Pomerance v McGrath
2015 NY Slip Op 32288(U)
December 1, 2015
Supreme Court, New York County
Docket Number: 650129/11
Judge: Barbara Jaffe

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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BRENDA POMERANCE, on behalf of her and in the right of 310 WEST 52 STREET CONDOMINIUM ASSOCIATION,

Plaintiff,

-against-

BRIAN SCOTT MCGRATH, BOARD OF MANAGERS OF THE 310 WEST 52 STREET CONDOMINIUM ASSOCIATION, CARL CHERNOFF, BONNIE GOLDNER, ALEXANDER MOSHINSKY, JOHN GATES, CHARLES HSU, MICHAEL NUTT, RACHEL OPPEN a/k/a RACHEL MATUSZAK, and KAREN HUDAK,

Defendants.

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Index No. 650129/11

Motion seq. nos. 007, 008

DECISION AND ORDER

BARBARA JAFFE, JSC:

For plaintiff:
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For defendants:
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This action arises from a dispute between plaintiff, an owner and resident of a condominium unit since 2007 and a board member from 2008 to 2009 at defendant 310 West 52nd Street Condominium, and the condominium board and its individual members.

By notice of motion, plaintiff moves pursuant to CPLR 3212(e) for an order granting her partial summary judgment on her thirteenth and fifteenth causes of action to the extent of allowing her to inspect certain condominium documents, and declaring her legal right to do so. Defendants oppose. (Mot. seq. no. 007).

By notice of cross motion, defendants move pursuant to CPLR 3212 for an order granting them summary judgment dismissing the thirteenth and fifteenth causes of action to the extent that plaintiff seeks inspection of documents, or in the alternative, summary dismissal as against the individually named defendants, as well as a declaration that the Appellate Division, First Department, had dismissed plaintiff's claim that members of the condominium board breached the fiduciary duty owed plaintiff when they condoned a noise nuisance, a claim she additionally sets forth in her fifteenth cause of action, or alternatively, an order summarily dismissing it. Plaintiff opposes. (Mot. seq. no. 007).

In a second notice of motion, plaintiff moves pursuant to CPLR 3212(e) for an order granting her partial summary judgment on the noise nuisance portion of her fifteenth cause of action. Defendants oppose. (Mot. seq. no. 008).

The motions are consolidated for disposition.

I. PERTINENT BACKGROUND

The condominium bylaws provide, in pertinent part, as follows:

> Section 1. Records and Audits. The Board of Managers or the managing agent shall keep detailed records of the actions of the Board of Managers and the managing agent, minutes of the meetings of the Board of Managers, minutes of the meetings of Unit Owners, and financial records and books of account of the Condominium, including a chronological listing of receipts and expenditures, ... In addition, it is the obligation of the Board of Managers of the Condominium to give all Unit Owners annually, the following:
>
> (a) The financial statement of the Condominium . . . for the prior fiscal year;
>
> (b) Prior notice of the annual Unit Owner's meeting;
>
> (c) A copy of the proposed annual budget, if any, of the Condominium, within ten (10) days prior to the date set for adoption thereof by the Board of Managers.

(NYSCEF 283). They exempt individual board members from liability to unit owners, "except for their own individual willful misconduct or bad faith." (*Id.*).

By several written requests sent to the board between August 2008 and the commencement of this action on January 18, 2011, plaintiff sought an opportunity to inspect monthly financial reports, invoices, legal invoices, board meeting minutes, or some combination thereof (NYSCEF 238-242), at least one of which was denied (NYSCEF 253). In her original complaint, plaintiff advanced five causes of action against defendants and sought, as pertinent here, a declaration that the board must permit her to inspect the condominium's financial records. (NYSCEF 1).

By decision and order dated December 27, 2011, the justice previously presiding in this part dismissed all but one cause of action and granted plaintiff leave to replead others. (2011 NY Slip Op 34060[U] [Sup Ct, New York County 2011], NYSCEF 25). By decision dated March 7, 2013, the Appellate Division, as relevant here, reversed the December 2011 order to the extent of "ordering defendants to provide plaintiff with contact information for the condominium's other unit owners in written form and any other format in which the condominium or its managing agent maintains such information." (*Pomerance v McGrath,* 104 AD3d 440, 441 [1st Dept 2013]). (NYSCEF 67).

