

Levine v Saah

2021 NY Slip Op 31653(U)

May 17, 2021

Supreme Court, New York County

Docket Number: Index No. 151119/2020

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART IAS MOTION 12

Justice

-----X

VANESA LEVINE,

Plaintiff,

- v -

INDEX NO. 151119/2020

MOTION DATE _____

MOTION SEQ. NO. 002

FARIS SAAH and HARVARD CLUB OF NEW
YORK CITY,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 36-38, 41, 49-51, 53-62, 65-70, 72, 73, 78, 79, 85, 87, 88

were read on this motion for priority of depositions/cross-motion to dismiss.

Plaintiff, a member of defendant Harvard Club of New York City (Club), sues it and club member defendant Saah for damages she sustained as a result of an incident on Club premises. She moves pursuant to CPLR 3106 for an order according her a priority of depositions of defendants. Defendants oppose and Club cross moves pursuant to CPLR 3211(a) (1) and (7) and 3016(b) to dismiss plaintiff’s eighth, ninth, eleventh, and twelfth causes of action.

I. AMENDED COMPLAINT (NYSCEF 38)*

A. The incident in issue

Plaintiff alleges that on the evening of February 6, 2019, she and her mother attended a previously advertised lecture at Club’s premises by a controversial university professor entitled, “The Hundred Years’ War on Palestine.” She complains that Club provided no additional

* It is undisputed that the amended complaint filed in the United States District Court for the Southern District of New York is the operative complaint in this action.

security measures for this well-attended and controversial event, did not require attendees to sign in to gain admission, and that the speaker presented only the Palestinian side of the Arab/Israeli conflict.

Immediately following the lecture, a question and answer session was held. According to plaintiff, after she was handed a microphone to ask a question, she began her question by setting forth her own opinion on an aspect of the conflict. The audience interrupted and booed her, thereby preventing her from asking her question. She also alleges that Saah then assaulted and battered her, and that other attendees witnessed her being subjected to offensive conduct. Saah assertedly continued his attack on her by shouting a derogatory Arabic term at her. A verbal altercation ensued between Saah and plaintiff's mother.

Some time later, Club security entered the lecture hall and plaintiff was then able to ask her question of the speaker, after which she and her mother were asked to leave the premises by security personnel. None of the perpetrators were asked to leave nor were statements taken from witnesses, except for one who exculpated plaintiff.

After plaintiff and her mother left the building, plaintiff was videotaped describing how she had been silenced, assaulted, and/or battered at the event. She denies having either mentioned "Harvard Club of New York City" or that she was standing in front of the Club premises when videotaped. The video was posted to plaintiff's private Facebook page "as a cry for support from her family and friends." Plaintiff refused Club's request that she remove the video from her Facebook page.

B. Club's refusal to provide plaintiff with **pre- and post-action** discovery

Plaintiff alleges that Club falsely denied possession of surveillance tapes and knowledge of the identity of her assailant. It also refused to provide her with a report of the incident and did

not report the assault to the New York City Police Department (NYPD). Plaintiff thus contends that Club concealed evidence from her, attempted to silence her, and when unsuccessful, expelled her, thereby violating its fiduciary duty to her.

C. Plaintiff's criminal complaint against Saah

Plaintiff filed a report of the alleged assault to the police but was unable to provide the name of her assailant. The report was incomplete and contained errors. She alleges that Club stonewalled the police investigation of the incident.

D. The hearing

After plaintiff had reported the assault to the NYPD, Club advised plaintiff that on March 21, 2019, its Board of Trustees had voted to recommend that she be expelled based on the events of February 6, 2019. Plaintiff objected and sought a fair hearing.

A hearing was conducted on July 10, 2019 at the premises before a committee that was assembled by Club's Board of Trustees, which plaintiff claims was in violation of its by-laws. During the course of the hearing the Board's secretary presided and cross-examined every witness. As plaintiff testified, he interrupted her, objected to her use of the word "assault," and stated that there was no evidence of an assault other than plaintiff's testimony. He argued with her and showed her no sympathy, compassion or understanding of her victimhood, and attributed no probative value to the video evidence of plaintiff's bruised arm.

