Board of Mgrs. of the 120 E. 86th St. Condominium v Park Ave. Physicians Realty, LLC
2018 NY Slip Op 32581(U)
October 9, 2018
Supreme Court, New York County
Docket Number: 162584/2014
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

- X

BOARD OF MANAGERS OF THE 120 EAST 86th STREET CONDOMINIUM,

Plaintiff,

Index No. 162584/2014

- against -

Motion Sequence No. 002

PARK AVENUE PHYSICIANS REALTY, LLC, GATEWAY I GROUP INC., NEW YORK CITY ENVIRONMENTAL CONTROL BOARD, and "JOHN DOE" No. 1 through "JOHN DOE" No. 15, the true name of said Defendants being unknown to plaintiff, the parties intended to be those persons having or claiming an interest in the mortgaged premises described in the complaint by virtue of being tenants, or occupants, or judgment creditors, or lienors of any type or nature in all or part of said premises,

Defendants,

- and -

120/86 OWNERS CORP., "JOHN DOE" No. 16 through "JOHN DOE" No. 35, the true name of said Additional Defendants being unknown to Defendant Park Ave Physicians Realty, LLC, the parties intended to be the constituent members of plaintiff Condominium Board (of Managers) at any time during 2013, 2014 and 2015, and 120 EAST 86th RETAIL LLC (added solely because it is one of the three ownership Units described in the Declaration and By-Laws which are applicable equally to all Unit Owners of the Condominium),

Additional Defendants.

- X

ROBERT R. REED, J.:

Plaintiff Board of Managers of the 120 East 86th Street Condominium (Condo Board) manages a "cond-op" located at 120 East 86th Street, New York, New York (Condominium) and brings the instant foreclosure and breach of contract action against defendant Park Avenue

Physicians Realty, LLC (Physicians), which owns the professional condominium unit (Professional Unit) at the Condominium, seeking to recover Physician's alleged share of common expenses. In its amended answer—which names 120/86 Owners Corp., the owner of the Condominium's residential cooperative unit (Residential Unit), and unknown individuals who served on the Condo Board in 2013, 2014 and 2015 as additional defendants[1]—Physicians asserts the following affirmative defenses and counterclaims: (1) declaratory judgment declaring that the Condo Board is a nullity and that a new board should be constituted in compliance with the Condominium's by-laws (By-Laws), which reserve a seat on the board for Physicians; (2) breach of fiduciary duty based on the Condo Board's alleged violation of the By-Laws; (3) self-dealing by the Condo Board in arranging to finance the Residential Unit's share of common charges, while leaving Physicians to make its own arrangements; and (4) prima facie tort.

The Condo Board and 120/86 Owners Corp. previously moved (in motion sequence number 001) for summary judgment dismissing the counterclaims. Physicians cross-moved for, inter alia, a declaration that the board was improperly constituted and, as such, was unauthorized to issue assessments or impose a lien against Physicians. By order entered March 3, 2016 (2016 Order), the court denied both motions. The Condo Board and 120/86 Owners Corp. appealed. On the instant motion, Physicians seeks leave to serve and file a second amended answer. The Condo Board and 120/86 Owners Corp. cross-move to renew and reargue their motion for summary judgment.

[1] The amended answer also names 120 East 86th Retail LLC as an additional defendant, solely because of its interest as the owner of the Condominium's retail condominium unit (Retail Unit).

I. Background and Procedural History

The Condominium occupies a six-story building and consists of three units: the Residential Unit, a cooperative which occupies the third through sixth floors of the building; the Retail Unit, which occupies the first floor; and the Professional Unit (together with Retail Unit, Commercial Units), which occupies the second floor. The Residential Unit holds 57.77% of the Condominium's common interest, the Retail Unit holds 27.56% and the Professional Unit holds 14.67%.

By letter dated March 8, 2013, the Condo Board informed Physicians that: the Condo Board was undertaking work to "modernize the elevator" and to address "a violation for the façade in the front of the building"; the Condo Board intended to finance the work with a seven-year loan of $360,000; and Physicians would be responsible for $97,746 of the loan. NYSCEF document number 21. By letter dated May 31, 2013, the Condo Board informed Physicians that, in addition to modernizing the elevator, repairing the façade and replacing portions of the roof, the building was also going to paint the common areas, install a security camera system and upgrade the intercom system. The letter also stated that, while the Residential Unit was taking out a loan to finance its portion of the cost, Physicians was responsible for paying or obtaining financing for its share of the cost, which was $81,365. According to John Cummings (Cummings), the managing agent for the Condominium, Physicians' share of the cost was reduced from $97,746, because it no longer included cost of financing. That assessment "was then lowered to $70,688 based on an adjustment of [Physicians'] share from twenty-five percent to twenty percent of the total." Cummings 7/10/15 aff, ¶ 10. Physicians paid $25,000.00 and $45,733.00 remains outstanding.

