SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

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DAVID BLUMENFELD and DOGWOOD RESIDENTIAL, LLC, in its own right and derivatively on behalf and in the right of STABLE 49, LIMITED,

Plaintiffs,

-against-

STABLE 49, LIMITED, KIM YOUNGBERG, MARIANNE MATANIC, and TEWFIC EL-SAWY, each individually and in their official Capacity as members of the Board of Directors of STABLE 49, LIMITED, the BOARD OF DIRECTORS of STABLE 49, LIMITED, and DAMIAN CAVALERI, individually,

Defendants,

-and-

STABLE 49, LIMITED,

Nominal Defendant on the derivative claim.

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DECISION AND ORDER

Index No. 157117/2017

Mot. Seq. Nos. 002 and 003

Hon. Kathryn E. Freed:

The following efiled documents filed with NYSCEF were reviewed in connection with this decision and order: documents 26 - 46 (motion sequence 002) and documents 74-109 and 111-115 (motion sequence 003).

Motion sequence nos. 002 and 003 in this action (the 2017 action) are hereby consolidated for disposition.

Defendant cooperative corporation, Stable 49, Limited (Stable), moves (motion sequence no. 002) for an order, pursuant to CPLR 3013, and CPLR 3211 (a) (1), (4), (5), and (7), dismissing the original 2017 complaint, with prejudice, and requesting sanctions in the form of a monetary fine and/or the imposition of a filing injunction against plaintiffs, proprietary lessee/shareholder Dogwood Residential, LLC (Dogwood LLC) and David Blumenfeld (Blumenfeld), a trustee of one of the two trusts, Dogwood Realty Group and Boxwood Realty Group, that comprise Dogwood LLC's sole members. Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 4, Occupancy agreement. Following service of that motion, plaintiffs served an amended 2017 complaint as of right, asserting individual causes of action and derivative causes of action on Stable's behalf, and naming as defendants Stable, both individually and nominally, proprietary lessees Marianne Matanic (Matanic), Kim Youngberg (Youngberg), and Tewfic El-Sawy (El-Sawy), all individually and in their capacities as members of Stable's three-member board of directors (the Board) from an unspecified date in 2016 until January 10, 2018,[1] the Board, and proprietary lessee and Stable officer Damian Cavaleri (Cavaleri) individually. The service of the amended 2017 complaint renders the original complaint of no consequence, and, thus, the branch of defendants' motion to dismiss the original 2017 complaint is denied as moot. Plaintiffs' service of the amended 2017 complaint triggered Stable's instant motion (sequence no. 003), which seeks dismissal of the amended 2017 complaint on the same grounds as urged with respect to the original 2017 complaint, and again

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[1] On January 10, 2018, after the instant motions were served, El-Sawy resigned from the Board and from his position as Stable's treasurer and Cavaleri filled both positions. *See* Davidson affirmation in further support of defendants' motion to dismiss the amended 2017 complaint, exhibits 24 (special meeting minutes, 1/10/2018) and 25 (El-Sawy's resignation letter).

requests sanctions.

Factual and Procedural Background

Much of the factual and procedural history of this action, which involves a125-year old landmark building that was converted in the late1980s from a stable to a 10-unit residential cooperative apartment building (the building), are set forth in this Court's decisions on motion seq. nos. 001 and 002 in plaintiffs' related 2015 action (index no. 157621/2015) and in the Appellate Division, First Department's determination of Stable's appeal of the latter decision (*see Dogwood Residential, LLC v Stable 49, Ltd.*, 159 AD3d 490 [1st Dept 2018]), and are deemed incorporated herein. Additional relevant factual and procedural history is set forth below.

In or about 1995, Yoko Ono (Ono), for her son's benefit, purchased 30% of Stable's outstanding shares, which entitled her to a proprietary lease[2] for the approximately 5,700 square-foot cooperative penthouse apartment (the Apartment) in the building, which also contains nine substantially smaller units. As is relevant, the proprietary lease describes three of those nine units, G-1, G-2, and G-3 (cellar units) as duplex garden apartments, each having an upper level with a powder room (a bathroom without a tub or shower), kitchen, and living room, a lower level with a full bathroom, a bedroom, a recreation room, and sliding doors leading to a garden/terrace, and each level having an entry into the building's hallway. Peterson affidavit in support of motion to dismiss the 2017 amended complaint, exhibit 2, Proprietary lease, ¶ 7 (c)

[2] According to plaintiffs' counsel, the proprietary lease's terms have not been amended since the cooperative was formed. Oral argument transcript of 4/30/2018 at 16. The lease was amended in 2002, however, to provide for the lessee's payment to the lessor of a transfer fee. Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 2.

(h). *Id.* The proprietary lease does not specify which of the building's floors comprise those two levels, but it is claimed in this action that the lower level is in the cellar.

The Apartment mainly comprises the building's entire fourth floor, includes the exclusive use of the entire roof, a roof deck, a large two-section residential portion of that Apartment which protrudes through the roof, and a private elevator terminating at the fourth floor. Ono's son lived in the Apartment for several years but, by the fall of 2013, it had been vacant for more than a decade. In October 2013, Ono, who wished to sell the Apartment, sued Stable and its then Board members/shareholders, i.e., Matanic, a third-floor resident, Youngberg, a cellar unit resident, and Phillip Frank (Frank), who resided in a second floor unit. Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 1, Amended 2017 complaint, ¶ 118. Ono asserted claims based on Stable's alleged failures to repair the elevator and a leaky roof, which issues she alleged were structural and, therefore (unless certain exceptions existed), Stable's responsibility under the proprietary lease. Complaint, *Ono v Stable*, index no. 653582/2013, NYSCEF Doc. 1.

Ono also asserted that the Apartment was uninhabitable and in need of major renovations. She alleged that the alterations which any purchaser would wish to make to the Apartment would, given its size, take a long time and inconvenience the other shareholders, including the Board members who lived in the building, especially Matanic, one of three third-floor residents who lived directly under the Apartment. Ono thus alleged that the Board members discriminated against her by enacting new rules requiring all lessees' construction/alterations projects to be completed within 120 days, so as to intentionally discourage anyone from buying her shares, since it was impossible to renovate the Apartment within that abbreviated period. As a result, Ono claimed that she lost a $6.6 million purchaser.

In November 2013, about a month after Ono commenced her action, Blumenfeld[3] entered into a contract with her, contingent on Stable's consent, to purchase the Apartment for $8.3 million, indicating that he and his three sons, Lucas, Max; and Jack, were the "proposed occupants." Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 5, Youngberg affidavit, exhibit 2. Ono represented in that contract's rider that, other than her aforementioned lawsuit, she was unaware of any pending litigation against the Apartment, its shares, the lease, or the property. *Id.*, rider, ¶ 47. The rider further indicates that the sale was "as is," that Ono was only aware of a leak in the kitchen, and that she was unaware of any other water infiltration for the two years prior to the contract date, of any mold issue, and, other than the roof and the elevator, of anything else that would give rise to the seller's obligation to make repairs. *Id.*, ¶¶ 35, 44, 45, 49, 50. The contract suggests that Stable had taken the position that the roof leak was due to Ono's alterations of the Apartment and that she was liable for repairing or maintaining the roof as well as the elevator (*id.*, ¶ 45), while Ono had contended that, because the roof and elevator problems were structural elements, they were Stable's responsibility. *Id.*, ¶ 44. The contract permitted Blumenfeld, after he was approved by Stable, to assign the contract to a trust for the benefit of the purchaser or "its" immediate family members, or to other entities controlling with purchaser or controlled by, or under common control with, the purchaser. *Id.*, ¶ 55.

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[3] Blumenfeld and his brother, Brad Blumenfeld, are vice presidents of Blumenfeld Development Group (BDG), which acquires and develops "high profile" real estate projects. *See* Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 5, sub-exhibits 8-10. Blumenfeld has been with BDG for more than 30 years and is also the president of BDG Construction Corp, which manages the construction process on BDG's projects. *Id.*, sub-exhibit 8.

Given Ono's lawsuit, and presumably because the issues raised by it would never be resolved in that lawsuit if Ono's sale went through, the Board wrote Blumenfeld seeking written confirmation that, if he were approved as a purchaser, he would not dispute that the elevator and roof were his responsibility. *Id.*, exhibit 5, ¶¶ 9-21; *id.*, sub-exhibit 4. On an unspecified date before January 15, 2014, Blumenfeld replied in writing that, once he became a cooperative member, he would assume responsibility for the roof and elevator repairs, including because he believed that the intended renovations would resolve any defective roof condition. *See*, *id.* The Board allegedly interviewed Blumenfeld in February 2014 and, according to the complaint, approved him and Dogwood LLC as "a" purchaser. Peterson affidavit in support of motion to dismiss 2017 amended complaint, exhibit 1, Amended 2017 complaint, ¶ 25. It appears that Blumenfeld assigned to Dogwood LLC his contract rights to purchase Ono's shares of Stable, because on April 6, 2014, before Dogwood LLC executed the Apartment's proprietary lease, Dogwood LLC and Stable signed an occupancy agreement.[4]

Dogwood LLC represented in the occupancy agreement that it would "not sublet or permit the occupancy of the Apartment by any parties, other than Blumenfeld and his immediate family (i.e., spouse children and parents) *residing with him* or any subtenant approved by the Corporation [Stable]." *Id.*, exhibit 4, Occupancy agreement at 1 (emphasis added). The occupancy agreement provides that any subletting had to be done solely in accordance with the provisions of the proprietary lease and Stable's by-laws, and with Stable's prior consent. *Id.*

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[4] A few weeks earlier, Ono discontinued her action. *Ono v Stable*, index no. 653582/2013, NYSCEF Doc. 2.

On April 8, 2014, the proprietary lease was executed by Stable and Dogwood LLC. *Id.*, exhibit 1, proprietary lease at 40. Therefore Dogwood LLC alone acquired Ono's shares of Stable, to which the Apartment's proprietary lease was appurtenant. The proprietary lease's "Use of the Premises" provision, which contemplates that the building's shareholders/proprietary lessees would be individuals who lived in their apartments, provides that occupancy by anyone, other than by the lessee, the lessee's spouse, his or her children, grandchildren, parents, siblings, grandparents, and domestic employees, and in no event by no more than one married couple, was prohibited without Stable's written consent. *Id.*, exhibit 2, proprietary lease, ¶ 14 (a); *see also id.*, exhibit 3, Stable's by-laws, Article V, § 1 (Board shall adopt a proprietary lease form for the leasing of all apartments "to be leased to shareholder-tenants under Proprietary Leases," with or without provisions for assignments and subletting). The proprietary lease's subletting clause generally barred subletting without the Board's majority consent by resolution, in writing, or, if the Board refused or failed to consent, by the written consent of the lessees holding at least 51% of the shares, without any limitation on the right of the Board or the lessees to grant or deny the subletting, for no, or any, reason, except legally impermissible reasons, except with respect to a sublease of under 12 months, in which case consent could not unreasonably be withheld. *Id.*, exhibit 2, ¶ 15.

Proprietary lease paragraph 18 (b), entitled "Repairs by the Lessee," sets forth the lessee's obligations with respect to repairing each unit's interior, and provides that additional obligations of lessees of apartments having various outdoor space, such as terraces and roofs, were set forth in paragraph 7. Paragraph 7 (b) recites that the Apartment includes the roof space adjacent to and above it. Paragraph 7(a), as applicable to the Apartment, indicates that

Dogwood LLC had the exclusive use of the part of the roof adjoining and appurtenant to the Apartment, subject to the lease's provisions and the Board's regulations, and that any structure erected by lessee or a predecessor in interest could be removed and restored by the lessor at the lessee's expense for the purpose of repairs, upkeep, and maintenance of the building. *Id.*, ¶ 7 (a), (b).

Paragraph 7 (c) describes each unit, and, as to the Apartment, recites that it includes, among other things, a private elevator, its shaftway through several floors, and the entire roof and all roof structures, except for other units' chimneys. After describing every other unit, paragraph 7 (c) provides that each of those described areas constitutes all of the building's exclusive areas, that the lessee of each described area has its exclusive use and "*shall be solely responsible for the maintenance of such areas subject to the conditions and limitations set forth below*" (emphasis added). Paragraph 7 then grants the lessor and other tenants the use of the other tenants' exclusive areas for several limited purposes and, as is relevant as to Stable, "[a]ccess for inspections, repair and maintenance purposes; to the extent that the same affect the repair and maintenance of the Building's structure (so long as the same is not necessitated, or deterioration accelerated by said Lessee's use), which shall be the sole and only obligation of [Stable] with regard to the such [sic] exclusive areas."

Shortly after Dogwood LLC acquired its shares, Blumenfeld requested and was granted consent to allow two guests to temporarily stay with him in the Apartment. Absent written consent otherwise permitting, the proprietary lease allowed guests to stay for up to a month, provided that an adult authorized under the lease was in occupancy. Without Blumenfeld or any other permitted adult ever having moved into the Apartment, defendants assert that six

young, adult guests moved in for at least seven months and proceeded, along with their own guests, to disturb the building's other residents, day and night. In December 2014, after Blumenfeld was allegedly asked, and agreed, to remove his guests, but failed to do so, Stable commenced a holdover proceeding against plaintiffs and the six guests.[5]

In an attempt to resolve the holdover proceeding and to set forth a process by which Stable and its experts and consultants would review Dogwood LLC's renovation plans, including Dogwood LLC's payment of Stable's costs in having those plans and any revisions reviewed, Stable, Dogwood LLC, Blumenfeld, Dogwood Realty Group, and Boxwood Realty Group entered into a July 2015 agreement (Holdover Case Agreement) pursuant to which Dogwood LLC was to place $50,000 into an escrow account and release certain sums to Stable in accordance with that agreement. Specifically, the agreement provides that Dogwood LLCand Blumenfeld agreed to be liable for "all costs," incurred by Stable in reviewing Dogwood LLC's renovation plans and revised plans, including the charges, fees, and disbursements of any Stable attorney, consultant, architect, or engineer, relating to "the proposed plans and the negotiations of the alteration agreement." *Id.*, exhibit 23, ¶ 2 (b). Further, Dogwood LLC and Blumenfeld agreed to "direct the escrow agent to reimburse [Stable] (or pay as directed by [Stable] within ten (10) days after a reasonably detailed demand [wa]s made (accompanied by copies of supporting bills), for [all such] fees, disbursements and charges . . ." *Id.*

Additionally, once the Holdover Case Agreement was signed, the escrow account was

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[5] According to defendants, no one ever raised any complaints about the condition of the Apartment when the guests lived in it. Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 5, Youngberg affidavit, ¶¶ 22-32.

funded, and specified checks from the escrow account, representing part of Stable's engineering and architect's fees, were received by Stable, it was to direct its engineer and architect to begin a review of Dogwood LLC's plans and cause its counsel to "discuss Dogwood [LLC]'s proposed changes to the alteration agreement . . . and negotiate in good faith and due diligence with Dogwood" LLC regarding its proposed changes to its plans. *Id.*, ¶ 3 (a). Stable agreed that it would not unreasonably withhold its consent to Dogwood LLC's plans. *Id.*, ¶¶ 2 (c), 3 (c), 4; *see also id.*, exhibit 2, Proprietary lease, ¶ 21 (a) (Stable's written consent to any alterations and enclosures was required and was not to be unreasonably withheld).