Plaintiff's mother also testified at the hearing and described Saah's assault and/or battery on her daughter, demonstrating how he had grabbed her and how the bruises were consistent with it, which the secretary also disregarded.

Although plaintiff had not consented to the release of her report to the police of the assault, she maintains that Club "unlawfully obtained a copy" and used it to impeach her

credibility based on errors that had been incorporated into their witnesses' statements, with the intent to discredit her.

In rebuttal, plaintiff attacked as "suspect" almost all of the written statements offered in evidence by the hearing committee. A Club security employee, called by the committee as a witness, had first admitted to having signed a statement bearing his name and then questioned the authenticity of his signature on cross-examination when plaintiff showed him a magnification of it. The secretary halted the cross-examination and gave no weight to the testimony. Although plaintiff produced magnifications of the "similarly suspect" signatures of all of Club's signed attendee-witness statements, the secretary "testified" in an attempt to rehabilitate the statements, all but one of which were drafted by Club lawyers and relied on at the hearing but are missing from the committee report to the full Board of Trustees. The lecturer's statement had also not been signed by him, and it was discovered during the hearing that the Club attorney had drafted and signed it without the lecturer's authorization. Plaintiff thus complains that hearing testimony from Board of Trustee committee members regarding facts germane to the subject inquiry rendered them fact witnesses, which was improper and unfair.

Plaintiff denies having violated House Rule X prohibiting Club members from "us[ing] the name of the Club in connection with communications to the press or the public. . . ," and observes that the Rule prohibits a victim of an alleged crime occurring at the premises from reporting it, thereby forcing a victim to choose between silence and Club membership.

E. The causes of action

Based on these allegations, plaintiff advances causes of action against Saah for assault, battery, slander, slander per se, and libel. Against Club she advances the following causes of action:

- 8) breach of contract and fiduciary duty;
- 9) fraud and fraudulent concealment;
- 10) negligent security;
- 11) judgment declaring that Club's bylaw X is void *ab initio* and that Club wrongfully expelled her; and
- 12) intentional infliction of emotional distress.

Although plaintiff alleges in her seventh cause of action for "loss of membership" that Club wrongly relied on Saah's false statement, she states therein that Saah is the liable party.

II. CLUB'S CROSS-MOTION TO DISMISS

Contentions

1. Defendants (NYSCEF 53)

Club contends, relying on its bylaws (NYSCEF 60), that Club membership must be annually renewed, and as renewal is at the Board's "complete discretion" (XI, XII), a member may be suspended or expelled for any conduct which, in the Board's judgment, is "improper, prejudicial or detrimental to the Club" (XIX). It asserts that plaintiff's refusal to remove the video from her Facebook page violates Rule X, which prohibits a member from using Club's name "in connection with communications to the press or the public . . ." (*Id.*).

At plaintiff's request, after a hearing committee was appointed by the Board, a hearing was held. Pursuant to the bylaws, the hearing committee has the "sole discretion . . . [to] determine the manner in which [the hearing was] to be conducted." (*Id.*, XIX.3).

Absent any indication in the amended complaint of the existence of an enforceable contract between plaintiff and Club, Club argues that plaintiff states no cause of action for breach of contract, observing that in other papers filed in this case, plaintiff had stated that her action "is

rooted in personal injuries,” originating from Saah’s tort. (NYSCEF 59).

Club also seeks dismissal of the cause of action for breach of fiduciary duty as it denies owing plaintiff such a duty. Rather, it argues, directors of a not-for-profit corporation like Club owe a fiduciary obligation to act on behalf of the corporation in good faith and with reasonable care so as to protect and advance its interests. Thus, absent any allegation that Club failed to act in good faith on behalf of itself or its members’ collective interests, as opposed to plaintiff’s claim that it failed to act in her personal best interest, Club asserts that plaintiff fails to state a cause of action against it for breach of fiduciary duty. And, having abandoned her constitutional claims in the subject amended complaint, she has no cause of action based on a fiduciary duty. Even if such a duty were owed, Club maintains, plaintiff alleges no actionable misconduct or breach of such a duty absent a contractual entitlement to membership. Additionally, such a cause of action is duplicative of her cause of action for breach of contract, as plaintiff alleges no fiduciary relationship independent of the alleged contract.