By letter dated May 31, 2013, defendants declined plaintiff's May 22, 2013 written request to inspect condominium documents, as "it is clear that [plaintiff is] attempting to conduct an 'end-run' around the current litigation and particularly the discovery stay that is in effect in same." (NYSCEF 252, 256).

By decision and order dated June 30, 2014, I granted plaintiff leave to amend her

complaint to the extent of permitting her to file an amended complaint comprising the first, third, fifth, eighth, tenth, eleventh, twelfth, thirteenth, fifteenth, and seventeenth causes of action. (NYSCEF 193-194). On January 20, 2015, the Appellate Division affirmed the June 2014 order to the extent of accepting the repleaded thirteenth and fifteenth causes of action "seeking to inspect certain documents." The other proposed causes of action were stricken, including those pertaining to special assessments or other board activity protected by the business judgment rule. (*Pomerance v McGrath*, 124 AD3d 481 [1st Dept 2015], *lv dismissed* 25 NY3d 1038, NYSCEF 204).

Plaintiff's complaint has thus been reduced to the thirteenth and fifteenth causes of action. In her thirteenth cause of action, plaintiff asserts that the board, in violation of the Condominium Act (the Act) (Real Property Law § 339-w) denied her access to inspect and copy its monthly financial reports, condominium invoices, and legal invoices. In her fifteenth cause of action, she asserts that individual defendant board members breached their fiduciary duties by denying her access to inspect and copy board meeting minutes, and by failing to enforce the bylaws to prevent her downstairs neighbor from interfering with her "quiet use and enjoyment of her unit." For each cause of action, plaintiff seeks an order allowing her to inspect, copy, and receive electronic versions of the documents, declaring that the individual defendants violated the Act, and awarding her attorney fees. For the unremedied noise complaints, plaintiff seeks damages of at least $100,000. (NYSCEF 190).

By letter dated April 27, 2015, defense counsel informed plaintiff that the board would permit her to inspect, at the offices of the managing agent, receipts and invoices pertaining to its expenses, legal invoices, and minutes from its monthly meetings, but denied her access to inspect

monthly financial and management reports, and forbade photocopying or making "other extracts" of the documents. (NYSCEF 279). Plaintiff has not responded to defendants' offer.

II. APPLICABLE LAW

A. Summary judgment

A party seeking summary judgment must demonstrate, *prima facie*, that it is entitled to judgment as a matter of law by presenting sufficient evidence to negate any material issues of fact. (*Forrest v Jewish Guild for the Blind,* 3 NY3d 295, 314 [2004]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). If the movant meets this burden, the opponent must offer evidence in admissible form to demonstrate the existence of factual issues that require a trial, as "mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient." (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]).

To prevail on a motion for summary judgment dismissing a cause of action, the movant must establish his or her entitlement to judgment as a matter of law "by negating at least one essential element of the [the other party's] claim." (*Rosabella v Metro. Transp. Auth.*, 23 AD3d 365, 366 [2d Dept 2006]).

B. The Condominium Act

The Act (Real Property Law article 9-B § 339-d, *et seq.*) provides, as pertinent here:

> The [board] . . . shall keep detailed, accurate records, in chronological order, of the receipts and expenditures arising from the operation of the property. Such records and the vouchers authorizing the payments shall be available for examination by the unit owners at convenient hours of weekdays. A written report summarizing such receipts and expenditures shall be rendered by the board of managers to all unit owners at least once annually.

(*Id.* § 339-w). This provision "shall be liberally construed to effect the purposes" of the Act (*id.*

§ 339-ii), which, as pertinent here, are to establish "broad rules of law encouraging and regulating condominium development generally" (*Matter of D.S. Alamo Assocs. v Commr. of Fin. of City of New York*, 71 NY2d 340, 347 [1988]).

In reversing the December 2011 order in this case, the Appellate Division held that as the Act encourages home ownership in condominiums, affording condominium owners the same rights as cooperative shareholder-tenants to examine books and records will further that goal. (*Pomerance*, 104 AD3d at 441-442).

