Kossoff v 910 Fifth Ave. Corp.
2021 NY Slip Op 32737(U)
December 20, 2021
Supreme Court, New York County
Docket Number: Index No. 161513/2018
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. FRANCIS KAHN, III** **PART** **32**

Acting Justice

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INDEX NO. 161513/2018

PHYLLIS KOSSOFF,

Plaintiff,

MOTION DATE ________

MOTION SEQ. NO. 004

- v -

910 FIFTH AVENUE CORP., BOARD OF DIRECTORS OF 910 FIFTH AVENUE, NEW YORK, NEW YORK 10021, and RUDD REALTY MANAGEMENT CORP.

Defendants.

DECISION + ORDER ON MOTION

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 163-170, 173, 174, 176-196

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motion is determined as follows:

Plaintiff Phyllis Kossoff is the proprietary lessee of cooperative unit 6D located at 910 Fifth Avenue, New York, New York. Defendant 910 Fifth Avenue Corp. ("910") is the cooperative corporation that owns the building and Defendant Board of Directors of 910 Fifth Avenue, New York, New York 10021 ("Board") is the cooperative board that oversees and manages the subject building. Defendant Rudd Realty Management Corp. ("Rudd") is the managing agent of the subject building.

Plaintiff claims her dispute with Defendants began soon after she rejected an adjoining neighbor's March 2018 offer to buy her apartment which was conveyed to her via Defendants. Soon after declining to sell, Defendants began informing Plaintiff that her balcony windows and sills were unsafe and had to be replaced at her expense. Plaintiff notified Defendants of her claim that the financial obligation for the work was Defendants' responsibility based upon the terms of the proprietary lease. In early October 2018, Defendants, via their contractor, removed Plaintiff's balcony windows and sills and replaced them with new sills and insulated aluminum panels and plywood. Subsequently, Defendants sent Plaintiff a "Notice of Default/Rent Demand", dated November 16, 2018, wherein they demanded Plaintiff pay all costs associated with the window replacement. Plaintiff commenced this litigation in response.

In her complaint, Plaintiff asserted eight causes of action: 1) for a judgment declaring Plaintiff owes no money to Defendants, that the "Notice of Default/Rent Demand" is a nullity and that any replacement of the balcony windows and sills are the sole responsibility and expense of Defendants; 2) for a permanent injunction prohibiting Defendants terminating Plaintiff's proprietary lease, commencing any action or proceeding against Plaintiff or interfering with her tenancy; 3) for a permanent injunction requiring Defendants to remove the plywood covering the windows and replace the windows and sills; 4) harassment pursuant to New York City Administrative Code §27-2004[a][48]; 5) retaliatory eviction pursuant to Real Property Law §223-b; 6) breach of warranty of habitability pursuant to Real Property

Law §235-b; 7) constructive eviction; and 8) for attorney's fees, costs and disbursements as per the lease agreement and pursuant to Real Property Law §234 as against Defendant 910 only. Defendants answered collectively asserting nine affirmative defenses and three counterclaims for a money judgment against Plaintiff for costs and expenses associated with the window replacement and this litigation.

Upon commencement of the action, Plaintiff moved by order to show cause pursuant to CPLR §§2201 and 6301 to enjoin Defendants from terminating her proprietary lease, commencing any action or proceeding against her or otherwise interfering with her tenancy. The motion further sought this Court to direct Defendants to remove the plywood covering the windows on the balcony and to replace the windows and sills. By order dated June 7, 2019, Justice Arlene Bluth granted Plaintiff's motion in part by directing Defendants to remove the plywood covering the windows on Plaintiff's balcony and to replace the windows and sills at Defendants' expense. Defendants' three counterclaims were rendered moot by this decision.

Defendants failed to comply with Justice Bluth's June 7, 2019 order and Plaintiff moved to for an order finding Defendants in contempt. By order dated December 12, 2019, Justice Bluth granted the motion and held the Defendants jointly and severally in contempt. As a result, Defendants were fined in the amount of $2,000.00 for each day after January 1, 2020 the plywood boards remained up, the windows not installed, and the incorrect charges not removed. By order of this Court dated March 3, 2021, Defendants were found to have completed the work by January 30, 2020 and accrued a fine in the amount of $58,000.00 which was eventually paid.