In arguing that plaintiff’s cause of action for fraud and fraudulent concealment states no claim, Club observes that she sets forth in her complaint no material misstatements, a duty to disclose the information, and any intent to deceive her. Plaintiff’s reliance on any such representations, Club claims, is thus immaterial. Additionally, Club alleges that it provided plaintiff with the incident reports promptly and she had a full opportunity to question the two security officers at the hearing.

Club also argues that plaintiff does not comply with CPLR 3216(b) absent an indication of how an alleged failure to comply with her demands for evidence constitutes fraud, there being no obligation to share information with her. Bylaw XI, which forbids the sharing of contact information of a member except to another member, does not require Club to provide contact

information for any member on request to any other member, and even if it did, plaintiff does not allege how the failure to do so constitutes deceit or an intent to deceive or any resulting detriment in relying on it.

According to Club, there is also no factual or legal basis for a judgment declaring that it wrongfully expelled plaintiff, as Club possesses complete discretion to expel her for “any conduct, which in the Board’s judgment, is improper, prejudicial or detrimental” to it. Additionally, it observes that the bylaws do not provide for any review of the Board’s exercise of its discretion, and that plaintiff’s alternative claim that the hearing committee was improperly composed is wrong given the presence on it of a Vice President and other Board members. That the Vice President did not personally attend the portion of the hearing where witnesses were interviewed in person, is immaterial, as he reviewed the witness statements, exhibits, and the hearing committee’s report which he signed. Plaintiff’s contention that in-person attendance was required, Club asserts, is misguided in view of the final and controlling authority given the Board, “[i]n respect to questions of construction of these By-Laws.” Having considered and rejected plaintiff’s construction of this bylaw, Club maintains, the Board’s decision is final.

To the extent that plaintiff advances against Club a cause of action for intentional infliction of emotional distress based on the alleged breach of fiduciary duty and/or fraud and/or fraudulent concealment and/or how the hearing was conducted, Club argues that she states no claim and in that any event, such conduct is neither extreme nor outrageous, even if a member of the Board had told her that he did not believe that she was a victim.

2. Plaintiff (NYSCEF 78, 79)

In the first instance, plaintiff objects to the admission in evidence on this motion of Club’s bylaws and the hearing committee report attached thereto absent proof of their

authenticity or admissibility. Moreover, she observes, pages are missing from each exhibit and each has been significantly redacted. She claims that the redactions from Club's bylaws enable it to advance its argument that memberships are at-will. Thus, plaintiff argues that Club's discretion does not extend to the allegations she sets forth in the amended complaint, and she was fraudulently advised in advance of the hearing that its purpose was fact-finding.

Plaintiff maintains that defense counsel's assertion that Club is a private social club is inadmissible, absent documentary support for it and in light of its public offer to rent out rooms for special occasions. Additionally, bylaw XII references "public" events held there. According to plaintiff, Club has been sued in federal courts for discrimination which would not have proceeded if Club was "private."

Plaintiff advances numerous arguments which she claims demonstrate that Club deprived her of due process at the hearing and that Club otherwise violated its bylaws by its conduct at and before the hearing. She challenges the Board's factual findings, including that her mention of the name "Harvard Club" on her video proves that she did not reference "Harvard Club of New York City."

According to plaintiff, the bylaws "contractually bind Club members like [her] and the Board of Trustees," and having violated them, Board willfully and knowingly breached the contract, breached its fiduciary duties, and acted fraudulently. She maintains that membership in a social club constitutes, *prima facie*, a contractual relationship through club bylaws or constitution.

The claim that Club breached its fiduciary duty is asserted by plaintiff as based on its having acted "without conscientious fairness and morality," and she denies that the business judgment rule prohibits review of Club's conduct in "deliberately singling [her] out for harmful

treatment.” Any lack of specificity is due, she contends, to her lack of knowledge of Club matters. She denies that she fails to meet the pleading requirements of CPLR 3016(b), as she understood that the hearing would be fair and fact-finding, and as Club’s representation in that regard was false, the sole reasonable explanation is that Club intended to deceive her.

