 14(a) provided that only the lessee and his or her immediate family and domestic employees could occupy the apartment without defendant's written consent. Appx. I, at Ex. D. Additionally, guests of the lessee could not stay for more than one month without written consent. Appx. I, at Ex. D. Paragraph 15 required that subletting was prohibited unless approved by a resolution of defendant's directors or, if such consent were not obtained, a vote of 51% of the shareholders of the building. Appx. I at Ex. D.

Paragraph 21(a) of the lease required that a lessee "shall not, without first obtaining the written consent of [defendant], which consent shall not be unreasonably withheld or delayed," make any alteration to the apartment or the building. Appx. I, at Ex. D.

After purchasing the apartment, plaintiffs hired an architect and expeditor to inspect the apartment in order to prepare plans to renovate the apartment. Appx. I, Blumenfeld Aff., at par. 6. The inspectors discovered, inter alia, that the apartment's private elevator had been issued violations by the Department of Buildings ("DOB"); that a two-story structure erected on the roof was improperly constructed and the weight of the structure was causing the roof's framing to sag, resulting in leaks into the apartment, which was vacant; and that the roof girders were undersized and posed the risk of a roof collapse. Id., at pars. 5, 13-14, 17, 23-25; Appx. I, Blumenfeld Aff., Ex. F.

On December 12, 2014, defendant commenced a holdover proceeding against plaintiffs, as well as Allessandro Brioschi, Matteo Garzia, Inka Colliander, Deimante Gouybite, Elina Bloomberg, and Mathilde Gourmer in the Civil Court, New York County. Appx. I, at Ex. H. In the notice to cure, defendant alleged that plaintiffs violated paragraphs 14 and 15 of the lease by subletting to the aforementioned individuals named along with plaintiffs in the holdover proceeding. The holdover proceeding was settled and marked off the Civil Court's calendar. Appx. I, Kassenoff Aff. In Supp., at par. 63.

On or about December 16, 2014, plaintiffs submitted a PW 1 : Plan/Work Application ("PW 1") to the DOB seeking approval to perform work at the apartment. The description of the work to be performed was "structural work in conjunction with the renovation of an existing duplex apartment. Reconfiguration of the mezzanine location. A new certificate of occupancy to be obtained." Appx. I, at Ex. K. The PW 1 further noted that structural plans were submitted along with the form. Id. The form was executed by Blumenfeld, as Trustee of Dogwood Residential LLC. A line calling for a signature by "Condo/Co-Op Board or Corporation Second Officer" was signed by

Brad Blumenfeld as "Trustee" (*id*), although there is no dispute that he was not a member of defendant's Board of Directors ("the Board").

On February 3, 2015, plaintiffs wrote to the DOB to advise that they had "no intention of commencing work on the property" without defendant's consent. Appx. I, at Ex. J.

Plaintiffs commenced the instant action on or about July 10, 2015. Appx. I, at Ex. A. As a first cause of action, they sought a declaration that defendant was in violation of the warranty of habitability. As a second cause of action, they sought an injunction directing defendant to render the apartment habitable. As a third cause of action, plaintiff's sought damages in excess of $1 million based on the alleged breach of the warranty of habitability. As a fourth cause of action, plaintiffs sought damages in excess of $500,000 for harassment based on defendant's commencement of a holdover proceeding and "consistent baseless demands and threats" pursuant to the New York City Housing Maintenance Code ("HMC"). As a fifth cause of action, plaintiffs sought damages in excess of $500,000 for breach of fiduciary duty alleging that "[d]efendant, by the Board, has breached its duty to treat all shareholders fairly and equally by singling out Dogwood and imposing restrictions and obligations on it that it does not impose upon other shareholders." Appx. I, Ex. A, at par. 91. As a seventh cause of action (which should have been labeled the sixth), plaintiffs sought a full rent abatement due to defendant's failure to maintain the building in compliance with the certificate of occupancy ("C of O"). Plaintiffs also sought a declaration that, pursuant to Multiple Dwelling Law § 302, no further maintenance payments for the apartment were due until all conditions which did not comply with the C of O were remedied.[1] As an eighth cause of action

