SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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REAL WORLD HOLDINGS, LLC, derivatively as a Shareholder on behalf of 393 WEST BROADWAY CORP.,

Plaintiff,

Index No. 655499/2018
Decision/Order

- against -

TIMOTHY M. CLARK, JAMES SCHAEUFELE, JOAN HARDIN, JOHN WOTOWICZ, MARIACRISTINA PARRAVICINI, JANE SINCLAIR, ANTHONY FAGLIONE, and as nominal defendant, 393 WEST BROADWAY CORP.,

Defendants.

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HON. CAROL R. EDMEAD, JSC.:

This is a derivative action brought on behalf of 393 West Broadway Corporation, a cooperative apartment corporation (the corporation), by plaintiff Real World Holdings, LLC (RWH), a shareholder of the corporation.[1] The corporation is the owner of the building known as 393 West Broadway, New York, New York, which includes the address known as 81 Wooster Street, and consists of 14 residential and 3 commercial units (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 20, complaint, ¶ 6; Doc No. 30, amended complaint, ¶ 6).[2] RWH is a resident in the apartment building. Defendants (defendants or the board) are the members of the board of directors of the corporation; most are shareholders and some are also residents (*see* NYSCEF Doc No. 30, amended complaint, ¶ 1).

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[1] RWH previously filed a direct action against defendants, with many of the same allegations (*see Real World Holdings LLC v 393 West Broadway Corp.*, Sup Ct, NY County, Edmead, J., index No. 160732/15).

[2] Because RWH has filed an amended complaint as of right (*see* CPLR 3025 [a]), this decision will refer to allegations in the amended complaint, unless otherwise noted (*see Campbell v Bank of America, N.A.*, 2014 NY Slip Op 32542 [U], ** 7 [Sup Ct, Suffolk County 2014], *affd* 155 AD3d 820 [2d Dept 2017]).

The original complaint, as relevant, alleged defendants engaged in corporate waste, deception and breaches of fiduciary duty and bad faith, in particular in their undertaking of a new roof installation, their purported upgrading of the building's electricity, and in their treatment of subletting non-commercial tenants when compared to subletting commercial tenants (*see* NYSCEF Doc No. 20, complaint, ¶ 1). Defendants moved, pre-answer, to dismiss the complaint based on documentary evidence, statute of limitations, and failure to state a cause of action (CPLR 3211 [a] [1], [5] and [7], respectively) (*see* NYSCEF Doc No. 16, notice of motion).

Rather than opposing the motion and defending the pleading, RWH proffered an amended complaint as of right pursuant to CPLR 3025 (a), deleting certain allegations and causes of action, adding two additional defendants (Jane Sinclair and Anthony Faglione), and new allegations and causes of action alleging trespass based on the presence of asbestos (*see* NYSCEF Doc No. 30, amended complaint). Defendants submitted a reply, arguing that the amended complaint has not cured the problems identified in their motion and fails to address many of their arguments (*see* NYSCEF Doc No. 35, memorandum of law in reply at 1-3; Doc No. 36, reply affirmation of defendants' counsel, ¶¶ 4-6). They also argue that the new causes of action sounding in trespass fail to state a cause of action and should be dismissed (*see* NYSCEF Doc No. 35 at 3).

RWH has sought permission to file a written response (*see* NYSCEF Doc No. 40, letter of August 12, 2018, Mark Lane to the court; Doc No. 42, affirmation of plaintiff's counsel in opposition). Defendants object to what they deem an unauthorized surreply (*see* NYSCEF Doc No. 41, letter of August 12, 2018, Jacqueline L. Aiello to the court).

For the reasons set forth below, RWH's response will be considered to the extent that it addresses defendants' arguments pertaining to the Thirteenth and Fourteenth causes of action.

Upon consideration of all the papers, defendants' motion to dismiss is granted in part and otherwise denied.

Factual Allegations (Amended Complaint)

Unnecessary and illegal repairs to the roof

RWH acquired the shares associated with Unit 6WBM in the coop building in 2008, along with exclusive rights, purchased separately from the cooperative corporation, to the portion of the roof over its apartment (the private roof) (*see* NYSCEF Doc No. 30, amended complaint, ¶¶ 26, 27). RWH obtained the right to construct certain items and additions on the private roof and made clear to the board at the time of the purchase that it intended to develop the private roof in conjunction with its overall future apartment renovation (*see* NYSCEF Doc No. 30, ¶ 30). Its anticipated renovations included the "expected" resurfacing of the private roof, to be done at RWH's sole expense (*see* NYSCEF Doc No. 11, ¶ 30).

All parties allegedly agreed that any roof work, other than routine maintenance, was not immediately necessary; RWH's assessment was that the private roof was in "reasonably good condition," and any major roof work done before it undertook its own renovations, would be a waste of corporate assets since the work "would likely have to be done over" when RWH undertook its work (*see* NYSCEF Doc No. 30, ¶¶ 32, 35-36). Furthermore, the cost to the corporation could be substantially reduced by coordination with RWH's self-funded work (*see* NYSCEF Doc No. 30, ¶ 31).

In 2011, after defendant James Schaeufele[3] was nominated to the board, the board decided to undertake certain capital improvements, including resurfacing the roof (*see* NYSCEF

[3] Schaeufele represented Dia Center for the Arts, the owner of one of the commercial spaces and the cooperative corporation's largest shareholder; Schaeufele was neither a resident nor shareholder but served on the board during most of the events at issue (*see* NYSCEF Doc No. 30, ¶¶ 8, 33).

Doc No. 30, ¶¶ 33-34, 37). RWH reminded the board that it intended to undertake work on its section of the roof in conjunction with its own renovations, which were then slated to begin in about 12-18 months hence (*see* NYSCEF Doc No. 30, ¶ 35).