According to plaintiff, Club does not challenge her allegations that its conduct against her for more than six years was unacceptable or outrageous and that the totality of the circumstances she alleges reveals a pattern of conduct that is outrageous.

By affirmation dated January 31, 2021, plaintiff sets forth the factual bases for counsel’s memorandum of law. There is no need to repeat them. Plaintiff adds that she has an “underlying and serious medical condition that was confidentially disclosed to [Club] that can be triggered, activated and exacerbated by stress.” (NYSCEF 79).

3. Club’s reply (NYSCEF 87)

In response to plaintiff’s contention that there is no evidentiary foundation for admitting in evidence the by-laws and hearing committee report, Club observes that the full text of all of the “relevant portions” of the bylaws are included and that it attached only the portion of the report necessary to refute the assertion that the hearing committee was not properly composed. Given plaintiff’s opposition, it includes with its reply the full committee report.

Club argues that plaintiff alleges for the first time in her opposition that the bylaws constitute a contract and, as there is no such allegation in the complaint, plaintiff fails to state a cause of action for breach of contract. Even if the bylaws constitute a contract, Club maintains, they offer no basis for plaintiff’s cause of action for breach of contract and she fails to allege her performance thereunder, breach, and damages.

Moreover, plaintiff’s argument based on the requirement of cause for expulsion fails to

account, Club claims, for the bylaw that unambiguously assigns discretion to the Board's determination of cause, and contends that plaintiff's disagreement with that decision offers no basis for her claim that her expulsion violated the bylaws. Even if a legal basis exists for challenging the decision, plaintiff's claim nonetheless fails, Club argues, absent any factual support for it. Rather, plaintiff's contention that the video does not "concern" Club because she denies having stood in front of the premises is not relevant here, as she is seen stating on the video that she had "just come from" from an event at the "Harvard Club," as she pointed to the Club's premises. And, in any event, the determination of whether the video was "concerning the Club" was for the Board, not plaintiff. Club also maintains that plaintiff's claim that it had no basis for relying on the Board's "sole discretion" to decide how the informal hearing was to be held fails to address the bylaws which leaves it to the hearing committee's "sole discretion" to "determine the manner in which [the hearing] is to be conducted...."

Club points out that in opposition to its motion, plaintiff points to no bylaw that she alleges was violated in expelling her, nor does she dispute that it is the Board's construction of the bylaws, not hers, that "shall control and be finally binding." Thus, plaintiff's disagreement with the Board's conclusions following the hearing does not amount to a breach of contract.

Club also asserts that plaintiff fails to state a claim for a breach of fiduciary duty, absent an allegation that Club possessed "specialized knowledge or expertise," nor does she allege that she relied on Club to provide special influence or exercise a position of trust. Rather, plaintiff misreads bylaw XI as requiring the release of member names and contact information to other members. And, while plaintiff argues that Club owes a duty of "good faith" to its members, she relies on inapposite authority, namely, that "directors of a corporation have the fiduciary obligation to act on behalf of the corporation in good faith," observing that the duty owed is to

the organization, not to the individual.

Club alleges that plaintiff does not dispute that her cause of action for breach of a fiduciary duty is duplicative of her contract claim, and she asserts, without support, that Club is a place of public accommodation and not a private club. Club argues that a private club which holds events that are open to the public does not thereby become place of public accommodation or public space, and she does not explain how Club's claimed status as "not purely private" renders her claims more viable.

According to Club, absent a fiduciary relationship owed by it, there is no duty to disclose. It summarizes plaintiff's argument as follows: She was "induced" to return to the United States to attend a hearing that would be fair. All she alleges in that regard, Club maintains, is that the hearing was adjourned to accommodate her counsel. Plaintiff also claims that Club "concealed" witnesses. Club disagrees, arguing that it not only had no duty to expose its members to the disciplinary process, but it disclosed to plaintiff 11 statements of individuals with personal knowledge of the event. Plaintiff also complains that the security report was excluded from "prehearing exchanges" and that the committee did not allow it in evidence at the hearing. The hearing report reflects, however, that two security reports were produced to plaintiff on the day of the hearing, which was when plaintiff first sought them. Moreover, she was given two weeks to submit new evidence raised by the reports but did not do so.