Cummings states that the "[t]he total assessment for the work on the building façade, roof and elevator was $344,626.00." Cummings 5/31/16 aff, ¶ 4. Notably, the 2012 contract that the Condominium entered for "Localized Repair & Roof Replacement" (Façade and Roof Contract), totaling $133,895.00, and the 2013 contract that 120/86 Owners Corp. entered for "Automatic Passenger Elevator Modernization/Maintenance" (Elevator Contract), totaling $144,700.00, do not add up to the total assessment. NYSCEF document numbers 27, 28. Cummings states that there were additional costs, including a $33,000.00 "engineering contract for the building façade and roof" and "a charge in the amount of $7,000 for elevator engineering." *Id.*, ¶ 2. He also states that "[t]he elevator contract amount was $152,860.00," rather than $144,700.00. *Id.* Finally, Cummings explains that "the discrepancy between the amount for the contracts and engineering services set forth above, and the total assessment is made up by a contingency for unexpected and unanticipated fees and charges which were anticipated to accrue during the course of construction projects." *Id.*, ¶ 5.

According to the Condo Board, the work on the elevator was necessary as demonstrated by: (1) two personal injury suits, one brought in 2006 and another in 2012, both alleging injury caused by elevator malfunction; (2) a May 8, 2012 letter from Centennial Elevator Industries, Inc., an elevator maintenance company, stating that "[t]he only way to have the elevator level to proper code requirements, [was] to perform a modernization . . . [of the] control system as well as the installation of a new machine and brake" (NYSCEF document number 25); and (3) an August 24, 2012 letter from Albert Gallo (Gallo) of Sierra Consulting Group, Inc., a certified elevator inspector, stating that "[a]ll components [were] in poor conditions and . . . definitely in need of a modernization of all mentioned equipment and in addition to a new elevator cab interior." NYSCEF document number 24. In an affidavit, dated June 25, 2015, Gallo

summarizes his findings from his 2012 inspection of the elevator, stating, in pertinent part, that he "found that the components for the elevator were in poor condition and that it was necessary to modernize the equipment. . . . [for] continued safe operation" (Gallo aff, ¶ 4), as "the machinery and structural components of the elevator were approximately ninety years old . . . [and] even the newest components of the elevator were almost 40 years old at the time of [his] inspection." *Id.*, ¶ 5.

The Condo Board states that the work on the façade and roof was necessary to address New York City Building Code violations. In his affidavit in support of the Condo Board and 120/86 Owners Corp.'s motion for summary judgment, Cummings states that "the Condo Board determined that it was necessary to (i) perform Local Law 11 work in order to maintain the façade of the Building in accordance with the laws of the City of New York . . . ." Cummings 7/10/15 aff, ¶ 7. In his affidavit in support of the instant motion, Cummings explains that all prior references to "Local Law 11" was "as an expression which referred to the fact that work was required to address violations on the façade and defects in the roof and façade of the building." Cummings 5/31/16 aff, ¶ 6.

With respect the Condo Board's ability to impose assessments to meet common expenses, the Condominium's declaration (Declaration) provides that the Condo Board is to allocate and assess common charges to the unit owners, "pro-rata in accordance with their respective Common Interests (except as otherwise provided in the Declaration or in the By-Laws), to meet the Common Expenses." NYSCEF document number 38 at 21. The By-Laws provide, in pertinent part, as follows:

> "Section 2.1 General. As more particularly set forth in Section 2.4, 2.5 and 2.6 hereof, the affairs of the Condominium shall be governed by the Condominium Board. In exercising its powers and performing its duties under the Declaration and these

By-Laws, the Condominium Board shall act as, and shall be the agent of the Unit Owners, subject to, and in accordance with, the terms of the declaration and these By-Laws.

* * *

"Section 2.5 Certain Limitation on the Powers of The Condominium Board. (A) Notwithstanding anything to the contrary contained in these By-Laws, the Condominium Board shall not take any of the following actions unless 75% of the members representing the Residential Unit and all the members thereof representing the Commercial Unit shall approve the same in writing or by a vote at a duly constituted meeting called for such purpose:

> "(i) impose any common charge or Special Assessment for the purpose of making any addition, alteration, or improvement to the Common Elements or to any Unit, unless the same shall be required by Law;
>
> * * *

"Section 5.1 Maintenance and Repairs. (A) Except as otherwise provided in the Declaration or in these By-Laws, all painting, decorating maintenance, repairs and replacements, whether structural or non-structural, ordinary or extraordinary:

* * *

> "(ii) in or to the Common Elements shall be performed by the Condominium Board as a Common Expense, other than repairs to the passenger elevator which shall be paid 65% by the Owners of the Residential Unit and 35% by the Owner of the Professional Unit.