Dogwood LLC and Blumenfeld acknowledged that the submission of one or more plan revisions would be necessary in order to obtain Stable's consent to the renovation and that Stable's request for the submission of revisions of Dogwood LLC's plans would not constitute Stable's denial of Dogwood LLC's ability to perform alterations, a bad faith failure to resolve a dispute, or an unreasonable refusal to consent to the proposed plans. *Id.*, exhibit 23, Holdover Case Agreement, ¶ 4. If Stable did not deliver a signed consent to Dogwood LLC's plans, the parties agreed to try, in good faith, to resolve any dispute, and, if after good faith negotiations, the parties could come to no agreement, the parties agreed that the Supreme Court, New York County would be the sole venue in which to resolve any dispute. *Id.*

That agreement also provides that, once Stable signed an alteration agreement with Dogwood LLC, and upon receipt of certain payments from the escrow account, including Stable's legal fees and costs in the holdover proceeding, Stable would provide a stipulation of discontinuance of that proceeding but that, if the parties could not reach an agreement

regarding Dogwood LLC's proposed renovations, Stable had no duty to discontinue the holdover case, and reserved its rights to seek its fees and costs in that matter. *Id.*, ¶¶ 2 (d), 3 (b). Further, Stable agreed that, once it consented in writing to Dogwood LLC's renovation plans, it would sign permit applications to the Landmarks Preservation Commission and to the New York City Department of Buildings (DOB). *Id.*, ¶ 3 (d).

In July 2015, the Board sent its reviewing architect, Harold Spitzer, Architect, PC (Spitzer), a copy of Dogwood LLC's proposed construction drawings and CDs regarding the Apartment's renovation. Spitzer reviewed those materials and sent the Board his analysis by letter dated September 22, 2015. Spitzer's letter reveals that the drawings were incomplete and that an additional CD had been sent to him for his review. *Id.*, exhibit 21, Spitzer letter of 9/22/15. He observed that the drawings were still incomplete, that the plans showed 25% design development architectural and structural drawings and a lack of any mechanical, electrical, and plumbing drawings. That letter reveals that Spitzer, during an August 20, 2015 conference call, which included Dogwood LLC's architect, requested the missing plans, and that the said architect sent Spitzer whatever additional plans he had, acknowledging that, because the renovation plans had been changed after those extra earlier plans had been formulated, they were inadequate. *Id.* at 1. Notwithstanding the preliminary and incomplete nature of the plans which Dogwood LLC provided, and Spitzer's assertion that various specified plans, which had not yet been provided, were needed going forward, Spitzer set forth his preliminary analysis of that which had been provided.

As part of the renovation, Dogwood LLC intended to remove part of the structure which extended above the roof line to create a larger deck area, which would permit the addition of a

rooftop lap pool, and to replace the remaining A-frame rooftop structure with one of increased width and height, which new structure Dogwood LLC's architect characterized as having two interior mezzanine levels. Spitzer recommended against the addition of a rooftop pool because, if it leaked or broke, it could cause "considerable" damage not only to the Apartment, but to the units below it. As for the removal of the old rooftop structure and replacement with a new multi-level one, Spitzer, giving detailed reasons, advised that the old rooftop structure, which had been built higher than zoning currently allowed, was grandfathered in, but that the proposed structure was higher than the old structure and the height currently permitted. Additionally, Spitzer opined that the proposed structure actually constituted two floors which, he claimed, would render the building a six-story structure, thus requiring the addition of a large building-wide elevator, as opposed to the Apartment's private elevator. Further, Spitzer asserted, citing specified code sections, that Dogwood LLC's proposed addition of a new small private elevator for the fourth floor through to the two new proposed rooftop levels was too small and failed to conform to the current code. Spitzer also averred that, as a six-story structure, the building would become subject to the provisions of Local Law 11.[6]

After receipt of Spitzer's letter, Stable's counsel, Tracy Peterson (Peterson), wrote Dogwood LLC's counsel on October 7, 2015, enclosing a copy of Spitzer's letter, and advising that Stable had no objection "in principle" to the plans, with two exceptions, namely, that the

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[6] New York City Local Law 11of 1998 (originally Administrative Code of the City of New York §27-129, now § 28-302.1 et seq), to insure proper maintenance of building facades, requires, among other things, periodic professional inspections of the exterior walls of buildings greater than six stories in height, the sending of reports of such inspections to the commissioner, the notification of the owners and DOB if an unsafe condition were discovered, and the prompt repair of any such condition.

rooftop pool would not be authorized for the reasons stated by Spitzer in his letter and that no changes which would subject the building to the requirements of Local Law 11 would be permitted. Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 21, Peterson letter. Further, Peterson also advised of the Board's desire to expeditiously continue with the review process, that the initially filed PW-1 must be withdrawn,[7] that Stable had communicated with DOB in that regard, and that once the plans were revised and approved by the Board, it would assist in the filing of a new PW-1 to keep the process moving.

Following this Court's dismissal of plaintiffs' entire original 18-page, eight cause of action 2015 complaint, plaintiffs sought leave to renew and/or reargue. In deciding that application, this court reinstated plaintiffs' eighth cause of action, sounding in breach of contract and seeking monetary damages for the alleged breach of proprietary lease, paragraph seven, pertaining to Stable's obligation to make repairs to the building's structure, with certain exceptions, and, thus, reinstated plaintiffs' ninth cause of action (incorrectly denominated their seventh cause of action) for reciprocal attorneys' fees, citing Real Property Law § 234. This Court also granted plaintiffs leave to amend the complaint to assert a breach of fiduciary duty cause of action against the Board, in a form "identical" to that set forth in the original complaint, which had asserted that cause of action solely against Stable. Peterson affidavit in

[7] This is a reference to the Plan/Work Application improperly filed by Dogwood LLC with DOB, without notice to, or consent of, the Board, which form was signed, in December 2014, by Blumenfeld, as a trustee for Dogwood LLC, evidently meaning a trustee of one of Dogwood LLC's members, in the section headed Property Owner's Statements and Signatures," which explains, in the case of co-ops, meant tenant-shareholders, and was signed the same day in the next section, headed "Co-op/Condo Board or Corporation Second Officer," by Brad Blumenfeld, rather than by Blumenfeld and his brother obtaining the required signature of an authorized representative of Condo or Co-op board, as plainly explained on that form in italics under the signature line. 2015 action, index no.157621/2015, NYSCEF Doc. 18.

support of motion to dismiss 2017 complaint, exhibit 14 at 17. The Appellate Division, First Department affirmed this Court's decision regarding plaintiffs' motion to renew/reargue.

Because plaintiffs in the 2015 action served an amended complaint which exceeded the scope of this Court's order, defendants rejected it, resulting in plaintiffs' motion for leave to amend their complaint in the 2015 action in the form of their proposed 42-page amended 2015 complaint, with new and varied allegations asserted in support of its causes of action, including the breach of fiduciary duty cause of action,[8] which also sought injunctive relief unlike any relief sought in the original complaint. In addition, that proposed complaint added a demand for injunctive relief under the breach of contract cause of action that had been reinstated. Plaintiffs thereafter commenced the 2017 action and, in October 2017, served an amended 48-page complaint in that action, which is, for the most part, identical to the proposed amended complaint in the 2015 action, with minor variations and additional facts.

In particular, the amended 2017 complaint, in support of its breach of warranty of habitability cause of action, alleges that Blumenfeld's adult son, Max, moved into the Apartment some time after his adult brother Lucas vacated it, and that Max continues to live there. In addition, the amended 2017 complaint alleges that, on August 9, 2017, DOB gained access to and inspected the three cellar units, and served Stable with a notice of violation, which indicated that each cellar level had a full bathroom and was being used as living

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[8] This cause of action in the original 2015 complaint was presumably varied because some of its allegations were irrelevant. For example, with respect to the allegation regarding disparate treatment in that complaint (¶¶ 65-66), i.e., that there was no formal subleasing policy, this was contradicted by the proprietary lease's detailed subleasing terms, and by the terms of the occupancy agreement. The 2015 complaint did not allege that Dogwood LLC, ever sought. permission to sublet the Apartment, including to any of Blumenfeld's sons.

quarters, rather than as a recreation room, as stated in the certificate of occupancy. Amended 2017 complaint, ¶ 114. Further alleged was that Stable was required to file a certificate of correction demonstrating that the violation had been removed and corrected, and that as long as one was not filed, the violation would remain open or active in DOB's records. *Id.*, ¶ 117. That complaint adds that, in September 2017, Stable agreed to perform less than $30,000 worth of repairs, "under protest" (taking the position that the repairs were Dogwood LLC's responsibility), which amount plaintiffs deemed wholly inadequate to address the alleged leaks, mold, and rotting wood joists and decking. *Id.*, ¶ 130; *see also*, 2017 action, NYSCEF Doc. No. 11, letter of Tracy Peterson, dated 9/8/2017 (regarding a description of repairs Stable intended to perform, under a reservation of rights); *id.*, NYSCEF Doc. No. 12, responding letter of Ronald Rosenberg, dated 9/12/2017 (contending that the required repairs would cost more than $750,000, rather than Stable's proposed repairs totaling less than $30,000).

The amended 2017 complaint also splits the proposed 2015 complaint's first cause of action, sounding in breach of contract and demanding both monetary and injunctive relief (as well as attorneys' fees), into two causes of action based on the same facts but seeking monetary damages and reciprocal attorneys' fees under the first cause of action and injunctive relief under the second cause of action. Plaintiffs' counsel, during oral argument of the instant motion and the motion for leave to serve the amended 2015 complaint, urged that, except for that splitting, the amended 2017 complaint was "identical" to the proposed amended 2015 complaint and that the former was designed to replace the latter. *See* Argument transcript of 4/30/18 at 9-10.

Discussion

CPLR 3211 (a) (1) and (7)

On a motion to dismiss a complaint for failure to state a claim pursuant to CPLR 3211 (a) (7), the "facts pleaded in the complaint must be taken as true and are accorded every favorable inference ... . However, allegations consisting of bare legal conclusions as well as factual claims flatly contradicted by documentary evidence are not entitled to any such consideration ... ." *Maas v Cornell Univ.*, 94 NY2d 87, 91 (1999) (internal quotation marks and citation omitted); *Wilson v Hochberg*, 245 AD2d 116, 116 (1st Dept 1997); *Gertler v Goodgold*, 107 AD2d 481, 485 (1st Dept 1985), *affd* 66 NY2d 946 (1985). A claim is inadequately pleaded if the complaint lacks adequate factual averments. *Stormes v United Water N. Y., Inc.*, 84 AD3d 1352, 1353-1354 (2d Dept 2011).

When a party moves pursuant to CPLR 3211 (a) (7), the court is "limit[ed] ... to an examination of the pleadings to determine whether they state a cause of action," even when the movant has submitted affidavits to support its defense. *See Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 345, 351 (2013). The plaintiff is not required in that circumstance "to come forward with claim-sustaining proof," except where the court decides to treat the motion as one for summary judgment, and so informs the parties. *Id.*; *see also Nonnon v City of New York*, 9 NY3d 825, 827 (2007). Affidavits submitted by the movant will rarely warrant dismissal, except where they conclusively demonstrate that the plaintiff "has no [claim or] cause of action." *Lawrence v Graubard Miller*, 11 NY3d 588, 595 (2008) (internal quotation marks and citation omitted).

If evidence is adduced in support of a CPLR 3211 (a) (7) motion, the court is required

to decide whether the plaintiff has a cause of action, rather than whether one has been stated. *Stinner v Epstein*, 162 AD3d 819, 820 (2d Dept 2018). If that evidence disproves a requisite allegation of the claim, the claim must be dismissed despite the fact that the allegations, by themselves, are adequate to resist a motion to dismiss. *Id.* Dismissal in that circumstance is permitted only when the evidence establishes that the material fact alleged by plaintiff is not really a fact, "and no significant dispute exists regarding it." *Id.*; *see also Guggenheimer v Ginzberg*, 43 NY2d 268, 274-275 (1977). When considering a motion pursuant to CPLR 3211 (a) (7), the court can consider evidence which a plaintiff has submitted to remedy a complaint's defects, since the salient issue on such an application "is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v Martinez*, 84 NY2d 83, 88 (1984) (internal quotation marks and citations omitted).

"A motion to dismiss based on documentary evidence pursuant to CPLR 3211 (a) (1) may be appropriately granted 'only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law' (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Norment v Interfaith Ctr. of N.Y.*, 98 AD3d 955, 955-956 [2012])." *North Shore Towers Apts. Inc. v Three Towers Assoc.*, 104 AD3d 825, 827 (2d Dept 2013). Documents which are, in essence, indisputable constitute documentary evidence under the statute. *Fontanetta v John Doe* 1, 73 AD3d 78, 84-85 (2d Dept 2010). Deposition transcripts, affidavits, and trial testimony are not documentary evidence, but judicial records and instruments which reflect out-of-court transactions, for instance deeds and contracts, which have contents which are basically undeniable, are documentary evidence. *Id.*; *see also Tsimerman v Janoff*, 40 AD3d 242 (1st Dept 2007). When a court does not find a movant's submission

"documentary," it must deny the motion. David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10; *Fontanetta v Doe*, 73 AD3d at 84.