Now, Defendants move pursuant to CPLR §§3211 [a][1] and [7] to dismiss the entire complaint as against Defendants Board, based upon their lack of capacity to be sued, and Rudd, since the complaint attributes no acts to the managing agent. Further, Defendants seek to dismiss the fourth, fifth and seventh causes of action in favor of all Defendants for failure to state a claim. Plaintiff opposes the motion.

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and the plaintiff must be accorded every possible favorable inference (*see eg Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and does not include, for instance, affidavits (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]).

Although Plaintiff is correct that the branch of Defendants' motion under this section is untimely as it was made after issue was joined (*see* CPLR §3211[e]; *Bennett v Hucke*, 64 AD3d 529 [2d Dept 2009]; *Cont'l Info. Sys. Corp. v Mut. Life Ins. Co. of N.Y.*, 77 AD2d 316, 318 [4th Dept 1980]), the objection is one of form over substance. Here, Defendants have also moved pursuant to CPLR §3211[a][7]. Such a motion may be made at any time (*see Goldberg v Torim*, 181 AD3d 443 [1st Dept

2020]) and can be supported by a wide spectrum of evidence (*see* Higgitt, CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers, 83 New York State Bar Journal 32, 34-35 [2011]). In such a case, where evidence submitted by a defendant flatly contradicts bare legal conclusions and factual claims contained in the complaint, the presumption of truth falls away when interpreting the viability of the complaint (*see Guggenheimer*, supra; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, supra; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

The first three causes of action for declaratory relief concerning financial responsibility for the repairs and injunctive relief compelling completion of the work and preservation of Plaintiff's leasehold were rendered moot by Justice Bluth's decision dated June 7, 2019 and are necessarily dismissed.

As to the branch of Defendants' motion to dismiss Plaintiff's fourth claim for harassment, Administrative Code §27-2005, titled "Duties of owner", provides in subsection d that "[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling". Harassment is defined as "any act or omission by or on behalf of an owner that [i] causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy" (Administrative Code §27-2004[a][48]). That section also delineates the prohibited acts and omissions by a landlord (Administrative Code §27-2004[a][48][ii][a] – [g]). Should the Department of Housing Preservation and Development not seek enforcement of these codes, the "lawful occupant" of the premises may "apply to the housing part for an order directing the and [HPD] to appear before the court" and civil penalties may be assessed based upon a finding of harassment (*see* New York City Administrative Code §§27-2115[h][1]).

Defendants assert the fourth cause of action is precluded by Administrative Code §27-2115[n] as Plaintiff is a shareholder of record on a proprietary lease for a dwelling unit. That section, titled "Imposition of civil penalty", reads:

> The provisions of subdivision d of section 27-2005 of this chapter, subdivision m of this section and subdivision b of section 27-2120 of this chapter shall not apply where a shareholder of record on a proprietary lease for a dwelling unit, the owner of record of a dwelling unit owned as a condominium, or those lawfully entitled to reside with such shareholder or record owner, resides in the dwelling unit for which the proprietary lease authorizes residency or in such condominium unit, as is applicable.

In opposition, Plaintiff posits the purpose of the statute was to distinguish proprietary lessees from the definition of owner as per New York City Administrative Code §27-2004[a][45] so that they are not held liable for acts of harassment as owners.

