SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

Justice

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INDEX NO. 158882/2018

CHRISTOPHER PEDDY, CHRISTINE PEDDY,

MOTION DATE 11/25/2019, 11/26/2019

Plaintiff,

MOTION SEQ. NO. 004 005

- v -

468 PROPERTY OWNER, LLC,THE 464 COLUMBUS AVENUE CONDOMINIUM, THE BOARD OF MANAGERS OF THE 464 COLUMBUS AVENUE CONDOMINIUM, 464 COLUMBUS AVENUE OWNERS, INC.

DECISION + ORDER ON MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 004) 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 93, 95, 98, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 126, 128, 129, 133

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 94, 96, 99, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 130, 131, 134

were read on this motion to/for DISMISS.

Upon the foregoing documents, motion sequences #4 and #5 are granted.

Plaintiffs are the owners of a residential cooperative unit ("subject apartment") located within the building known as 464 Columbus Avenue, New York, NY ("condorp building").

The condorp building is comprised of a ground floor commercial unit and the residential cooperative unit. The residential cooperative unit is comprised of eight (8) residential apartments, including the subject apartment, and is managed by defendant, The Board of Managers of the 464 Columbus Avenue Condominium ("Coop Board of Directors").

Defendant 468 Property Owner, LLC ("468 LLC") owns the building known as 468 Columbus Avenue, which previously included a three (3) story building which has been demolished since the commencement of this action. The remaining defendants are 464 Columbus

Avenue Condominium (the "condominium"), and 464 Columbus Avenue Owners, Inc. (the "Cooperative").

Plaintiffs' apartment is one of the eight residential apartments in the condo. The apartment is a duplex located on the top floor of the subject building and is the largest residential unit. A portion of the roof of the subject apartment is comprised of fourteen panels of glass measuring approximately two hundred square feet. The glass roof is appurtenant to the apartment and is located approximately twenty feet over the main living/dining area of the subject apartment.

Plaintiffs claim that in April of 2018, defendant 48 LLC reached out to the building's attorney to initiate negotiations of an access agreement to install protection on the condorp's roof and windows. At that time, plaintiff Christopher Peddy was the president of the Condo Board. Initially, plaintiffs state that they were included in the negotiations. However, they claim that at some point 48LLC excluded them from all discussions about the proposed project.

Sometime later, 48 LLC and the other defendants agreed on a proposed license and a license fee which was accepted by all of remaining defendants. Plaintiffs assert that they were not given the opportunity to participate in the discussions which resulted in the final license agreement.

A prior proceeding, regarding the installation of temporary protections on various portions of the residential cooperative unit, including protections over plaintiff's glass roof during the demolition and construction, was settled. Plaintiffs state that they never saw that settlement agreement and did not sign it.

In this case, plaintiffs argue that the agreement settling the prior proceeding is a nullity, because they did not sign it and that Christopher Feick, who signed on the board's behalf, was not a board officer and as such, did not have the authority to enter into such an agreement on behalf of the board.

Plaintiffs commenced this action after learning about the settlement agreement and the provision contained therein which permitted 468 LLC to install plywood protections over the glass roof of their apartment for approximately 18 months.

Plaintiffs assert that they were denied an opportunity to have any input into the design of the scaffolding which covers their glass roof and that none of the defendants have communicated with them to ascertain the impact that the construction and glass roof covering has had on their lives.

Plaintiffs also claim that none of the defendants have been willing to compensate them for the loss of light in their apartment. In addition, they argue that the 464 defendants (the Co-op Board of Directors, the Condominium and the Cooperative), seem content to take the license fee and share it with the other shareholders, but not them. According to plaintiffs, this act is in violation of the fiduciary duties owed them. Moreover, plaintiffs believe that 468 LLC has also violated additional provisions of the license agreement.

Based on the above, plaintiffs seek compensation claiming that they are suffering from the intrusion and loss of light caused by the roof protection. They assert that their compensation claims are completely different from that of the other owners in the building because they are the only ones with a large glass roof which is being obstructed by the scaffolding. They also state that they have not received their pro rata share of the benefits obtained by the other 464 defendants.

In addition, the plaintiffs argue that the 464 defendants have refused to provide them with any abatement in the rent they pay under their proprietary lease. Plaintiffs claim that in response to an inquiry about an abatement, a representative of the 468 LLC defendant stated that it has no obligation to compensate plaintiffs under the license agreement because the 464 defendants have

concluded that they have no obligation to compensate plaintiffs. All defendants move to dismiss the complaint.

"When assessing the adequacy of a complaint in light of a CPLR 3211(a)(7) motion to dismiss, the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true, and provide [the] plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005], quoting *Leon*, 84 NY2d at 87; see also *Goshen v Mutual Life Inc. Co. of NY*, 98 NY2d 314, 326 [2002]). Whether a plaintiff can ultimately establish its allegations "is not part of the calculus to determine a motion to dismiss" (*EBC, Inc. v Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 [2005]). "Further, any deficiencies in the complaint may be amplified by supplemental pleadings and other evidence" (*AG Capital Funding Partners, L.P.*, 5 NY3d at 591; see also *Rovello v Orogino Realty Co.*, 40 NY2d 633, 635–66 [1976]). Such a motion, pursuant to CPLR 3211(a)(7), must fail if the facts as alleged fit within any cognizable legal theory (see *Leon*, 84 NY2d at 87–88; *Morone v Morone*, 50 N.Y.2d 481, 484 [1980]; *Rovello*, 40 N.Y.2d at 634).