The building fully commenced the roof work in March 2013 at which time Schaeufele assured RWH in writing that the roof repairs would proceed on the common areas but would "leav[e] out your square footage of the roof," other than a "small 'transition' area" between the common and private roofs (NYSCEF Doc No. 30, ¶¶ 41-42, 44). However, in July 2013, the board notified RWH of the existence of one or more leaks in the area of the private roof, leaks that RWH asserts were "fraudulently fabricated" and were from a pipe that was part of the building's common plumbing (*see* NYSCEF Doc No. 30, ¶¶ 44, 48). In "a barrage of openly malicious communications," the board demanded that RWH "immediately undertake to resurface" the private roof (*see* NYSCEF Doc No. 30, ¶ 44). RWH expressed to Schaeufele that it was "a waste" of the corporation's assets to undertake non-emergency work when RWH "expect[ed] to have [its] entire portion updated and redone" in the future (NYSCEF Doc No. 30, ¶ 50).

Defendant Timothy Clark, the board president, responded to RWH in writing, stating in part that, "there is a clear disconnect on the responsibilities of the parties," and that pursuant to governing documents, the board can determine in its "sole discretion" what repairs were necessary for the roof (NYSCEF Doc No. 30, ¶ 51). "Although the Board may determine to work with you on your roof plans[,] the Board may determine at any time that repairs need to be done to your portion of the roof" (NYSCEF Doc No. 30, ¶ 51). Clark added that pursuant to the corporation rules, RWH was required to "reimburse the [b]oard for any expenses it incurs with respect to your portion of the roof within 10 days" (NYSCEF Doc No. 30, ¶ 51).

The roof work was apparently completed around the end of September 2013 (*see* Doc No. 30, ¶¶ 61-63). RWH then hired a contractor and a roofing expert to examine the need for repairs to the private roof (*see* NYSCEF Doc No. 30, ¶¶ 50, 63). The expert issued a report in October 2013 (*see* NYSCEF Doc No. 30, ¶ 68, citing NYSCEF Doc No. 32, letter WJE Engineers & Architects PC to J. Mark Lane, dated October 15, 2013). The expert opined that at the time of the resurfacing, the private roof had "a serviceable life expectancy of one to two years, if properly maintained" (NYSCEF Doc No. 30, ¶ 70). As to the common roof, the report found that two previous roof coatings appeared to have been "adequately installed," but that the work recently done by the building's contractor was in "various respects incomplete or improperly done," including leaving exposed gypsum board and "exposed and uncoated" pipe penetrations, with "four new areas of leakage" in areas recently repaired in RWH's apartment (NYSCEF Doc No. 30, ¶ 69, citing NYSCEF Doc No. 32, WJE Engineers letter, October 15, 2013).

RWH maintains that the roof work may have violated the New York City Buildings Code which provides that in order to resurface where two layers of roofing already exist, both layers must be removed (*see* NYSCEF Doc No. 30, ¶¶ 62, 63, 71-73, citing NY City Building Code [Administrative Code of City of NY tit 28, ch 7] § BC 1510.3).[4] The contractor's work, installing a third layer, may have subjected the corporation to possible civil penalties and criminal prosecution pursuant to the New York City Construction Code (*see* NYSCEF Doc No.

[4] Section 1510.3 of the New York City Building Code states:

> "**Recovering versus replacement.** New roof coverings shall not be installed without first removing all existing layers of roof coverings down to the roof deck where any of the following conditions occur:...
>
> 3. Where the existing roof has two or more applications of any type of roof covering"

(NY City Building Code [Administrative Code of City of NY tit 28, ch 7] § 1510.3).

30, ¶ 73, citing NY City Construction Code [Administrative Code of City of NY, tit 28, ch 2] § Constr C 28.202 [civil penalties], § 28.203 [criminal penalties]).[5] The board never confronted its roofing contractor about the quality of its work (Doc No. 30, ¶ 74). More importantly, the board "fraudulently represented" to the shareholders that it had obtained a roof warranty from the contractor, although in fact there is "no warranty of the actual roof work, or of the roof as installed," and in fact no warranty can be obtained, RWH asserts, based on the actual work done (*see* NYSCEF Doc No. 30, ¶ 66).[6]

The "net result," as summed up by the amended complaint, "was that the [c]orporation, under the leadership and direction of defendants Clark and Schaeufele, incurred costs in excess of $600,000 to do roof work that was not at that time necessary," at a cost that "would have been very largely reduced or offset if the [c]orporation had merely waited and allowed [RWH]'s planned renovation – including resurfacing of the [p]rivate [r]oof and installation of decking – to move forward" (NYSCEF Doc No. 30, ¶ 55). The board "complete[ly] disregard[ed]" the corporation's "legitimate interests," and its actions "constitute[d] corporate waste and a breach of fiduciary and other duties owed … to the [c]orporation and the [s]hareholders" (NYSCEF Doc No. 30, ¶¶ 55, 57).

Discriminatory treatment in subletting

The amended complaint alleges that the board has wasted corporate assets and has exercised its right inconsistently under the proprietary lease and its amendments by requiring shareholders to pay various fees and sublet surcharges to the corporation as a condition to

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[5] As the particular sections are somewhat lengthy and dependent on other regulations for their applicability and enforcement, they will not be included here.

[6] RWH also asserts that because defendants failed "to follow proper procedure," the private roof had to be resurfaced in 2018, paid for by the corporation (*see* NYSCEF Doc No. 30, ¶¶ 57, 100). The 2018 roof work will be discussed below.

subletting their units (*see* NYSCEF Doc No. 30, ¶¶ 77-81). Fees are always imposed on noncommercial shareholders, but the board, "including specifically Mr. Clark," has allowed commercial shareholders either to "largely bypass the requirement" or not required them "to provide any portion of [their rental profit from subletting] or any additional maintenance to the [c]orporation" (see NYSCEF Doc No. 30 ¶¶ 77-81, 180-181). RWH asserts that because of this preferential treatment, the corporation has lost substantial amounts of income over the years that should have been collected from commercial unit sublet fees, resulting in a waste of corporate assets (*see* NYSCEF Doc No. 30, ¶¶ 79, 84). The alleged reason for the difference in treatment is that in not assessing fees, the board "secure[s] the continuing 'support' of [the commercial] [s]hareholders, who control the largest block of voting shares and routinely vote in favor of [i]ndividual [d]efendants in elections and other…votes" (NYSCEF Doc No. 30 ¶ 183).