[1]Specifically, plaintiffs alleged that "upon information and belief, the shareholders and proprietary lessees of the ground floor units, which include space in the basement of the [b]uilding, maintain their basement spaces in a manner [violative of the C of O]," specifically

(which should have been labeled the seventh), plaintiffs alleged that defendant breached the lease and owed damages in excess of $500,000 due to its failure to repair the roof and elevator. Finally, as a ninth cause of action (erroneously labeled as a second seventh cause of action), plaintiffs sought attorneys' fees in excess of $50,000 pursuant to Real Property Law section 234.

Defendant joined issue by service of its verified answer on or about August 27, 2015. Appx. I, at Ex. B. On September 15, 2015, defendant served an amended answer denying all substantive allegations of wrongdoing and asserting as an affirmative defense, inter alia, that plaintiffs purchased the apartment "as is" without undertaking the necessary due diligence. Appx. I, Ex. C, at par. 114.

As a first counterclaim for breach of contract, defendant alleged that plaintiffs breached the lease by allowing unapproved occupants to live in the apartment and by violating noise provisions of the lease. Id., at pars. 120-122, 147.

Defendant further alleged that, prior to purchasing the apartment, an inspection performed by plaintiffs revealed that the roof, which was part of the apartment, had issues which made it prone to leakage, that there were structural and Fire Code issues regarding air conditioning units on the roof, and there were signs of water penetration into the apartment. Appx. I, Ex. C, at par. 126. In addition to this inspection, alleged defendant, the prior owner of the apartment, Yoko Ono, sued defendant in 2013 alleging, inter alia, that the apartment was "in an uninhabitable state since it [was] in need of major renovations." Id., at par. 128; Ex. M, at par. 21. Nevertheless, claimed defendant, plaintiffs purchased the apartment from Ms. Ono "as is," acknowledging her lawsuit against defendant, which was eventually discontinued in March, 2014, in a rider to the purchase agreement.

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that "those units contain bedrooms which were constructed in the basement of the building" in violation of the C of O. Appx. I, Ex. A at pars. 50-51.

Appx. I, Ex. C, at pars. 127, 136; Appx. II, Exs. 1 and 2 to Youngberg Aff. Defendants asserted that, despite plaintiffs' agreement under the lease to be solely responsible for the maintenance of the elevator and roof, plaintiffs have not fulfilled this responsibility and have therefore breached the lease. Defendant further claimed that plaintiffs breached paragraph 21(a) of the lease by failing to obtain defendant's prior written consent to alter the apartment. Indeed, maintained defendant, on or about December 22, 2014, plaintiffs submitted a fraudulent application to the DOB seeking a permit to perform work on the apartment. Id., at par. 142-143[2]; Appx. I, at Ex. K.

As a second counterclaim, defendant alleged that plaintiffs have submitted fraudulent applications to the DOB and the Landmarks Preservation Commission ("LPC") seeking permission to perform work in the apartment and a declaration that plaintiffs may not submit any applications for work to those agencies without first obtaining defendant's consent to such a permit application, as required under the lease. As a third counterclaim, defendant sought an order enjoining plaintiffs from submitting any applications to the DOB, LPC, or any other agency for work to be performed on the apartment without first obtaining the permission of defendant in the permit application. As a fourth counterclaim, defendant sought attorneys' fees in an amount no less than $50,000.