Even if plaintiff's allegations are accepted as true and notwithstanding the documentary evidence, Club maintains that there is no stated claim for fraud absent plaintiff's failure to allege anything other than that actions were deceptive. She also fails to allege a pecuniary loss, and as to at least two of the alleged misrepresentations, she does not allege deception. That plaintiff wanted access to more evidence to use at the hearing, which constitutes a complaint about the

adequacy of Club's procedures, falls short of stating a claim for fraud, Club asserts, and her claim that she need not be specific in alleging the fraud without relevant information available to her fails. According to Club, given the numerous witness statements and other evidence furnished to her, she is wrong and even without full access to all relevant information, she must nonetheless allege the necessary elements of her claim.

Although plaintiff argues that Club fails to meet its burden that she engaged in wrongdoing, Club observes that the bylaws provide for no burden. Rather, the Board has the discretion to expel plaintiff for "any conduct, which in the judgment of the Board, is improper, prejudicial or detrimental to the Club." Otherwise, plaintiff posits numerous claims about her termination that do not state a viable cause of action pertaining to her expulsion from Club.

Additionally, plaintiff's request for declaratory relief, Club alleges, is baseless, as is her cause for action for intentional infliction of emotional distress, as a dispute over the termination of membership in a private social club does not rise to the level of outrageousness. In any event, she does not allege that Club intended to cause her severe emotional distress.

B. Analysis

"In assessing the adequacy of a complaint under CPLR 3211(a)(7), the court must give the pleading a liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff 'the benefit of every possible favorable inference.' " (*JP Morgan Sec. Inc. v Vigilant Ins. Co.*, 21 NY3rd 324, 334 [2013] quoting *AG Capital Funding Partners LP v State St Bank & Trust Co.*, 5 NY3rd 582, 591 [2005]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*511 W 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2nd 144, 152 [2002] quoting *Polonetsky v Better homes Depot, Inc.*, 97 NY2nd 46, 54 [2001]).

1. Breach of fiduciary duty

To state a claim for breach of fiduciary duty, a plaintiff must allege that “(1) defendant owed [plaintiff] a fiduciary duty, (2) defendant committed misconduct, and (3) [plaintiff] suffered damages caused by that misconduct.” (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2011]). In general, “[a] fiduciary relationship may exist where one party reposes confidence in another and reasonably relies on the other’s superior expertise or knowledge.” (*WIT Holding Corp. v Klein*, 282 AD2d 527, 529 [2d Dept 2001]; *see Chimento Co. v Banco Popular de Puerto Rico*, 208 AD2d 385, 386 [1st Dept 1994]; *Penato v George*, 52 AD2d 939, 942 [2d Dept 1976], *appeal dismissed* 42 NY2d 908 [1977]). Although agreements or contractual relations are factors to consider, they are not dispositive as to the existence of a fiduciary relationship. (*Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 673, 676 [2d Dept 2017]).

The directors of Club, a domestic not-for-profit corporation, owe Club’s members a fiduciary duty to act in their collective best interest; they do not owe plaintiff a duty to act in her personal best interest. Consequently, plaintiff fails to state a cause of action for breach of fiduciary duty. (*See Nachbar v Cornwall Yacht Club*, 160 AD3d 972, 973 [2d Dept 2018] [dismissing breach of fiduciary duty claim where plaintiff alleged that not-for-profit corporation did not act in his “personal best interest”]; *Doe v Holy See (State of Vatican City)*, 17 AD3d 793, 795 [3d Dept 2005], *lv denied* 6 NY3d 707 [2006] [no fiduciary relationship between church and individual parishioner absent allegations that plaintiff’s relationship with church was “unique or distinct from institution’s relationship with other parishioners generally”]).