Improper electrical work

Sometime in 2012, the board ostensibly undertook an "electrical upgrade" of the building for the benefit of all individual units, although RWH was told that the electrical capacity in its unit could not be upgraded (*see* NYSCEF Doc No. 30, ¶¶ 85-86). Only after RWH obtained a court order, issued in August 2017 in its direct action, was its expert allowed to inspect the completed electrical work (*see* NYSCEF Doc No. 30, ¶¶ 87-88). The expert's report, issued in December 2017, concluded that the upgrade appeared to have been a "deliberate attempt" to preclude increasing electrical capacity to all units other than Clark's residential unit and the commercial unit represented by defendant Mariacristina Parravicini (*see* NYSCEF Doc No. 30, ¶¶ 89-90).[7]

[7] Parravicini, who is neither a shareholder nor resident, represents the owner of a commercial unit in the building, currently subleasing its space to the clothier Eileen Fisher (*see* NYSCEF Doc No. 30, ¶¶ 7, 11).

Transfer of common space and additional improper electrical work

The board undertook another "electrical upgrade" that relocated part of the building's electrical equipment from the basement's south wall to another area of the basement (*see* NYSCEF Doc No. 30, ¶ 96). The electrical equipment had been housed in the space of one of the commercial tenancies (*see* NYSCEF Doc No. ¶ 94). In May 2016 the commercial unit and shares were acquired by the company in which defendant Faglione, who later became a non-resident shareholder and a board member in May 2018, was a member (*see* NYSCEF Doc No. 30, ¶¶ 13, 93). The board's decision to move the electrical equipment was made after Faglione acquired the commercial unit (*see* NYSCEF Doc No. 30, ¶ 95). The amended complaint alleges this action was taken without "follow[ing] proper corporate procedures for turning a common space into a private space," and that the corporation did not receive fair, if any, consideration for the transfer (*see* NYSCEF Doc No. 30, ¶ 95). In essence, the board "gave" space owned by the building to the commercial tenant and relocated the electrical equipment at a cost of more than $175,000.00 that mainly benefited Faglione (*see* NYSCEF Doc No. 30, ¶¶ 96-98).

Failure to test and remediate for asbestos contamination

The two new causes of action alleging trespass, grew out of the necessity to have the private roof resurfaced in March-June 2018. The roof contained asbestos (*see* NYSCEF Doc No. 30, ¶ 229). To remediate as required by law, the board hired the same contractor it had previously used, over RWH's objection (*see* NYSCEF Doc No. 30, ¶¶ 101, 230). The contractor's work was to have been overseen by the corporation's managing agent and board member Faglione; however the contractor issued its two reports concerning its asbestos abatement and testing to Schaeufele (*see* NYSCEF Doc No. 30, ¶¶ 103-106). The June 1, 2018 report indicated that abatement had been performed over a 10-day period with testing done

throughout, and that the results as detailed in the report, "met all applicable criteria for re-occupancy" (NYSCEF Doc No. 30, ¶¶ 104-105). The second report, dated June 5, 2018, made the same findings and concluded that RWH's unit was "safe for occupancy" (*see* NYSCEF Doc No. 30, ¶ 106).

RWH hired its own asbestos specialist to examine the unit, and its July 16, 2018 report found that "three out of six spots randomly tested … exceeded [the safety benchmark of the Environmental Protection Agency (EPA)]" (NYSCEF Doc No. 30, ¶¶ 107-108). Two areas "contained more than ten times the allowable asbestos," and a third area "contain[ed] 80 times the allowable asbestos" (NYSCEF Doc No. 30, ¶ 108). RWH's expert concluded that occupants present in the apartment could have inhaled airborne asbestos fibers before they settled on the floor and recommended additional remediation and further testing (*see* NYSCEF Doc No 30, ¶¶ 109-111). RWH notified the board and then the other residents (*see* NYSCEF Doc No. 30, ¶ 112).

Defendants' conduct, states the amended complaint, "constitutes a trespass into the [b]uilding, by causing the infiltration of a hazardous substance" (NYSCEF Doc No. 30, ¶¶ 234, 245). Defendants then "willful[ly]" and "reckless[ly]" denied the findings of RWH's expert and have refused to conduct further remediation (NYSCEF Doc No. 30, ¶¶ 115; 235, 246). It is RWH's belief that the building "continues to contain unsafe levels of asbestos, putting all residents at risk" (NYSCEF Doc No. 30, ¶ 115). Additionally, the value of the building' units and the corporation are diminished (*see* NYSCEF Doc No. 30, ¶¶ 234, 245).

The amended complaint sets forth 14 causes of action alleging breach of fiduciary duty on the part of the individual defendants. It seeks actual and punitive damages and injunctive relief compelling defendants to correct and reverse their previous actions (*see* NYSCEF Doc No.

30 at 47-48, §§ A-N). RWH argues in sum that the actions of the board and the individual board members revealed "an extensive and prolonged campaign of hostility, and tortious and discriminatory conduct," resulting in decisions and actions driven not by "good faith desire or duty to act in the best interests of the [c]orporation, but by improper motives," and costing "hundreds of thousands of dollars … that should never have been spent" (NYSCEF Doc No. 30, ¶ 117). Further, defendants repeatedly sought to obtain money from RWH that RWH should not have been obligated to pay and which benefited "[i]ndividual [d]efendants; including Parravicini, Clark and Schaeufele" (NYSCEF Doc No. 30, ¶ 118).

The First through Sixth causes of action pertain to the board's decision to resurface the roof, the timing of the work, the qualifications of the contractor, the manner in which the work was carried out and its supervision, and the question of the warranty (*see* NYSCEF Doc No. 30 at 47-48). The Seventh and Eighth causes of action allege discriminatory treatment of non-commercial subletting shareholders. The Ninth and Tenth causes of action allege that defendants Clark and Parravicini wrongfully benefited from an upgrade of the building's electrical system that only benefitted their units. The Eleventh and Twelfth causes of action allege failure to follow corporate procedures in the transfer of common space in the basement to Faglione's company, failure to obtain fair value for the transfer and corporate waste by moving the electrical equipment. The Thirteenth and Fourteenth allege trespass caused by contamination by asbestos and defendants' refusal to conduct further remediation.

Defendants' Pre-answer Motion to Dismiss and Reply

Defendants argue that their motion papers should be applied to the amended complaint, in particular as RWH has not cured the problems identified in defendants' motion and leaves unaddressed many of their arguments, requiring dismissal (see NYSCEF Doc No. 36, affirmation

of defendants' counsel in reply at ¶¶ 2, 4). The amended complaint only alleges that defendants' conduct was "undertaken in bad faith, and involved extensive unequal treatment of shareholders, fraud, acts done knowingly in violation of the laws…and other tortious and unlawful acts and omissions," but does not detail the individuals or the acts in question (NYSCEF Doc No. 35 at 7, quoting NYSCEF Doc No. 30, ¶ 122). Disagreeing with a board action, defendants note, is not the same as alleging bad faith or fraud (*see* NYSCEF Doc No 35 at 7). The new Thirteenth and Fourteenth claims alleging trespass based on the presence of asbestos, fail to state a cause of action and must also be dismissed (*see* NYSCEF Doc No. 35 at 10-11).

Liability of individual defendants and the business judgment rule

Defendants argue that the First through the Eighth and the Eleventh through the Fourteenth causes of action must be dismissed because instead of allegations and details of specific tortious acts committed by particular individual board members, the amended complaint only alleges that decisions were made in bad faith and tortiously by defendants while serving on the board, insufficient to form a basis for individual liability (*see* NYSCEF Doc No. 35 at 8-9, citing *Cohen v Kings Point Tenant Corp.*, 126 AD3d 843 [2d Dept 2015] [dismissing complaint where the allegations that two defendant board members acted tortiously and outside the scope of their board authority were found conclusory]; *Avramides v Moussa*, 158 AD3d 499 [1st Dept 2018] [no allegations of independent tortious acts by the board members; the allegations fell "squarely within the protections of the business judgment rule"]). Further, there is no merit to RWH's claims that board members engaged in corporate waste because they decided in the course of their board-related duties, to resurface the common roof at a time when it allegedly was not in need of "immediate repair," or in not obtaining a work warranty from the contractor, or for possible violations of the NYC Building Code (*see* NYSCEF Doc No. 28, memorandum of law

in support at 8-9, citing *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). The rule is that a shareholder may not question a corporation's decision simply because he or she is dissatisfied with it (*see* NYSCEF Doc No. 28 at 9, citing *Konrad v 136 E. 64th St. Corp.*, 254 AD2d 110 [1st Dept 1998], *lv dismissed in part and denied in part* 92 NY2d 1042 [1999]; *Parker v Marglin*, 56 AD3d 374, 374 [1st Dept 2008]).

Defendants concede that the Ninth and Tenth causes of action include particularized allegations of specific tortious acts that benefited only defendants Clark and Parravicini, although they argue that the claims must be dismissed on other grounds (*see* NYSCEF Doc No. 35 at 9).

Ripeness

Defendants argue that the claims pertaining to the roof work should also be dismissed because they are not ripe for adjudication (*see* NYSCEF Doc No. 35 at 4). They quote *Chase Manhattan Bank v Kress* (131 AD2d 807 [2d Dept 1987]), that where "the issue presented for adjudication involves a future event... which may never occur, the action... is premature" (NYSCEF Doc No. 28 at 11, quoting 131 AD2d at 808, citing *American Ins. Assn. v Chu*, 64 NY2d 379 [1985]; *see also Cuomo v Long Is. Light. Co.*, 71 NY2d 349, 354 [1988] [internal quotation marks and citation omitted]). They point out that although RWH seeks to recover damages representing the costs of correcting the allegedly unlawful or poorly executed work, there are no allegations of actual damages suffered by the corporation's building, only that there might be in the future (*see* NYSCEF Doc No. 28 at 11). As to the claim that the work may have been illegally performed, the corporation has not been notified of any fines or violations imposed by the Department of Buildings (*see* NYSCEF Doc No. 28 at 12).

Statute of limitations

Defendants originally argued that the statute of limitations barred RWH's claims of breach of fiduciary duties because where such claims seek primarily money damages, they are held to a three-year statute of limitations found in CPLR 214 (4) (*see* NYSCEF Doc No. 28 at 13, citing *DiRaimondo v Calhoun*, 131 AD3d 1194, 1196 [2d Dept 2015]). Accordingly, the claims pertaining to the original roof work done in 2013, and the Ninth and Tenth causes of action alleging that the 2012 building's electrical upgrade solely benefited Clark and Parravicini, all of which seek money damages and punitive damages, are barred by the statute of limitations and must be dismissed accordingly (*see* Doc No. 28 at 23; Doc No. 35 at 9).

In New York, there is no single statute of limitations for a claim of breach of fiduciary duty, and therefore the statute of limitations is determined by the substantive remedy sought (*see* NYSCEF Doc No. 28 at 21, citing *DiRaimondo* at 1196). Defendants point out that the original complaint almost exclusively sought money damages and punitive damage, requiring dismissal of most of the claims based on the statute of limitations; they acknowledge the addition of new claims in the amended complaint seeking injunctive relief which have a six-year statute of limitation but argue that they are merely a "transparent tactic to avoid the shorter limitations period" and should not be considered (NYSCEF Doc No. 35 at 3).

Failure to state a cause of action and documentary evidence

As concerns the claims alleging different treatment of subletting noncommercial and commercial unitholders, defendants argue that they fail to state a cause of action as evidenced by the contents of the corporation's tenant ledgers for the two commercial spaces that have been at least partially sublet (*see* NYSCEF Doc No. 28 at 22, citing NYSCEF Doc No. 25, tenant ledgers for Dia Art Foundation and Christinerose Gallery). The ledgers show that from May 2015

through April 2019, and from May 2015 through May 2019, both Dia Art Foundation and Christinerose Gallery, respectively, paid a monthly maintenance fee and a sublet fee (*see* NYSCEF Doc No. 25, tenant ledgers). Defendants conclude that this fully refutes RWH's claims.