By notice of motion filed September 30, 2015 (NYSCEF Doc. No. 5), plaintiffs moved: a) pursuant to CPLR 3212, for summary judgment on their first cause of action; b) pursuant to CPLR 3211(b), to dismiss defendant's fifth affirmative defense; c) pursuant to CPLR 3211(a)(7), to dismiss defendant's first counterclaim to the extent it was based on plaintiff's alleged failure to make repairs to the building and/or apartment; d) pursuant to CPLR 3211(a)(4), dismissing defendant's

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[2]Defendant's allegation refers to the PW 1, which Brad Blumenfeld purported to sign as a member of defendant's board of directors.

first counterclaim to the extent the allegations made therein were the subject of a prior proceeding between the parties; e) pursuant to CPLR 3211(a)(7), dismissing defendant's second counterclaim for declaratory relief since no justiciable controversy existed between the parties; f) pursuant to CPLR 3211(a)(7), dismissing defendant's third counterclaim for injunctive relief since no justiciable controversy existed between the parties; and g) for such other and further relief as this Court deemed just and proper. Appx. I.

On October 22, 2015, defendant cross-moved a) pursuant to CPLR 3212, for summary judgment dismissing the complaint, with prejudice, and severing and continuing all of its counterclaims; and b) for such other and further relief as this Court deemed just and proper. Appx. II.

By order dated April 11, 2016, this Court issued an order, inter alia, denying that branch of plaintiff's motion seeking summary judgment on its first cause of action (for breach of warranty of habitability); denying that branch of plaintiff's motion seeking to dismiss the fifth affirmative defense as moot; denying that branch of plaintiff's motion seeking to dismiss defendant's first, second and third counterclaims; and granting defendant's motion for summary judgment seeking dismissal of the complaint. Ex. A to Rearg. Mot. In dismissing plaintiffs' fifth cause of action, for breach of fiduciary duty, against defendant, this Court held that a cooperative corporation does not owe a fiduciary duty to its shareholders. This Court also denied plaintiffs permission to amend their complaint to add a breach of fiduciary claim against the Board on the grounds that they failed to make a formal motion for such relief and on the ground that such a claim lacked merit.

Plaintiff now moves, pursuant to CPLR 2221, seeking leave to renew and reargue the order of this Court dated April 11, 2016 which, inter alia, granted the motion by defendant Stable 49,

Limited for summary judgment dismissing the complaint and, upon renewal and reargument: a) reinstating the eighth of action for breach of contract and the ninth cause of action (erroneously denominated in the complaint as the seventh cause of action) seeking attorneys' fees; b) modifying the order so as to dismiss the fifth cause of action without prejudice and granting plaintiff leave to replead to add the Board as an additional defendant; and c) for such and further relief as this Court deems just and proper. In support of the motion, plaintiffs submit, inter alia, an affidavit from Blumenfeld annexing the report of Silman, a structural engineeering firm hired by his company, addressing certain potential structural issues with the roof. Ex. D.

**THE PARTIES' POSITIONS**:

Plaintiffs argue that this Court erred by granting defendant's cross motion for summary judgment dismissing the complaint since defendant failed to establish its prima facie entitlement to such relief. Specifically, plaintiffs maintain that defendant failed to annex to its cross motion any evidentiary proof that plaintiffs were responsible for structural repairs to the apartment or that the repairs needed were not structural. Further, plaintiffs assert that this Court erred in finding that the email sent to defendant by Blumenthal prior to the execution of the proprietary lease estopped plaintiffs from asserting that defendant was not responsible for structural repairs since such estoppel would be violative of the parol evidence rule. They maintain that an estoppel cannot be used to circumvent the parol evidence rule. Moreover, plaintiffs assert that, even if an estoppel was not barred by the parol evidence rule, defendant did not plead estoppel as an affirmative defense and failed to establish any of the elements needed to establish an estoppel.

In addition, plaintiffs urge that parol evidence could not be used to alter the terms of the

proprietary lease since Paragraph 6 prohibited any variation from the form of the lease unless the same was authorized by "[l]essees owning at least 75% of the [l]essor's shares then issued and outstanding."