Breach of Proprietary Lease-Repairs

The amended 2017 complaint's first cause of action, asserted by Blumenfeld and Dogwood LLC against Stable, alleges breaches of paragraphs two and seven of the proprietary lease insofar as Stable purportedly failed to keep the Apartment in good repair, by not making structural and "other" repairs,[9] including of the roof and the elevator. This cause of action seeks monetary damages and reciprocal attorneys' fees, pursuant to Real Property Law § 234 and proprietary lease section 28, which latter provision requires the lessee to pay the lessor, on demand, as additional rent, any expenses it incurs, including reasonable attorneys' fees, in the event that the lessee is in default under the lease's terms.

The branch of defendants' motion which seeks an order dismissing the first cause of action on substantive grounds is granted to the extent that it is brought on Blumenfeld's behalf. This cause of action alleges that Dogwood LLC entered into a contract in November 2013 to purchase the Apartment (apparently referring to the Ono contract which Blumenfeld signed in November 2013 and seemingly assigned to Dogwood LLC), that Dogwood LLC alone purchased the Apartment, is its owner, its shareholder, the proprietary lessee, and the entity which dealt with the Board, had the Apartment inspected, had repairs made to the elevator, issued the

[9] This Court notes that the amended 2017 complaint's allegation (¶ 47), that the proprietary lease imposes upon the shareholder no duty to repair any areas other than certain primarily interior areas of the Apartment set forth in proprietary lease paragraph 18, is inaccurate because the last sentence of that paragraph advises that the lessee has additional repair obligations, as set forth in proprietary lease ¶ 7.

renovation plans, hired an engineer, advised the Board of the Apartment's deficiencies, sought the Board's consent to Dogwood LLC's renovation plans, and was the one which entered into the occupancy agreement. Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 1, Amended 2017 complaint, ¶¶ 1, 4, 18, 24, 26, 31, 51, 52, 63, 68-70,133, 138, 139, 154, 159, 192. The amended 2017 complaint's allegation that Blumenfeld was interviewed by the Board on February 12, 2014, and that the "Board approved Dogwood [LLC] and Blumenfeld as "*a* purchaser on or about February 19, 2014" (*id.*, ¶ 25 [(emphasis added]), is irrelevant because he did not subsequently become a party to the proprietary lease, or, for that matter, to the occupancy agreement, and the amended 2017 complaint continues to allege that only Dogwood LLC was the proprietary lessee. Moreover, because the amended 2017 complaint does not indicate when Blumenfeld transferred his contract with Ono to Dogwood LLC, the complaint could simply be averring that Stable had advised, after interviewing Blumenfeld, that it would approve the purchase of the shares by Blumenfeld or, in the event he assigned the Ono contract to Dogwood LLC, it would approve the purchase by that entity. In addition, Blumenfeld could not become the Apartment's subtenant or occupant unless he were approved by the Board, as mandated by the occupancy agreement which, as the amended 2017 complaint alleges, the Board required Dogwood LLC to sign (in April 2014) because the "purchaser" was an LLC, rather than a person. *Id.*, ¶ 26.

Even assuming that Blumenfeld is a member of Dogwood LLC, which the amended 2017 complaint does not allege, and does not appear to be the case from the occupancy agreement, which lists the two trusts as Dogwood LLC's only members, that is an insufficient basis upon which to permit Blumenfeld to assert an individual claim for breach of the proprietary lease. *See*

Limited Liability Company Law § 610 (with limited exceptions irrelevant here, LLC member is "not a proper party to proceedings by or against" an LLC); *270 N. Broadway Tenants Corp. v Round Oaks Props., LLC*, 116 AD3d 1035, 1037 (2d Dept 2014); *see also Katz v Katz*, 55 AD3d 680, 683-684 (1st Dept 2008) (merely because former husband was the sole member of LLC, which owned former marital residence, he could not recover damages against ex-wife for use and occupancy in a holdover proceeding he commenced against her when she failed to leave such residence as provided in separation agreement); Limited Liability Company Law § 601 (member has no interest in the specific property of an LLC).

The amended 2017 complaint does not allege that Blumenfeld owns any of Stable's shares, or that the proprietary lease was amended to name him as a party to it. Nor does it otherwise set forth any facts alleging that he was a party to the proprietary lease, so as to enable him to assert such a cause of action. In an apparent attempt to limit his potential liability, and/or for tax or other business reasons, Blumenfeld decided not to purchase the shares and that Dogwood LLC would instead acquire them. Ownership of the Apartment's shares by a limited liability company affords limited liability to its members, managers, and agents (*see* Limited Liability Company Law § 609 [a]), as well as various tax advantages (*see Tzolis v Wolf*, 39 AD3d 138, 143 [1st Dept 2007], *affd* 10 NY3d 100 [2008]) unavailable to an individual cooperative apartment owner.

Further, in their motion to dismiss the amended 2017 complaint, defendants urged that Blumenfeld, as a stranger to the lease, could not assert breaches of the proprietary lease against Stable (*see* defendants' memo of law in support of motion to dismiss amended 2017 complaint, at 12, n 7), a claim which plaintiffs did not dispute in their papers opposing defendants' motion.

Moreover, the amended 2017 complaint (¶ 239) alleges only that Dogwood LLC has a reciprocal right to recover its expenses under Real Property Law § 234. Thus, on the facts alleged, only Dogwood LLC can assert a breach of the proprietary lease against Stable. Also, to the extent, if any, that the first cause of action is alleged against the Board or its individual members, none of whom is a party to the proprietary lease, the only appropriate defendant to this cause of action is Stable. *King v 870 Riverside Dr. Hous. Dev. Fund Corp.*, 74 AD3d 494, 495 (1st Dept 2010); *see also Pomerance v McGrath*, 124 AD3d 481, 482 (1st Dept 2015) (internal quotation marks and citations omitted) (the participation of board members in a breach of contract will usually "not give rise to individual director liability"). Therefore, to the extent, if any, that the first cause of action is alleged against any defendant other than Stable, it is dismissed.

As for the balance of this cause of action, this Court finds that Dogwood LLC has adequately pleaded a breach of contract cause of action against Stable, and ultimately a determination will have to be made as to what defects exist, whether they are structural or not, whether any defects were caused by Dogwood LLC's occupants or guests or by its predecessor-in-interest, whether it is the lessor or the lessee that is responsible for repairing any defective condition, and whether Dogwood LLC is entitled to damages and reciprocal attorneys' fees and, if so, in what amount. As determined by this Court on plaintiffs' motion to renew/reargue in the 2015 action, and as affirmed by the Appellate Division, First Department (*Dogwood Residential, LLC v Stable 49, Ltd.*, 159 AD3d at 491-492), the parol evidence rule precludes Stable's reliance on Blumenfeld's representations regarding the repair of the roof and elevator. Stable must, therefore, meet any contractual obligation it may have to make any required repairs.

Injunctive Relief-Breach of the Proprietary Lease-Repairs

The amended 2017 complaint's second cause of action seeks to compel "[d]efendants" to make the needed repairs that are the subject of the first cause of action on plaintiffs' behalf, based on the assertions that defendants have failed to make the repairs and that plaintiffs "do not have an adequate remedy at law." Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 1, Amended 2017 complaint, ¶¶ 150, 151. To the extent that the second cause of action is asserted on Blumenfeld's behalf, this part of the second cause of action is dismissed because the amended complaint alleges no contractual relationship between Blumenfeld and Stable or that he is a third-party beneficiary of any contract. To the extent that the second cause of action is alleged against Cavaleri solely in his capacity as an assistant secretary, no claim is made that he had the power to order any repairs in that capacity. Therefore, the second cause of action is dismissed as to Cavaleri. Although after this Court was apprised, after the instant motion was filed, that had Cavaleri become a Board member (*see* n 1, *supra*), no application has been made to reflect those changes in the complaint. Further, because the injunctive relief sought herein arises from Stable's alleged breaches of the proprietary lease, the individual Board members and the Board are improper parties to this cause of action, and the second cause of action is dismissed as against the Board and its individual members here, where, pursuant to paragraph 2 of the proprietary lease, the lessor is the party required to make repairs not required of the lessee under proprietary lease paragraph 18 (*see also, id.*, ¶ 7), and where an injunction against Stable would also be enforceable against those who act for it. *Cf. Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 58 (1st Dept 2012). Moreover, as indicated hereinafter, all breach of fiduciary duty causes of action asserted in this complaint have been dismissed. *See id.* In

addition, once it is ultimately determined whether it is Stable or Dogwood LLC which is responsible for a particular repair, it is unclear who will be on the Board *(id.)*, a fact highlighted by the ongoing changes to the Board.

With respect to Dogwood LLC's allegation that it lacks an adequate remedy at law, whether the obligation to perform some or all of the claimed necessary repairs will fall on Stable, which, under the proprietary lease, is responsible for ensuring the building's structural integrity in the Apartment's exclusive areas, provided the need for the repair is not "necessitated, or deterioration accelerated" by the lessee's use (Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 2, Proprietary lease, ¶ 7, at 9), has not yet been determined. Under the amended 2017 complaint's first cause of action, if Stable is found to have breached the lease by failing to make certain repairs, a finding would have to be made regarding whether Dogwood LLC is entitled to monetary damages, including for any compensable injury it suffered as a result of Stable's failure to make any such repairs and to recoup sums paid by Dogwood LLC to repair defective conditions which Stable ought to have repaired. Those damages will not result in the repair of any existing defective structural condition that Stable, rather than Dogwood LLC, was required to have made. If it is determined that Stable breached the proprietary lease by failing to repair a particular existing structural condition, then Stable would be required to repair it. However, since an award of monetary damages to Dogwood LLC will not result in repairs by Stable, this Court declines to dismiss the claim for injunctive relief seeking to compel Stable to make required repairs.

Breach of Contract-Failure to Approve Renovation Plans and Sign Requisite Applications

The amended 2017 complaint's third cause of action alleges on behalf of both plaintiffs a breach of paragraph 21 (a) of the proprietary lease, which requires that consent to alterations not be unreasonably withheld. Plaintiffs charge both the Board and Stable with bad faith failures to review and consent to Dogwood LLC's renovation plans and to issue the necessary applications to the DOB, the Fire Department, and to the Landmarks Preservation Committee. Consequently, plaintiffs seek damages and request an award of reciprocal attorneys' fees.

To the extent that such cause of action is alleged by Blumenfeld and asserted against any defendant other than Stable, this cause of action must be dismissed, since they are not parties to the proprietary lease. Because defendants do not otherwise attack this cause of action, this Court does not dismiss the balance of it on substantive grounds. With respect to this cause of action, as well as the fourth cause of action, which has the same factual underpinnings, including that Peterson's October 7, 2015 letter to plaintiffs' counsel advised that the Board would not approve any part of the plan that subjected Stable to the requirements of Local Law 11 (Amended 2017 complaint, ¶ 57), this Court notes that, although none of the parties discusses the substance of Local Law 11 in detail, its applicability is doubtful. Spitzer indicated in his letter to the Board that, because the two proposed rooftop mezzanine levels constituted two additional floors, they, together with the building's existing lower four floors, would amount to a six-story building, and, hence, fall within the purview of Local Law 11. However, Local Law 11 provides that it applies to buildings having more than six floors. *See* n 6, *supra*.

Mandatory Injunction Approving Dogwood LLC's Plans and Executing the Applications

The amended 2017 complaint's fourth cause of action is based on "[d]efendants[']" alleged breaches of the proprietary lease under the third cause of action and seeks, on behalf of "[p]laintiffs" a mandatory injunction compelling the Board, on Stable's behalf, to approve Dogwood LLC's plans and to execute the necessary documents, including applications to the DOB, Landmarks Preservation Committee, and to the New York City Fire Department. Amended 2017 complaint, ¶159. Preliminarily, Stable has failed to establish that any issue with respect to the pool and Local Law 11 is time-barred on the ground that receipt of Peterson's October 7, 2015 letter constitutes a final determination that started the running of the four-month Article 78 statute of limitations. *See* CPLR 217. The July 2015 Holdover Case Agreement, which sets forth the parties' framework for the review of Dogwood LLC's plans, contemplates that the parties would work together, within that agreement's parameters, toward a final approved plan, that any initial plan reviewed by the Board and its experts might have to be revised one or more times, and that the parties would cooperate and engage in good faith negotiations, including attempts to resolve any dispute. Holdover Case Agreement, ¶ 4. Under these circumstances, where the parties' ongoing negotiations were contemplated, defendants have failed to establish that Dogwood LLC could have concluded that Stable's counsel's October 7, 2015 letter constituted a final and binding Board determination commencing the running of the four-month statute of limitations period set forth in Article 78. Thus, that portion of defendants' motion which seeks an order dismissing such claims as time-barred is denied.

To the extent, if any, that this cause of action is alleged on behalf of Blumenfeld and against the Board and any of its members, it is dismissed because they are not parties to the

proprietary lease. As for the part of this cause of action which seeks to compel Stable to approve the rooftop pool, defendants assert that this claim has been inadequately pleaded because plaintiffs have alleged no facts demonstrating that the decision to deny a rooftop pool was unreasonable and, thus, a breach of proprietary lease paragraph 21 (a). Defendants urge that the fact that Dogwood LLC's pool installer is "experienced" and "highly respected" and that the installation would adhere to the "highest safety standards" (amended 2017 complaint, ¶ 56), does not render Stable's decision unreasonable.

Clearly, even a good installer is no guarantee against a potential accident which could arise from human error, product defects, and improper and inadequate maintenance over the life of the pool and its auxiliary parts, which could result in a flood of the Apartment and other units. The Board, in deciding what is reasonable, has a duty to consider the best interests of the shareholders as a whole, including any financial or other burden that might befall them should the pool overflow or leak, especially in a small building, where the risks have to be absorbed by a limited group of individuals. It is therefore questionable whether Dogwood LLC could prevail on a claim that the denial of consent to a pool was unreasonable.