When interpreting legislation, the court must ensure that "[a]ll parts of [the] statute [are] harmonized with each other as well as with the general [legislative] intent of the whole statute, and effect and meaning must, if possible, be given to the entire statute and every part and word thereof" (McKinney's Cons Laws of NY, Book 1, Statutes §98; *see also Matter of Yolanda D.*, 88 NY2d 790, 795 [1996]; *see also Heard v Cuomo*, 80 NY2d 684, 689 [1993]; McKinney's Cons Laws of NY, Book 1, Statutes §§ 97, 231). Here, the plain language of Administrative Code §27-2115[n] renders the harassment cause of action defective as a matter of law. Excluding cooperative shareholders from

asserting a harassment claim or seeking the remedies thereunder is supported by the primary purpose for enacting the legislation which was "to address a perceived effort by landlords to empty *rent-regulated apartments* by harassing tenants into giving up their occupancy rights" (*Aguaiza v Vantage Props., LLC,* 69 AD3d 422 [1st Dept 2010][emphasis added]). Further, the legislative history of 27-2115[n] reveals that exclusion of cooperative and condominium apartments was expressly intended based upon the existence of "other rights and remedies conferred by the proprietary lease, other applicable documents and other applicable laws." (Report of the Committee on Housing and Buildings, Infrastructure Division, Local Law 627-A, February 27, 2002, NY City Legis Ann, 2008).

In any event, the Court notes that the private right of action created under Administrative Code §§27-2115[h][1] [1] authorizes that application be made to "the housing part" of the New York City Civil Court, not the New York State Supreme Court (*see Carlson v Chelsea Hotel Owner, LLC,* Misc3d____, 2021 NY Slip Op 31014[U][Sup Ct NY Cty 2021]; *Berg v Chelsea Hotel Owner, LLC,* ____Misc3d____, 2021 NY Misc LEXIS 1498 [Sup Ct NY Cty 2021]). Moreover, "New York does not recognize a common-law cause of action for harassment" (*Edelstein v Farber*, 27 AD3d 202 [1st Dept 2006]).

Accordingly, the branch of Defendants' motion pursuant to CPLR §3211[a][7] to dismiss Plaintiff's fourth cause of action of harassment under Administrative Code §27-2004[a][48] is granted.

As for the branch of Defendants' motion to dismiss Plaintiff's fifth cause of action for retaliatory eviction pursuant to Real Property Law §223-b, that section has been found applicable to cooperative apartments (*Raderman v Talia Mgmt. Co.*, 170 Misc. 2d 622 [Sup Ct NY Cty 1996]). That statute "prohibits landlords from attempting to evict tenants for actions taken in good faith by a tenant to secure or enforce any rights under a lease" (*id.*). Specifically, RPL §223-b bars landlords from prosecuting proceedings to recover possession or serving a "notice to quit" in retaliation for, *inter alia*, "good faith" complaints to the landlord or a governmental agency concerning a violation of law related to the tenancy or actions taken by the tenant to secure or enforce their rights under the lease or applicable law.

Here, Plaintiff pled in paragraph 58 of her complaint that "Defendants have delivered the Notice of Default/Rent Demand in order to retaliate for Plaintiff's efforts to secure rights guaranteed by Proprietary Lease or by law." Defendants argue that since no action or proceeding was commenced to terminate Plaintiff's tenancy and the "Notice of Default/Rent Demand" did not constitute a "notice to quit", the cause of action fails. Therefore, the question to be attended is whether the "Notice of Default/Rent Demand" constitutes a "notice to quit" within the meaning of the statute.

By the "Notice of Default/Rent Demand", Defendant 910 demanded, "pursuant to Section 19 of the Lease", Plaintiff make of payment of $55,040.30 representing the amount it considered due and owing for the replacement of the balcony windows and sills. The notice also contained the following language:

> Failure to pay the full amount of the Bill promptly entitles Lessor to collect from Lessee interest thereon at the maximum legal rate of interest accruing from November 1, 2018. *Id.* at Section 12. Further, pursuant to Section 31(d) of the Lease, if Lessee has defaulted in rent payment for a period of one month and fails to cure such default within ten (10) days after **written notice** from Lessor, Lessor is entitled to terminate Lessee's lease and repossess Lessee's apartment.

Lessor hereby notifies Lessee that Lessee is in default of rent payment, and that Lessor is entitled to and will take all necessary steps to enforce its rights, including those described above, pursuant to the terms of the Lease. **Your failure to pay the total amount now due, $55,040.30, by December 11, 2018 could result in termination of your Lease.**

Real Property Law §223-b, nor any other statute for that matter, defines what language is necessary to constitute a "notice to quit" (*see 1274 51 Realty, LLC v Gross*, 15 Misc3d 1055, 1056 [Civil Ct. Kings Cty, 2007]; *see also Helping Out People Everywhere, Inc. v Deich*, 160 Misc2d 1052, 1054 [App Term 2d Dept, 1994]). Guidance from other analogous statutes and cases interpreting same is instructive.