2. Breach of contract and declaratory judgments

To state a claim for breach of contract, a plaintiff must allege “the existence of a contract,

the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages." (*Markov v Katt*, 176 AD3d 401, 401–02 [1st Dept 2019], quoting *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

Club's bylaws constitute a contract by which both plaintiff and Club are obligated to comply. (*See Craine v NYSARC, Inc.*, 88 AD3d 1105, 1108 [3d Dept 2011], citing *Polin v Kaplan*, 257 NY 277, 281 [1931] [constitution and bylaws of unincorporated association constitute contract between organization and its members]; *James v Nat'l Arts Club*, 33 Misc 3d 1211[A] [Sup Ct, NY County 2011] [constitution and bylaws of not-for-profit corporation are contract between parties and determinative of parties' rights]).

When reviewing whether a not-for-profit corporation complied with its own bylaws and procedures in expelling a member, however, a plaintiff must bring her claims in a special proceeding pursuant to CPLR article 78, not by plenary action. (*Melucci v Sackman*, 37 Misc 3d 1212[A] [Sup Ct, Kings County 2012] [plaintiff seeking reinstatement to membership and board affiliation in not-for-profit corporation must raise claims in special proceeding, not plenary action]; *see e.g. Stadtmiller v New York State Soc'y of Physician Assistants*, 294 AD2d 228 [1st Dept 2002] [challenging club membership suspension in article 78 proceeding]; *Clark v E. Tennis Umpires Ass'n*, 118 AD2d 853 [2d Dept 1986] [article 78 proceeding to review whether not-for-profit corporation conducted disciplinary hearing in accord with its constitution]; *Anderson v Bd. of Directors of Powelton Club*, 183 Misc 2d 200 [Sup Ct, Orange County 1999] [same]). As plaintiff's claims for breach of contract and for declaratory judgments are premised on Club's alleged failure to comply with its bylaws in conducting the hearing and terminating her membership, plaintiff was required to raise such claims in a CPLR article 78 proceeding, not this plenary action.

While a plenary action may be converted into a CPLR article 78 proceeding, the action must be commenced with four months after a body's determination becomes final (CPLR 217), and as this action was commenced more than four months after Club issued its decision to expel plaintiff, the proceeding would be time-barred. (*See Meisner v Hamilton, Fulton, Montgomery Bd. of Coop. Educ. Servs.*, 175 AD3d 1653, 1656 [3d Dept 2019] [action cannot be converted into a CPLR article 78 proceeding where claims are time-barred]). Consequently, the parties' remaining contentions as to whether plaintiff states a cause of action for breach of contract are not addressed.

3. Fraud and fraudulent concealment

Plaintiff's claim of fraud is duplicative of her breach of contract claim, and each concerns the manner in which the disciplinary hearing was conducted, which may only be reviewed in a CPLR article 78 proceeding. (*See supra*, II.B.2). Accordingly, whether plaintiff satisfies the pleading requirements of CPLR 3016(b) is not addressed.

In any event, to the extent that plaintiff premises her fraud claim on bylaw XI, the rule does not require disclosure of membership information to other members; rather, it prohibits disclosure of membership information to nonmembers. She offers no other basis for her allegation that Club was obligated to disclose information to her.

4. Intentional infliction of emotional distress

To state a claim for intentional infliction of emotional distress, plaintiffs must allege "(1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress." (*Video Voice, Inc. v Local T.V., Inc.*, 156 AD3d 848, 850 [2d Dept 2017]). There is no authority for the propositions advanced by plaintiff that an expulsion, even under the

circumstances set forth here, suffices to demonstrate, *prima facie*, the outrageousness that must support a cause of action for an intentional infliction of emotional distress.

Having apparently decided that her right to present her own views was more pressing than her interest in avoiding stress, plaintiff's assignment of liability for her emotional to Club is unreasonable. Nor does Club's alleged conduct at the hearing offer a basis for it.