Regardless of whether the Board's decision regarding the pool was reasonable and plaintiffs sufficiently pleaded such a claim, defendants' motion to dismiss the amended 2017 complaint's fourth cause of action is granted. This cause of action, as demonstrated by the amended complaint's allegations, is premature, since plaintiff's concede that the review conducted by Spitzer was merely preliminary, leading to Peterson's October 7, 2015 letter to defendants' counsel, which referenced and attached Spitzer's September 22, 2015 letter. *See* Amended 2017 complaint, ¶ 57. The amended complaint wholly fails to explain why the review

was preliminary and, although Spitzer's letter explains why it was, including because Dogwood LLC's architect acknowledged that the plans provided to Stable were incomplete, and that Stable would have to conduct further review, the amended complaint, by admitting that the review was only preliminary, in essence concedes that further review was anticipated and required. Further, the amended 2017 complaint (¶ 51), while alleging that Dogwood LLC provided Stable with Dogwood LLC's plans in about May 2015, does not allege that those plans were complete and ready for a full review by Stable when Spitzer reviewed them.

The amended complaint also acknowledges that the Board halted the review process and never rendered any determination as to whether Dogwood LLC's plans would be approved. It is readily apparent from the allegations in the amended 2017 complaint that Stable did not refuse to consent to Dogwood LLC's plans. Instead, as alleged in the amended 2017 complaint, because plaintiffs failed to pay "legal and other professional fees,"[10] which Stable claimed it was owed, pursuant to the Holdover Case Agreement, Stable refused to further review Dogwood LLC's plans, never reached their merits, and, thus, never rejected them (except to the limited extent set forth preliminarily in Peterson's October 7, 2015 letter). *See* Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 1, Amended 2017 complaint, ¶¶ 57- 58 ("Board improperly halted all further review of plans . . . and refused to further review plans, much less approve them, until it got paid in full"); *id.*, ¶ 61 (Board refused to review plans,

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[10] Although the amended 2017 complaint alleges that plaintiffs objected to a November 2015 and a July 2016 demand regarding outstanding and "past due" "legal and other professional fees" (*id.*, ¶¶ 58, 61), the complaint only discusses the allegedly improper and "excessive" legal fees. *Id.*, ¶ 58-60. It is thus unclear from that pleading whether plaintiffs ever paid all of the nonlegal professional/consulting fees required of them under the Holdover Case Agreement.

unless paid in full). Based on the foregoing, the amended 2017 complaint's fourth cause of action, premised on Stable's breach of that portion of paragraph 21 (a) of the proprietary lease, which requires that consent to alterations not be unreasonably withheld (*see* Amended 2017 complaint, ¶ 153), in that the Board allegedly refused, in bad faith, to consent to Dogwood LLC's renovation plans (*id.*, ¶ 155), puts the cart before the horse. Under the foregoing circumstances, and where the relief sought is not an order compelling Stable to review Dogwood LLC's plans, but, instead, to approve them (*id.*, ¶ 159), the trier of fact will not usurp the Board's function by deciding which renovations are acceptable and directing Stable to approve those plans.

With respect to the amended 2017 complaint's allegation that the legal fees were improper because they were unrelated to the negotiation of an alteration agreement, which were allegedly the only legal fees which Dogwood LLC agreed to pay (*id.*, ¶ 60), this Court notes that a review of the plain language of the aforementioned Holdover Case Agreement does not purport to so limit Stable's legal fees. That agreement recites that plaintiffs were responsible for all costs incurred by Stable "in connection with the *review of Dogwood [LLC]'s plans* to renovate the [A]partment, including all fees, charges, and disbursements" *of any attorney retained by Stable* "in connection with the proposed plans *and* the negotiation of the alteration agreement." *Id.*, exhibit 23, Holdover Case Agreement, ¶ 2 (b) (emphasis added). Further, plaintiffs agreed to direct the escrow agent to reimburse Stable or pay as Stable directs, within 10 days after plaintiffs received a "reasonably detailed demand" with supporting bills, for "all fees, disbursements and charges of [Stables's] attorneys . . . for the *review of plans*, drawings and specifications, submitted by Dogwood [LLC] and/or Blumenfeld (and any revisions thereto), for *inspection of the plans* for the renovation of the apartment, *and* for the negotiation of the alteration agreement

(emphasis added)." *Id.*

Since Spitzer's September 2015 letter refers not only to Local Law 11, but also to various building codes, strongly suggests, especially since Spitzer improperly interpreted Local Law 11's applicability, at least one reason why Stable's counsel would have to review Dogwood LLC's plans, i.e., to ensure that they comply with the relevant statutes, regulations, and codes. *See also* Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 2, Proprietary lease, ¶ 21 (a) (lessee's alterations must be in accordance with all of the rules and regulations of the applicable governmental agencies). Moreover, although the amended 2017 complaint (¶ 60) alleges that the legal fees were to be limited to negotiating an alteration agreement, the amended complaint's immediately preceding paragraph asserts that the legal fee sought by the Board were improper, excessive, and *were not limited to the 'review' of Dogwood's plans*" (*id.*, ¶ 59 [emphasis added]), which contradicts the allegation that the legal fees were to be limited to negotiating an alteration agreement. As for the claim that unspecified legal fees were excessive, such allegation is wholly conclusory here, where Dogwood LLC and Blumenfeld presumably had the requisite information from the detailed demands and itemized bills they were to receive.

This Court further notes that paragraph four of the Holdover Case Agreement requires the parties to that agreement to attempt to resolve, in good faith, any dispute they had in the event that Stable did not deliver a signed consent to Dogwood LLC's plans, and to resort to litigation only after the parties could not resolve their dispute via good faith negotiations. The amended 2017 complaint fails to allege facts demonstrating that any good faith negotiations were conducted before plaintiffs resorted to litigation on this issue.

Although plaintiffs allege in the amended 2017 complaint that the Board's refusal to sign various applications constituted a violation of paragraph 21 (a) of the proprietary lease, that provision does not specifically refer to the lessor's obligation to sign any such applications. Although the Holdover Case Agreement (¶ 3 [d]) provides that the Board would sign DOB and Landmark Preservation Commission's applications, such obligation was contingent on the Board's approval of Dogwood LLC's plans. Because the Board, according to the allegations in the amended 2017 complaint, never reached the ultimate issue of whether to accept or reject Dogwood LLC's plans, the demand for injunctive relief compelling the Board to execute various documentation and applications is premature, devoid of merit, and is dismissed, along with the balance of the fourth cause of action.

Breach of Fiduciary Duty

"The very concept of cooperative living entails a voluntary, shared control over rules, maintenance and the composition of the community. . . . [A] shareholder-tenant voluntarily agrees to submit to the authority of a cooperative board, and consequently the board 'may significantly restrict the bundle of rights a property owner normally enjoys.' " *40 W. 67th St. v Pullman*, 100 NY2d 147, 158 (2003) (internal citation omitted). That said, a cooperative corporation's board of directors owes a fiduciary duty to its shareholders. *Stinner v Epstein*, 162 AD3d at 820-821. The board must act "within the scope of its authority and in good faith," in furtherance of the cooperatives's legitimate purposes, and with loyalty for the benefit of cooperative and its shareholders as a whole. *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538-539 (1990). If a board acts in accordance with its fiduciary duties, the "courts

[as a general matter] will not substitute their judgment for the board's." *Id.*

Nonetheless, because of the expansive powers afforded cooperative board members, a potential for abuse exists through decision making that may smack of favoritism or is discriminatory, arbitrary, and/or malicious. *Fletcher v Dakota, Inc.*, 99 AD3d 43, 48 (1st Dept 2012). Decision making tainted by such considerations is not covered by the business judgment rule, which ordinarily protects inquiry into the actions of cooperative board members. *Id.*; *cf. Board of Mgrs. of Honto 88 Condominium v Red Apple Child Dev. Ctr., a Chinese Sch.*, 160 AD3d 580, 582 (1st Dept 2018) (board members protected by the business judgment rule absent allegations of tortious acts outside of legitimate condominium purposes, and were granted summary judgment dismissing the breach of fiduciary duty cause of action asserted against the individual board members where no tortious acts were alleged and the allegations of discrimination were conclusory); *20 Pine St. Homeowners Assn. v Pine St., LLC* 109 AD3d 733, 735-736 (1st Dept 2013) (breach of fiduciary duty cause of action asserted against individual board members dismissed pursuant to CPLR 3211 [a] where no individual wrongdoing was alleged against board members except for their collective actions taken on the condominium's behalf). When board members treat a shareholder unequally, they may be found to have breached their fiduciary duty to that shareholder. *Stinner v Epstein*, 162 AD3d at 821. Thus, despite the deference given to cooperative board determinations, courts should review them when the tenant-shareholder demonstrates that the board acted in bad faith, exceeded the scope of its authority, or failed to "legitimately further the corporate purpose." *40 W. 67th St. v Pullman*, 100 NY2d at 155.

The elements of a breach of fiduciary duty claim are "the existence of a fiduciary

relationship, misconduct by the defendant, and damages that were directly caused by the defendant's misconduct." *Daly v Kochanowicz*, 67 AD3d 78, 95 (2d Dept 2009) (internal quotation marks and citations omitted); *see also Pokoik v Pokoik*, 115 AD3d 428, 429 (1st Dept 2014). A breach of fiduciary duty cause of action is required to be pleaded with the particularity mandated by CPLR 3016 (b). *Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 (2d Dept 2011); *see e.g. Baker v 16 Sutton Place Apt. Corp.*, 110 AD3d 479, 480-481 (1st Dept 2013) (CPLR 3211 motion granted to cooperative corporation where only conclusory, nonfactual allegations of "bad faith" and "harassment" were asserted on breach of fiduciary duty cause of action); *see also Board of Mgrs. of Honto Condominium v Red Apple Child Dev. Ctr.*, 160 AD3d at 582 (on successful motion to dismiss breach of fiduciary duty cause of action, individual board members were protected by the business judgment rule where the complaint was devoid of factual, nonconclusory "allegations of tortious acts outside legitimate condominium purposes").

Furthermore, " [a] cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand." *William Kaufman Org. v Graham & James*, 269 AD2d 171, 173 (1st Dept 2000); *see also Granirer v Bakery, Inc.*, 54 AD3d 269, 272 (1st Dept 2008) (breach of fiduciary duty cause of action against cooperative dismissed as duplicative of breach of proprietary lease cause of action). Nevertheless, "the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself." *Mandelblatt v Devon Stores*, 132 AD2d 162, 167-168 (1st Dept 1987).

The branch of Stable's motion which seeks an order dismissing the amended 2017

complaint's direct breach of fiduciary duty cause of action (fifth cause of action) is granted, and that cause of action is dismissed. To the extent that this cause of action is brought by Blumenfeld, he is not a Stable shareholder, and the complaint sets forth no allegations as to how and why the Board would owe him a fiduciary duty. Although this claim is asserted against Cavaleri, there is no specific allegation that he breached any fiduciary duty to plaintiffs. As previously noted, the mere fact that he was appointed Stable's assistant secretary in 2017 is inadequate, because there is no allegation that he had any relevant decision making authority in that role relevant to this cause of action, and Dogwood LLC has not sought to further amend this complaint to allege any cause of action against him.

As for the portion of the fifth cause of action relating to all claims aside from those pertaining to the Board's alleged inaction regarding the nonconforming cellar units, the allegations are wholly conclusory, replete with surmise and speculation, and are devoid of facts necessary to meet the pleading requirements of CPLR 3016 (b). *See* 2017 action amended complaint, ¶¶ 165-171. For example, plaintiffs merely speculate that Matanic, who lives in one of the three third-floor apartments that are on the floor under the Apartment (*see id.*, exhibit 2, Proprietary lease, ¶ 7), is acting with self-interest because "upon information and belief" she and her family "may be inconvenienced" by Dogwood LLC's alterations. *Id.*, ¶ 166. As for plaintiffs' surmise that each Board member, as a shareholder, has a financial interest in Stable's compliance with its obligations to make structural repairs and, thus, would not want to approve Dogwood LLC's structural repairs because it would cost the Board members money (*id.*, ¶ 149), such is true of members of any cooperative board, and does not demonstrate disparate treatment.

Similarly, as an example of the Board's disparate treatment, plaintiffs allege, again

merely "upon information and belief" and, thus, without concrete facts, that Matanic, Youngberg, and El-Sawy, as proprietary lessees, at unspecified times, which was not necessarily when they were Board members, renovated their own apartments without having to have written agreements[11] and without having to reimburse Stable for legal, architectural, and engineering fees. *Id.*, ¶ 165. In addition, putting aside the fact that El-Sawy only became a Board member at an unspecified time in 2016, after plaintiffs' disputes with the Board began, the amended 2017 complaint does not allege that these Board members intended to remove residential structures from the building's roof, reconfigure the structures, and build a two-story structure and a swimming pool on top of their leased premises, or on top of any of the building's terraces (as contrasted with nonstructural renovations conducted within the four walls of their units). Indeed, plaintiffs' complaint is devoid of any allegations as to what, if any, renovations each Board member, as an individual proprietary lessee, performed, "upon information and belief," in their units. Also, the proprietary lease's description of each of the building's units reveals that none of the Board members has any exterior residential structure outside the confines of his or her unit's four walls within the building's interior. Nor does any Board member have a swimming pool. At most, there were Board members when this action was commenced who only had a terrace and/or garden outside their units. Furthermore, Dogwood LLC and Blumenfeld, in voluntarily

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[11] To the extent that the amended 2017 complaint (¶ 55) alleges an unreasonable time frame for completing alterations set forth in an alteration agreement that Dogwood LLC was allegedly asked to sign, this assertion is irrelevant to any cause of action because Dogwood LLC never signed an alteration agreement and, as set forth in Holdover Case Agreement, the parties agreed to negotiate a revised alteration agreement. This Court further notes that, in the original 2015 complaint (¶¶ 62-63), there was no allegation that a 120-day limit for completing renovations was imposed on plaintiffs and, in fact, it was alleged that it was unclear whether any such rule was still in effect.

signing the Holdover Case Agreement, agreed to pay fees Stable's legal, architectural, and engineering fees, and to negotiate an alteration agreement.