Real Property Actions and Proceedings Law §711[2] provides that a condition precedent to commencement of a non-payment special proceeding where a landlord-tenant relationship exists is service of a "written demand of the rent has been made with at least fourteen days' notice requiring, in the alternative, the payment of the rent, or the possession of the premises". A notice which informs the occupants that they are "required to quit" and that failure "to vacate the subject premises within the 10-day period a legal suit to evict them may be commenced" constitutes sufficient notice under the statute (*see First Fed. Sav. & Loan v Souto*, 162 Misc 2d 224 [Civ Ct, NY Cty 1994]).

Real Property Actions and Proceedings Law §713 provides that a condition precedent to commencement of a holdover proceeding absent a landlord-tenant relationship is service of "a ten-day notice to quit". Under that statute, a notice to quit is sufficient if it "clearly inform[s] respondents that their license [has] been revoked" even without specifying a termination date or potential eviction proceedings (*see 1274 51 Realty, LLC v Gross*, supra).

Real Property Law §232-a provides that to terminate a month-to-month tenancy, a landlord must serve "a notice in writing to the effect that the landlord elects to terminate the tenancy and that unless the tenant removes from such premises on the day designated in the notice, the landlord will commence summary proceedings under the statute to remove such tenant therefrom." "All that the notice [under this section] must inform tenant of is that landlord elects to terminate the tenancy and that refusal to vacate will lead to summary proceedings" (*Park Summit Realty Corp. v Frank*, 107 Misc2d 318, 321 [App Term 1st Dept 1980], *aff'd* 84 AD2d 700 [1st Dept 1981], *aff'd*, 56 NY2d 1025 [1982]).

The commonality of the notices in all these edicts is that the occupant of a premises be informed that the owner/landlord has elected to terminate their tenancy and/or possession of the premises (*see 1820 First Ave. Inc. v Mendoza*, ____Misc3d____, 2015 NY Slip Op 31776[U][Civ Ct, NY Cty 2015]).

In this case, the Notice of Default/Rent Demand contains no indication 910 elected to terminate Plaintiff's leasehold, no demand she vacate the premises, no notice a proceeding to dispossess her would be commenced nor the legal consequences of her failure to vacate the subject premises. Instead, the notice indicates that Plaintiff was in default in rent payments and that her failure to cure the default *could* result in the termination of her lease. Such language is not precise enough to constitute a notice to quit under §223-b (*cf. Ellivkroy Realty Corp v HDP 86 Sponsor Corp.*, 162 AD2d 238 [1st Dept 1990]).

Plaintiff's assertion that her fifth cause of action survives under section 2 of Real Property Law §233-b is unavailing. That section provides that:

> No landlord of premises or units to which this section is applicable or such landlord's agent shall substantially alter the terms of the tenancy in retaliation for any actions set forth in paragraphs a, b, and c of subdivision one of this section. Substantial alteration shall include, but is not limited to, the refusal to continue a tenancy of the tenant, upon expiration of the tenant's lease, to renew the lease or offer a new lease, or offering a new lease with an unreasonable rent increase; provided, however, that a landlord shall not be required under this section to offer a new lease or a lease renewal for a term greater than one year.

Contrary to Plaintiff's argument, there was no attempt by Defendants to substantially alter the terms of the tenancy in retaliation for any actions set forth in paragraphs a, b, and c of subdivision one of RPL §233-b. Defendants attempt to have Plaintiff pay for the balcony window and sill replacement, despite the lease being silent on the issue, while misguided, did nothing to alter the terms of Plaintiff's tenancy.

Accordingly, the branch of Defendants' motion pursuant to CPLR §3211[a][7] to dismiss Plaintiff's fifth cause of action for retaliatory eviction under Real Property Law §233-b is granted.