III. PLAINTIFF'S MOTION FOR PRIORITY OF DEPOSITION

A. Pertinent procedural background

Plaintiff commenced this action on January 31, 2020. (NYSCEF 1). Service on all defendants was completed by February 25, 2020. (NYSCEF 3). The parties agree that Club succeeded in moving to remove the action to federal court before plaintiff filed her amended summons and complaint. The removal stayed this action (NYSCEF 16) from March 9, 2020 until November 12, 2020 (NYSCEF 19). The following day, on November 13, 2020, plaintiff sent defendants a notice to take the deposition of Saah. (NYSCEF 20). Then, by stipulation, plaintiff agreed to extend the time for Club to respond to the complaint to December 14, 2020 (NYSCEF 56), and by letter dated November 18, 2020, Saah sought the same extension and proposed certain dates for discovery, including May 28, 2020 for depositions. (NYSCEF 29). By notice dated December 12, 2020 and efiled on December 14, 2020, Saah noticed his intent to depose all adverse parties (NYSCEF 48) and efiled his answer to the amended complaint (NYSCEF 47).

B. Contentions

1. Plaintiff (NYSCEF 36)

Plaintiff alleges that as Saah did not serve a notice of deposition within the time for him to answer the amended complaint, she became entitled to depose him first upon service of her notice. According to her, Saah did not serve his notice of her deposition after "either the verified

complaint in March 2020 [or] the amended complaint in April 2020,” and then, after she served her notice on November 13, 2020, Saah orally asked for an extension to answer, which he did not follow up with a proposed written stipulation. Even so, plaintiff maintains that she preserved her right to priority.

According to plaintiff, her causes of action against Club for fraud and breach of fiduciary duty warrant the granting of priority of deposition for her as against Club.

2. Saah (NYSCEF 49)

Saah observes that the sole basis for plaintiff’s motion for priority is the notice she filed on the day the action was remanded from federal court, and that no discovery had been exchanged. Moreover, neither defendant had answered the amended complaint that was filed in federal court. Thus, plaintiff’s notice of deposition was premature, especially in view of the fact that the case was “in a holding pattern” pending a decision on plaintiff’s motion to remand back to state court and the reinstatement of the action in this court.

According to Saah, CPLR 3025(d) requires an answer or responding motion to the amended complaint, which plaintiff does not dispute, and she agreed to extend to both defendants time to do so until December 14, 2020. He alleges that plaintiff refused to execute a stipulation memorializing that agreement and accuses plaintiff’s counsel of attempting to invalidate it even though plaintiff’s counsel assured his counsel that the extension was both understood and agreeable.

Saah alleges that plaintiff acknowledges his right to priority of examination, absent “special circumstances,” as long as his notice is served within his time to answer, and while plaintiff claims that he abandoned his right to priority of deposition due to his having interposed an answer to the first complaint in the federal action, she fails to consider that her amended

complaint was filed in the federal action and that she agreed to extend his time to answer up to and including December 14, 2020. He maintains that plaintiff's position is internally inconsistent and reveals the baselessness of her demand for priority. He also denies having abandoned his right to priority.

Saah characterizes as disingenuous plaintiff's insinuation that he had been dilatory for not yet seeking discovery, observing that the action has been on pause for almost a year until it was remanded back to this court by the federal court, where the action pended from March 2020 to September 2020, not to be reinstated in this court until November 13, 2020. Moreover, as plaintiff filed her amended complaint just before the expiration of the briefing deadlines for her motion to remand to this court, neither defendant interposed an answer in the federal court while the motion to remand was pending.

Maintaining that defendants could not have filed any responsive papers to the amended complaint when the action was no longer in federal court and was not yet reinstated in this court, Saah adds that within days of the November 13, 2020 reinstatement, Club sought to reassign the action to the commercial division and Saah's counsel filed a notice of appearance on November 17, 2020. That same day, plaintiff's counsel left him a voicemail message indicating plaintiff's consent to the extension sought by Saah counsel earlier that day.

In view of the foregoing, Saah argues that all parties understood and agreed to his counsel's proposed discovery schedule, as circulated on NYSCEF on November 18, 2020. Then, on November 19, 2020, after granting him the extension of time to answer, plaintiff's counsel sent email correspondence stating that plaintiff should have priority of deposition based on the November 13, 2020 notice, although acknowledging that the action remained "pre-discovery."