Laying at the heart of the case at bar is plaintiffs' discontent with the terms of the license agreement between the 468 defendant and the condominium board. That agreement grants the 468 defendant a temporary, non-exclusive license to access certain portions of the condominium building during a designated license term for the purpose of protecting the condominium building and its occupants in accordance with city regulations and the specific terms of the license agreement in exchange for a payment of a license fee in the amount of $100,000.00 for the first 20 months and $6,500 for each month thereafter. Among the many protections outlined in the agreement is the installation of temporary protective measures over the condominium's roof, including the glass roof in plaintiffs' living room and the condominium's windows. The

Declaration, Article 5; By-Laws, Article V, Sections 10,13 show that all portions of the roof and windows are owned by the Cooperative.

Plaintiffs' amended complaint alleges six causes of action. The first cause of action requests that the Court issue a Judgment declaring that the license agreement is void and asks that the Court direct the 468 defendant to enter into a new license agreement with the cooperative which takes reasonable actions to minimize the loss of light to plaintiffs' apartment and pays plaintiffs a licensee fee and/or damages at trial, but believed to be in excess of $5,000.00 per month, plus legal and engineering fees incurred by plaintiff.

The second, fifth, and sixth causes of action also seek a declaration that the license agreement be declared void. However, the second cause of action seeks damages for the loss of plaintiffs' quiet enjoyment of their apartment. The fourth cause of action asks that the court determine the license void because it was not properly executed and the sixth cause of action seeks that the court declare the license agreement unenforceable against the cooperative.

These causes of action, while grounded in separate and distinct legal theories, must be dismissed, as they presume that the plaintiffs have standing to assert them. However, plaintiffs lack such standing, as it is clear from the cooperative's declaration and by-laws that the skylight/glass roof at issue, is a common element owned, controlled, and managed by the residential cooperative unit and not by plaintiffs.

Pursuant to Article 5 of the Condominium Declaration, the residential unit includes all roofs and windows. Article 6.4 of the Condominium Declaration details the limited common elements within the individual residential units and does not include the skylight, or any roofs or windows. The proprietary lease between the residential unit and the plaintiffs, clearly states that the windows are the responsibility of the residential unit and not the individual unit owner. The

by-laws of the residential unit also suggest that the skylight is not under plaintiffs' control but under the control of the residential unit.

It has been held that in order to have standing in a dispute, a plaintiff must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law. *Dairylea Coop., Inc., v. Walkley*, 38 NY2d 6 (1975). As in the case at bar, a shareholder of a corporation bringing suit, the remedy sought is for wrong done to the corporation; the primary cause of action belongs to the corporation; [and] recovery must ensure to the benefit of the corporation. *Isaac v. Marcus*, 258 NY257; *see Marx v. Akers*, 88 NY2d 189. Specifically, in the context of a corporation, the standing of the shareholder is based on the fact that he or she is defending his or her own interests as well as those of the corporation.

Plaintiffs cannot recover for any of their claimed losses arising out of the construction of the roof protection in the absence of a contractual relationship between them and defendant 48 LLC (*Lake Placid Club Attached Lodges v Elizabethtown Bldgs.*, 131 AD2d 159).

Plaintiffs are only incidental, not intended, beneficiaries of the contract between the defendants (*Board of Mgrs. v Schorr Bros. Dev. Corp.*, 182 AD2d 664). Absent privity of contract, plaintiffs have no right to assert a claim demanding recovery from the defendants related to the license agreement (*supra*).

Plaintiffs have also failed to state a cause of action for breach of contract or breach of fiduciary duty. While plaintiff and the cooperative are parties to the proprietary lease, a contract, plaintiffs fail to allege that a breach of the lease has occurred, or that they have suffered any loss as a result of such breach.

Plaintiffs have not pled the prima facie elements of a claim for breach of quiet enjoyment, as they have not pled that they have been substantially and materially deprived of the beneficial use and enjoyment of their premises, *Barash v. Pennsylvania Term. Real Estate Corp.*, 26 NY 2d 77 (1970).

Likewise, plaintiffs claim against the condominium and condominium board for "aiding and abetting" the cooperative's alleged breach of the proprietary lease must be dismissed because there was no breach and because no such cause of action exists. *Purvi Enterprises, LLC v. City of New York*, 62 AD3d 508 (2009).

Plaintiffs breach of fiduciary duty cause of action against the 464 defendants is also dismissed, as a corporation does not owe fiduciary duties to its members or shareholders. *Hyman v. New York Stock Exchange, Inc.*, 46 AD3d 335 (2007). However, it has been held that a condominium board owes a fiduciary duty to individual unit owners, plaintiffs are not owners at the condominium, and therefore cannot maintain a claim for breach. *Odell v. 704 Broadway Condo.*, 284 AD2d 52 (2001).

The defendants' motions are granted and the complaint is dismissed in its entirety.

This is the decision and order of the Court.

12/7/2020
DATE

W. FRANC PERRY, J.S.C.

CHECK ONE:	X	**CASE DISPOSED**			**NON-FINAL DISPOSITION**		
	X	**GRANTED**		**DENIED**	**GRANTED IN PART**		**OTHER**
APPLICATION:		**SETTLE ORDER**			**SUBMIT ORDER**		
CHECK IF APPROPRIATE:		**INCLUDES TRANSFER/REASSIGN**			**FIDUCIARY APPOINTMENT**		**REFERENCE**