Plaintiff's seventh cause of action claims constructive eviction through Defendants' actions in relation to the replacement of the sills and windows. To pled a claim for constructive eviction, a tenant need not allege physical expulsion, but must demonstrate wrongful acts by the landlord that "substantially and materially deprive the tenant of the beneficial use and enjoyment of the [entire] premises" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]; *see also Shackman v 400 E. 85th St. Realty Corp.*, 161 AD3d 438, 439 [1st Dept 2018]). However, a tenant must abandon possession of the premises to claim constructive eviction (*see Barash v Pennsylvania Term. Real Estate Corp.*, supra; *Int'l Dev. Inst. v Westchester Plaza,* 194 AD3d 411 [1st Dept 2021]). In the present case, there is no claim by Plaintiff that she ever abandoned the premises as the result of the removal of the balcony windows and installation of the plywood.

Nevertheless, ouster from a portion of the premises, so long as it is actual, can constitute a sustainable claim of a partial constructive eviction (*see Barash v Pennsylvania Term. Real Estate Corp.*, supra). Abandonment of the portion of the premises affected is still an essential element of the cause of action (*see eg Minjak Co. v Randolph,* 140 AD2d 245, 248–50 [1st Dept 1988]). If the tenant continues to use affected portion, even if the usage is greatly diminished, then a partial constructive eviction cause of action cannot stand (*see Garry v Ryan & Henderson, P.C..,* 53 Misc3d 200, 212 [Dis Ct. Nassau County, 2016], *citing Arpino v Cicciaro,* 38 Misc3d 129[A] [App Term 2d Dept 2012]; *see also Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 120-121 [1958]). But even absent being physically barred from the disputed area, a partial constructive eviction may occur when the tenant "is unable to use the area for the purpose intended" (*Dinicu v Groff Studios Corp.,* 257 AD2d 218, 224 [1st Dept 1999]).

In her complaint and bill of particulars, Plaintiff alleges that by removing all the windows and boarding up the openings with plywood during the period from October 2018 until January 2020 she was deprived of necessary light and air previously available when the windows were in place. She also avers removal of the windows deprived her of the use of the balcony for its intended purpose. Attached to the complaint were photographs which showed the affected area which appeared to be what can best be described as a sun porch. Contrary to Defendants' argument, Plaintiff's response to Defendants'

demand for a bill of particulars properly amplified Plaintiff's cause of action for constructive eviction (*see KRU, Inc. v 1000 Massapequa, Inc.*, 238 AD2d 314, 315 [2d Dept 1997]).

In evaluating the presented information, not only must it be presumed true (*see 219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506 [1979]; *Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]), but "whatever may be implied from its statements by reasonable intention" is required to be accepted (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127 [1st Dept 2017]). Defendants are correct that Plaintiff was not entirely deprived of access to the balcony by removal of the windows and installation of plywood. Yet, by entirely enclosing the balcony, Defendants radically transformed the nature of the area from what appeared to be sun porch to what can be aptly described as a closet. When these facts are viewed in this procedural context, the Court concludes Plaintiff has stated, for pleading purposes, a claim that Defendants actions deprived her of the intended use of the balcony (*see Bernard v 345 East 73rd Owners Corp.*, 181 AD2d 543 [1st Dept 1992]; *Oresky v Azzouni*, 232 AD2d 463 [2d Dept 1996]; *Super Nova 330, LLC v Municipal Partners, LLC*, 2009 NY Slip Op 32481[U][Sup Ct NY Cty 2009]; *compare York Towers, Inc. v Kotick*, 2012 NY Slip Op 30648[U][Sup Ct NY Cty 2012]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]).

Accordingly, the branch of Defendants' motion to dismiss Plaintiff's seventh cause of action for constructive eviction pursuant to CPLR §3211[a][7] is denied.