The causes of action alleging corporate waste and failure to follow governing corporate procedures based on defendants "giving" common space to Faglione's commercial unit without fair consideration, should also be dismissed, defendants argue, for failure to state a cause of action as shown by documentary evidence (*see* NYSCEF Doc No. 28 at 24-25; Doc No. 35 at 5-6). Defendants explain that in 2016, when the company then owned by Faglione acquired the basement commercial space, his company signed an agreement memorializing its understanding that the corporation reserved its right to enter the commercial space as needed, upon notice or in an emergency, in order to attend to the building's mechanical, electrical, boiler, elevator and other related equipment (*see* NYSCEF Doc No. 28 at 25, citing NYSCEF Doc No. 26, access agreement, ¶ 1). In 2018, the parties agreed to an "exchange [of] space," wherein the corporation transferred ownership of the basement area then housing the electrical equipment to the company, and relocated the electrical equipment to an area near the basement entrance, an area "more convenient" to the corporation, "as opposed to the middle of [the commercial]'s unit" (NYSCEF Doc No. 28 at 25, internal punctuation omitted). Defendants' attorney claims in her affirmation that the original space housing the electrical equipment was 248 square feet while the new area is 312 square feet; this increase in the corporation's square footage was acquired without payment (NYSCEF Doc No. 28 at 25, citing Doc No. 27).

Corporate waste, defendants explain, is "the diversion of corporate assets for improper or unnecessary purposes," such as a transfer for no consideration (Doc No. 28 at 24-25, quoting

Security Police & Fire Professionals of Am. Retirement Fund v Mack, 30 Misc 3d 663, 676 [Sup Ct, New York County 2010], *affd* 93 AD3d 562 [1st Dept 2012] [internal quotation marks and citation omitted]). Where some consideration is given, a claim of corporate waste must allege facts that show "that the economics of the transaction were so flawed that no disinterested person of right mind and ordinary business judgment could think the transaction beneficial to the corporation" (NYSCEF Doc No. 28 at 24, quoting *Security Police* at 676 [internal quotation marks and citation omitted]; Doc No. 35 at 6). Here, RWH cannot show that the corporation "gave away" corporate assets nor that a disinterested person would think the transaction was not beneficial to the corporation (*see* NYSCEF Doc No. 28 at 25; Doc No. 35 at 6). The documents clearly show that the transfer of space was of benefit to both parties, increased the amount of space owned by the corporation, and was negotiated without payment to the commercial tenant (*see* NYYCEF Doc No. 28 at 25).

Finally, defendants argue that the allegations that they are liable in trespass for the failure of the corporation's contractor to conduct proper asbestos remediation, resulting in asbestos entering the building, also fail to state a cause of action (*see* NYSCEF Doc No. 35 at 10-11). Property owners are liable for a trespass committed by an independent contractor only where the property owner directed the trespass, or the trespass was necessary to complete the work (*see* NYSCEF Doc No. 35 at 10, citing *Semon v Chasol Constr. Corp.*, 7 AD2d 1009, 1009 [2d Dept 1959]; *Whitaker v McGee*, 111 AD2d 459, 462 [3d Dept 1985]; *Gracey v Van Camp*, 299 AD2d 837, 838 [4th Dept 2002]). Defendants argue that RWH is simply unable to allege that the board members directed the contractor to allow asbestos into the building while doing asbestos remediation, or that it was necessary to allow asbestos into the building in order to complete remediation (*see* NYSCEF Doc No. 35 at 10).

RWH's Response to Defendants' Trespass Arguments[8]

RWH disputes defendants' argument that the amended complaint fails to assert specific allegations concerning defendants' tortious conduct and trespass which include their hiring, over RWH's objection, the same contractor who had "unlawfully" performed the previous roof work, their failure to properly supervise the work including the remediation and testing for asbestos, their promotion of the contractor's false claims of full remediation and failure to notify the shareholders otherwise, and their refusal to undertake further remediation, resulting in the building remaining contaminated with asbestos (*see* NYSCEF Doc No. 42, affirmation of J. Mark Lane in opposition to motion to dismiss, ¶ 32, citing Doc No. 30, ¶¶ 101-115). RWH argues that for all these reasons, defendants are responsible for the contractor's work (Doc No. 42, ¶ 32, citing Doc No. 30, ¶¶ 101, 113). RWH has shown that defendants "caused" asbestos, "in amounts vastly beyond any safe standards" to be "deposited into the [b]uilding," and "without any right to do so" (Doc No. 42, ¶ 33, citing *Shackman v 400 E. 85th St. Realty Corp.*, 2017 NY Slip Op 30618 [U] [Sup Ct, NY County, 2017], *affd as modified* 161 AD3d 438 [1st Dept 2018] [defendant cooperative's failure to properly remediate clogs and address pipe deterioration, causing water to be deposited into the plaintiffs' apartment without permission, was properly alleged with trespass]).

Discussion

Amendment as of right

CPLR 3025 (a) provides that a party may amend a pleading once without leave of court by filing and serving the amended pleading "at any time before the period for responding to [the

[8] As noted previously, this court will consider RWH's arguments in surreply as to defendant's arguments in reply pertaining to the trespass claims.

original pleading] expires" (*Toikach v Basmanov*, 31 Misc 3d 615, 618 [Sup Ct, Kings County 2011). Here, defendants made a pre-answer motion to dismiss the complaint, and RWH filed an amended complaint as of right pursuant to CPLR 3025 (a).[9] Defendants then filed their reply, in essence treating the amended complaint as RWH's opposition to their motion, and object to RWH's argument that it is entitled to file a brief in response because defendants raised new substantive arguments in response to the allegations in the amended complaint (*see* NYSCEF Doc No. 40, John Lane letter to the court, dated Aug. 12, 2019).[10]

Caselaw does not provide overt guidance in determining the procedural posture of the motion. For instance, in *Gurary v Rendler*, 40 Misc 3d 1231 (A), 2013 NY Slip Op 51361 (U) (Sup Ct, Kings County 2013), the defendants had moved to dismiss on the sole ground that the plaintiff lacked the capacity to sue, after which the plaintiff filed an amended complaint that remedied the error and differed significantly from the original; the defendants in their affirmation made in further support, also made entirely new arguments unrelated to the grounds set forth in their original motion (*Gurary* at **6). The court found little merit to plaintiff's objection to allowing the defendants to continue their motion as against the amended complaint, reasoned that "the new grounds raised for dismissal could be raised by a new motion addressed to the amended complaint," and accordingly addressed the merits of the motion and dismissed the amended complaint (*Gurary* at **5, **6; *see also Terrano v Fine*, 17 AD3d 449, 449 [2d Dept 2005]

[9] RWH has sufficiently established that a pre-suit demand pursuant to Business Corporation Law § 626 would have been futile prior to instituting this action: it made an initial demand in August 2013 which was found by defendants' counsel after investigation to be without merit (*see* NYSCEF Doc No. 30, ¶¶ 58, 59), and a second demand in May 2015 was acknowledged by defendants' counsel, without further response, and certain of the resident board members refused or returned the demand letters (*see* Doc No. 30, ¶¶ 17-19).