In opposing defendants' motion to dismiss plaintiffs' direct breach of fiduciary duty cause of action, plaintiffs' counsel raises the new claim that the Board engaged in disparate treatment by repairing structural defects (*cf.* Multiple Dwelling Law §§ 34 [2], 6 [c], [d] (regarding water- and damp-proofing and/or drainage requirements for cellar rooms, exterior walls, yards, and courts]) affecting the leaseholds of Board members but not those affecting Dogwood LLC's leasehold. *See* Rosenberg affirmation in opposition to dismiss amended 2017 complaint, ¶¶ 10-15; *id.* exhibits A, C. Specifically, plaintiffs' counsel attaches a January 2013 proposal, showing payments made in full by February 2013, for work building a wall the length of the building to protect all three cellar units, which were subjected to flooding and damage from storm water flowing through their gardens, down to their lower levels, and into their units. However, counsel's assertion overlooks the fact that, when the Board approved and paid for that project, only one Board member, Youngberg, lived in a cellar unit. El-Sawy did not become a Board member until 2016 (Amended 2017 complaint, ¶ 12), and neither Matanic nor Frank lived in cellar units. Thus, the majority of the Board which authorized that work was disinterested. That the wall was not built solely around Youngberg's unit, and was built to resolve the flooding problems of two non-Board members, undercuts plaintiffs' counsel's suggestion that the Board engaged in the disparate treatment of non-Board members in performing repairs. Plaintiffs' counsel also submits a June 2017 bill for what is claimed to be structural work, on the outside cellar unit 3G, Cavaleri's apartment (*see* Amended 2017 complaint, ¶ 13), causing water damage to his apartment's interior, which the Board repaired. Contrary to plaintiffs' counsel's assertion

(Rosenberg affirmation in opposition to dismiss amended 2017 complaint, ¶ 11), Cavaleri was not then a Board member, and only became one in 2018. In light of the foregoing, these alleged bases for the breach of fiduciary duty cause of action, which were never set forth in the amended 2017 complaint, or, for that matter, in connection with the proposed 2015 complaint, are unavailing. In an apparent attempt to demonstrate disparate treatment, plaintiffs allege that a non-Board member unit owner's alteration plans were "*apparently* approved almost immediately" (Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 1, Amended 2017 complaint, ¶ 170, emphasis added). However, this allegation is speculative and fails to demonstrate the nature of those plans and how they contrasted with Dogwood LLC's.

This cause of action's allegation that "the Board," on an unspecified date in 2016, approved Youngberg's purchase of a second unit, but instructed other shareholders who were selling units not to consider selling to Blumenfeld, because the Board would not permit such a sale (*id.*, ¶ 171), is similarly devoid of factual support because it does not indicate who, in particular, instructed whom not to consider such a sale, or when, or under what circumstances, such statement was made. The amended 2017 complaint also fails to name the Board members at that time, a deficiency that is repeated throughout the amended complaint, (*id.*, ¶ 61, 172, 228), despite the fact that Board members changed and where, as to El-Sawy, that pleading merely alleges that he has been a Board member "since 2016." *Id.*, ¶ 12. Moreover, the amended 2017 complaint's prefatory allegations demonstrate that this allegation has no factual underpinning. Specifically, the amended 2017 complaint alleges that the unit owner Frank told Blumenfeld that he would never consider selling his (second-floor) unit to him; that, "on information and belief,"

Frank told Blumenfeld that the Board would never approve a sale to him; and that, "on information and belief," "the Board instructed all shareholders" not to talk to Blumenfeld. *Id.*, ¶¶ 118-120. This Court notes in passing that, even if the Board declined to approve a sale of a unit to Blumenfeld because of concern that he, along with Dogwood LLC, with its 30% stake in Stable, would, with additional shares, exert undue influence over Stable's governance, effectively freezing out the voices of other shareholders, that would not necessarily be improper. *See generally Barbour v Knecht*, 296 AD2d 218, 227 (1st Dept 2002).

To the extent that this cause of action which, in part, seeks monetary damages, relies on the Board's alleged inaction with respect to the cellar units' lack of conformity with the building's certificate of occupancy, this Court notes that the amended 2017 complaint does not set forth with specificity any item of damages that Dogwood LLC has suffered as a result of the Board's alleged failure to address that problem, as contrasted with damages arising from former shareholders' having sold, with Stable's consent, shares associated with nonconforming units, and from Stable's issuance of proprietary leases for three nonconforming units.

Further, this cause of action is premised on the Board and its members treating Dogwood LLC unequally and unfairly, by imposing restrictions and obligations on it, but not on other shareholders. What this theory has to do with the Board's claimed inaction regarding nonconforming cellar units cannot be discerned, because Dogwood LLC never had a cellar unit, much less one which was treated differently from the other cellar units. Also, Dogwood LLC does not specifically allege that, because the Board failed to take action with respect to illegal cellar units, the Board should have ignored some illegality with respect to Dogwood LLC's unit. Even if Board members who had cellar units ignored the fact of their nonconformance with the

certificate of occupancy, that would not require the Board to waive every other illegality involving the building. *See* Peterson affidavit, exhibit 2, Proprietary lease, ¶ 26 (Stable's failure to insist on strict adherence to any lease provision or to exercise any right in one or more instances would not constitute a waiver of Stable's right to do so in the future; all of the lease's provisions remain in full force and effect in the future). Dogwood LLC has not alleged any actionable disparate treatment that it has suffered as a consequence of the Board's claimed inaction regarding the nonconforming cellar units.

Moreover, claims pertaining to the Board's failure to act on the nonconforming cellar units would arise, if anywhere, in a derivative cause of action and/or be addressed at a special shareholders' meeting, either through the Board's initiative or at the request of shareholders having at least 25% of the outstanding shares. *Id.*, exhibit 3, Stable's by-laws, Art. II, § 2. In addition, plaintiffs' counsel's newly-raised position that the Board further breached its fiduciary duty when it did not ignore the cellar unit issue and hired consultants to see if it was feasible to legalize the cellar units and cure the DOB violation (Rosenberg affirmation in opposition to motion to dismiss amended 2017 complaint, ¶ 10; *id.*, exhibit D), contradicts plaintiffs' allegation in the complaint that the Board breached its fiduciary duty by ignoring the cellar unit issue and, for the reasons stated in addressing the derivative breach of fiduciary duty cause of action (eleventh cause of action), is factually inadequate to demonstrate a breach of fiduciary duty cause of action.

In any event, given that this fifth cause of action constitutes a conglomeration of individual and derivative claims, it must be dismissed. *Barbour v Knecht*, 296 AD2d at 227-228. This Court further notes that the plaintiffs have also failed to adequately allege what damages

they directly sustained as a result of each of their divergent claims of disparate treatment that allegedly constituted a breach of fiduciary duty. *Daly v Kochanowicz*, 67 AD3d at 95. Instead, after setting forth a panoply of allegations of disparate treatment, plaintiffs, lumping all claimed breaches together, simply allege in conclusory fashion that they caused them to be damaged in excess of a million dollars. Peterson affidavit, exhibit 1, ¶ 176. To the extent that this cause of action also seeks an injunction removing the Board members and barring them from serving in the future, this Court notes that removal of Board members for cause requires a majority vote of the Board or of the shareholders at a meeting properly called for such purpose. *Id.*, exhibit 3, Stable's by-laws, § III, ¶ 6. In light of the foregoing, this cause of action is dismissed.

Declaratory Relief - Occupancy Agreement

Defendants move to dismiss the amended 2017 complaint's sixth cause of action, which seeks a declaration that the occupancy agreement conflicts with the proprietary lease, violates Real Property Law § 235-f, as well as public policy, and/or is null and void. In particular, plaintiffs assert that the occupancy agreement's provision, which empowers Dogwood LLC to permit the occupancy/subletting of the Apartment by "Blumenfeld and his immediate family (i.e., spouse, children and parents) "*residing with him* or any subtenant approved by" Stable (*see* Peterson affidavit, exhibit 4, occupancy agreement at 1, [emphasis added]), conflicts with the proprietary lease. Plaintiffs' concern over this clause was triggered when the Board threatened to evict Blumenfeld's son Lucas on the ground that the occupancy agreement did not permit him to live in the Apartment unless his father concurrently resided there, and served a notice to cure, which the Board later withdrew, after Lucas vacated the Apartment. Peterson affidavit, exhibit 1,

Amended 2017 complaint, ¶¶ 123-127.

Plaintiffs, relying on the 1994 Civil Court decision in *Barbizon Owners Corp. v Chudick* (159 Misc 2d 1023, 1024-1027 [Civil Court, Queens County 1994]), maintain that occupancy agreement paragraph 14 (a) in the instant case, which is virtually identical to proprietary lease paragraph 14 in the *Barbizon* case, permits Blumenfeld's sons to live in the Apartment, irrespective of whether Blumenfeld has been concurrently living there. Proprietary lease, paragraph 14 (a) provides that occupancy by anyone other than the lessee, the lessee's spouse, their children, grandchildren, parents, siblings, grandparents, and domestic employees, and in no event by no more than one married couple, without the lessor's written consent, was prohibited. In *Barbizon*, the Civil Court, interpreting that provision, found that the proprietary lessee was not required to live in the apartment contemporaneously with his brother, who had been living there alone.

However, as defendants aptly observe, Blumenfeld is not subject to the aforementioned proprietary lease terms relative to the proprietary lessee's occupancy, because he is not the proprietary lessee, and because the occupancy agreement provides, in essence, that "notwithstanding any provision of the [proprietary] Lease or any other document," those to whom Dogwood LLC may sublet or permit occupancy of the Apartment, with Stable's consent, is governed by the terms of the occupancy agreement, which Blumenfeld signed on behalf of Dogwood LLC, by Dogwood Realty Group, and which permits only those of Blumenfeld's children who are residing with him to occupy the Apartment. It must also be noted that there is no allegation in the amended 2017 complaint that, when the occupancy agreement was being negotiated, Dogwood LLC, Blumenfeld, Dogwood Realty Group, Boxwood Realty Group, or

Brad Blumenfeld objected to this unambiguous clause or that Blumenfeld and his brother, as trustees of Dogwood LLC's two members, refused to sign the occupancy agreement, unless Blumenfeld's sons and other relatives were permitted to live in the Apartment without him. *See* Amended 2017 complaint, ¶¶ 26-29.

Moreover, even were Blumenfeld, and, therefore, his sons, subject to the occupancy terms specific to the proprietary lessee, the Appellate Division, First Department held, almost nine years after the *Barbizon* decision, in a case involving language essentially identical to that in paragraph 14 of the proprietary lease, that the IAS court properly interpreted that provision as permitting the occupancy of those other than the proprietary lessee only when the latter was simultaneously living there. *445/86 Owners Corp. v Haydon*, 300 AD2d 87, 88 (1st Dept 2002); *see also Chiagkouris v 201 West 16 Owners Corp.*, 160 AD3d 469, 469-470 (1st Dept 2018); *230-79 Equity, Inc. v Frank*, 50 Misc 3d 144 (A) (App Term, 1st Dept 2016), 2016 NY Slip Op 50245, *1. The First Department reasoned that to permit all those individuals, other than the lessee, to live in the apartment without the lessee, would also permit the lessee's domestic employees to live in the apartment without the lessee, an interpretation characterized as "patently unintended if not absurd." *445/86 Owners Corp. v Haydon*, 300 AD2d at 88. Thus, Blumenfeld's sons can live in the Apartment only if Blumenfeld concurrently resides there, or if Dogwood LLC seeks and obtains Stable's permission, pursuant to the occupancy agreement, for Blumenfeld's sons to sublet the Apartment. Accordingly, plaintiffs' claim that the two provisions conflict is without merit.

This Court also finds that the amended 2017 complaint's allegation, that the occupancy agreement conflicts with and violates Real Property Law § 235-f, commonly known as the

"Roommate Law," lacks merit. The Roommate Law was enacted by the legislature to recognize that "severe disruption of the rental housing market [wa]s threatened as a result of the present state of the law." *See* McKinney's Session Law, 1983, ch. 403, § 1, Legislative findings. In particular, Real Property Law § 235-f was promulgated to overcome case law which upheld, as nondiscriminatory, a lease clause restricting occupancy of an apartment to the tenant and members of the tenant's immediate family. *See e.g. Hudson View Props. v Weiss*, 59 NY2d 733, 735-736 (1983). Consequently, Real Property Law § 235-f was enacted to provide protection against hardship and dislocation and to afford security to the thousands of households where unrelated persons were living together for financial reasons, companionship, and safety, and whose living arrangements were potentially in jeopardy. *See* McKinney's Session Law, 1983, ch. 403, § 1, Legislative findings.

Real Property Law § 235-f (2) renders it unlawful for a landlord of residential premises to restrict occupancy, "by express lease terms or otherwise, to a tenant or tenants or to such tenants and immediate family." Such a lease restriction is "unenforceable as against public policy." *Id.* Any rental agreement or lease for residential property must be construed to permit occupancy by the tenant or tenants and their immediate family, and by one more occupant and that occupant's dependent children, provided that the tenant or the tenant's spouse occupies the premises as his or her primary residence. Real Property Law § 235-f (3). A tenant under the statute is defined as one who is entitled to occupy the residential premises and is a party to the lease or rental agreement. *Id.*, subsection 1. Any "lease or rental agreement purporting to waive a provision of [Real Property Law § 235-f] is null and void." Real Property Law § 235-f did not restrict or expand tenant occupancy rights but instead only "limited the ability of landlords to restrict

them." Real Property Law § 235-f, Rudolph de Winter and Larry Loeb, Practice Commentaries at 413, McKinney's Cons Laws of NY, Book 49 (2006) ; *see also Capital Holding Co. v Stavrolakes*, 242 AD2d 240, 243-244 (1st Dept 1997), *affd* 92 NY2d 1009 (1998). Real Property Law § 235-f applies to proprietary leases. *Mitchell Gardens No. 1 Coop, Corp. v Cataldo,* 175 Misc 2d 493, 495 (App Term, 2d Dept 1997); *Southridge Coop. Section No. 3 v Menendez*, 141 Misc 2d 823, 828 (App Term, 2d Dept 1988); *see also Lenox Hill Hosp. v 305/72 Owners Corp.*, 90 AD3d 470, 471 (1st Dept 2011) (proprietary lease's occupancy provision was consistent with Real Property Law § 235-f [2]); *see generally* Richard Siegler, *Development of the Roommate Law*, NY Law Journal, July 5, 1989 at 3.