Further, plaintiffs argue that they should have been permitted to amend the complaint to add a claim for breach of fiduciary duty against the Board since, although the caption and complaint omitted the Board, the complaint clearly alleged that the Board breached its fiduciary duty. Plaintiffs maintain that their failure to make a formal motion for such relief did not warrant denial of this request for relief but that this Court should have granted them permission to amend their complaint to add the Board as a defendant or should have dismissed the claim for breach of fiduciary duty against defendant without prejudice to replead it against the Board.

In opposition, defendant argues that the motion must be denied as procedurally defective since plaintiffs failed to properly delineate their grounds for reargument and renewal, respectively. Defendant maintains that plaintiffs are not entitled to renewal, since they do not explain why the Silman report could not have been introduced in connection with the underlying motions. Defendant further asserts that it was properly granted summary judgment dismissing the complaint since plaintiffs failed to prove, in connection with the underlying motion, that the problems with the roof were structural in nature.

Defendant also maintains that plaintiffs' motion for reargument must be denied since this Court did not misapprehend or overlook any fact or principle of law. It maintains that it established its prima facie entitlement to summary judgment dismissing the complaint by introducing the lease, which required plaintiffs to maintain the roof and roof structures. Additionally, defendant asserts that this Court properly held that plaintiffs were estopped from asserting that defendant was

responsible for repairs to the roof and elevator given the email sent by Blumenthal. It urges that plaintiffs' argument regarding the parol evidence rule cannot be considered by this Court since it was not raised in connection with the underlying motion.

Finally, defendant argues that this Court properly denied plaintiffs' informal motion seeking to amend the complaint to add a claim for breach of fiduciary duty against the Board as a defendant since the claim had no merit and no proposed amended complaint was submitted.

In reply, plaintiffs argue that their failure to specify each and every item of relief sought in their motion for renewal and reargument does not warrant the denial of the motion. Plaintiffs further maintain that defendant failed to establish its prima facie entitlement to summary judgment dismissing the breach of contract claim as a matter of law because it failed to present proof that the repairs to the roof were not needed or that they were not structural in nature. Plaintiffs reiterate that, due to the parol evidence rule, this Court should not have considered the email sent to defendant prior to the execution of the proprietary lease. Finally, plaintiffs argue that this Court erred by failing to grant them leave to bring a claim against the Board for breach of fiduciary duty.

**LEGAL CONCLUSIONS**:

**Reargument**

**A. Breach of Contract and Attorneys' Fees Claims**

A motion for leave to reargue, pursuant to CPLR 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the proper motion." Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81

N.Y.2d 782 (1993). In N.Y. Prac, § 254, at 449 (5th ed), Professor David Siegel succinctly instructed that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

This Court, in its discretion, hereby grants reargument of defendant's motion for summary judgment. As noted above, in or about January 2014, defendant sought written approval *from* Blumenfeld as to whether, if the sale were approved, he would dispute that the elevator and roof were his responsibility and Blumenfeld replied by email that "I am willing to accept responsibility for the future if and when I become a member of the coop. The roof is somewhat tied to the what [sic] will be my proposed construction since correcting the current leaks will be resolved with my proposed plans, so in essence they are tied together." Id. Plaintiffs correctly assert that this Court misapprehended the relevant law in finding that this email estopped them from asserting that defendant was responsible for structural repairs pursuant to the lease. They are also correct that defendant failed to establish its prima facie entitlement to summary judgment dismissing the complaint.

Although Blumenfeld indeed advised defendant in writing in January of 2014 that he was willing to accept responsibility for the elevator and roof (Appx. II, at Ex. 4 to Youngberg Aff.), and plaintiffs applied to the DOB in December of 2014 for a permit to conduct structural work in connection with renovations in their apartment (Appx. I, at Ex. K), the parties' lease of April 8, 2014, providing that it would be the "obligation" of defendant to perform structural repairs (Appx. I, Ex. D, at par. 7[c][1][a]), controls the obligations of the parties.

