Supreme Court: New York County
Part 40B

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440 West 164th Street HDFC, Community Homes LLC, and Inna Khiterer and Andreas Kroll,

Plaintiffs,

-against- **Index No. 653943/12**

Michael De La Force, Individually, a/k/a Michael Shane Leforce, Individually, a/k/a Duc Michael Shane De La Force, Individually, and Save Our Homes Corporation,

Defendants.

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Peter H. Moulton, Justice

This action arises from various disputes at an HDFC residential cooperative building in Manhattan. The action was transferred to me by Justice Kornreich in late 2012 as I had an Article 78 proceeding before me concerning a disputed election at the cooperative. After transfer, defendants moved to dismiss this action. In response, plaintiffs sought to discontinue the action without prejudice. Defendants state that any dismissal must be with prejudice. The parties have submitted letter briefs on this issue.

After the motion to dismiss was filed, and after plaintiff sought to discontinue the action without prejudice, I issued a decision in the Article 78 proceeding dated July 2, 2013, finding

in favor of the petitioner Michael De La Force, who is the main defendant in this action. Familiarity with the July 2nd decision is assumed herein.

Defendants' motion to dismiss contains persuasive arguments demonstrating the legal insufficiency of most of plaintiffs' claims. Plaintiffs have made no attempt to oppose defendants' motion or to substantiate the causes of action set forth in the amended complaint. Instead, as noted above, they seek to discontinue without prejudice.

BACKGROUND

The cooperative 440 West 164 Street HDFC owns the building located at 440 West 164th Street in Manhattan. The cooperative is a low income Housing Development Finance Corporation ("HDFC") cooperative.

This action, and the Article 78 proceeding decided in the July 2nd decision, both hinge in large part who among the parties was duly elected to the board of the cooperative.

The cooperative's governing documents specify that the board shall consist of three shareholders. Article III section 8 of the by-laws provide that in order to serve on the board, and to vote in a board election, a shareholder must not be more than two months delinquent in payments due the corporation.

Defendant Michael De La Force and plaintiff Inna Khiterer were

elected to the Board of Directors in an election held on June 22, 2011. A third alleged shareholder, nonparty Gregory Washington, was either elected to the board the same day, as alleged by De La Force, or appointed to the board by De La Force on September 10, 2011, as alleged by Khiterer. Washington apparently resigned from the board sometime in October 2011.

On November 1, 2011, Khiterer, Kroll, St. Claire and alleged shareholder Carl Jeremy noticed a special meeting to be held on November 29, 2011. The notice stated that the business at the meeting would be "[e]lecting a new Board of Directors." No other business was stated.

In a letter dated November 2, 2011, De La Force informed Khiterer that she was excluded from the board pursuant to the by-laws because she had failed to pay maintenance to the cooperative for two months. For her part Khiterer avers that she resigned from the board on November 11, 2011 because of De La Force's alleged abusive behavior and ultra vires actions.

A meeting went forward on November 29, 2011. Khiterer contended that the meeting was properly called and that the election conformed to the coop's governing documents. De La Force disputed the validity of the purported election on November 29.

In the July 2nd decision the court agreed with De La Force. Because the meeting was not properly noticed, and because it was not clear which shareholders were eligible to vote and/or serve on

the board, I found for De La Force. I held that De La Force was not properly removed as a director, and that the respondents were not properly installed as directors, at the Special Meeting convened on November 29, 2011.

DISCUSSION

CPLR 3217(a)(1) provides that a notice of voluntary discontinuance may be filed at any time before a responsive pleading is filed. Case law makes clear that a "responsive pleading" includes a pre-answer motion to dismiss. An attempt at voluntary discontinuance will not be countenanced, where, as here, it comes in the wake of a motion to dismiss. (E.g. Rosenfeld v Penika Pty., Ltd., 84 AD3d 703.) Except as provided by CPLR 3217(a), leave of court must be sought before discontinuing an action, and the court is empowered to set such "terms and conditions" on dismissal as are proper.

De La Force has expended the time and money necessary to oppose an earlier application by plaintiffs for a preliminary injunction, and now to bring the instant motion. Defendants gave plaintiffs two adjournments to respond to the motion to dismiss. Plaintiffs have not submitted any opposition.

The amended complaint manages to be both prolix, and, with respect to most of its causes of action, facially deficient. The sixth, seventh, ninth and twelfth causes of action are brought on

behalf of the corporation. As Khiterer's status as board president was at issue in the Article 78 proceeding when she filed the amended complaint, plaintiffs' authority to bring these claims was dubious. After the amended complaint was served I held in the Article 78 proceeding that Khitterer was not properly elected to the board. Therefore, plaintiffs now clearly have no standing to bring these claims. Plaintiffs' initial complaint contained purported derivative claims, which they dropped in their amended complaint after Justice Kornreich pointed out the claims' varied infirmities.

Plaintiffs' defamation claims are poorly drafted. Most of the claims arise from statements made within the context of litigation. Such statements are clearly privileged. (See Sexter v Warmflash, P.C. v Margrabe, 38 AD3d 163.) The alleged defamatory statements made outside of judicial, or quasi judicial, proceedings, are either not set forth with any clarity or are simple expressions of opinion.

Plaintiffs' fifth cause of action, alleging abuse of process and malicious prosecution do not set forth all the elements of those claims. De La Force's actions in bringing an HP action in Housing Court clearly had merit and was not motivated by actual malice. (See Villacorta v Saks, Inc., 32 Misc3d 1203[A].)

The only claims brought by plaintiffs that have any facial validity are the claims by plaintiffs that they were allowed by the

building's board to sublet their apartments and De La Force took action to interfere with those sublets. Plaintiffs claim that they lost revenue because of De La Force's actions. The cooperative's governing documents at least arguably allow subletting in certain situations.

CONCLUSION

Because of plaintiffs' eleventh hour attempt to discontinue, and the patent invalidity of most of their causes of action, the court grants leave to discontinue only on the following conditions. All causes of action are discontinued with prejudice, with the exception of first, second, and third causes of action, which are discontinued without prejudice. Defendants' motion to dismiss is moot. The branch of defendants' motion seeking sanctions pursuant to 22 NYCRR § 130-1.1 is denied. While plaintiffs' causes of action, and their behavior in prosecuting this lawsuit, bordered on frivolous, the court cannot find that plaintiffs crossed the line set by § 130-1.1. This case is discontinued. This constitutes the decision and order of the court.

DATE: **October 7, 2013**

A.J.S.C.

HON. PETER H. MOULTON
SUPREME COURT JUSTICE