* * *

"Section 5.3 Alterations, Additions, or Improvements to the Common Elements. Except as otherwise provided in the Declaration or in these By-Laws, all necessary or desirable alterations, additions, or improvements in or to any of the Common Elements shall be made by the Condominium Board, and the cost and expense thereof shall constitute a Common Expense. Notwithstanding the foregoing, however, whenever the cost and expense of any such alterations, additions, or improvements would, in the judgment of the Condominium Board, exceed $100,000 in

the aggregate in any calendar year such proposed alterations, additions, or improvements shall not be made unless first approved by the Commercial Unit Owners owning a majority of the Common Interests, the Residential Unit Owner and by the Mortgage Representatives, if any. Except as otherwise provided in the Declarations and in these By-Laws, all such alterations, additions or improvements costing $100,000 or less in the aggregate in any calendar year may be made as aforesaid without the approval of either the Unit Owners or any Mortgage Representatives.

* * *

"Section 6.1 Determination of Common Expenses and Fixing of Common Charges.

* * *

"(C) In addition to the foregoing duty to determine the amount of and assess Common Charges, the Condominium Board shall have the right, subject in all respects, to the strictures contained in Section 2.5 hereof, to levy Special Assessments to meet the Common Expenses. . . . [which] shall be levied against all Unit Owners in proportion to their respective Common Interests . . . ."

Id. at 37, 42, 58, 60, 71-72.

In other pertinent parts, the By-Laws provides as follows:

"Section 2.7 Number, Election and Qualification of Members. Until the first annual meeting of the Unit Owners held pursuant to the terms of Section 4.1 hereof, the Condominium Board shall consist of three individuals to be designated from time to time by Sponsor. From and after the first annual meeting of the Unit Owners, the Condominium Board shall consist of five individuals to be elected three by the Residential Unit Owner, one by the Retail Unit Owner and one by the Professional Unit Owner pursuant to the terms of Section 4.9 hereof. . . .

* * *

"Section 4.1 Annual Meetings of the Unit Owners. The first annual meeting of the Unit Owners shall be held within thirty (30) days after the First Closing, at which meeting the incumbent three-member Condominium Board shall resign and a successor nine-

> member Condominium Board shall be elected by the Unit Owners, as provide both in this Article 4 and in Article 2 hereof. . . .
>
> * * *
>
> "Section 4.12 Contractual Liability of Unit Owners. Every contract made by the Condominium Board . . . shall state (if obtainable . . .) that the liability of any Unit Owner with respect thereto shall be limited to: (i) such proportionate share of the total liability thereunder as the Common Interest of such Unit Owner bears to the aggregate Common Interest of all Unit Owners and (ii) such Unit Owner's interest in his Unit and its Appurtenant Interests, unless otherwise provided by Law."

Id. at 44, 53, 57.

Following Physicians' failure to pay the assessment in full, the Condo Board placed a lien on the Professional Unit and commenced the instant action. After Physicians filed its amended answer, asserting four counterclaims challenging the validity of the assessment, the Condo Board and 120/86 Owners Corp. moved for summary judgment dismissing the counterclaims. Physicians cross-moved for, inter alia, a declaration that its exclusion from the Condo Board meant that the board was improperly constituted and, as such, that it was unauthorized to make assessments or impose a lien on Physicians. The court denied both motions in the 2016 Order. The Condo Board and 120/86 Owners Corp. appealed. Physicians made the instant motion for leave to file a second amended answer. The Condo Board and 120/86 Owners Corp. cross-moved to renew and reargue the summary judgment motion. While these motions were sub judice, by decision and order dated April 12, 2018 (Appellate Decision), the Appellate Division, First Department modified the 2016 Order, dismissing Physician's first, second and third counterclaims, and otherwise affirmed. In pertinent part, the First Department held as follows:

> "Physicians presents no evidence that it was deliberately excluded from representation on the board. Moreover, there is no evidence

> that it ever invoked its right to be represented but was rebuffed. Indeed, Physicians asserts that it never knew of its right to have a seat on the board. However, this right was clearly stated in the bylaws that it, as grantee, expressly assumed to abide by upon acceptance of the deed. While it appears that Physicians' attorney, the father of one of its principals, took possession of the deed, he did so as Physicians' agent, such that knowledge of the bylaws' contents, including Physicians' right to representation on the board, is imputable to Physicians (*see Kirschner v KPMG LLP*, 15 NY3d 446, 466 [2010]).
>
> "Based on the foregoing, the first two counterclaims, which relate solely to the composition of the board, fail to state a cause of action. To the extent Physicians contends there is outstanding discovery that might shed further light on how and why the board was composed the way it was, they fail to offer a scintilla of evidence that the decision was made in bad faith, as opposed to as a result of Physicians' inaction. However, as to the third counterclaim, plaintiff has not satisfied its prima facie burden of showing that its decision, as alleged, to arrange for financing of the assessment for the residential cooperative, but not Physicians and the retail unit, advanced a legitimate interest of the Condominium (*see Pomerance v McGrath*, 124 AD3d 481, 483 [1st Dept 2015], lv dismissed 25 NY3d 1038 [2015]). Accordingly, summary judgment was appropriately denied on that counterclaim.
>
> "Finally, the condominium is entitled to dismissal of Physicians' fourth counterclaim, for prima facie tort. Although it alleges intentional and malicious action, Physicians does not allege, as required, that the Condominium's sole motivation was 'disinterested malevolence' (*see Posner v Lewis*, 18 NY3d 566, 570 n 1 [2012] [internal quotation marks omitted])."

Board of Mgrs. of the 120 E. 86th St. Condominium v Park Ave. Physicians Realty, LLC, 160 AD3d 487, 490-491 (1st Dept 2018).

Analysis

As a preliminary matter, in light of the Appellate Decision, the cross motion to renew and reargue is denied as moot. This leaves only Physicians' motion for leave to file the second amended answer. The Condo Board contends the motion should be denied, because each of the proposed counterclaims and cross claims is either time-barred, barred by the business judgment rule, or fails to state claim. Physicians does not address these arguments in its papers in support

of its motion. Instead, it repeats and adds new allegations of misconduct against the Condo Board and its individual members, 120/86 Owners Corp. and their attorneys.

Pursuant to CPLR 3025 (b) "[a] party may amend his or her pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court." "A motion for leave to amend the complaint pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient to state a cause of action or is patently devoid of merit." *Bishop v Maurer*, 83 AD3d 483, 485 (1st Dept 2011) (internal quotation marks and citations omitted).

"An appellate court's resolution of an issue on a prior appeal constitutes the law of the case and is binding on the Supreme Court. . . ." *Carmona v Mathisson*, 92 AD3d 492, 492 (1st Dept 2012) (internal quotation marks and citation omitted). The doctrine of law of the case preludes parties from relitigating an issue previously decided in the same action, "either directly or by implication," where there was a fair and full opportunity to address the issue. *Holloway v Cha Cha Laundry, Inc.*, 97 AD2d 385, 386 (1st Dept 1983).

The business judgment rule applies to the actions of a condominium board of directors. *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 (1st Dept 2009). The rule provides that,

> "a court's inquiry is limited to whether the board acted within the scope of its authority under the bylaws (a necessary threshold inquiry) and whether the action was taken in good faith to further a legitimate interest of the condominium. Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of the business decision."

Id. (internal quotation marks and citation omitted).

Here, the first affirmative defense/counterclaim of the proposed second amended answer alleges that Physicians did not know of its right to a seat on the Condo Board and that, as a result, the Condo Board was improperly constituted from 2012 through 2016. However, the First Department has already held that these allegations do not state a claim, because Physicians' "right [to a seat on the Condo Board] was clearly stated in the bylaws" and that "knowledge of the bylaws' contents . . . is imputable to Physicians." *Board of Mgrs. of the 120 E. 86th St. Condominium*, 160AD3d at 490. This is the law of the case. *Carmona*, 92 AD3d at 492. Therefore, the "proposed amendment is palpably insufficient to state a cause of action." *Bishop*, 83 AD3d at 485 (internal quotation marks and citations omitted).

The second proposed affirmative defense/counterclaim also alleges that the Condo Board was improperly constituted. This time the claim is based on the alleged violation of section 4.1 of the By-Laws, which required the "incumbent Board" to resign at the first annual meeting of the unit owners, which was purportedly held in 1989, so that "a successor nine-member Board [could] be elected by the Unit Owners," as provided in Article 4 and Article 2 of the By-Laws. NYSCEF document number 38 at 53. Contrary to the Condo Board's assertion, the claim is not time-barred pursuant to CPLR 217 (1), which provides that "a proceeding against a body or officer must be commenced within four months after the determination to be reviewed becomes final and binding upon the petitioner . . . ." "The violation of bylaws is akin to a breach of contract" and is subject to the six-year statute of limitations. *Pomerance v McGrath*, 124 AD3d 481, 482 (1st Dept 2015); *see Brasseur v Speranza*, 21 AD3d 297, 297 (1st Dept 2005) (stating that "[c]ondominiums . . . are not amenable to article 78 proceedings in the nature of mandamus for claims of bylaw breach," and applying the six-year statute of limitations to such claims). The claim accrued at the time of the breach (*see Ely-Cruikshank Co. v Bank of Montreal*, 81 NY2d

399, 402 [1993]), allegedly in 1989, which is more than six years before commencement of the instant action. Therefore, the claim is time-barred.

In any event, section 4.1 conflicts with section 2.7, which states that, "[f]rom and after the first annual meeting of the Unit Owners, the Condominium Board shall consist of *five* individuals to be elected three by the Residential Unit Owner, one by the Retail Unit Owner and one by the Professional Unit Owner." NYSCEF document number 38 at 44 (emphasis added). In interpreting a contract "the intent of the parties must be found within the four corners of the contract, giving a practical interpretation to the language employed and reading the contract as a whole." *Ellington v EMI Music, Inc.*, 24 NY3d 239, 244 (2014). Where "there [is] an inconsistency between a specific provision and a general provision of a contract . . . , the specific provision controls." *Muzak Corp. v Hotel Taft Corp.*, 1 NY2d 42, 46 (1956). Here, when reading the By-Laws as a whole, the parties' intention to have a five-member Condo Board becomes apparent. Section 4.1 expressly states that board members are to be elected pursuant to Articles 2 and 4 of the By-Laws. Section 2.7, the more specific provision of the two, then provides, not only that the total number of members shall be five, but also allocates the five seats among the Condominium's three units.[2] Therefore, the failure to elect a nine-member board does not constitute a violation of the By-Laws. For the foregoing reasons, the second proposed affirmative defense and counterclaim "is palpably insufficient to state a cause of action [and] is patently devoid of merit." *Bishop*, 83 AD3d at 485 (internal quotation marks and citations omitted).

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[2] Notably, section 4.8 also contemplates a five-member Condo Board, providing, in pertinent part, that "the Residential Unit Owner shall be entitled to cast three votes at all meetings of the Unit Owners and the Commercial Unit Owner shall be entitled to cast two votes (one by the Professional Unit Owner and one by the Retail Unit Owner) at all meeting of the Unit Owners." NYSCEF document number 38 at 55.

The third proposed affirmative defense/counterclaim alleges that the Condo Board violated section 5.3 of the By-Laws—which requires prior unit owner approval for any "alterations, additions, or improvements" that would "exceed $100,000 in the aggregate in any calendar year" (NYSCEF document number 38 at 60)—with respect to the Façade and Roof Contract. In addition, it alleges that the work was not mandated by Local Law 11 and that all references to the law "were part of a false and fraudulent scheme created by . . . 100% Residential Unit-controlled Board . . . to 'pad' the assessment to be imposed upon Unit Owners, a form of trick and device to knowingly acquire and keep monies to which they were not entitled . . . ." Second amended answer, ¶ 26. Similarly, the fourth proposed affirmative defense/counterclaim alleges that the assessment in connection with the Elevator Contract was invalid, because the Condo Board failed to obtain approvals mandated by section 5.3. Physicians alleges that the Elevator Contract was, "by its language[,] . . . for the modernization and improvement of the elevator system (not an expensive repair)," and that this is apparent from "the fact that the contractor supplied Owners with a Certificate of Capital Improvement so as to avoid any sales tax thereon (there is a sales tax on mere repairs)." *Id.*, ¶ 29.

Both claims are barred by the business judgment rule. First, "the board acted within the scope of its authority under the bylaws . . . ." *Perlbinder*, 65 AD3d at 989. Pursuant to section 5.1 of the By-Laws, the Condo Board is empowered to perform "repairs and replacements, whether structural or non-structural, ordinary or extraordinary" as a common expense. NYSCEF document number 38 at 58. Unlike section 5.3, which deals with "alterations, additions, or improvements" (*id.* at 60), section 5.1 authorizes the Condo Board to perform maintenance, replacement and repairs without the consent of the unit owners. The record before the court establishes that the work on the roof, façade and elevator constituted repairs and maintenance.