"[T]he parol evidence rule operates to exclude evidence of all prior or contemporaneous negotiations between the parties offered to contradict or modify the terms of their writing. (*Fogelson*

*v Rackfay Constr. Co.*, 300 NY 334; *Thomas v Scutt*, 127 NY 133)." *Marine Midland Bank-Southern v Thurlow*, 534 NY2d 381, 387 (1981). The rule cannot be circumvented by an estoppel. *Le Bovici v Jamaica Sav. Bank*, 81 AD2d 150 (2d Dept 1981). In any event, "[a] truthful statement as to the present intention of a party with regard to his future acts is not the foundation upon which an estoppel may be built (*Metropolitan Life Ins. Co. v Childs Co.*, 230 NY 285, 294, *mot for rearg den* 231 NY551)." *Le Bovici*, 81 AD2d, at 152. Since the lease specifically imposed upon defendant the obligation to perform structural repairs, this Court could not consider extrinsic evidence of a prior or subsequent agreement or the subsequent course of performance by the parties. *See Cellular v Mann, Inc., v JC 1008* LLC, 113 AD3d 521 (1st Dept 2014); *Chelsea Piers, L.P. v Hudson River Park Trust*, 106 AD3d 410, 412 (1st Dept 2013).

Although defendant correctly asserts that plaintiffs did not raise the issue of the parol evidence rule in opposition to its cross motion for summary judgment, this Court reaches it because it presents a legal issue which could not have been avoided had it been raised in connection with the underlying motion. *See Harrington v Smith*, 138 AD3d 548 (1st Dept 2016); *Glasheen v Valera*, 116 AD3d 505 (1st Dept 2014). Further, this Court retains the discretion to review its prior orders during the pendency of the action. *See Liss v Trans Auto Systems, Inc.*, 68 NY2d 15, 20 (1986); *Garcia v Jesuits of Fordham, Inc.*, 6 AD3d 163, 165 (1st Dept 2004).

Plaintiffs are also correct that, in granting defendant's motion for summary judgment dismissing the complaint based on the estoppel created by Blumenfeld's email and plaintiffs' DOB application, it overlooked defendant's burden of proof. "The proponent of a summary judgment motion 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 . . . ." *Winegrad v New York Univ. Med.*

*Ctr.*, 64 NY2d 851, 853 (1985). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *People v Grasso*, 50 AD3d 535, 544, citing *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). Here, plaintiffs correctly assert that, in support of its motion for summary judgment, defendant merely submitted the affidavit of Kim Youngberg, secretary of the Board. However, neither Youngberg's affidavit, nor any of the exhibits annexed thereto, established that the repairs which allegedly needed to be made were not structural in nature and therefore not the responsibility of defendant pursuant to paragraph 7(c)(1)(a) of the lease.

Although defendant maintains that plaintiffs' motion is procedurally flawed because, as a combined motion for renewal and reargument, it does not "identify separately and support separately each item of relief sought" (CPLR 2221[f]), such failure is not fatal to the motion. *See GMAC Mtge., LLC v Spindelman*, 136 AD3d 1366 (4th Dept 2016). It is evident from plaintiffs' motion that they seek reargument on the ground that this Court misapprehended the law regarding the parol evidence rule and the summary judgment standard and that they seek renewal based on the Silman report, as introduced by Blumenfeld's affidavit in support of the instant motion.

Given the foregoing, this Court reinstates plaintiffs' eighth cause of action for breach of contract. Since plaintiffs may be able to prevail on their breach of contract claim, the ninth cause of action (erroneously denominated in the complaint as the seventh cause of action) seeking attorneys' fees is also reinstated. See Real Property Law § 234.