According to David Clurman, one of the drafters of several portions of the Act, it was the intention of its drafters "that the unit owners be able to inspect any and all financial records maintained by the condominium, any financial records reviewed by the board of the condominium, and all vouchers of the condominium." He equates the term "vouchers" with "invoices," and states that in directing that section 339-w be liberally construed, "the drafters of the [Act] intended that the Court would rely on [section 339-ii] to uphold the broadest possible rights for full disclosure to prospective purchasers and to unit owners." He explains that when the Act was drafted in 1964, before electronic storage was used by small entities such as managing agents, only hard copy records were kept. Thus, unit owners were afforded the right to inspect such records. With the advances in technology, Clurman opines:

> a proper liberal construction of the [Act] gives unit owners access to information in electronic form, including condominium operational records maintained in electronic form and sent to board members via email or via a private website, and entitles unit owners to receive the information electronically rather than being forced to inspect in person.

Clurman also observes, from his personal knowledge, that attorneys for prospective buyers in many condominiums are regularly granted access to board meeting minutes, and thus in his

opinion, "there is no valid reason to withhold access, for minutes of board meetings, to unit owners when such access is granted to the public," and that unit owners should be assisted in understanding certain financial decisions made by the board. (NYSCEF 220).

III. PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT

A. Justiciability

1. Contentions

Defendants allege that having offered plaintiff the opportunity to inspect certain documents, including board meeting minutes, there is no longer a case or controversy, arguing that plaintiff's failure to bring the April 2015 letter to the court's attention was deceitful and evidences her bad faith and intent to harass them with this action. However, although they acknowledge that they denied her access to monthly management reports on the ground that they are proprietary and confidential, they now agree to furnish her with "monthly financial reports." (NYSCEF 274, 285).

Plaintiff explains that she did not accept defendants' offer because it does not substantially provide the relief she seeks, and predicts that absent a declaration of her rights, defendants will again obstruct her access once this action concludes. She accuses the board members of placing their interests ahead of the board's interests. (NYSCEF 286).

2. Analysis

Pursuant to CPLR 3001, the court "may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy." The primary purpose of a declaratory judgment is to stabilize an uncertain or

disputed jural relationship with respect to present or prospective obligations, and a justiciable controversy exists when the plaintiff asserts rights that are challenged by the defendant. (*Chanos v MADAC, LLC*, 74 AD3d 1007, 1008 [2d Dept 2010]).

A justiciable controversy constitutes a real dispute between adverse parties with a stake in the outcome. (*Long Is. Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006], *appeal dismissed* 8 NY3d 956 [2007]). If the dispute is moot, there no longer exists a justiciable controversy (*Big Four LLC v Bond St. Lofts Condo.*, 94 AD3d 401, 403 [1st Dept 2012], *lv denied* 19 NY3d 808), and any judgment necessarily becomes advisory (*Premier Restorations of New York Corp. v New York State Dept. of Motor Vehicles*, 127 AD3d 1049, 1049 [1st Dept 2015]).

"The fact that the court may be required to determine the rights of the parties upon the happening of a future event does not mean that the declaratory judgment will be merely advisory"; rather, a declaratory judgment is inappropriate when the future event is beyond the control of the parties and may never occur, as opposed to when a future event is an act contemplated by a party. (*New York Pub. Interest Research Group, Inc. v Carey*, 42 NY2d 527, 531 [1977]; *Matter of Gates v Hernandez*, 26 AD3d 288, 289 [1st Dept 2006]).

Where parties settle, the controversy between them becomes non-justiciable. (*Matter of Gates*, 26 AD3d at 289). Apprehension of future litigation without more does not render a claim justiciable. (*Sutton Madison, Inc. v 27 E. 65th St. Owners Corp.*, Sup Ct, New York County, Sept. 5, 2008, Shafer, J., index No. 107183/08, *affd* 68 AD3d 512, 512-513 [1st Dept 2009]).

Here, although defendants have, in effect, made plaintiff an offer to settle her claim of entitlement to inspection of defendants' books and records, plaintiff has declined it as

insufficient, and defendants cite no authority for the proposition that a settlement offer is sufficient to moot a claim or render it non-justiciable. (*See e.g.*, *Zeitlin v N.Y. Islanders Hockey Club, L.P.*, 49 Misc 3d 511 [Sup Ct, Nassau County 2015] [rejecting argument that defendant's unaccepted settlement offer moots action or renders it non-justiciable]; *see also McCauley v Trans Union, L.L.C.*, 402 F3d 340 [2d Cir 2005] [rejected settlement offer does not moot case]).

Moreover, as defendants do not concede that plaintiff has a right to inspect and/or copy the documents she requested, a judgment declaring whether she has such a right would stabilize the parties' uncertain or disputed jural relationship with respect to present and future obligations. And, while plaintiff's fear that defendants will deny her access to future documents may be speculative, whether or not access will be granted or denied is within defendants' sole control, and thus it cannot be said that the future event is beyond the parties' control. Defendants have thus failed to demonstrate that plaintiff's claims are moot or non-justiciable.

B. Plaintiff's thirteenth cause of action

In her thirteenth cause of action, plaintiff asserts that the board, in violation of the Act (Real Property Law § 339-w) denied her access to inspect and copy its monthly financial reports, condominium invoices, and legal invoices.

1. Right to inspect documents generally

a. Contentions

Plaintiff contends that she has the right to inspect the documents she seeks, and offers Clurman's affidavit as evidence that the Act requires that unit owners be given full and broad disclosure of a condominium's financial affairs. (NYSCEF 219).

Defendants assert that plaintiff's legal right to examine condominium documents is

circumscribed by the bylaws and the Act, and that while they offered her an opportunity to inspect some documents, such as board minutes, they deny a legal obligation to do so. They claim that plaintiff's interpretation of the Act reflects a misunderstanding of the relationship between unit owners and the board, and observe that there is no common law right to inspect corporate board minutes. (NYSCEF 285).

By affidavit, defendant Chernoff, current president of the board, complains that plaintiff has continually second-guessed most of the board's legitimate business decisions. He explains that the board denied many of her pre-action requests for documents given its belief that she was aligned with the condominium sponsor, the condominium's adversary in litigation, that plaintiff renewed her requests after this action was filed, and that by her own admission, she seeks them to assist her in this action rather than by conducting formal discovery. Chernoff thus contends that plaintiff engaged in a subterfuge reflecting bad faith, but that the board has nonetheless granted several of her requests. Chernoff acknowledges, however, that "the threat that plaintiff will disclose strategic, private information to the sponsor no longer exists." (NYSCEF 284).

In reply, plaintiff reiterates her contentions, and states that her purpose in inspecting the documents is to fulfill her role under the Act of evaluating candidates for election to the board, deciding whether she should run for election, and deciding whether to remove a board member, and to evaluate the ongoing lawsuit against the sponsor to determine if she should advise other unit owners that the lawsuit will cost more than any possible recovery and to see how much the board has spent on litigation. (NYSCEF 286-287).

b. Analysis

"The unit owners of a condominium collectively own the common elements thereof and

are responsible for the common expenses. . . . [and t]hus, the rationale that existed for a shareholder to examine a corporation's books and records at common law applies equally to a unit owners vis-à-vis a condominium." (*Pomerance v McGrath*, 104 AD3d 440, 441 [1st Dept 2013] [internal citations omitted]). Thus, a unit owner's right to examine certain documents pursuant to RPL 399-w does not translate into a prohibition against examining other documents under the common law. (*Id.*; *see also Retirement Plan for Gen. Employees of N. Miami Beach v McGraw-Hill Cos., Inc.*, 120 AD3d 1052, 1055 [1st Dept 2014] [as shareholder's common law right to inspect is broader than statutory right, petitioners entitled to inspect books and records beyond specific records delineated in statute]). This result is consonant with the purpose and intent of the Act, which must be broadly construed.

It is well-established that corporate shareholders have a common law right to inspect a corporation's books and records "so long as the shareholders seek the inspection in good faith and for a valid purpose." (*Retirement Plan for Gen. Employees of N. Miami Beach*, 120 AD3d at 1055). A valid purpose is that which is reasonably related to the shareholder's interest in the corporation, including efforts to ascertain the corporation's financial condition, to investigate management's conduct, and to obtain information in aid of legitimate litigation. (*Matter of Tatko v Tatko Bros. Slate Co., Inc.*, 173 AD2d 917, 918 [3d Dept 1991]). Improper purposes include those that are inimical to the corporation, including the discovery of business secrets to help the corporation's competitor, securing prospects for personal business, finding technical details in corporate transactions in order to commence illegitimate lawsuits, and gathering information for one's own social or political goals. (*Id.* at 917-918).

If the corporation raises an issue of fact as to the shareholder's good faith or motive in

seeking corporate records, a hearing is required. (*Matter of Goldstein v Acropolis Gardens Realty Corp.*, 116 AD3d 776, 777 [2d Dept 2014]; *Madison Liquidity Inv. 103 LLC v Carey*, 291 AD2d 362, 362 [1st Dept 2002]). At such a hearing, the corporation bears the burden of demonstrating the shareholder's bad faith or improper purpose. (*Matter of de Paula v Memory Gardens, Inc.*, 90 AD2d 886, 887 [3d Dept 1982], *citing Crane Co. v Anaconda Co.*, 39 NY2d 14, 19 [1978]).

Here, plaintiff's concerns about board mismanagement and excessive expenditures are, on their face, proper. (*See Retirement Plan for Gen. Employees of N. Miami Beach*, 120 AD3d at 1055-1056 [shareholder established valid purpose when it sought corporate records to investigate "mismanagement and breaches of fiduciary duty . . . in failing to oversee purported wrongdoing of (subsidiary, which) . . . exposed (corporation) to substantial potential liability"]; *see also Mayer v Natl. Arts Club*, 192 AD2d 863, 865 [3d Dept 1993] ["[i]ll feelings and a desire to change respondent's current management and policies" not improper purpose]). Thus, her desire to obtain information to aid in this litigation does not disqualify her from obtaining the relief she seeks. (*See Matter of Tatko*, 173 AD2d at 918 [seeking books and records to aid in "legitimate litigation" deemed proper purpose]).

Nevertheless, defendants' allegations of plaintiff's vexatious and vengeful motives, particularly the claim that she seeks to inspect the documents to aid the sponsor and to harm the board, raise an issue as to her good faith in making the request, thereby requiring a hearing as to whether plaintiff's requests to inspect the condominium documents referenced herein are made in bad faith or for an improper purpose.

2. Right to copy and/or receive electronic versions of all records

a. Contentions

Plaintiff contends that her right to receive documents includes the right to both hard copies and electronic copies, particularly where, as here, many are stored electronically. Defendants' proposed procedure for inspecting documents, she claims, is physically difficult, and amounts to a "bait and switch" as it does not afford her full access to the documents to which she is entitled. She argues that defendants' parameters for inspection are burdensome to nonresident unit owners and those who work during business hours, and that disallowing electronic copies is meant to stymie communications among unit owners. Plaintiff relies on Clurman's affidavit in arguing that permitting the copying of records and the production of electronic records is consistent with the purpose and intent of the Act. (NYSCEF 219-220, 286).

Defendants assert that plaintiff is not entitled, under either the Act or the bylaws, to make or receive hard copies or electronic copies of the documents, and maintain that recognition of such a right sets a dangerous precedent, as public dissemination of certain documents would undermine condominium boards. (NYSCEF 274).

In reply, plaintiff relies on the recent appellate decision in this case holding that a unit owner has a right to copy and receive electronic copies of condominium documents, and that while the Act is silent on the issue, it must be liberally construed to include this right. She argues that the potential public disclosure of electronic documents cited by defendants will benefit the condominium, and that in any event, she consents to confidentiality. (NYSCEF 286).

b. Analysis

Here, on appeal from my June 2014 decision, the Appellate Division directed that the

condominium make available to plaintiff contact information for the other unit owners in "written form and any other format in which the condominium or its managing agent maintains such information." (104 AD3d at 442). It relied on *Matter of Bohrer v Intl. Banknote Co.*, wherein it held, before the onset of more advanced technological improvements in computing, that a corporation was required to release certain information to its shareholder by providing the shareholder with magnetic computer tapes and such computer processing data as is necessary to make use of the tapes and printouts. (150 AD2d 196 [1st Dept 1989]). It may thus be inferred that the production of information in electronic form is permissible and may be ordered.

And, in light of the Act's purpose, and absent contrary authority, the right to inspect is reasonably extended to the right to obtain electronic versions of and/or copying corporate documents. (*See e.g.*, *Matter of Mook v Am. Fabrics Co.*, 17 NY2d 756 [1966] [affirming order compelling corporation to permit stockholders to inspect corporate books and records and "make copies and take extracts therefrom"]; *Matter of De Paula v Memory Gardens, Inc.*, 96 AD2d 641 [3d Dept 1983] [petitioner's application to inspect and copy certain documents, including minutes, reports and membership properly granted]; *Matter of Raynor v Yardarm Club Hotel, Inc.*, 32 AD2d 788 [2d Dept 1969] [affirming petition granting shareholder permission to inspects corporation's books and records and make copies and extracts thereof]; *cf. Matter of Becker v Lunn*, 200 AD 178, 180 [3d Dept 1922] [in construing General Municipal Law § 51, finding right to copy necessary incident of right to inspect, "for otherwise the purpose of the inspection would largely be thwarted, or at least the person making the inspection would be subjected to much inconvenience and loss of time."]).

In any event, defendants' fear of public dissemination of the documents may be

ameliorated with a confidentiality order, which plaintiff has agreed to sign.

3. Right to inspect and copy unredacted legal invoices

a. Contentions

Plaintiff contends that as the board owes a fiduciary duty to the unit owners, it has an unqualified obligation to provide her with all legal invoices beginning in 2008 and not pertaining to the current litigation. (NYSCEF 219).

Defendants resist providing plaintiff with the "back-up" to the legal invoices, as it contains detailed time entries that include privileged information. They also argue that to the extent plaintiff requests inspection of the back-ups, the fiduciary exception is inapplicable absent a showing of good cause which cannot be demonstrated as all of her substantive claims were dismissed. Defendants also contend that the fiduciary exception is inapplicable to unit owners, absent any fiduciary duty owed them by the board's attorney. (NYSCEF 274, 285).

In reply, plaintiff reiterates her entitlement to access to the full, unredacted legal invoices, including time entries, and claims that defendants improperly conflate back-ups, which she agrees should be redacted, with billing detail, including time entries, which do not appear on the invoices. In any event, she asserts that the fiduciary exception requires full disclosure so long as the invoices relate to legal representation of the board, a fiduciary to all unit owners. (NYSCEF 286-287).

b. Analysis

"[W]here a shareholder . . . brings suit against corporate management for breach of fiduciary duty or similar wrongdoing, courts have carved out a 'fiduciary exception' to the privilege that otherwise attaches to communications between management and corporate

counsel." (*Nama Holdings, LLC v Greenberg Traurig LLP*, — AD3d —, 2015 NY Slip Op 07346, *4 [1st Dept 2015]). Before a shareholder may rely on the exception, she must demonstrate good cause, which may be determined by the consideration of factors such as the nature of the shareholder's claim and whether it is colorable, whether the information sought is available from other sources, whether the attorney-client communication pertains to past or prospective matters, or to the present litigation, and whether the communication sought is identified or the shareholder is blindly fishing. (*Garner v Wolfinbarger*, 430 F2d 1093, 1104 [5th Cir 1970]; *Nama Holdings, LLC*, 2015 NY Slip Op 07346, *6 [New York courts must consider *Garner* factors in determining whether good cause shown]).

Here, plaintiff seeks unredacted legal invoices in support of her substantive claims. Thus, although defendants owe her a fiduciary duty (*see generally Matter of Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 538 [1990]; *Caprer v Nussbaum*, 36 AD3d 176, 191 [2d Dept 2006]), the policy preventing a corporation from shielding its misconduct from its own members (*Nama Holdings, LLC*, 2015 NY Slip Op 07346, *4) is not implicated here, as all of plaintiff's claims of board misconduct, apart from defendants' denial of access to the records, have been dismissed on the merits. Thus, plaintiff cannot articulate a good cause for obtaining the legal invoices where her only remaining claims relate to obtaining them and not to her substantive claims about the board's wasteful expenditures on legal fees and other activities protected by the business judgment rule. Thus, the fiduciary exception is inapplicable and plaintiff fails to establish, *prima facie*, her right to unredacted legal invoices.

4. Defendants' cross motion

As the issue of plaintiff's motive in her request to inspect defendants' documents will be

set down for a hearing, at which defendants bear the burden of demonstrating plaintiff's bad faith in seeking the documents at issue (*supra*, III.B.1.b.), defendants' cross motion for summary judgment is held in abeyance pending the hearing.

5. Other requested relief

Plaintiff asks, without citing authority, that I order defendants to inform all unit owners in the condominium of defendants violations of the pertinent statutes and bylaws.

C. Plaintiff's fifteenth cause of action

1. Right to inspect board minutes

Defendants and plaintiff reiterate their contentions addressed in opposition to and in support of plaintiff's motion, respectively. (NYSCEF 285, 291).

I have already found that plaintiff may have the right to inspect the board's records, which would include minutes, depending on her motive and purpose in doing so. (*Supra*, III.B.1; *see e.g.*, *Matter of Goldstein v Acropolis Gardens Realty Corp.*, 116 AD3d 776 [2d Dept 2014] [petitioner entitled to copy of board meeting minutes]; *Bondi v Bus. Ed. Forum, Inc.*, 52 AD2d 1046, 1047 [4th Dept 1976] [under common law and BCL, stockholder, acting in good faith and for proper purpose, has right to inspect corporate minutes]; *Novikov v Oceana Holdings Corp.*, 46 Misc 3d 561 [Sup Ct, Kings County 2014] [directing respondent to provide access to its shareholder proceeding minutes]). Accordingly, the validity of this claim also awaits resolution until after the hearing.

2. Breach of fiduciary duty based on unremedied noise complaints

a. Contentions

Defendants maintain that the Appellate Division, in its January 2015 order, dismissed

plaintiff's claim premised on the noise complaints, as it dismissed all substantive claims asserting individual board members' liability. Alternatively, they argue that absent a landlord-tenant relationship or specific allegations of independent tortious conduct on the part of individual board members, the claim is not viable. (NYSCEF 285).

In response, plaintiff denies that the Appellate Division dismissed that portion of the fifteenth cause of action and claims that, after the Court dismissed the other causes of action, it "otherwise affirmed" the fifteenth cause of action, and claims that her neighbor's conduct, consisting of 93 documented incidents, constituted an actionable private nuisance which the board, by its members, failed to remedy in violation of the bylaws, the condominium "house rules," and pertinent statutes. (NYSCEF 291-292)

Plaintiff also alleges that she first notified the board of the noise problem in 2009, that the board implemented a noise policy for a period inconsistent with the house rules, that the board selectively enforced the condominium noise policy, and that the board retaliated against her for her various grievances by encouraging her downstairs neighbor to play music loudly. She relies on the circumstantial evidence that once her neighbor moved out of the building, the board adopted a stricter noise policy. She denies that this claim is premised on a breach of contract, and contends that she need not plead separate tortious conduct by each board member. (*Id.*).

Defendants reiterate that they cannot be held individually liable for alleged violations of the bylaws. They deny any awareness that the noise was continuous, that they were presented with evidence that the noise levels were actionable, that plaintiff's grievances are the kind ordinarily addressed by individual board members, that they encouraged her neighbor to make noise, or that they protected him in any way or otherwise selectively enforced the noise policy.

(NYSCEF 346-347).

b. Analysis

i. Appellate Division's January 2015 order

In my June 2014 decision and order, I found that plaintiff had alleged "the independently tortious nature of defendants' conduct" sufficiently to warrant leave to add a claim of a breach of fiduciary duty. That the Appellate Division neither referenced the unremedied noise nuisance portion of plaintiff's fifteenth cause of action nor adopted my reasoning, and may have overlooked or glossed over it, does not constitute a reversal or modification of that finding, particularly as the Court affirmed the decision as to the fifteenth cause of action. (*Cf. Matter of Levandowski v Zoning Bd. of Appeals of Town of Murray*, 29 Misc 2d 198, 199 [Sup Ct, Orleans County 1961] [lower court's determination on statutory notice requirement not referenced by Appellate Division and thus considered affirmed]). Defendants cite no authority supporting a different result.

ii. Liability of individual board members

While defendants seek an order granting them summary judgment, as to this aspect of their motion, they challenge only the sufficiency of this pleading, which challenge was resolved against them both by me and by the Appellate Division. These prior determinations are thus the law of the case (*see Krutyansky v Krutyansky*, 128 AD3d 907, 907 [2d Dept 2015] [issue of rate of interest on distributive award decided on previous cross appeal, and thus defendant precluded from advancing those arguments again]; *In re E. 51st St. Crane Collapse Litig.*, 114 AD3d 611, 611 [1st Dept 2014] [determination of contract ambiguity issue determined in earlier stage of litigation and thus became law of case]), and defendants fail to demonstrate that plaintiff's claim

should be dismissed on this ground.

