

<b>Omansky v 160 Chambers St. Owners Inc.</b>
2017 NY Slip Op 31798(U)
August 22, 2017
Supreme Court, New York County
Docket Number: 654367/16
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK : IAS PART 12

-----X  
LAWRENCE A. OMANSKY, *et al.*,

Index No. 654367/16

Plaintiff,

Mot. seq. nos. 004, 005

- against -

**DECISION AND ORDER**

160 CHAMBERS STREET OWNERS INC., MARYA  
COHEN, MATTHEW PALEOLOGOS, MICHAEL LATEFI,  
and NAZLIE LATEFI,

Defendants.  
-----X

BARBARA JAFFE, J.:

**For plaintiff self-represented:**

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**For defendants:**

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By amended notice of motion (sequence 004), defendants move pre-answer for an order dismissing certain claims against them on the grounds that the claims are barred and do not state a claim against the individual defendants. Plaintiff opposes and, by notice of cross motion, moves for leave to enter a default judgment against defendant 160 Chambers Street Owners Inc. (Owners), and to hold the other defendants individually liable. Defendants oppose the cross motion.

By order to show cause (sequence 005), defendants move for orders: (1) deeming the motion to dismiss to have been made on behalf of all defendants; (2) deeming their notice of motion to dismiss as amended *nunc pro tunc* to reflect that it is made on behalf of all defendants; (3) extending Owners' time to answer the complaint or vacating its default in answering and compelling plaintiff to accept its late answer. Plaintiff opposes the motion.

The motions are consolidated for disposition.

## I. BACKGROUND

### A. Prior action

This action is part of a long-running dispute among plaintiff, a tenant of and shareholder in the building at issue, Owners, a cooperative corporation and landlord/owner of the building, and the individual defendants, shareholders/members of the coop's board of directors, based on issues relating to the building and plaintiff's unit.

Plaintiff previously sued the same defendants (Index no. 603738/08), alleging the following in his amended verified complaint, dated May 1, 2012, as pertinent here: third cause of action: that defendants breached their duty to repair or replace plaintiff's skylights and roof leaks, and that the corporate veil should be pierced to hold the individual defendants liable for breach of their fiduciary duties. (NYSCEF 74). As part of the motion practice in that action, I consolidated two Civil Court housing proceedings commenced by Owners against plaintiff, one a non-payment proceeding relating to his failure to pay maintenance, the other a holdover proceeding relating to his failure to pay rent for the commercial premises in the building. (NYSCEF 76).

By decision and order dated January 20, 2016, I granted Owners' motion for summary judgment and dismissed plaintiff's claims as they related to commercial premises in the building and counterclaims that he had asserted in a holdover proceeding. Given certain factual determinations rendered therein, I denied plaintiff's motion for summary judgment on his claims, including the third cause of action. (NYSCEF 76). Plaintiff's appeal of that decision pending.

### B. Current action

In this action, plaintiff sues based on defendants' alleged failures to fulfill their obligations under the proprietary lease and to repair the roof, replace windows and skylights that are leaking into plaintiff's unit, and to permit him to reinstall the deck/terrace on the appurtenant portion of his unit. (NYSCEF 37).

In a supplemental amended complaint dated September 21, 2016, plaintiff asserts the following claims:

- (1) Piercing the corporate veil against the individual defendants to hold them personally liable for damages incurred based on their breaches of fiduciary duties in refusing to allow plaintiff to reinstall the terrace and to repair/replace the defective windows and skylights and repair interior water damage; plaintiff contends that defendants intentionally and maliciously breached the lease as revenge for plaintiff's prior lawsuit against them and for their own financial gain in avoiding payment for the repairs;
- (2) specific performance requiring Owners to allow plaintiff to reinstall the deck, and directing it to replace the skylights and repair all water-damaged elements in his unit and all common areas;
- (3) attorney fees and costs related to defendants' breach of fiduciary duties;
- (4) indemnification/payment for the requested repairs;
- (5) an abatement of maintenance due by plaintiff, with 85 percent of the maintenance to be placed in an escrow account until sufficient funds have accumulated in order to effectuate the requested repairs;
- (6) an abatement of 85 percent of maintenance due by plaintiff based on defendants' failure to install sliding glass doors in plaintiff's unit;
- (7) individual liability against the individual defendants based on their intentional and malicious gross misconduct based on their breach of fiduciary duty and refusal to make the required repairs, with damages consisting of reimbursement for all repairs, legal fees, actual damages, and punitive damages;
- (8) indemnification against Owners for attorney fees, damages, court costs, and

judgments; and

- (9) based on Owners' gross negligence, plaintiff's unit was burglarized, resulting in the loss of valuables worth approximately \$500.

(*Id.*).

## II. MOTION TO DISMISS

### A. Whether certain claims are barred

#### 1. Contentions

Defendants contend that plaintiff raised the same issues regarding the repairs in his prior action or could have done so, and that the grant of summary judgment in defendants' favor and denial of plaintiff's motion for summary judgment in that action bars him from re-litigating the issues here. They argue that plaintiff's first five causes of actions in this proceeding relate to the alleged failure to repair or replace the skylights, windows, and roof, and that he is thus precluded from asserting them as they were already dismissed in the prior action. (NYSCEF 79).<sup>1</sup>

Plaintiff maintains that as his claim in the prior action related to the repairs was not dismissed on the merits, he is not precluded from raising it. He also contends that the prior action involved only breaches occurring up to 2010, and that breaches that occurred thereafter were not part of that action. (NYSCEF 84). In a later affidavit, plaintiff concedes that both actions involve the same issues, but that the instant action "does not exactly duplicate the original action . . . since the period from 2010 to present was not included in the initial complaint." (NYSCEF 147).