**B. Breach of Fiduciary Duty Claim**

This Court also grants reargument with respect to the dismissal of plaintiffs' claim for breach

of fiduciary duty. Although this Court properly dismissed the claim for breach of fiduciary duty against defendant on the ground that a cooperative corporation, such as the sole defendant named in the caption, owes no such duty to its shareholders (*see Peacock v Herald Sq. Lofi Corp.*, 67 AD3d 442 (1st Dept 2009), such a claim may be asserted against the Board. *See Ackerman v 305 E. 40th Owners Corp.*, 189 AD2d 665, 667 (1st Dept 1993). Although this Court denied plaintiffs' informal motion to amend the caption to add the Board as a defendant given, inter alia, that such relief was not demanded in the notice of motion as required by CPLR 2214, but rather was made in a reply memorandum of law in opposition to defendant's motion for summary judgment, such a formal defect "will not defeat an otherwise meritorious motion, provided that the motion is timely made and the merits of the case are adequately presented in the supporting documents (citations omitted)." *Mallory Factor, Inc. v Schwartz*, 146 AD2d 465, 467 (1st Dept 1989).

"Motions for leave to amend pleadings should be freely granted (CPLR 3025[b]), absent prejudice or surprise resulting therefrom (*see Jacobson v McNeil Consumer & Specialty Pharms.*, 68 AD3d 652 [2009]), unless the proposed amendment is palpably insufficient or patently devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499 (1st Dept 2010). Here, no issue regarding the timeliness of the application exists and defendant, against which this claim was dismissed, of course does not assert that it would be prejudiced by such an amendment. Further, since the complaint alleged that defendant, acting through the Board, treated plaintiffs unequally (Appx. I, Ex. A, at p. 14), they have, contrary to this Court's initial ruling, pleaded an adequate claim for breach of fiduciary duty against the Board. *See Ackerman*, 189 AD2d, at 667. Therefore, this Court should have granted plaintiffs leave to amend the complaint to name the Board as a defendant.

**Renewal**

Plaintiffs' motion to renew is denied, since they have failed to proffer any justification for their failure to submit the purportedly new evidence, i.e., Silman's engineering report, in support of their initial motion. *See James v 1620 Westchester Ave., LLC*, 105 AD3d 1, 7 (1st Dept 2013). Specifically, the Silman report was dated May 20, 2015 (Ex. D) but was not included in plaintiff's underlying motion filed September 30, 2015. NYSCEF Doc. No. 5.

It accordance with the foregoing, it is hereby:

ORDERED that plaintiffs' motion for reargument of defendant's October 22, 2015 cross motion for summary judgment is granted; and it is further,

ORDERED that plaintiffs' motion for renewal of defendant's October 22, 2015 cross motion for summary judgment is denied; and it is further,

ORDERED that upon reargument of defendant's October 22, 2015 cross motion for summary judgment, plaintiffs' eighth cause of action, for breach of contract, and ninth cause of action (erroneously denominated in the complaint as the seventh cause of action), seeking attorneys' fees, are reinstated; and it is further,

ORDERED that upon reargument of defendant's October 22, 2015 cross motion for summary judgment, plaintiffs are granted leave to amend the complaint to add a claim for breach of fiduciary

duty against the Board of Directors of defendant Stable 49, Limited; and it is further,

ORDERED that plaintiffs shall serve an amended complaint upon the Board of Directors of defendant Stable 49, Limited, identical in form to the complaint served on defendant Stable 49, Limited, except with a new caption naming the Board of Directors of Stable 49, Limited, within 20 days after service of this order with notice of entry; and it is further,

ORDERED that plaintiffs shall, within 20 days of this order, serve a copy of this order with notice of entry upon counsel for defendant and upon the Clerk of the Trial Support Office (Room 158); and it is further,

ORDERED that the parties are to appear for a settlement conference on January 25, 2015 at 80 Centre Street, Room 280, at 2:30 p.m., and it is further,

ORDERED that this constitutes the decision and order of the Court.

Dated: December 19, 2016

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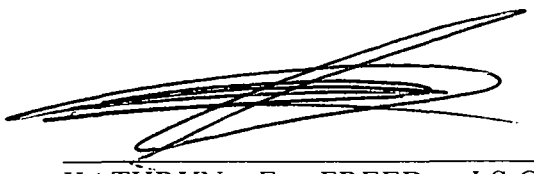

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT