

**Golden Ox Realty LLC v Board of Mgrs. of Colden
Garden Condominium, Inc.**

2020 NY Slip Op 34188(U)

December 18, 2020

Supreme Court, New York County

Docket Number: 159693/2014

Judge: Lucy Billings

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46

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GOLDEN OX REALTY LLC,

Index No. 159693/2014

Plaintiff

- against -

DECISION AND ORDER

BOARD OF MANAGERS OF COLDEN GARDEN
CONDOMINIUM, INC. a/k/a COLDEN GARDEN
CONDOMINIUM, DAVID LIN, and JOHN DOES
1-6,

Defendants

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LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues defendants for breach of a contract, breach of a fiduciary duty, and a declaratory judgment concerning use of a condominium unit. Plaintiff moves to amend the complaint to join Golden Ox ER, LLC. as a plaintiff, identify the John Doe defendants, and correct factual allegations in the original complaint. C.P.L.R. §§ 1001(a), 3025(b). Although plaintiff's notice of its motion also seeks to disclose documents under seal, plaintiff offers no support for this relief. See C.P.L.R. § 3103(a); 22 N.Y.C.R.R. § 216.1.

II. PLAINTIFF'S MOTION TO AMEND ITS COMPLAINT

Leave to amend a complaint is freely granted unless the amendment would surprise or otherwise prejudice the opposing parties, Davis v. South Nassau Communities Hosp., 26 N.Y.3d 563, 580 (2015); Kimso Apts., LLC v. Gandhi, 24 N.Y.3d 403, 411 (2014); Global Liberty Ins. Co. v. Tyrell, 172 A.D.3d 499, 500 (1st Dep't 2019); Y.A. v. Conair Corp., 154 A.D.3d 611, 612 (1st Dep't 2017), or the amendment lacks merit. C.P.L.R. § 3025(b); Avail 1 LLC v. Acquafredda Enters. LLC, 184 A.D.3d 476, 477 (1st Dep't 2020); Brook v. Peconic Bay Med. Ctr., 172 A.D.3d 468, 469 (1st Dep't 2019); Jean-Baptiste v. 153 Manhattan Ave. Hous. Dev. Fund Corp., 124 A.D.3d 476, 477 (1st Dep't 2015); Onetti v. Gatsby Condominium, 111 A.D.3d 496, 497 (1st Dep't 2013).

A. Joining Golden Ox ER as a Plaintiff

"Persons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." C.P.L.R. § 1001(a). See Sweezey v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 19 N.Y.3d 543, 550 (2012); Buckley v. National Frgt., 90 N.Y.2d 210, 217 (1997); Eclair Advisor Ltd. v. Jindo Am., Inc., 39 A.D.3d 240, 244 (1st Dep't 2007). In an affidavit dated January 16, 2020,

Ziming Shen attests that he and his wife Xiaoping Fan are the managing members of plaintiff limited liability company. Shen and Fan transferred their membership in plaintiff in trusts to their three children. Shen and his children retain an interest in Golden Ox ER, LLC, which owns the condominium unit at issue. Since Golden Ox ER is the unit owner whose interests are necessarily affected by this action, it is a necessary party to this action. Odell v. 704 Broadway Condominium, 284 A.D.2d 52, 59 (1st Dep't 2001). See Stephen & Mark 53 Assoc. LLC v. New York City Dept. of Evtl. Protection, 168 A.D.3d 440, 440 (1st Dep't 2019); Seevers v. Tang, 280 A.D.2d 392, 393 (1st Dep't 2001).

While defendants contend that the plaintiff's transfer of its interest in the unit to Golden Ox ER violated the condominium bylaws because plaintiff failed to notify the board of the transfer or seek its approval, that contention only gives rise to defenses or counterclaims by defendants and does not furnish grounds for denying the joinder. In any event, Article VIII § 7(4) of the bylaws provides that the board's right of prior refusal to a unit transfer does not apply to a "conveyance or transfer from Unit Owner by gift, devise by will or intestate succession." Aff. of Todd Manister Ex. D, at 23. Shen attests

in reply that the transfer of plaintiff's interest in the unit to his children was without consideration.

B. Identifying the John Doe Defendants

Plaintiff also now seeks to identify the John Doe defendants as the individual members of defendant board. Defendants first contend that the applicable statutes of limitation bar the claims against the individual defendants. The statute of limitations for breach of a contract is six years. C.P.L.R. § 213(2). Since plaintiff seeks both equitable relief and damages, the statute of limitations for breach of a fiduciary duty is also six years. C.P.L.R. § 213(1); Hamapour v. Harounian, 182 A.D.3d 426, 427 (1st Dep't 2020); DiBartolo v. Battery Place Assoc., 84 A.D.3d 474, 476 (1st Dep't 2011). Plaintiff alleges that in a letter dated September 5, 2014, less than six years before plaintiff served and filed this motion, defendants advised the New York City Department of Buildings that plaintiff's conversion of the unit from a medical office to a day care center was illegal. Thus the claims against the individual defendants are not time barred. See Brook v. Peconic Bay Med. Ctr., 172 A.D.3d 468, 469 (1st Dep't 2019).

Defendants next contend that plaintiff fails to plead a breach of a fiduciary duty claim against the individual

defendants because neither the complaint nor the proposed amended complaint alleges that they acted for their own self-interest.

Yet ¶ 44 of the complaint and ¶ 50 of the proposed amended complaint both allege that the individual defendants "sought to promote their own self-interests and political agenda." *Aff. of Enrico DeMarco Ex. A*, at 12; *Ex. B*, at 7.

Nevertheless, the business judgment rule protects individual defendants, as members of the board, from liability for decisions within the scope of their authority as a board members. 40 W. 67th St. v. Pullman, 100 N.Y.2d 147, 150 (2003); Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 536-37 (1990); Weinreb v. 37 Apts. Corp., 97 A.D.3d 54, 57 (1st Dep't 2012); Berenger v. 261 W. LLC, 93 A.D.3d 175, 184-85 (1st Dep't 2012). Neither the original nor the proposed amended complaint singles out any board member as having dominated the transactions to injure plaintiff, so it fails to "pierce the corporate veil" to render any board member individually liable. Berenger v. 261 W. LLC, 93 A.D.3d at 185. Similarly, since plaintiff does not allege that any individual defendant committed tortious conduct, the individual defendants are not personally liable for breach of a fiduciary duty. Board of Mgrs. of Honto 88 Condominium v. Red Apple Child Dev. Ctr., a Chinese Sch., 160 A.D.3d 580, 582 (1st Dep't 2018);

Pomerance v. McGrath, 143 A.D.3d 443, 447 (1st Dep't 2016); Hixon v. 12-14 E. 64th Owners Corp., 107 A.D.3d 546, 547 (1st Dep't 2013); Fletcher v. Dakota, Inc., 99 A.D.3d 43, 56 (1st Dep't 2012). Plaintiff's failure to demonstrate the merit of the individual board members' personal liability mandates denial of the motion to join these members as named defendants. Café Lughnasa Inc. v. A&R Kalimian LLC, 176 A.D.3d 523, 523 (1st Dep't 2019); Nichols v. Curtis, 104 A.D.3d 526, 528 (1st Dep't 2013); Yeger v. E*Trade Sec. LLC, 52 A.D.3d 441, 441 (1st Dep't 2008).

C. Prejudice

Although defendants further contend that plaintiff has not established a reasonable excuse for the delay in moving to amend the complaint, delay in moving to amend a pleading alone does not constitute prejudice. Shareholder Representative Servs. LLC v. NASDAQ OMX Group, Inc., 176 A.D.3d 632, 633 (1st Dep't 2019); Flowers v. 73rd Townhouse LLC, 149 A.D.3d 420, 421 (1st Dep't 2017); Tri-Tec Design, Inc. v. Zatek Corp., 123 A.D.3d 420, 420 (1st Dep't 2014). See Schiff v. ABI One LLC, 155 A.D.3d 543, 543 (1st Dep't 2017). Defendants illustrate plaintiff's delay in moving to amend its complaint by pointing to its proposal to amend the complaint at a deposition in February 2016, a withdrawn motion to amend the complaint in January 2018, and correspondence

expressing an intent to move to amend the complaint to join Golden Ox ER, LLC, if defendants did not stipulate to the amendment in July 2019. These actions, however, eliminate any claimed surprise by defendants. While defendants also claim prejudice due to a need for additional disclosure when disclosure is near completion, plaintiff points out that the proposed plaintiff's members as well as the proposed individual defendants already have been deposed.

III. CONCLUSION

For the reasons explained above, the court grants plaintiff's motion to amend the complaint to the extent of adding Golden Ox ER, LLC, as a plaintiff and correcting the factual allegations as specified in the Affirmation of Enrico DeMarco ¶ 10 ((Mar. 2, 2020), which defendants do not oppose. C.P.L.R. §§ 1001(a), 3025(b). The court denies plaintiff's motion to identify the John Doe defendants and to disclose documents under seal. C.P.L.R. §§ 1001(a), 3025(b), 3103(a); 22 N.Y.C.R.R. § 216.1. Within 10 days after entry of this order, plaintiff shall serve a copy of this order with notice of entry and an amended complaint in conformity with this order on defendants. Consistent with the Status Conference Stipulation and Order dated December 18, 2020, defendants shall answer or otherwise respond

to the amended complaint within 20 days after service of the amended complaint and within 30 days after entry of this order. This decision constitutes the court's order.

DATED: December 18, 2020

Lucy Billings

LUCY BILLINGS, J.S.C.

LUCY BILLINGS
J.S.C.