Plaintiffs' reliance on Real Property Law § 235-f is unavailing, as are plaintiffs' claims that the occupancy agreement is null and void and/or against public policy. Even if Blumenfeld were a tenant within the meaning of the statute, which is questionable since the amended 2017 complaint does not allege that he was a party to a lease or any rental agreement, he and a spouse, if any, admittedly have never occupied the Apartment, much less occupied it as their primary residence, as required by Real Property Law § 235-f (3). Nor does the amended 2017 complaint allege that Blumenfeld ever intended to occupy the Apartment as his primary residence. *See 445/86 Owners Corp. v Haydon*, 300 AD2d at 88. Further, Dogwood LLC has never occupied the Apartment and is not capable of doing so. Given the foregoing, this cause of action seeking declaratory relief fails to state a viable claim. Therefore, the branch of defendants' motion seeking an order dismissing the amended 2017 complaint's sixth cause of action is granted, and that cause of action is dismissed.

Breach of Warranty of Habitability

The amended 2017 complaint's seventh cause of action, which seeks monetary damages as well as a full rent abatement until the claimed violations are remedied, purports to allege on Dogwood LLC's behalf a cause of action for breach of the warranty of habitability predicated on Real Property Law §235-b. Amended 2017 complaint, ¶¶ 183. That statute provides that, in every residential lease, whether written or oral, "the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented . . . are fit for habitation and for uses reasonably intended by the parties . . . ." The tenant's obligation to pay rent under the lease "is dependent upon the landlord's satisfactory maintenance of the premises in habitable condition." *Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 327 (1979), *cert den* 444 US 992 (1979). The warranty of habitability applies to tenant-shareholders in cooperative buildings. *Frisch v Bellmarc Mgt.*, 190 AD2d 383, 384-385 (1st Dept 1993); *Suarez v Rivercross Tenants' Corp.*, 107 Misc 2d 135 (Appellate Term, 1st Dept 1981). It is the proprietary lease which creates a landlord-tenant relationship between the shareholder and the cooperative corporation. Richard Siegler, *Cooperatives and Condominiums, The Warranty of Habitability*, NYLJ, Jan. 5, 1994 at 3, col 2. Furthermore, it is the landlord-tenant relationship which gives rise to the warranty of habitability. *Frisch v Bellmarc Mgt.*, 190 AD2d at 388-389. Significantly, unless the lessee has personally resided in the apartment, he cannot avail himself of the warranty of habitability. *Id.* at 390; *Halkedis v Two E. End Ave. Apt. Corp.*, 161 AD2d 281, 282 (1st Dept 1990).

The breach of warranty of habitability cause of action was previously dismissed in the 2015 action because Blumenfeld never lived in the apartment and there were no prior demands to fix those alleged conditions which were claimed to be detrimental to human habitation. The

amended 2017 complaint attempts to rectify those deficiencies, alleging that, in 2017, Dogwood LLC made specified demands on Stable and the Board to remedy those conditions (amended 2017 complaint, ¶¶ 72, 199), including a leaky roof, which was "likely" caused by a warped structural roof support beam, and "widespread," mold due to the leaks, but that the Board and Stable "essentially" refused to make repairs, claiming that they were Dogwood LLC's responsibility, but did agree to install a new roof membrane. Amended 2017 complaint, ¶¶ 69, 77-78, 81, 187-191, 192, 195. It is further alleged that the Apartment's private elevator had, over the years, been issued various violations and had been inoperable, requiring repairs, which Dogwood LLC made, but for which Stable refused to reimburse Dogwood LLC, and that, because of its advanced age, the elevator will continue to need repairs. It is also alleged that Dogwood LLC bargained for, but did not get, a unit that was fit for habitation, and that, on "information and belief," the foregoing conditions have rendered the Apartment "uninhabitable, in whole or in part." *Id.*, ¶ 200.

In an apparent attempt to address the fact that nobody had moved into the Apartment, it is now alleged that, in about November 2016, Blumenfeld's adult son, Lucas, despite the various alleged hazardous and detrimental conditions, which rendered the Apartment unfit for human habitation, moved into the Apartment because he worked in the City and wanted a short commute, and vacated it in July 2017.[12] *Id.*, ¶¶ 67, 83. It is further alleged that, after he vacated the Apartment, his brother Max moved in and continues to live there. *Id.* ¶ 83. Dogwood LLC seeks, under this cause of action, a complete abatement of the monthly maintenance and

[12] Lucas moved out about eight months after he moved in, according to plaintiffs' counsel, "solely" because he obtained a job in California. Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 9.

monetary damages.

Although the proprietary lease denominates Dogwood LLC as the proprietary lessee, it is not an individual and thus cannot occupy the Apartment within the intendment of the proprietary lease, which contemplates that the building's lessees would be individuals, and that the lessee, together with any family members, would be occupying their respective units for residential purposes. *Cf. Lenox Hill Hosp. v 305/72 Owners Corp.*, 90 AD3d at 471. Because Dogwood LLC cannot occupy the Apartment and, thus, never attempted to live in it, it has no breach of warranty of habitability claim against Stable. *Cf. Halkedis v Two E. End Ave. Apt. Corp.*, 161 AD2d at 282. Dogwood LLC is, of course, free to pursue any viable breach of contract cause of action premised, for example, on breaches of paragraphs two and seven of the proprietary lease, or for any other viable cause of action that it has.

As for the newly-asserted claim that Lucas and, thereafter, his brother Max, moved into the Apartment, as previously noted in connection with the sixth cause of action, their occupancies of the Apartment were, and, as to Max remains, improper. Further, even assuming, for argument's sake, that the occupancy agreement permitted them to move in despite the fact that their father never occupied the Apartment, neither Blumenfeld, Lucas, nor Max is a proprietary lessee (*id.*), nor do they have a landlord-tenant relationship with any defendant. Blumenfeld, for whatever reason, made a calculated decision not to become the Apartment's proprietary lessee/shareholder. The occupancy agreement, to which Blumenfeld is not a party, merely provides the mechanism by which Dogwood LLC is permitted to populate the Apartment. The occupancy agreement provides that Dogwood LLC agrees that it would not sublet or allow occupancy by anyone except Blumenfeld and his immediate family members who reside with

him or any subtenant approved by Stable. It is unclear whether: the occupancy agreement considers Blumenfeld and his family residing with him to be Dogwood LLC's permitted subtenants or its occupants with Stable's consent, which had previously been obtained after the Board interviewed Blumenfeld; Blumenfeld and/or his sons paid monthly maintenance to Dogwood LLC; and whether Blumenfeld and/or his sons had any written agreement with Dogwood LLC regarding their occupancy.

However, the seventh cause of action does not allege that Blumenfeld has a prime leasehold interest in the Apartment or a landlord-tenant relationship with Stable. *McCarthy v Board of Mgrs. of Bromley Condominium*, 271 AD2d 247, 247 (1st Dept 2000); *see also Wright v Catcendix Corp.*, 248 AD2d 186 (1st Dept 1998) (motion to dismiss subtenants' causes of action against cooperative corporation for breach of the warranty of habitability and breach of the lease, among other causes of action, was properly granted where there was neither a contractual nor a landlord-tenant relationship between the subtenants and the cooperative corporation, which causes of action could be asserted by the subtenants against their sublessor, but not against the lessor). Similarly, Blumenfeld does not allege that he and his family were in privity with Stable (*see generally SI Hylan Care, LLC v 2454-2464 Hylan Blvd., LLC*, 138 AD3d 821, 822 [2d Dept 2016]; *Tamco Enters. v Mitsubishi Elec. Am.*, 190 AD2d 623, 623-624 [1st Dept 1993), or were third-party beneficiaries of the proprietary lease between Dogwood LLC and Stable. *Id.* (remote subtenant could not avail itself of any lease provision because it was not a third-party beneficiary of the lease, since the landlord did not undertake a duty toward it or intend to confer any benefit upon it). Indeed, the complaint does not even mention the two trusts, which are Dogwood LLC's sole members, or refer to the fact that Blumenfeld is a trustee of one of them. Any ability that

Blumenfeld and his sons may have had to reside in the Apartment flows, in the first instance, from whatever occupancy arrangement Blumenfeld and his sons may have with Dogwood LLC. At most, they are Dogwood LLC's undertenants. *Cf. 304 PAS Owner LLC v Life Extension Realty LLC*, 60 Misc 3d 132 (A), *2, 2018 NY Slip Op 51020 (U) ("undertenant, whether licensee, subtenant or occupant, need not be served with the notice of termination" in holdover proceeding, since they were not the lessor's immediate tenant).

In any event, the seventh cause of action does not purport to assert a claim on behalf of Blumenfeld or his sons, and repeatedly asserts allegations, not about what Blumenfeld bargained for, but what Dogwood LLC bargained for under its proprietary lease, and Dogwood LLC's inability to use the Apartment as intended, and only seeks relief on Dogwood LLC's behalf. Proposed amended complaint, ¶¶ 165, 166, 168, 180. Dogwood LLC cannot use the occupancy of the Apartment by strangers in an attempt to benefit from the proprietary lease or, in the case of Max and Lucas, improper occupants, to cure Dogwood LLC's inability, as an entity, to occupy its residential unit in order to create a breach of the warranty of habitability claim. Thus, in the amended 2017 complaint, Dogwood LLC fails to state a breach of warranty of habitability cause of action as against Stable pursuant to Real Property Law § 235-b and that claim is thus dismissed.[13]

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[13] As for Dogwood LLC's assertion that it was withholding monthly maintenance because of the alleged breach of the warranty of habitability and the failure to make repairs, this Court notes that the proprietary lease prohibits the withholding of rent on account of any set-off or claim that the lessee might have against the lessor. Peterson affidavit in support of motion to dismiss the amended 2017 complaint, exhibit 2, Proprietary lease, ¶ 12; *see also Dune Deck Owners Corp. v Liggett*, 34 AD3d 523, 524 (2d Dept 2006) (cooperative corporation properly granted summary judgment for maintenance arrears and late fees, where proprietary lessee waived right to any offset pursuant to terms of proprietary lease ¶ 12, which provision was identical to ¶ 12 of the proprietary lease in the instant case). *See Dune Deck Owners Corp. v J.J.*

Derivative Causes of Action

The eighth through eleventh causes of action assert derivative claims by plaintiffs on Stable's behalf and are based on the prefatory allegations concerning the cellar units, namely that the use of some of the cellar level rooms fail to conform to the building's 1987 certificate of occupancy, which allegedly authorizes the cellar level space to be used solely for storage or as recreation rooms, but not as bedrooms or as bathrooms with a tub or shower, which is how portions of the lower levels of those units are being used, as set forth in the proprietary lease's description of the duplex garden apartments. The amended 2017 complaint avers that, as the holder of 30% of Stable's shares, Dogwood LLC stands to be the most affected shareholder in the event of adverse action resulting from the cellar units' illegal occupancy. *Id.*, exhibit 1, Amended 2017 complaint, ¶ 140.

It is also alleged, on "information and belief," that the cellar space cannot be legalized, because the entire cellar is below grade and, in the event of fire, each cellar unit lacks a sufficient number and means of egress, including because, "upon information and belief," some of the doors to the hallway have been blocked or sealed. *Id.*, ¶¶ 99, 102-106, 116. It is further claimed that the cellar lacks adequate light and air to satisfy various specified and unspecified code provisions and statutes (*id.*, ¶¶ 204, 208), including Multiple Dwelling Law § 300 (6), which bars the use of the cellar for living purposes, unless a written permit is issued after all applicable laws

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& P. Assoc. Corp., 2008 NY Slip Op 31676 [U] [Supreme Ct, Suffolk County, 2008], *3); *see also 170 West End Ave. Owners Corp. v Turchin*, 37 Misc 3d 1226(A) (Civil Ct, NY County 2012), 2012 NY Slip Op 52185(U), *7-*9. Proprietary lease paragraph 4 (b) provides for a rent abatement, but only when a fire or other cause has rendered the Apartment "wholly untenantable" or when the means of access to the Apartment has been destroyed. *Cf. generally Granirer v Bakery, Inc.*, 54 AD3d at 270-271.

are satisfied, and Multiple Dwelling Law § 34, which sets forth various requirements for cellar rooms, including those pertaining to adequate ventilation, lighting, and window size, fire-proofing, outside drainage for the yard and every exterior court, and to the damp- and water-proofing of exterior walls and interior floors.

Of the three current cellar unit owners, Youngberg is alleged to have acquired her shares in 2000, El-Sawy in 2013, and Cavaleri in 2016. *Id.*, ¶¶ 10, 12, 13. The amended 2017 complaint alleges that the "Board" was made aware of the illegal use "on numerous occasions", including in July 2015, when Dogwood LLC commenced the 2015 action against Stable.[14] *See id.*, ¶¶ 89, 172, 228. The Board was not a party to the original July 2015 complaint, which, is the only specific, non-conclusory notification of this illegality alleged in the amended 2017 complaint, which contains no prior allegation of any particular demand made of the Board by any identified individual on Dogwood LLC's behalf to take any steps in an attempt to deal with the cellar units' lack of conformity with the certificate of occupancy. Instead, the amended 2017 complaint merely sets forth conclusory allegations regarding demands. *See* Amended 2017 complaint, ¶¶ 3, 112, 136, 138, 139.

The amended 2017 complaint does not distinguish among the various Board members

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[14] The original July 2015 complaint contains allegations regarding the cellar units' failure to conform to the certificate of occupancy in partial support of plaintiffs' cause of action alleging that Stable breached its fiduciary duty to plaintiffs, based on a claim of disparate treatment, for which plaintiffs sought monetary damages and an order directing Stable to remedy the lack of compliance with the certificate of occupancy. Peterson affidavit in support of motion to dismiss amended 2017 complaint, exhibit 7, ¶¶ 50-57, 68, 90-96. That complaint also sets forth a cause of action which alleges that Dogwood LLC was entitled to a rent abatement because the cellar units violated the building's certificate of occupancy. *Id.*, ¶¶ 97-99. This Court dismissed both causes of action, the former because Stable lacked a fiduciary relationship with its shareholders, and the latter because the plaintiffs were not injured by the cellar units' lack of conformity with the certificate of occupancy. *Id.*, exhibit 8 at 18-21.

regarding when Dogwood LLC allegedly informed the Board of the alleged illegal occupancy of the cellars. When the July 2015 action was commenced, the Board was composed of Matanic, Youngberg (the only Board member at that time who occupied a cellar unit), and Frank, who is not a party to the 2017 action. Thus, even if a demand had been made of the 2015 Board, the cellar unit occupants did not control the Board. Further, there is no allegation in the amended 2017 complaint that Dogwood LLC ever notified El-Sawy of the issue after he became a Board member at some unspecified time in 2016. In any case, the amended 2017 complaint alleges demand futility insofar as two of the three Board members at the time the amended 2017 complaint was filed, i.e., El-Sawy and Youngberg, because they were cellar unit proprietary lessees, were incapable of impartiality and deciding whether to take steps to halt the illegal uses and restore the nonconforming parts of the cellar levels to conforming space. *See Marx v Akers*, 88 NY2d 189, 198-199, 200 (1996) (demand is excused as futile when complaint alleges with particularity that majority of board is interested in the transaction).