Having "expressly and unambiguously" granted defendant Saah's request for an

extension of time to answer the amended complaint, plaintiff nonetheless asks that the extension be ignored absent a proposed written stipulation presented to her. Saah's counsel alleges that a draft stipulation extending time to answer was sent to plaintiff's counsel for execution, but he sought to revise it by adding that it would have no effect on plaintiff's request for priority and later refused to execute it due to its "potential impact" on plaintiff's motion for priority of deposition while otherwise assuring counsel that Saah's extension to December 14, 2020 would be honored.

Plaintiff's counsel also accepted Club's request for the extension to December 14, 2020, although no stipulation had been filed, and plaintiff's filing of a deposition notice on that date should not be credited to deprive Saah of priority under these circumstances.

3. Club (NYSCEF 53)

According to Club, the time for it to respond to the complaint did not expire until December 14, 2020, and thus, it had not served a notice of deposition prior thereto. Moreover, the alleged special circumstance that plaintiff advanced causes of action for fraud and breach of fiduciary duty are insufficient absent facts within its knowledge relating to any claimed fraud or fiduciary duty. In any event, if any representations were made to plaintiff, she plainly knowledge of it.

As plaintiff was "intimately involved in the incident at issue and the process of removing her," her case is distinguishable from those where the defendants have been deposed first. Rather, given the conclusory allegations set forth in her complaint, Club needs an opportunity to find out what she is claiming before producing its own witnesses for examination. Thus, plaintiff fails to meet her burden of establishing a "special showing" to justify reversing the priority of depositions. That she is not privy to "what goes beyond closed doors" at Club does not to

constitute the special circumstances that warrant a reversal of deposition priority.

Merely alleging a breach of a fiduciary duty is also insufficient as a plaintiff must show that the use of the usual discovery procedure would result in prejudice. Absent an allegation of prejudice, plaintiff's argument fails.

C. Analysis

Pursuant to CPLR 3016(a), if the time for serving a responsive pleading has not expired, plaintiff must seek leave to have priority of depositions. Generally, defendants have priority of taking depositions, and absent "special circumstances," defendants retain priority. (*Bennett v Riverbay Corp.*, 40 AD3d 319, 319–20 [1st Dept 2007]). As plaintiff's counsel executed a stipulation extending Club's time to answer the complaint and acknowledged having discussed with Saah's counsel an extension of time to serve an answer to the amended complaint, and as Saah's counsel sought via letter posted on NYSCEF an extension of time (NYSCEF 29), it is evident that defendants did not intend to waive their priority of depositions, especially given the procedural whiplash following the remand from federal court. Plaintiff did not reject Saah's answer to the amended complaint or allege that he was in default, and thus, there is no reason to disturb defendant's priority. (*See e.g. Peralta v John Tara, Inc.*, 30 AD3d 256, 256 [1st Dept 2006] [maintaining defendant's priority where counsel had conversation seeking extension to answer and plaintiff did not reject answer]).

That plaintiff advances causes of action for breach of fiduciary duty and fraud is not dispositive as to priority (*see Hakim Consultants Ltd. v Formosa Ltd.*, 175 AD2d 759, 769 [1st Dept 1991] [plaintiff's cause of action for breach of fiduciary duty does not in and of itself warrant giving plaintiff priority]), and in any event, those claims are dismissed.

IV. CONCLUSION

Accordingly, it is hereby

ORDERED, that plaintiff’s motion for priority of depositions is denied in its entirety; it is further

ORDERED, that defendant Harvard Club of New York City’s cross motion to dismiss is granted, and plaintiff’s eighth, ninth, eleventh, and twelfth causes of action against it are severed and dismissed, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED, that the parties either enter into a stipulation encompassing their preliminary conference on or before July 14, 2021, or appear for the conference in room 341, 60 Centre Street, New York, New York, on July 14, 2021 at 2:15 pm or virtually if necessary.

5/17/2021

DATE

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BARBARA JAFFE, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE