

<b>Krishkevich v Rapid Condominium</b>
2019 NY Slip Op 31458(U)
May 17, 2019
Supreme Court, Kings County
Docket Number: 502984/2016
Judge: Loren Baily-Schiffman
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At an IAS Part 65 of the Supreme Court of the State of New York, County of Kings at a Courthouse Located at 360 Adams Street, Brooklyn, New York on the 17<sup>th</sup> day of May, 2019.

**PRESENT: HON. LOREN BAILY-SCHIFFMAN**  
JUSTICE

MARINA KRISHKEVICH,  
Plaintiff,  
  
- against -  
  
RAPID CONDOMINIUM,  
THE BOARD OF MANAGERS OF THE RAPID  
CONDOMINIUM ASSOCIATION, and  
MICHAEL VOLLER  
Defendants.

Index No.: 502984/2016

Motion Seq. #5

DECISION & ORDER

KINGS COUNTY CLERK  
FILED  
2019 MAY 20 AM 9:27

As required by CPLR 2219(a), the following papers were considered in the review of this motion:

	<u>PAPERS NUMBERED</u>
Notice of Motion, Affidavits, Affirmation and Exhibits	1
Plaintiff's Affirmation in Opposition and Exhibits	2
Defendant's Affirmation in Reply	3

Upon the foregoing papers Defendants, Rapid Condominium, the Board of Managers of the Rapid Condominium ("the Board") (collectively "Defendants"), move this Court for an Order pursuant to CPLR § 3212 granting summary judgment and for such other and further relief that this Court deems just and proper.

**Background**

This action arises from certain improvements made to a condominium apartment complex, located at 2800-2900 East 29<sup>th</sup> Street, Brooklyn, New York 11235. Marina Krishkevich ("Plaintiff"), a resident of 2800 East 29<sup>th</sup> Street, alleges that on or about October 2012, boilers in the apartment complex were destroyed in Hurricane Sandy. As a result, Defendants contracted with non-party Nadkos, Inc. to install new boilers. Plaintiff further alleges that Nadkos, Inc. was

inexperienced in installing the tankless type of boiler the Board had selected and the building was not designed to accommodate this type of boiler. Plaintiff alleges that as a result of non-party Nadkos Inc.'s installation, fumes are emitted to Plaintiff's apartment when the boilers run, liquid pollution emanates from the boilers' vents damaging Plaintiff's patio, and the liquid freezes and rains down on the patio during the winter.

In an Order dated July 21, 2017, Hon. Edgar G. Walker granted a motion to dismiss Michael Voller from the action. Accordingly, the fourth, fifth, sixth and seventh causes of action of the complaint are dismissed as they pertain only to the conduct of Michael Voller and not the other defendants.

#### Discussion

Defendants move for summary judgment on the remaining causes of action, claiming (i) that individual unit owners in the condominium lack standing to sue for damages of common elements; (ii) that the Board's decisions are protected by the "business judgment rule;" (iii) that under condominium bylaws, the Board is only liable to unit owners for bad faith or willful misconduct-neither of which is alleged in the complaint; (ix) that Plaintiff failed to follow bylaw provisions to remove a member or conduct an election. Plaintiff claims that summary judgment is premature as discovery, which may lead to relevant evidence, has not yet taken place.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is established sufficiently to warrant directing judgment in favor of any party as a matter of law. *CPLR 3212(b); Gilbert Frank Corp.v Federal Ins. Co., 70 NY2d 966, 967 (1988); Zuckerman v City of New York, 49 NY2d 557, 562 (1980)*. On such a motion, the evidence will be construed in a light most favorable to the party against whom

summary judgment is sought. *Spinelli v Procassini*, 258 AD2d 577 (2<sup>nd</sup> Dept. 1999); *Tassone v Johannemann*, 232 AD2d 627, 628 (2<sup>nd</sup> Dept. 1996); *Weiss v Garfield*, 21 AD2d 156, 158 (3<sup>rd</sup> Dept. 1964). A party opposing summary judgment is entitled to obtain further discovery when it appears, from affidavits submitted in opposition to the motion, that facts supporting the opposing party's position may exist but cannot then be stated. *Ingram v. Bay Ridge Auto. Mgmt. Corp.*, 145 AD3d 672, 672–73 (2<sup>nd</sup> Dept. 2016).

#### Defendants' Motion for Summary Judgment on the First Cause of Action

Plaintiff alleges that Defendants were negligent in hiring Nadkos Inc. to install the boilers in question. Under the Declaration of Condominium, “[a]ll central and appurtenant installations and Facilities for services such as... plumbing, hot and cold water distribution and ventilation are defined as common elements. **Article 7, Declaration of Condominium.** The boilers clearly fall within this definition. Moreover, condominium unit owners lack standing to sue for damages to common elements. *Carper v Nussbaum*, 36 AD3d 176, 186 (2<sup>nd</sup> Dept. 2006). In Plaintiff's Affirmation in Opposition, Plaintiff does not address Defendants' argument that the boilers are a common element of the condominium, and Plaintiff therefore cannot assert a claim. Furthermore, allowing discovery to proceed, as Plaintiff contends, will not shed any light on whether the boilers are common elements. Accordingly, the branch of the motion for summary judgment of the first cause of action sounding in negligent hiring is granted.

#### Defendants' Motion for Summary Judgment on the Second Cause of Action

Plaintiff alleges that Defendants violated their fiduciary duty when they failed to pay Nadkos Inc. in full. As a result of the alleged nonpayment, Nadkos Inc. filed a mechanic's lien against Plaintiff's unit. Notably, Plaintiff argues that the work performed by Nadkos Inc. was

deficient. Additionally, Nadkos is not a party to this action, and the lien Nadkos filed expired in 2017. To establish a prima facie case for breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages directly caused by the defendant's misconduct. *Vil. of Kiryas Joel v County of Orange, 144 AD3d 895, 898–99 (2d Dept 2016), citing Varveris v Zacharakos, 110 AD3d 1059 (2d Dept 2013)*. While it is undisputed that a fiduciary duty existed between Plaintiff and Defendants, it is unclear that Plaintiff pleaded any misconduct in the complaint. Moreover, even if Defendants engaged in misconduct, no damage was caused directly by it and a now expired lien was allegedly placed on Plaintiff's apartment by a non-party contractor. Accordingly, the branch of the motion for summary judgment of the second cause of action sounding in breach of fiduciary duty is granted.

**Defendants' Motion for Summary Judgment on the Third Cause of Action**

Plaintiff alleges that Defendants violated their fiduciary duty by failing or refusing to hold properly noticed annual shareholder meetings, elections for seats on the Board, failing refusing to share financial information with Plaintiff and failing or refusing to permit access of their books, records and financials. Defendants claim that Plaintiff failed to follow the condominium's bylaw procedure to hold a meeting or challenge the incumbent Board member in election. Additionally, Defendants provided the financial information requested as Exhibit G of its Affirmation in Support of Summary Judgment. Plaintiff does not address, much less oppose, Defendants' contentions that Plaintiff failed to follow bylaw proceedings and already has the financial information requested. The branch of the motion for summary judgment of the third cause of action sounding in breach of fiduciary duty is, therefore, granted.

**Defendants' Contention that the Eighth Cause of Action was Previously Dismissed**

In the Affirmation of Support of Summary Judgment, Defendant argues that the eighth cause of action was dismissed when Hon. Edgar G. Walker dismissed Michael Voller from the action. The Order dated July 21, 2017 does not specify which causes of action are dismissed in their entirety. Defendants make no other arguments supporting their motion for summary judgment on this cause of action. However, in relevant part, the eighth cause of action states "Defendants [plural] have created an additional parking spot unauthorized by the building department." Accordingly, Plaintiff has remaining claims against the other Defendants, and the branch of Rapid Condominium's motion for summary judgment on the eighth cause of action is denied.

**Defendants' Motion for Summary Judgment on the Ninth and Tenth Causes of Action**

Defendant gives no explanation why the ninth cause of action alleging conversion and the tenth cause of action alleging violations of New York Condominium Law §339-w should be granted. Accordingly, the branch of the motion for summary judgment of the ninth and tenth causes of action are denied.

**The Board of Managers of the Rapid Condominium Association's Motion for Summary**

**Judgment**

The Board moves for summary judgment dismissing all causes of action against it, claiming that as an unincorporated association the Board lacks capacity to be sued. Under ***General Associations Law § 13***, "[a]n action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action.... against all the associates." Additionally, "[u]nlike a partnership, an unincorporated association may not sue or be sued solely in the association name." ***Pascual v Rustic Woods***

*Homeowners Ass'n, Inc., 134 AD3d 1006 (2<sup>nd</sup> Dept. 2016).* The complaint was dismissed as against Michael Voller, the president of the Board and the other Board members were never named in this action. Plaintiff has not opposed the assertion that the Board is an unincorporated association or that an unincorporated association cannot be sued in this manner. It follows that summary judgment is granted to the Board of Managers of Rapid Condominium dismissing the remaining causes of action.

For the foregoing reasons, it is HEREBY:

ORDERED that the Defendants' motion for summary judgment is granted as to the first, second and third causes of action; and it is further

ORDERED that Defendants' motion for summary judgment is denied as to the eighth, ninth and tenth causes of action; and its further

ORDERED that summary judgment is granted to the Board of Managers of the Rapid Condominium Association in its entirety

This is the Decision and Order of the Court.

ENTER,

  
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LOREN BAILY-SCHIFFMAN  
JSC

**HON. LOREN BAILY-SCHIFFMAN**

2019 MAY 20 AM 9:27

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