Despite this claim of demand futility, plaintiffs' counsel, in opposing the motion, points to a consulting agreement and various invoices, dated April 20, 2017 (allegedly four days before DOB's inspector first visited the building to try to inspect the cellar units [*see id.*, ¶ 113]) and June 28, 2017, which shows that the Board, as then comprised, had in fact taken steps to address the issue of the illegal cellar occupancy about six months before the amended 2017 complaint, and several months before the proposed amended complaint in the 2015 action, were filed. *See* Rosenberg affirmation in opposition to motion to dismiss amended 2017 complaint, ¶¶ 10, 14; *id.*, exhibit D (4/20/2017, 6/28/2017 invoices from Callahan Consulting, for "Consultation & DOB Research", "DOB Research," "Zoning Code and Feasibility," and "Zoning Analysis"); *see*

also id. (Sheldon Lobel letter of 9/25/2017 relating to another consultant hired by Matanic on Stable's behalf to perform a zoning investigation to address the residential occupancy in the cellar that was contrary to the certificate of occupancy).

Nevertheless, plaintiffs' counsel now takes the position that any attempt by the Board, including any sum spent by it to explore the legalization of the cellar units and to try to clear the DOB violation, is a breach of fiduciary duty because it constitutes the payment of Stable's funds allegedly for the sole purpose of personally benefitting those Board members who are proprietary lessees of the cellar units (Rosenberg affirmation in opposition to motion to dismiss, ¶ 14), notwithstanding that the complaint charges the Board with refusing to investigate and remedy the illegal occupancies, and to eject the cellar unit shareholders "if necessary" (Amended 2017 complaint, ¶¶ 138, 139), allegations which seemingly leave open the cellars' legalization as a possible resolution. *See also id.*, ¶ 89 (emphasis added) (Board breaches its obligations if it does nothing to "*correct*[]" or stop the illegal cellar uses).

Defendants seek dismissal of plaintiffs' derivative causes of action on various substantive grounds. Defendants' counsel also surmises that Dogwood LLC or someone on its behalf placed a 311 call and reported that the cellar units' occupancy had been changed to bedrooms, rendering the use illegal, thereby triggering inspection of the cellar units and the issuance of the DOB violation, and exposing Stable to the possibility of future fines and expenses. *See* Peterson affidavit in support of defendants' motion to dismiss the amended 2017 complaint, at 4, n 1. Defendants assert that plaintiffs' goal was to use the DOB violation and these derivative causes of action as a bargaining tool in its attempt to obtain the required consent to its renovation plans. Accordingly, defendants maintain that it would be improper to allow

Dogwood LLC to bring any derivative claim on Stable's behalf and that such causes of action must be dismissed.

The branch of defendants' motion which seeks an order dismissing Dogwood LLC's derivative causes of action solely on the ground that the relationship between the parties are such that Dogwood LLC cannot act as a proper representative of Stable on these claims is denied at this juncture. Assuming, for argument's sake, that a Dogwood LLC representative reported the illegal cellar occupancies to DOB, Dogwood LLC had the right to do so. Dogwood LLC has an interest as a shareholder in ensuring that the cellar units' nonconformity with the certificate of occupancy is remedied because, for example, if someone in the cellar were injured in a fire due to inadequate means of egress and Stable were successfully sued, such a judgment would negatively impact Stable, and likely cause indirect harm to the shareholders, including Dogwood LLC. Whether any such call was the best way to attempt to resolve this problem among the shareholders is, however, another matter.

Although Dogwood LLC's amended 2017 complaint alleges that the Board failed to take any measures to address the DOB violation, plaintiffs' counsel takes a position to the contrary, namely that the Board breaches its fiduciary duty to Stable when it takes any steps to address the issue and ascertain whether the cellar units can be legalized. This Court finds the foregoing argument troubling, and suggests that Dogwood LLC might not be the best candidate to represent Stable derivatively. *See generally Gilbert v Kalikow,* 272 AD2d 63 (1st Dept 2000), *citing G.A. Enters. v Leisure Living Communities*, 517 F2d 24, 26-27 (1st Cir 1975); *James v Bernhard*, 106 AD3d 435, 436 (1st Dept 2013); *Sigfeld Realty v Landsman*, 234 AD2d 148 (1st Dept 1996); *see generally Pokoik v Pokoik*, 146 AD3d 474, 475 (1st Dept 2017).

However, the cat is now out of the proverbial bag, since the cellar unit shareholders and the current Board members are aware of the issue, and DOB has been alerted to it. The illegality must by remedied, irrespective of whether Dogwood LLC's renovation plans warrant approval and DOB has sufficient staffing to follow up on the violation. If one with knowledge and responsibility for resolving the problem takes no action and bodily injury or property damage occurs as a result, he or she may well be held accountable. The law is clear that, unless certain conditions are met, cellar occupancy is prohibited by laws and regulations that have evolved to protect the occupants' health and safety.

It is unclear from the motion papers whether allegations regarding the cellar units, including those pertaining to adequate and proper means of egress, are accurate. Although there is no claim that, during the past 30 years, anyone in the cellar level was ever harmed as a result of a lack of compliance with the relevant statutes and codes, that is not necessarily indicative of the present risk of harm facing the cellar units' lessees, their families, and their guests. Whether the cellar units can be legalized is uncertain where, as here, the complaint's allegation in that regard was made on "information and belief." Amended 2017 complaint, ¶ 116. Further, it is unclear how long, if ever, it would take to legalize the cellar units, and whether DOB gave Stable a time frame for filing a certificate of correction.

That the Board implemented measures in 2017 to address this issue is a step in the right direction, but whether further steps are needed in the meantime to protect the safety of the units' occupants remains unresolved. This Court is not unsympathetic to the fact that the cellar units' lack of compliance with the certificate of occupancy is understandably a difficult and troubling one with which Stable's Board members must grapple and attempt to resolve in this small

building, where presumably everyone knows the shareholders associated with those units, which are not merely an investment, but their homes. Further, the potential loss of three of the ten units, or parts thereof, surely has economic implications for all of Stable's shareholders.

That two of the three Board members are cellar unit shareholders is problematic in terms of their conflicting interests, as is the fact that Dogwood LLC, which has asserted derivative claims involving the cellar units, wants its renovation plans approved by a Board, the majority of which owns cellar units and whom Dogwood LLC could unfairly attempt to pressure. Yet, irrespective of whether Dogwood LLC dangles the carrot of dropping any derivative claim in exchange for approval of its plans, the Board must ensure that the building conforms to the certificate of occupancy. No other shareholder has offered to step in as plaintiff in connection with any derivative claim. *See e.g. James v Bernhard*, 106 AD3d at 435-436. This Court cannot ascertain from the motion papers the extent to which the other shareholders have been made aware by the Board, or otherwise, of the potential conflicts on both sides, and the implications such conflicts may have for Stable.

Moreover, given that the safety of the cellar units' occupants may be imperiled and the fact that the majority of the Board has conflicting interests and that some additional oversight may be needed, including to see that Stable's funds are reasonably spent in light of the probabilities of legalizing the units, this Court does not believe that the derivative claims warrant dismissal based solely on the assertion that Dogwood LLC is an inappropriate plaintiff for the derivative causes of action.

Despite the foregoing, the branch of defendants' motion which seeks an order dismissing the eighth through eleventh causes of action is granted, and such causes of action are dismissed.

Defendants correctly urge that Blumenfeld is not, and has never been, a shareholder, and, therefore, lacks standing to assert any of the derivative causes of action. *See generally Tenney v Rosenthal*, 6 NY2d 204, 211-213 (1959). Accordingly, all of the derivative causes of action are dismissed as to him. As for the remaining plaintiff, Dogwood LLC, each of the derivative causes of action includes all of the allegations that precede that cause of action, including those that are relevant solely to the individual causes of action. The mixing of such claims under a cause of action requires the dismissal of all of the derivative causes of action on that ground alone. *Barbour v Knecht*, 296 AD2d at 227-228. Thus, all of the derivative causes of action are dismissed as to plaintiff Dogwood LLC. In addition, as to Cavaleri, in his capacity as a Stable officer, the amended 2017 complaint does not allege any proper claim as to him, because he was not a Board member when that pleading was filed, and there are no allegations that, as an officer, he had any power over the Board's actions or inactions, including over whether the Board should have taken measures to legalize the cellar's occupancy. Further, there is no evidence that he neglected his obligations as a Board member.

Because leave to replead may be appropriate with respect to one or more of the derivative causes of action, whether in this action, or in the largely identical proposed amended complaint in the 2015 action, the merits of the balance of the derivative causes of action will be addressed. The amended 2017 complaint's derivative ninth cause of action, which seeks a mandatory injunction compelling Youngberg, Cavaleri, and El-Sawy to grant access to each of their units to DOB's inspector, is dismissed on the additional ground that it is devoid of any underlying factual basis. The complaint alleges that these three proprietary lessees purposely refused entry to DOB's inspectors to conceal their illegal units. However, as is further alleged in the amended

2017 complaint, in August 2017, DOB's inspector was granted access to each of the three cellar units and issued a violation. *See id.*, ¶¶ 117, 216. The amended 2017 complaint, in an attempt to preserve this cause of action, which plaintiffs had initially asserted in their proposed amended 2015 complaint, before DOB had been granted access, alleges, on "information and belief," that in the future the cellar unit owners will not be cooperative in permitting such inspections. *Id.*

This assertion is without merit since all three cellar unit occupants/proprietary lessees have already granted access to their units. Moreover, plaintiffs' counsel, pointing to various April, June, and September 2017 invoices and a consultation agreement, a number of which documents predate the DOB violation, demonstrates that the Board at that time, which included two of the cellar unit shareholders, Youngberg and El-Sawy, hired, through Matanic, consultants and counsel to perform DOB research in an attempt to remove the DOB violation and to ascertain whether the cellar units could be legalized, further demonstrating that the issue was not being ignored, at least by two of the three cellar unit shareholders. *See* Rosenberg affirmation in opp. to dismissal motion, ¶ 14; *id.*, exhibit D. Neither does the complaint allege what the unit owners would hope to gain by refusing entry to their units by a DOB inspector in the future, here where DOB is already aware that the units fail to comply with the certificate of occupancy. If, in the future, a cellar unit proprietary lessee unreasonably fails to comply with any required inspection, Dogwood LLC is free to take any steps it deems necessary to obtain compliance.

The derivative eleventh cause of action alleges a breach of fiduciary duty by those who were Board members when the amended 2017 complaint was filed, premised on the Board having "repeatedly" been advised by "Dogwood" LLC of the illegal occupancy and having allegedly "done nothing about it." Amended 2017 complaint, ¶¶ 228, 231. This cause of action,

which must be pleaded in conformity with the particularity requirements of CPLR 3016 (b), is deficient as to El-Sawy because the only specific notification alleged in the complaint was the commencement of the original 2015 complaint when El-Sawy was not a Board member. There is no particularized allegation that El-Sawy was otherwise notified. Moreover, the amended 2017 complaint does not attempt to distinguish among any damages allegedly caused by each individual Board member's alleged inaction, in this case where El-Sawy became a Board member later than Youngberg and Matanic. Neither does the amended 2017 complaint set forth the precise term of office of each such Board member, which would relate to any damages attributable to each member's alleged inaction. Indeed, this cause of action fails to allege any damages whatsoever, since the DOB has not fined Stable. The complaint only alleges future damages which "could" arise, such as fines, penalties, court fees, and the possible acceleration of the building's mortgage due to the building's lack of compliance with the certificate of occupancy. Amended 2017 complaint, ¶ 234; *see also Pokoik v Pokoik*, 115 AD3d at 429 (damages directly due to the other side's misconduct is a required element of a breach of fiduciary duty cause of action). Even if Stable incurred any such costs, the complaint does not distinguish between any damages that accrued due to a particular Board member's inaction, once notified of the issue, and any damages accruing solely because the non-conforming cellar units were created and leased to the shareholders in the first place. In light of these additional pleading deficiencies, the eleventh cause of action is dismissed on these grounds as well.

This Court further observes that plaintiffs' counsel's newly-raised unpleaded theory, i.e., that the Board's spending of any sum to address the cellar units' illegality amounts to a breach of fiduciary duty, is inadequate to constitute such a claim, because the DOB violation itself,

according to the amended 2017 complaint, requires that Stable correct and remove the violating conditions, which does not preclude a reasonable attempt by Stable to ascertain whether the violating conditions can and should be corrected and, if so, to correct them. *Id.*, ¶ 117. Moreover, the amended 2017 complaint alleges that the Board breaches its fiduciary duty if it does nothing to "investigate," "correct, remedy [and/]or rectify" the illegal uses and occupancies of parts of the cellar levels, and bases the complaint's assertion of demand futility on the Board's alleged refusal to "investigate and remedy" the illegal occupancies." *See id.*, ¶¶ 89, 139, 172.