With respect to the elevator, a professional inspection concluded that "[a]ll components [were] in poor conditions and . . . definitely in need of a modernization." NYSCEF document number 24. The scope of work in the Façade and Roof Contract includes, among other things, masonry restoration, roofing, and flashing. *See* NYSCEF document number 27. As both projects "merely involved the replacement of existing building components that had fallen into a state of disrepair," they did not constitute improvements and, therefore, consent of unit owners was not required. *Pomerance*, 124 AD3d at 483 (internal quotation marks and citation omitted) (finding that cause of action alleging that the condominium board "acted outside the scope of its authority under the bylaws because it failed to get approval from unit owners of an improvement costing more than $10,000" was barred by the business judgment rule, because the elevator project at issue constituted a repair rather than an improvement); *see also Gennis v Pomona Park Bd. of Mgrs*, 36 AD3d 661, 663 (2d Dept 2007) (finding that a $1.5 million restoration project at a condominium, which included, among other things, the removal and replacement of the shingled roofs, gutters and leaders, entry doors and sidelight units, and wooden decks, constituted "maintenance, repairs and replacements in or to the Common Elements," which, unlike "alterations, additions, and improvements," did not require consent of the unit owners). In addition, the decision to issue the assessment "was taken in good faith to further a legitimate interest of the condominium" (*Perlbinder*, 65 AD3d at 989), as it was necessary to address a violation against the building and to modernize the aged elevator. *See Baxter St. Condominium v LPS Baxter Holding Co., LLC*, 126 AD3d 417, 418 (1st Dept 2015) (holding that "[t]he condominium board's determination that the assessment was necessary for 'repair' work, which, pursuant to the bylaws, [did] not require the sponsor's consent or the unit owners' approval, [was] protected by the business judgment rule," where "[t]he board's determinations [were] supported

by evidence of water leaks . . . , an engineer's report . . . and recommending remedial measures, as well as the engineer's estimated budget for the work to be performed."); *see also Helmer v Comito*, 61 AD3d 635, 636 (2d Dept 2009) (finding "that the [condominium] [b]oard's determination that the proposed construction work constituted 'repairs' and 'maintenance' under the condominium declaration and by-laws was within its authority and made in good faith to further a legitimate interest of the condominium," where the determination was based on, among other things, the findings of architectural and engineering firms hired to address leaks in the building). Therefore, the third and fourth proposed affirmative defenses/counterclaims are barred by the business judgment rule.

The fifth proposed affirmative defense/counterclaim alleges that: 120/86 Owners Corp., rather than the Condominium, entered the Elevator Contract; the Elevator Contract is, by its terms, non-assignable; and none of the unit owners, with the exception of 120/86 Owners Corp., has any contractual liability for the Elevator Contract, because it lacks language required by section 4.12 of the By-Laws. Physicians contends that this means that the $144,700 obligation is solely that of the Residential Unit and may not be assessed against Physicians. However, the instant action is not seeking recovery for breach of the Elevator Contract. The Elevator Contract merely serves as evidence of the repairs that the Condo Board undertook. As discussed above, section 5.1 of the By-Laws authorizes the Condominium Board to make such repairs as a common expense. As such, the fifth proposed affirmative defense/counterclaim is palpably insufficient to state a cause of action.

The sixth proposed affirmative defense and counterclaim alleges that, assuming, arguendo, the total assessment was proper, the $70,688.00 assessment against Physicians overcharged Physicians, because "14.67% instead of said 20% would amount to $51,850.00 . . ."

Second amended answer, ¶ 39. The Condo Board contends that the claim is without merit, because, pursuant to section 5.1 (ii) of the By-Laws, Physicians is liable for 35% of the cost of elevator repairs. However, the Condo Board does not offer any evidence that it "acted within the scope of its authority under the bylaws" when it assessed the $70,688.00 against Physicians. *Perlbinder*, 65 AD3d at 989. The Declaration and the By-Laws provide that Physicians' pro-rata share of common expenses, such as the roof and façade repairs, is 14.67%, and that its share of costs for elevator repairs is 35%. Neither percentage was used to calculate Physician's share of these costs. Instead, the "$70,688 [was] based on an adjustment of [Physicians'] share from *twenty-five percent* to *twenty percent* of the total." Cummings 7/10/15 aff, ¶ 10 (emphasis added). Therefore, Physicians' motion for leave to file a second amended answer is granted to the extent it alleges that Physicians was overcharged, because it was allocated an improper percentage of the expenses in violation of the By-Laws. However, because "'participation in a breach of contract will typically not give rise to individual director liability . . . ,'" to the extent the sixth counterclaim seeks to hold the individual board member liable, the claim is not viable and leave to amend is denied. *Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500, 501 (1st Dept 2018), quoting *Fletcher v Dakota, Inc.*, 99 AD3d 43, 47 (1st Dept 2012).

The seventh proposed affirmative defense and counterclaim alleges that the Condo Board engaged in self-dealing in obtaining financing for the Residential Unit only and that this was in violation of section 2.1 of the By-Laws. The proposed amendment is substantially similar to the third affirmative defense and counterclaim of the amended answer. In affirming denial of summary judgment dismissing that counterclaim, the First Department held that "[the Condo Board] ha[d] not satisfied its prima facie burden of showing that its decision, as alleged, to arrange for financing of the assessment for the residential cooperative, but not Physicians and the

retail unit, advanced a legitimate interest of the Condominium." *Board of Mgrs. of the 120 E. 86th St. Condominium*, 160 AD3d at 490. On the instant motion, the Condo Board has not advanced any new arguments or evidence to demonstrate that the claim is palpably insufficient or devoid of merit. Therefore, Physicians' motion for leave to file a second amended answer is granted in connection with this affirmative defense and counterclaim. However, because the second amended answer "does not allege that any of the individual board members committed an independent wrong that was distinct from the actions taken as a board collectively," to the extent Physicians seeks to hold individual members of the Condo Board liable, leave to amend is denied. *Hersh*, 163 AD3d at 500.

The eighth proposed affirmative defense/counterclaim and the first cross claim consist of a smorgasbord of allegations of wrongdoing by parties and non-parties to this action. It alleges that the Condo Board and its individual members, "willfully, wantonly and deliberately falsely and fraudulently" engaged in an "ongoing plot, plan and scheme" to "permanently and unlawfully depriv[e] Unit Owners of their monies" by assessing "excessive, false and fraudulent and untrue amounts." Second amended answer, ¶ 48. It alleges "an ongoing pattern and course of conduct, and *modus operandi*," by which the individual board members, "have from time to imposed, and continue to impose, Special Assessments only on one or more Unit Owners, not only to meet Common Expenses." *Id.*, ¶ 51. Specifically, Physicians alleges the Condo Board has improperly assessed a "*new and additional* Special Assessment" for $56,471.00 against it, which "is not authorized or permitted by the By-Laws" (*id.*, ¶ 57 [A]), and that it "[i]mproperly increase[ed] the Common Charges in a manner not recognized by, and in violation of the By-Law methods and protocols concerning any increase of Common Charges, which increase they commenced on a date the By-Laws prevented them from so doing." *Id.*, ¶ 57 (B). This was

allegedly done in retaliation for Physicians revealing that the original assessment was "unlawful and exaggerated," as the total for the Elevator Contract and the Façade and Roof Contract was $81,405 less than the total assessment, and that the Board attempted to "cover-up [the] misappropriation by . . . falsely invoking Local Law 11 . . . and . . . patently inapplicable provisions of the By-Laws as some sort of mitigation of said misappropriation." *Id.*, ¶ 57. It also alleges that the attorneys representing the Condo Board and 120/86 Owners Corp. in the instant action have aided and abetted in the alleged scheme to overcharge unit owners, because, despite knowing that the Board was improperly constituted and that the assessment against Physicians was in violation of the By-Laws and the Declaration, they filed a lien against Physicians, instituted the instant action and have refused to cooperate in discovery.

To the extent that this counterclaim/cross claim is premised on the impropriety of the original assessment, as explained above, such claims are barred by the business judgment rule. *See Pomerance*, 124 AD3d at 483. To the extent that they allege that the Condo Board issued a new assessment and increased the common charges in violation of the By-Laws, the allegations are "vague and conclusory [and, as such] insufficient to sustain a breach of contract cause of action." *Marino v Vunk*, 39 AD3d 339, 340 (1st Dept 2007). To the extent that the claims allege that the individual board members and the attorneys representing the Condo Board and 120/86 Owners Corp. aided and abetted in the alleged violation of the By-Laws, "no cause of action exists for aiding and abetting a breach of contract." *Pomerance*, 124 AD3d at 484. Lastly, to the extent that these allegations seek to assert a claim for civil conspiracy, they fail to allege an underlying tort. "A mere conspiracy to commit a [tort] is never of itself a cause of action. Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort." *Alexander & Alexander of N.Y. v Fritzen*, 68 NY2d 968, 969

(1986) (internal quotation marks and citations omitted); *see also Johnson v Law Off. of Kenneth B. Schwartz*, 145 AD3d 608, 611 (1st Dept 2016). Therefore, the allegations of the eighth proposed affirmative defense/counterclaim and the first cross claim are insufficient to state a claim.

The ninth proposed affirmative defense/counterclaim and the second cross claim consists of the same conclusory allegations of prima facie tort that the First Department dismissed as insufficient to state a claim. *See Board of Mgrs. of the 120 E. 86th St. Condominium*, 160 AD3d at 491. The allegations are, therefore, palpably insufficient to state prima facie tort.

In its reply, Physicians seeks leave to amend the ninth proposed affirmative defense/counterclaim and the second cross claim to state a civil violation of the Racketeer Influenced and Corrupt Organizations (RICO) Act. Physicians seeks to leave to amend paragraph 59 of the second amended complaint to state as follows:

> "59. Upon information and belief, the Residential Unit and its individual Board members, and those aiding and abetting them, and those covering up the following alleged acts, had participated in and are continuing to participate in a plot, plan and scheme to obtain money from [Physicians] by trick and device, and to deprive Park Avenue Realty of all such money, such plot, plan and scheme consisting of the following"
>
> "A. For years, it has been limiting its own common expenses to an artificially low amount;
>
> "B. For years, it has surreptitiously been making what it calls 'loans' to the Condominium (not permitted by the By-Laws) for the Condominium to pay 'expenses of the Condominium' but which are expenses of the Residential Unit, including, but not limited to, the Elevator Contract which is the Residential Unit's sole obligation;
>
> "C. For years, it has been maing 'repayments' from the Condominium to the Residential for such phantom 'loans';

> "D. This has all resulted in a false and fraudulent hidden 'debt' created by the Residential Unit which it claims is payable to it by the Condominium, the current balance of which fraudulent 'debt' approximates $300,000.00;
>
> "E. With respect to which, the improperly constituted Condominium Board controlled by the Residential Unit, imposed a false and fraudulent assessment against Part Avenue Realty in the amount of $56,471.00 on or about February 18, 2016 to have Park Avenue Realty—and no one else—pay the so-called 'debt' supposedly owned by the Condominium to the Residential Unit;
>
> "F. Said plot, plan and scheme constitutes an 'enterprise' within the meaning of the law known as 'RICO'; and
>
> "G. Park Avenue Realty has a valid civil RICO claim against the Residential Unit, each Member of its Board and everyone else who participates, covers up or aids and abets this enterprise, and/or who has done so."

NYSCEF document number 166 at 9-10.

> "The elements of civil RICO are: (1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity. . . . The definition of racketeering includes any one of a number of predicate offenses, including wire and mail fraud. . . . In order to establish a 'pattern' there must be at least two racketeering activities within a ten (10) year period."

Penn Warranty Corp. v DiGiovanni, 10 Misc 3d 998, 1007 (Sup Ct, NY County 2005) (internal citation omitted). Here, Physicians fails to allege racketeering activity. *See Board of Mgrs. of Exec. Plaza Condominium v Jones*, 251 AD2d 89, 89-90 (1st Dept 1998). Nor does it allege a pattern, *i.e.*, "at least two acts of racketeering activity." *Simpson Elec. Corp. v Leucadia, Inc.*, 72 NY2d 450, 461 (1988) (internal quotation marks and citation omitted). Therefore, the proposed civil RICO claim is palpably insufficient.

Accordingly, it is hereby

ORDERED that defendant Park Avenue Physicians Realty, LLC's motion for leave to amend the amended answer is granted, in part, as follows: leave is granted with respect to the

sixth and seventh proposed affirmative defenses/counterclaims, except to the extent they seek to hold individuals liable, and to this extent the second amended answer in the form e-filed at NYSCEF Doc. No. 97 shall be deemed served upon service of a copy of this order with notice of entry; and it is further

ORDERED that leave to amend the amended answer is denied with respect to the proposed first, second, third, fourth, fifth, eighth and ninth affirmative defenses/counterclaims and the proposed first and second cross claims and those affirmative defenses/counterclaims and cross claims are stricken; and it is further

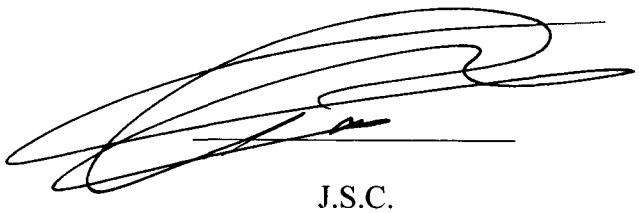
ORDERED that plaintiff shall answer the second amended complaint or otherwise respond thereto within 20 days from the date of said service; and it is further

ORDERED that plaintiff's cross motion for leave to renew and reargue is denied; and it is further

ORDERED that the parties are directed to appear for a status conference in Room 581, at 111 Centre Street, on November 29, 2018, at 11:00 AM.

Dated: October 9, 2018

ENTER:



J.S.C.