Defendants also seek dismissal of the entire complaint as against Defendant Board and Rudd. Defendants argue that since the cooperative corporation 910 is a party, Plaintiff cannot separately sue Defendant Board. As to Rudd, the managing agent, Defendants assert the complaint contains no facts supporting any actions or omissions by this Defendant. Based upon the Court's determinations, supra, the only remaining causes of action against Defendants Board and 910 are the fourth cause of action for partial constructive eviction and the sixth cause of action alleging a breach of the warranty of habitability.

As to the Board, failure to allege any individual wrongdoing by members of a cooperative board or directors separate and apart from their collective actions made for the benefit of the cooperative corporation renders a cause of action against a board collectively or its individual members defective as a matter of law (*see eg Granirer v Bakery, Inc.*, 54 AD3d 269 [1st Dept 2008]). This is because "[t]he individual Board members are protected by the business judgment rule absent allegations of tortious acts outside of legitimate [cooperative] purposes" (*Board of Mgrs. of Honto 88 Condominium v Red Apple Child Dev. Ctr., a Chinese Sch.*, 160 AD3d 580, 582 [1st Dept 2018]). The business judgment rule "' bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'" (*Fe Bland v Two Trees Management Co.*, 66 NY2d 556, 565 [1985], *citing Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Indeed, "it is presumed that the actions of a cooperative's directors are [made in good faith]" (*40 W. 67th St. v Pullman*, 296 AD2d 120, 126 [1st Dept 2002], *aff'd* 100 NY2d 147 [2003]). However, the Court of Appeals has cautioned that "that the broad powers of cooperative governance carry the potential for abuse when a board singles out a person for harmful treatment or engages in unlawful discrimination, vendetta, arbitrary decision making or favoritism" (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 157 [2003]).

Contrary to Defendants' assertion, Plaintiff has expressly alleged in the complaint that she was singled out by the Defendants, including the Board, for disparate treatment because she rejected her neighbor's offer, conveyed by Rudd, to purchase her property. Again, that allegation must be presumed true since Defendants have proffered no evidence to conclusively rebut this claim. "Unequal treatment of shareholders is sufficient to overcome the directors' insulation from liability under the business judgment rule" (*Stinner v Epstein*, 162 AD3d 819, 821 [2d Dept 2018]).

Accordingly, the branch of Defendants' motion to dismiss all claims against Defendant Board is denied.

Concerning Rudd, as a general proposition, a managing agent for a disclosed principal cannot be held liable to third parties unless it is claimed it was the Board's intention to have the managing agent assume its liability or that the managing agent was in exclusive control of the building (*see eg McMahon v Cobblestone Lofts Condominium*, 161 AD3d 536 [1st Dept 2018]). In this case, Plaintiff's complaint contains no allegations whatsoever, not even unsupported legal conclusions, that Defendant Board relinquished entire control of the building to Rudd or meant to absolve itself of liability by engaging Rudd. In opposition, Plaintiff submitted no evidence to support the claim that Rudd completely assumed the responsibilities and/or liabilities of Defendant Board (*see Makhnevich v. Bd. of Mgrs. of 2900 Ocean Condominium*, ____Misc3d____, 2021 NY Slip Op 50679[U][Sup Ct NY Cty 2021]).

Accordingly, the branch of Defendants' motion to dismiss all claims against Defendant Rudd is granted.

Based on the foregoing, it is

ORDERED that the branch of Defendants' motion to dismiss Plaintiff's entire complaint as against Defendants Board of Directors of 910 Fifth Avenue, New York, New York 10021 and Rudd Realty Management Corp. is granted as to Rudd and denied as to Board, and it is

ORDERED that the branch of Defendants' motion to dismiss Plaintiff's first, second and third causes of action is granted as those claims are moot, and it is

ORDERED that the branch of Defendants' motion to dismiss Plaintiff's fourth, fifth and seventh causes of action is granted as to the fourth cause and fifth causes of action, but denied as to the seventh, and it is

ORDERED that all parties appear for a status conference on **January 18, 2022 at 11:30 am** via Microsoft Teams.

12/20/2021
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
APPLICATION:	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
CHECK IF APPROPRIATE:	[ ] INCLUDES TRANSFER/REASSIGN		[ ] FIDUCIARY APPOINTMENT	[ ] REFERENCE