Further, plaintiffs' counsel's new position, that Stable's payment of any sum to address the illegal occupancy constitutes a breach of fiduciary duty because it solely benefits the cellar unit occupants, lacks merit under the circumstance presented. Given that shares, which were associated with illegal units, were sold, and Stable leased those illegal units, representing, in essence, in the proprietary leases that such units had their only bathing facilities and bedrooms in the cellar area which, as it turns out, was illegal for those purposes, and where Stable granted those shareholders the right to quiet enjoyment of those units, without any hindrance by Stable (*see id.*, exhibit 2, Proprietary lease, ¶¶ 7 [h], 10]), any cooperative board would be wise to at least take preliminary steps to ascertain the legal and economic feasibility of legalizing those units. In particular, if those units could be legalized at a relatively reasonable cost, Stable could avoid or minimize its legal exposure to those shareholders. *See e.g. Bartolomeo v Runco*, 162 Misc 2d 485, 489-490 (City Court, Yonkers 1994); *see also Measom v Greenwich & Perry St. Hous. Corp.*, 268 AD2d 156, 158-163 (1st Dept 2000) (co-op liable for breaching proprietary lease where cellar studio apartment was not legally habitable as a dwelling at time shares were acquired); *Measom v Greenwich & Perry St. Hous. Corp.*, 8 Misc 3d 50, 51- 54 (App Term, First

Dept 2005), *affd as mod*, 42 AD3d 366 (1st Dept 2007) (damages, including reciprocal attorneys' fees, awarded to proprietary shareholders of illegal cellar studio apartment). Stable could also avoid the possible loss of monthly income associated with those units, all of which damages and losses may well be onerous for the remaining shareholders, especially for its largest shareholder, in this relatively small building. On the other hand, were sufficient facts to emerge that the Board had spent unreasonable sums in an effort to legalize the cellar units, when the circumstances, including the odds of success, did not warrant such expenditures, that would be another matter, and Dogwood LLC would be free to seek leave to assert such a cause of action. However, as of yet, no such factual allegations have been made.

As for the two remaining derivative causes of action, the eighth and the tenth, it must be noted that the defendants do not substantively attack the eighth cause of action except to the limited extent previously indicated as to all of the derivative causes of action. However, the allegations of this cause of action are relevant to this Court's discussion of the tenth cause of action, which defendants assert is completely devoid of merit. Dogwood LLC's eighth cause of action requests a judgment declaring that the cellar units' occupants' use of portions of the cellar level space as residential living space, i.e., bedrooms and full bathrooms, violates Multiple Dwelling Law §34, which sets forth various requirements for cellar and basement rooms, Multiple Dwelling Law § 300 (6), which bars the occupancy of cellar and basement rooms for living purposes, without a written permit for such occupancy having been issued after compliance with all applicable laws, and New York City Administrative Code § 27-217, which code provision was repealed, effective July 1, 2008, and barred any change in use or occupancy that was inconsistent with the building's certificate of occupancy, without obtaining a new

certificate. *See People v Butt*, 153 Misc 2d 751, 735 (Crim Ct, Kings County 1991).

It is further alleged that there are requirements of the Building, Fire, Administrative, and Housing Codes that must be met before a cellar space can be occupied for residential purposes, and that no permits, plans, or certificate of occupancy exists which show that the cellar units have been legalized for residential use. Plaintiffs seek a declaration that the use of those parts of the cellar levels of each cellar unit which have been used as residential living space amounts to an illegal occupancy. This cause of action further requests preliminary and permanent relief enjoining Youngberg, Cavaleri, and El-Sawy, and anyone residing in their apartments, from using any cellar level room as residential living space and compelling the proprietary lessees of those units to restore those cellar level rooms of their units which have been associated with residential living space to conform to the certificate of occupancy as recreation rooms with a powder room.

The tenth cause of action, which incorporates all prior allegations, including those of the eighth cause of action, purports to allege, on Stable's behalf, a "common law" derivative claim, "pursuant to RPAPL §601," to "recover" the three cellar units, or their cellar portions, and to eject the shareholders/occupants of those units, Youngberg, El-Sawy, and Cavaleri, and members of their households, and any other occupants and subtenants of those units "from all illegal uses" (Amended 2017 complaint, ¶ 226), on the ground that occupancy of portions of the cellar level is illegal because it violates the certificate of occupancy, the proprietary lease, the Multiple Dwelling Law, and the New York City fire, health, safety, and zoning codes. *Id.*, ¶¶ 222, 224-225. RPAPL § 601 is a section of Article 6 of the Real Property Actions and Proceedings Law, which article is headed "Action to Recover Real Property." RPAPL § 601 is entitled "[d]amages

for withholding real property obtainable in action to recover possession; set-off by defendant," and provides for the damages, including lost profits and rents, or the value of use and occupancy that a plaintiff may recover from a defendant who has been improperly withholding plaintiff's property. This statute further provides that, when a defendant makes permanent improvements to the property in good faith, "while holding under color of title, adversely to the plaintiff," the value of such improvements must be used to reduce the amount of damages owed by defendant to plaintiff, but not beyond that which is owed to plaintiff.

The tenth cause of action further alleges that, as a result of the cellar unit proprietary lessees' failures to comply with the certificate of occupancy and their violation of various statutes and codes, Stable is exposed to the possibility of incurring fines and penalties, and is at risk for a mortgage default, pursuant to Multiple Dwelling Law § 302 (1), which permits the mortgagee to declare a mortgage due if the building is fully or partially occupied in violation of Multiple Dwelling Law § 301. The latter statute provides that a multiple dwelling can not be occupied, in whole or in part, unless a certificate is issued demonstrating that the dwelling fully conforms to the Building Code, all applicable laws and the requirements of certain provisions of the Multiple Dwelling Law. Aside from seeking to recover the cellar units or parts thereof and to eject the occupants of the cellar units from their apartments or from the cellar parts of those units, this cause of action charges Youngberg, Cavaleri, and El-Sawy with violating their proprietary leases, the certificate of occupancy, and various statutes and codes, and seeks to bar their and their units' occupants' illegal uses of those units, to "remove" illegal uses, and to restore the cellar rooms to the occupancy permitted by the current certificate of occupancy. Amended 2017 complaint, ¶ 226. Although the wording of this cause of action is somewhat vague, it appears as if the

demand to remove the illegal uses and to restore the units is directed at those units' proprietary lessees, since they are alleged to be in violation of their proprietary leases.

Plaintiffs' reliance on RPAPL § 601 is misplaced. That statute has no relationship to the circumstances here, where the proprietary lease describes the cellar units as having cellar level bedrooms and full baths and the upstairs levels as having only a powder room and no bedrooms, and further provides that the lessee shall have the quiet enjoyment of the apartment without any suit or hindrance by Stable if the rent is paid. Proprietary lease ¶¶ 7 (h), 10. There is no allegation under this cause of action that Stable would be entitled to any damages from the owners of each of the cellar units, and this cause of action requests no damages. Moreover, if those units cannot be legalized and the cellar units' proprietary lessees assert breach of contract claims against Stable, it may be found liable to them. *See e.g. Measom v Greenwich & Perry St. Hous. Corp.*, 8 Misc 3d at 51- 54.

Although the tenth cause of action cites to cases, including *Measom v Greenwich & Perry St. Hous. Corp.* (8 Misc 3d at 51- 54), in which cellar occupants were ejected from their apartments (Amended 2017 complaint, ¶ 222), and this cause of action alleges that it is one sounding in common law ejectment (Amended 2017 complaint, ¶ 226) to permit Stable to recover all three cellar units and/or the cellar portions of the cellar units and to restore the units to their lawful occupancy as recreation rooms with powder rooms, the plaintiffs' opposing memorandum of law avers that plaintiffs are not seeking to eject the cellar unit shareholders *"from their homes,"* but, rather, are *"seek[ing] to eject them from using, i.e., sleeping in,* the cellar areas in violation of the Building's C/O. They may still lawfully use such areas for storage and/or "recreation rooms."' Plaintiffs' opposing memo of law at 27, n 20 (emphasis in the

original). This same relief has effectively been sought under the eighth cause of action, essentially on the same grounds, namely, to enjoin the cellar units' proprietary lessees, and any other occupant of those units, from using the cellar rooms in a manner that is illegal and violates the certificate of occupancy, the Multiple Dwelling Law, and various codes, and to restore the cellar rooms to their lawful occupancy. Given plaintiffs' concession that this cause of action does not seek to actually eject the cellar unit shareholders, this claim is also dismissed, as duplicative of the eighth cause of action.

Reciprocal Attorneys' Fees/ Prior Pending Action/ Sanctions

The twelfth cause of action seeks reciprocal attorneys' fees, in accordance with Real Property Law § 234, based on proprietary lease section 28, which sets forth the circumstances under which Stable would be entitled to attorneys' fees from Dogwood LLC. This cause of action is dismissed as to Blumenfeld because he is not a party to the proprietary lease. This cause of action does not specify the bases for Dogwood LLC's entitlement to such fees except to the extent that it incorporates every other allegation of the complaint. It does not appear, however, that Dogwood LLC is seeking, under this cause of action, to recoup legal fees in connection with its derivative causes of action. If Dogwood LLC were asserting such a claim for reciprocal attorneys' fees, however, such request would have to be dismissed because the derivative claims have been dismissed and in, any case, the derivative claims neither arise under Dogwood LLC's proprietary lease, nor does Real Property Law § 234 entitle any party to reciprocal attorneys' fees for bringing derivative claims.

As for the balance of this cause of action, it should be noted that Dogwood LLC asserted

a claim for reciprocal attorneys' fees in connection with its first and third causes of action in its amended 2017 complaint, but did not assert such a claim for reciprocal legal fees with respect to its other individual cause of action, including its second cause of action, which seeks injunctive relief based on the alleged breaches of the lease set forth in the first cause of action. Whether a claim for reciprocal attorneys' fees arising from the first and third causes of action is again being sought under the twelfth cause of action is unclear as is whether Dogwood LLC is seeking, under the twelfth cause of action, to assert a claim for reciprocal attorneys' fees in connection with its second cause of action. To the extent that Dogwood LLC is seeking the same reciprocal attorneys' fees twice under two different causes of action, such demand is redundant and, thus, improper, and if reciprocal attorneys' fees are being sought solely under the twelfth cause of action, each underlying cause of action from which the right to such fees allegedly flows, should have been set forth in the twelfth cause of action.

Nevertheless, because all of the valid claims remaining in the amended 2017 complaint have been asserted in the proposed amended 2015 complaint, and because Stable is the only defendant left in the 2017 action and is the only current defendant in the 2015 action, in the exercise of this Court's discretion (*Whitney v Whitney*, 57 NY2d 731 [1982]), the balance of the amended 2017 complaint, i.e., those portions of the first, second, third, and twelfth causes of action that have not already been dismissed, are dismissed on the ground that there is another action pending, namely the 2015 action. *See* CPLR 3211 (a) (4). There is no reason why plaintiffs needed to commence the 2017 action, soon thereafter serve the amended 2017 complaint, and then seek leave to serve a virtually identical proposed amended 2015 complaint. There are substantial identities of the parties, and "'both suits arise out of the same subject matter

or series of alleged wrongs.'" *White Light Prods. v On The Scene Prods.*, 231 AD2d 90, 94 (1st Dept 1997) (*quoting Kent Dev. Co. v Liccione,* 37 NY2d 899, 901 [1975]); *see also 2445 Creston Ave., LLC v Gold Star Gift Shop*, 117 AD3d 631, 632 (1st Dept 2014) (denial of motion to dismiss subsequent action reversed, and action dismissed where claims "were or could be asserted" in prior action).

Although leave for Dogwood LLC to replead the eighth cause of action in the instant action may have been appropriate had this complaint not been dismissed, Dogwood LLC will not suffer any prejudice, because the amended 2017 complaint's eighth cause of action is largely identical to the proposed amended 2015 complaint's derivative seventh cause of action, and any proper relief can be granted on plaintiffs' motion for leave to amend the 2015 complaint. Furthermore, any allegation set forth in the amended 2017 complaint that was not set forth in the proposed amended 2015 complaint (*see e.g.*, amended 2017 complaint, ¶¶ 86-87, 130-135), and is relevant to any proposed cause of action which this Court allows plaintiffs to assert in its determination of plaintiffs' motion for leave to serve its proposed amended 2015 complaint, or is relevant to any proposed cause of action that this Court grants plaintiffs leave to replead in the 2015 action, can be added as allegations to the amended complaint in that action. Accordingly, plaintiffs will suffer no prejudice by this action's dismissal.

The branch of defendants' motions which seeks to have sanctions imposed on plaintiffs for filing various lawsuits, proceedings, and motions, is denied. There has been a great deal of litigation in these related cases, and the majority of plaintiffs' claims in the instant action have not been adequately pleaded and/or warranted dismissal based on the documentary evidence. However, at least one of plaintiffs' motions in the 2015 action was successful, and given that

issues exist as to whether Dogwood LLC or Stable is responsible for repairs of the Apartment, it cannot be said that plaintiffs' applications were completely frivolous. Additionally, because safety issues involving the cellar units may be at stake, which could negatively affect Stable and its shareholders, the assertion of derivative claims was not completely frivolous. If, in the future, a pattern of frivolous applications emerges, any party against which such applications have been asserted is free to move for such sanctions as that party deems advisable. The parties are reminded that this case involves a residential cooperative and, as the name implies, cooperation will benefit all shareholder-lessees, and a lack of cooperation will harm all of them, in wasted time and money and in damage to the sense of community.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the branch of motion sequence no. 002, which seeks an order dismissing the original complaint in the 2017 action (motion seq. no 002), is denied as moot, since that complaint has been superseded by the amended 2017 complaint, and it is further

ORDERED that the branches of motion sequence nos. 002 and 003, which seek an order imposing sanctions on plaintiffs in the form of a monetary fine and/or the imposition of a filing injunction, are denied; and it is further

ORDERED that the branch of defendants' motion which seeks an order dismissing the amended 2017 complaint is granted, and that action is dismissed in its entirety against all defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the dismissal of the amended 2017 complaint is without prejudice to

plaintiffs adding any allegation contained in that complaint which was not set forth in the proposed amended 2015 complaint, but which is relevant to any cause of action in the instant complaint which has been dismissed and corresponds to any proposed cause of action in the proposed amended 2015 complaint, which this Court, in its decision on motion sequence no. 003 in the 2015 action, permits either plaintiff to assert, or to any proposed cause of action in the 2015 action that this Court grants either plaintiff leave to replead; and it is further

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

Dated: December 17, 2018

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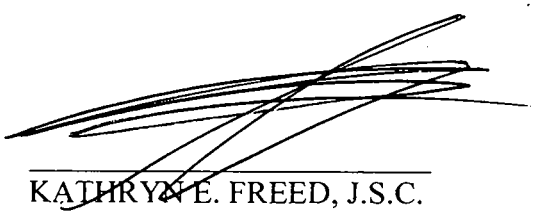

KATHRYN E. FREED, J.S.C.