[10] RWH has uploaded its proposed response to defendant's "reply" (*see* Doc No. 42, affirmation by plaintiff's counsel in opposition).

[holding that the amended complaint did not render academic the motion to dismiss "which was addressed to the merits"]). However, in *Fownes Bros. & Co., Inc. v JPMorgan Chase & Co.* (92 AD3d 582 [1st Dept 2012]), where the plaintiffs filed an amended complaint after the motions to dismiss had been briefed and oral argument held, and two days before the court was to issue its order, the Court held that in that instance, it was impossible for the defendants to meaningfully respond and directed the motions toward the original complaint, in particular because the amended complaint had not "moot[ed]" the motions to dismiss (92 AD3d at 582). Finally, in *Lipary v Posner* (96 Misc 2d 578, 579 [Sup Ct, Monroe County 1978]), it was held that the result of filing an amended pleading, was to "abate" the original motion, meaning that it is denied as moot since it referred to a superseded pleading.

The First Department has held that when an amended pleading has been filed in response to a motion to dismiss, it is preferable that "the moving party has the option to decide whether its motion should be applied to the new pleadings" (*Sage Realty Corp. v Proskauer Rose*, 251 AD2d 35, 38, 38 [1st Dept 1998]). Defendants ask that their motion be applied to the amended pleading and for this court to decide, as the court did in *Napoli v New York Post* (2016 NY Slip Op 32268[U] [Sup Ct, NY County 2016]), whether "the amended pleading cures the problems identified in the motion, thereby rendering it moot, or fails to do so, in which case the motion may be granted" and the amended complaint dismissed (NYSCEF Doc No. 41, Jacqueline L. Aiello letter to the court, Aug. 12, 2019 at 1, quoting *Napoli* at **7). Certainly, there is no reason to abate defendants' motion because of the amended complaint. Unlike the parties in *Gurary*, the amended complaint is not significantly changed but rather supplements and deepens the original arguments, as well as adding two new causes of action; notably the motion was decided in *Gurary* despite the significant changes in both the amended complaint and the

defendants' reply. In contrast, defendants' reply here refers to the arguments in the original complaint to bolster their arguments for dismissal of the amended complaint, showing the usefulness of treating the amended complaint as if were RWH's opposition.

Accordingly, the court will consider defendants' motion to dismiss as against the amended complaint. To allay any concerns of due process, the proffered affirmation of RWH's attorney in opposition to the motion to dismiss will be considered to the extent it addresses defendants' arguments pertaining to the newly added claims of trespass, but RWH does not otherwise get a second bite of the proverbial apple.

Motion to dismiss

As an initial matter, defendants' argument that the statute of limitations bars most of RWH's claims is of little merit. This is an action brought derivatively against the members of the cooperative corporation's board of directors and therefore is governed by the six-year statute of limitation set forth in CPLR 213 (7), pertaining to "an action by or on behalf of a corporation against a present or former director … to recover damages for waste or for an injury to property." (CPLR 231 [7]; *see Roslyn Union Free School Dist. v Barkan,* 16 NY3d 643, 652 [2011] [holding that CPLR 213 (7) governs "any action by a corporation against its present or former … directors …, whether seeking equitable or legal relief," and that "there is no merit to the assertion that the statute does not cover causes of action for money damages"]).

In considering a motion to dismiss the complaint for failure to state a cause of action (CPLR 3211 [a] [7]), the "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Guggenheimer v Ginzberg*, 43 NY2d 268, 275 [1977]). The court liberally construes the complaint and accepts as true the facts alleged in the complaint and any

submissions in opposition to the motion to dismiss (*see 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19, [2005] [citation omitted]). However, factual allegations may be negated by affidavits and documentary evidence (*see Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 613 [1st Dept 2015]), although dismissal is only warranted when the documentary evidence shows "that a material fact as claimed by the plaintiff is not a fact at all, and no significant dispute exists regarding it" (*Stinner v Epstein*, 162 AD3d 819, 820 [2d Dept 2018], citing *Guggenheimer v Ginzburg*, 43 NY2d at 274-275).

Fiduciary Duty

A board of directors of a cooperative corporation is entrusted with the responsibility of protecting its shareholders' interests, and therefore owes its shareholders a fiduciary duty (*see Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322, 326 [2d Dept 1993], citing *Matter of Levandusky.*, 75 NY2d at 538; *see* Business Corporation Law § 717 [a]). The fiduciary responsibility owed by the directors is to treat all shareholders fairly and evenly (*see Schwartz v Marien*, 37 NY2d 487, 491 [1975]). The board is required to act solely in the best interests of the shareholders (*see Bernheim v 136 E. 64th St. Corp.*, 128 AD2d 434 [1st Dept 1987]). Departures from uniform treatment of shareholders must "be in furtherance of a justifiable and bona fide business purpose" (*Smolinsky v 46 Rampasture Owners*, 230 AD2d 620, 622 [1st Dept 1996], citing *Schwartz v Marien*, 37 NY2d at 491-493).

In alleging a breach of fiduciary duty, the movant must show the existence of a fiduciary relationship, misconduct by the other party, and damages directly caused by that party's misconduct (*see Pokoik v Pokoik*, 115 AD3d 428, 429 [1st Dept 2014]). It is well-established

that these elements "must be pleaded with the particularity required by CPLR 3016 (b)" (*Stinner v Epstein*, 162 AD3d at 820). This means that "the circumstances constituting the wrong shall be stated in detail" (CPLR 3016 [b]). The participation of an individual director in a corporation's tort is sufficient to give rise to individual liability (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 47 [1st Dept 2012]).