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<sup>1</sup> I observe that all parties have submitted motion papers that exceed the 25-page limit set forth in my court rules, which are published on the court's website. The parties are, accordingly, admonished that any future submissions that are not in compliance with the pertinent rules will be deemed nullities and a default entered.

## 2. Analysis

In the interests of providing finality to the resolution of lawsuits and assuring that parties not be troubled by further litigation, a valid judgment bars future actions between the same parties on the same cause(s) of action. (*Landau, P.C. v Larossa, Mitchell & Ross*, 11 NY3d 8 [2008]; *Matter of Reilly v Reid*, 45 NY2d 24, 27-28 [1978]). Thus, where a claim has been litigated and resolved in a prior proceeding arising from the same facts or transaction, and should have or could have been resolved in the prior proceeding, it has been finally decided, or is “res judicata,” and is barred. (*Id.*).

Here, the claims dismissed in the prior action were those relating to the commercial premises and plaintiff’s counterclaims to the holdover proceeding, which also relate the commercial premises. Plaintiff’s claims relating to the alleged leaks and necessary repairs in his residential unit were thus, not decided. Rather, I denied his motion for summary judgment on that claim; it was not dismissed.

However, as the repair claims are identical in the two proceedings, and as the claim in the first action remains, plaintiff may not assert the repair claim here. (CPLR 3211[a][4]; see *Wachtell, Lipton et al. v CVR Energy, Inc.*, 143 AD3d 648 [1<sup>st</sup> Dept 2016] [claim should have been dismissed as there was another action pending between parties with same claim]; *PK Restaurant, LLC v Lifshutz*, 138 AD3d 434 [1<sup>st</sup> Dept 2016] [certain claims dismissed as other action pended and arose out of “same subject matter or series of alleged wrongs”], quoting *Syncora Guarantee Inc. v J.P. Morgan Securities LLC*, 110 AD3d 87 [1<sup>st</sup> Dept 2013]; *Shah v RBC Cap. Markets LLC*, 115 AD3d 444 [1<sup>st</sup> Dept 2014] [court has broad discretion to dismiss action on ground that prior action pends between same parties arising out of same subject matter,

even if different legal theories or claims in both actions]).

That some of the issues allegedly arose after plaintiff commenced the prior action does not preclude dismissal of them here. (*PK Restaurant, LLC*, 138 AD3d at 436 [as to claims in action that arose after plaintiff commenced other action, plaintiff could seek leave to supplement complaint in other action]).

B. Whether individual defendants may be held liable

As plaintiff's claims against the individual defendants relate to the repairs that are also at issue in the prior action, the claims are dismissed for the reasons set forth above. In any event, plaintiff's disagreement with defendants' contention that they were unable to make repairs due to a lack of funds does not establish that the defendants' actions are not protected by the business judgment rule. In *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, the Court of Appeals held that a challenge to a decision made by members of a coop or condominium board of directors must be analyzed by applying the business judgment rule, which "prohibits judicial inquiry into actions . . . 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" (75 NY2d 530 [1990], quoting *Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Thus, if a director has not breached his or her fiduciary duty to the corporation, his or her decisions may not be questioned, even if there are negative results or consequences. (*Id.* at 538). Examples of decisions that may be reviewed by the courts are those that have "no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority." (*Id.* at 540).

Plaintiff's allegations that defendants were motivated to act against him based on their

personal animosity toward him and/or their hope for financial gain in avoiding payment for the repairs are conclusory and insufficient. (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 540-541 [1990] [allegation that board's decision motivated by personal animosity wholly conclusory]).

### III. REMAINING MOTIONS

As Owners has established that its failure to specify that the motion to dismiss was also made on their behalf was inadvertent, and as it is clear from the arguments set forth in defendants' motion papers that the motion was interposed on behalf of all defendants and plaintiff had an opportunity to respond to the arguments, its motion to deem the papers amended *nunc pro tunc* to reflect that the motion to dismiss was made by all defendants is granted.

Based on this result, plaintiff's cross motion for a default judgment based on Owners' alleged failure to appear or answer or move to dismiss pre-answer is denied. Owners' time to answer the complaint is extended for 20 days from the date of this order.

Plaintiff's cross motion for a judgment piercing the corporate veil is denied for the reasons set forth above.

### V. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss (sequence 004) is granted to the extent of dismissing plaintiffs' claims: (1) relating to repairs or replacement of windows, skylights, and the roof, and (2) against the individual defendants; it is further

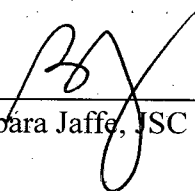
ORDERED, that plaintiff's cross motion is denied; and it is further

ORDERED, that defendants' motion (sequence 005) is granted to the extent of deeming



the motion to dismiss to have been interposed on behalf of all of the defendants; and extending defendant Owners' time to answer the complaint to 20 days from the date of this order.

ENTER:

  
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Barbara Jaffe, JSC

DATED: August 22, 2017  
New York, New York