Moreover, the Appellate Division found that plaintiff had sufficiently stated her thirteenth and fifteenth causes of action against the individual board members, in contrast to other claims that they dismissed against the individual board members. (*Pomerance v McGrath*, 124 AD3d 481, 483 [1st Dept 2015], *lv dismissed* 25 NY3d 1038).

Defendants' remaining arguments, namely, their unsubstantiated denial that they were aware of plaintiff's grievances, or that the noise level was actionable, also constitute insufficient bases for summary judgment. (*See Lavergne v Dist. Three IUE Troy Hills Hous. Corp.*, 275 AD2d 545, 546 [3d Dept 2000] [superintendent's unsubstantiated assertions that no defects existed insufficient to establish that defendant had no actual or constructive notice of dangerous condition warranting summary judgment dismissing complaint]).

IV. PLAINTIFF'S SECOND MOTION FOR SUMMARY JUDGMENT

I need not consider plaintiff's second motion. (*See Coccia v Liotti*, 101 AD3d 664, 666 [2d Dept 2012], *lv dismissed* 21 NY3d 985 [2013] [absent showing of new evidence or other sufficient cause, court will not entertain successive summary judgment motions]; *cf. Crane v JAB Realty, LLC*, 48 AD3d 504, 504 [2d Dept 2008] [rule against successive summary judgment motions not violated when "based on grounds and factual assertions which could not have been raised on the first motion"]).

V. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff's motion for partial summary judgment seeking a declaration of her right to inspect and receive copies and/or electronic records of condominium monthly

financial reports, building invoices, redacted legal invoices, and board meeting minutes is held in abeyance pending a determination at a hearing; and plaintiff's motion is otherwise denied; it is further

ORDERED, that defendants' cross motion for summary judgment dismissing the thirteenth and fifteenth causes of action to the extent they seek a declaration of plaintiff's rights is held in abeyance pending a hearing, and the portion of the cross motion seeking dismissal as against the individually named defendants, as well as a declaration that the Appellate Division, First Department, dismissed plaintiff's claim of a breach of fiduciary duty based on a noise nuisance, is denied; it is further

ORDERED, that a Special Referee shall be designated to hear and report to this court on the following individual issues of fact, which are hereby submitted to the Special Referee for such purpose: The issue of whether plaintiff's requests for the condominium documents referenced herein were made in bad faith or for an improper purpose; it is further

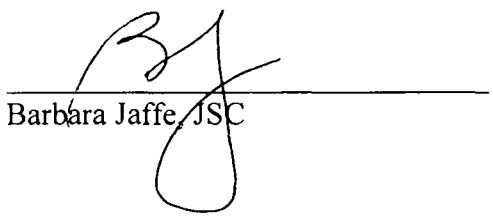
ORDERED, that this matter is hereby referred to the Special Referee Clerk (Room 119M, 646-386-3028 or *spref@nycourts.gov*) for placement at the earliest possible date upon which the calender of the Special Referee Part (Part SRP), which, in accordance with the Rules of that Part, shall assign this matter to an available Special Referee to hear and report as specified above; it is further

ORDERED, that counsel shall immediately consult one another and counsel for plaintiff shall, within 15 days from the date of this order, submit to the Special Referee Clerk by fax (212-401-9186) or email, an information sheet (which can be accessed at the "References" link on the court's website) containing all the information called for therein and that, as soon as practicable

thereafter, the Special Referee Clerk shall advise counsel for the parties of the date fixed for the appearance of the matter upon the calender of the Special Referee Part; and it is further

ORDERED, that the parties shall appear for the reference hearing, including with all witnesses and evidence they seek to present, and shall be ready to proceed, on the date first fixed by the Special Referee Clerk subject only to any adjournment that may be authorized by the Special Referee Part in accordance with the Rules of that Part.

ENTER:



Barbara Jaffe, JSC

DATED: December 1, 2015
New York, New York