Business judgment rule

In New York, where a director performs his or her duties in "good faith" and with the degree of care that an "ordinarily prudent person in a like position would use under similar circumstances," he or she will have no liability simply because of having been a director of the corporation (Business Corporation Law § 717 [a]). The standard of review for examining allegations brought against a board is that of the business judgment rule (*see Barbour v Knecht*, 296 AD2d 218, 224 [1st Dept 2002], citing *Levandusky*, 75 NY2d 530). "[I]n the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" (*40 W. 67th St. v Pullman*, 100 NY2d at 153, internal quotation marks and citation omitted).

The business judgment rule shields directors' decisions even if they were "unwise or inexpedient," as long as they did not breach their fiduciary obligations to the corporation (*see Levandusky*, 75 NY2d at 538). The rule shields directors when they possess "a disinterested independence" and have no dual relations that would "prevent an unprejudicial exercise of judgment" (*Allannic v Levin,* 57 AD3d 443, 443 [1st Dept 2008], citing *Auerbach v Bennett*, 47 NY2d 619, 631 [1979]). Thus, in *Konrad v 136 E. 64th St. Corp.* (254 AD2d 110), the defendants' decisions concerning the manner and extent of building repairs and renovations were

within the scope of their authority under the by-laws and proprietary lease of the cooperative, and they were shielded from judicial review by the business judgment rule, as the plaintiff failed to substantiate her claims of fraudulent misrepresentations and other breaches of fiduciary duties. Conversely, in *Allanic v Levin*, a motion for summary judgment, the Court found there were questions of fact regarding whether the defendant board members were disinterested members or engaged in self-dealing when they voted to enter into a lease extension of a master lease under which not all shareholders would be treated fairly and evenly (57 AD3d at 444; *see also Kravtsov v Thwaites Terrace House Owners Corp.*, 267 AD2d 154, 154-155 [1st Dept 1999] [dismissing the claim for breach of fiduciary duty as against all but one of the board members, named in the complaint and alleged to have demanded a commission and the discontinuance of the plaintiff's suit against him in exchange for arranging for approval of the sale of the plaintiff's apartment as well as of buying an adjoining apartment).

Of course, there is the potential for abuse by a cooperative board because of its broad powers and may involve acts such as arbitrary and malicious decisionmaking, favoritism, or discrimination (*see Levandusky* at 536). These kind of abuses "are incompatible with good faith and the exercise of honest judgment" required of a board (*40 W. 67th St. v Pullman,* 100 NY2d at 157). Therefore, it is well-established that the business judgment rule does not insulate a board's action that "deliberately singles out individuals for harmful treatment" (*Barbour v Knecht*, 296 AD2d at 224 [internal quotation marks and citation omitted]; *see Stinner v Epstein*, 162 AD3d at 821; *Meadow Lane Equities Corp. v Hill*, 63 AD3d 699, 700 [2d Dept 2009]). Arbitrary or malicious decision making or decision making tainted by discriminatory considerations is not protected (*see Fletcher v Dakota, Inc.*, 99 AD3d 43, 48 [1st Dept 2012]). A director who makes decisions affected by an inherent conflict of interest is not protected (*see*

Wolf v Rand, 258 AD2d 401, 404 [1st Dept 1999]). Further, a director "who participates in the commission of a tort committed by the board may be held individually liable" (*Stinner v Epstein*, 162 AD3d at 821, citing *Fletcher v Dakota, Inc.*, 99 AD3d 43, 47 [1st Dept 2012]).

Because of the courts' deference to the decisions made by a cooperative board of directors, allegations that a board or board member has breached its fiduciary duties will only survive a motion to dismiss if they are pleaded with specificity (*see Cohen v Kings Point Tenant Corp.*, 126 AD3d at 844 [the plaintiffs' allegations that two board members, by refusing to address certain conditions in the building, breached their fiduciary duty because their conduct was motivated by religious discrimination, were found to be only conclusory and without factual basis, nor was it alleged that defendants acted tortiously other than within the scope of their board authority]; *Avramides v Moussa,* 158 AD3d 499, 500 [1st Dept 2018] [no allegations of independent tortious acts by the board members, and the allegations fell "squarely within the protections of the business judgment rule"]; *Stalker v Stewart Tenants Corp.*, 93 AD3d 550, 552 [1st Dept 2012] [allegations that some board members did not review the application of the prospective purchases, and that the board improperly rejected the plaintiffs' application to purchase a cooperative unit, failed to allege that the directors acted outside their official capacities and were insufficient to state claims against the directors in their individual capacities because individual directors are not subject to liability without allegations that they committed separate tortious acts]).

Case law is mixed as to whether a complaint or a cause of action should be dismissed when the defense rests on the business judgment rule (*see Bryan v West 81 St. Owners Corp.*, 186 AD2d 514, 515 [1st Dept 1992] ["Defendants cannot seek dismissal of the pleadings at this stage merely by invoking the 'business judgment rule'"]; *Ackerman v 305 E 40th Street Owners*

Corp., 189 AD2d 665, 667 [1st Dept 1993] [pre-discovery dismissal of pleadings in the name of the business judgment rule was inappropriate where the shareholders sufficiently alleged facts to support finding that defendant board did not act in good faith by withholding approval of sale of apartment]).

The roof resurfacing causes of action (First through Sixth causes of action)

The decision by a board to resurface or repair a roof, including the contractor to hire, the kind of warranty to acquire, and the sign-off of work completed, is quintessentially the type of action protected under the business judgment rule. The amended complaint does not allege acts or statements by any board member made in bad faith when making the decision to resurface the roof or when, upon learning from its contractor that there were leaks in the private roof, requiring RWH to resurface the private roof at that time. There is no claim of self-dealing or other tortious conduct. Certainly, RWH's plan may have been smart, and may have saved the corporation funds, but the board members decided a different course, acting within their capacity as members of the board when approving the work and its funding. Minority members "may not seek to substitute their judgment or that of the court for the judgment of the directors" (*Schmidt v Magnetic Head Corp.*, 101 AD2d 268, 281 [2d Dept 1984], citing *Kalmanash v Smith*, 291 NY 142, 155 [1943]). Disagreement with the board as to costs, means, allocation and methods employed by the board in making repairs to the building, without evidence of self-dealing, fraud or other acts that would constitute a breach of fiduciary duty, are insufficient to put aside the business judgment rule (*see Parker v Marglin*, 56 AD3d 374, 374 [1st Dept 2008]).

As long as a board of a cooperative corporation acts for the purposes of the entity and within the scope of its authority and in good faith, its actions are protected by the business judgment rule, even if "unwise or inexpedient" (*see Levandusky*, at 538 [internal quotation marks

and citation omitted]). The allegations that the board knew that the roofing work was allegedly being done incorrectly is without a factual basis, and the allegations of bad faith and other improper conduct concerning the roof work are merely conclusory. "Minority shareholders cannot interfere with the management of a corporation so long as those in control are acting honestly and within their discretionary powers" (*Schmidt v Magnetic Head Corp.*, 101 AD2d at 281, citing *Burden v Burden*, 159 NY 287, 308 [1899]).

The court concludes that the business judgment rule shields defendants from the First through Sixth causes of action pertaining to the roof repairs, and accordingly these claims are dismissed.[11]

Discriminatory treatment in subletting (Seventh and Eighth causes of action)

Unequal treatment of shareholders by directors is not insulated from liability under the business judgment rule (*see Stinner v Epstein*, 162 AD3d at 821; *Fletcher v Dakota, Inc.*, 99 AD3d at 48 [decision making tainted by discriminatory considerations is not protected under the business judgment rule]). Defendants have not conclusively disproven, through the tenant ledgers of Christinerose Gallery and Dia Art Foundation, RWH's claims that defendants have either never or only sporadically assessed sublet fees from commercial tenants while consistently requiring such fees from noncommercial tenants. For one thing, the tenant ledgers only begin with the year 2015 rather than 2012, the commencement of the running of the statute of limitations. Nor have defendants provided an affidavit stating that the gallery and the foundation have been the only commercial units subletting part or all of their units since 2012. A motion to dismiss based on documentary evidence may only be granted when the documentary evidence "conclusively dispose[s] of [the plaintiff]'s claims as a matter of law" (*Cronos Group Ltd. v*

[11] Defendants' arguments concerning ripeness not be addressed as they are rendered academic.

XComIP, LLC,156 AD3d 54, 60 [1st Dept 2017]). Because the amended complaint sufficiently alleges that the board has treated noncommercial subletting tenants differently from commercial tenants, defendants' motion to dismiss the Seventh and Eighth causes of action is denied.

Improper electrical work (Ninth and Tenth causes of action)

The amended complaint has sufficiently alleged specific tortious actions benefitting Clark and Parravicini by alleging that the 2012 electrical work ostensibly undertaken to upgrade the building, was of benefit only to them, and raising questions of self-dealing and failure to treat all shareholders evenly (*see Allannic v Levin,* 57 AD3d at 444). As the six-year CPLR 213 (7) statute of limitations applies to derivative actions, defendants' motion to dismiss the Ninth and Tenth causes of action is denied.

Transfer of common space and additional improper electrical work (Eleventh and Twelfth causes of action)

The amended complaint sufficiently alleges a breach of fiduciary duty by the board's decision to transfer some of the corporation's common space in the basement to Faglione's company, in exchange for relocating the electrical equipment to an area apparently belonging to Faglione's company. Although RWH alleges that corporate procedures contained in the governing documents were not followed, it has not cited the sections allegedly at issue, nor provided copies. Nonetheless, the decision to undertake the costs of relocating the electrical equipment out of the space of the commercial unit owned by Faglione's company, which occurred the same year that Faglione joined the board of directors, certainly suggests favoritism and the board's failure to act in an evenhanded manner on behalf of all shareholders and unitholders. Notably, defendants have not proffered documentary evidence to show that the corporation gained space in the transfer. Therefore, defendants' motion to dismiss the Eleventh and Twelfth causes of action is denied.

Trespass – failure to remediate for asbestos (Thirteenth and Fourteenth causes of action)

"Trespass is the invasion of a person's right to exclusive possession of his [or her] land" (*Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2012], citing *Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61 [2009]). Trespass "includes the entry of a substance onto land" (*Berenger*, at 181 [glycol]).

The act is intentional and done without justification or permission (*see Phillips v Sun Oil Co.*, 307 NY 328, 328 [1954] [no liability for trespass as there was no indication the defendant "had good reason to know or expect" that oil from its tanks was leaking and polluting a neighbor's well]); *see also Chaikin v Karipas*, 162 AD3d 842, 843 [2d Dept 2018], quoting *Reyes v Carroll*, 137 AD3d 886, 888 [2d Dept 2016]). There need not be an intent to produce the damaging consequences, only the intent to perform the act that produces the unlawful invasion (*see Berenger,* at 181). As stated by the Court of Appeals,

> "while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness"

(*Phillips v Sun Oil Co.*, 307 NY at 331).

Contrary to defendants' arguments, because plaintiffs are accorded the benefit of every possible inference when deciding a motion to dismiss (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]), the court finds that RWH has sufficiently alleged that defendants have trespassed, by their refusing to conduct further remediation for asbestos in RWH's unit despite the findings of its that asbestos is still present (*see Curwin v Verizon Communications (LEC)*, 35 AD3d 645, 646 [2d Dept 2006] [showing of trespass by defendant's refusal to remove equipment from the plaintiffs' land after conveying the property to them]). They did not intend or expect that asbestos would be released during the resurfacing of the roof,

but they are negligently or willfully unwilling to take further remedial measures. Defendants' motion to dismiss the Thirteenth and Fourteenth causes of action is therefore denied.

Accordingly, it is

ORDERED that defendants' motion to dismiss is granted to the extent that the first through sixth causes of action are dismissed, and is otherwise denied; and it is further

ORDERED that defendants will file and serve their answers within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for defendants.

Dated: December 13 2019

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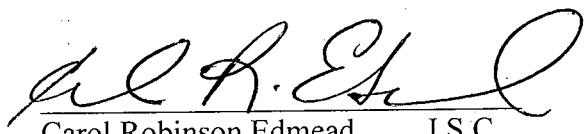

Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.