SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **56M**

Justice

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INDEX NO. 100198/2019

MOTION DATE 08/20/2021

MOTION SEQ. NO. 005

ORANGE ORCHESTRA PROPERTIES, LLC, TIMOTHY MOORE, individually, and in his capacity as a member of ORANGE ORCHESTRA PROPERTIES, LLC, shareholder of GENTRY UNLIMITED, INC., and MARY MOORE, individually, and in her capacity as a member of ORANGE ORCHESTRA PROPERTIES, LLC, shareholder of GENTRY UNLIMITED, INC.,

Plaintiff,

- v -

GENTRY UNLIMITED, INC., and THE BOARD OF DIRECTORS OF GENTRY UNLIMITED, INC.,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

This is an action for declaratory and injunctive relief against a residential cooperative corporation and the board of directors of that corporation and to recover damages against those defendants for, inter alia, trespass to property and unlawful eviction, arising from the defendants' denial of the plaintiffs' proposed plans to alter and rehabilitate a cooperative apartment unit and its concomitant termination of the underlying proprietary lease. The defendants move pursuant to CPLR 3211(a) to dismiss the third amended complaint based on a defense founded upon documentary evidence (CPLR 3211[a][1]), lack of standing (CPLR 3211[a][3]), and for failure to state a cause of action (CPLR 3211[a][7]), the latter based, among other things, on the contention that the business judgment rule applicable to residential cooperative corporations bars the plaintiffs' claims. The plaintiffs oppose the motion. The

motion is granted only to the extent that (a) the complaint is dismissed insofar as asserted by Mary Moore for lack of standing, (b) all causes of action save the eighth cause of action are dismissed insofar as asserted by Timothy Moore for lack of standing, and (c) the tenth cause of action is dismissed only insofar as asserted by the plaintiff Orange Orchestra, LLC (Orange), against the defendant Gentry Unlimited, Inc. (Gentry) for failure to state a cause of action. The motion is otherwise denied.

II. BACKGROUND, PLEADINGS, AND RELEVANT DOCUMENTS

Orange the owner of shares allocated to an apartment in a complex owned by Gentry, a residential cooperative corporation. The defendant The Board of Directors of Gentry Unlimited, Inc. (the board), denied Orange's application for permission to alter, renovate, and rehabilitate that apartment by relocating gas pipes, and installing plumbing and other water-using fixtures and appliances in a room immediately above a room in another apartment in which no such fixtures were installed, a so-called "wet-over-dry" configuration. Initially, the plaintiffs, who were originally petitioners/plaintiffs, commenced a hybrid CPLR article 78 proceeding and plenary action against the defendants and several individual board members, seeking judicial review of the board's determination to deny permission to construct the wet-over-dry configuration and make the other proposed alterations, and also sought declaratory, monetary, and injunctive relief. The defendants, who were then respondents/defendants in the hybrid proceeding and action, moved to dismiss the petition/complaint (SEQ 001). While that motion was pending, the plaintiffs withdrew the petition/complaint, and instead served and filed an amended complaint on April 26, 2019, rendering that motion academic.

In their amended complaint, the plaintiffs alleged that, in November 2014, Orange purchased shares of Gentry that had been allocated to Apartment 1F in a building located at 23 West 88th Street in Manhattan, and was issued a proprietary lease on November 17, 2014. They further alleged that the plaintiffs Timothy Moore and Mary Moore were the sole members of Orange, and intended to reside in the subject unit as their primary residence. The plaintiffs

alleged, however, that none of them was provided with a copy of any relevant house rules. They asserted that they retained an architect to prepare plans for rehabilitation and renovation of the apartment. They further alleged that the proprietary lease, although requiring board approval for the relocation of water and steam risers and plumbing fixtures by tenant shareholders, provided that such approval may not unreasonably be withheld; they further averred that the proprietary lease dispensed with the need for board approval where the proposed alterations were to be made by a holder of unsold shares, that is, a person or entity who purchased shares from the sponsor for investment purposes and has chosen not to reside in the unit, or a successor purchaser of those shares who did not intend to become a tenant shareholder. As relevant here, the plaintiff additionally alleged that the proprietary lease permitted tenant shareholders to remove refrigerators, air conditioners, dish washers, washing machines, and ranges, without board approval, as long as the removal required no structural alterations and caused no permanent damage to the unit. The plaintiffs further asserted that the board routinely approved various plans submitted by other coop owners in the building.

In the amended complaint, the plaintiffs went on to assert that they submitted their proposed architectural plans to the board, which included an “offset” consisting of a four-foot rerouting of three gas lines, only one of which was active, that their plans did not require structural alterations and would cause no permanent damage, and that five architects certified to the propriety of the plans. They contended that, in 2015, they executed the required alteration agreement and submitted it to the board, and that the board initially approved both the architectural plans and the agreement, but, 14 months later, rescinded its approval, and voted on September 11, 2016 to prohibit the plaintiffs from continuing with any renovation and improvement work and to require the execution of a replacement alteration agreement. According to the allegations in the amended complaint, beginning in November 2017, the board excluded Timothy Moore, formerly a board member, from its meetings, and unlawfully voted to suspend work on the plaintiff’s apartment via proxy. In addition, the plaintiffs alleged that the

board compelled them to retain architects and other professionals favored by the board. They further asserted that, during the time when their contractors were able to undertake work in the apartment, they located and replaced ceiling beams that had been charred by a previous fire, and that the replacement of the beams was Gentry's responsibility, as the beams were not within the subject apartment, but a structural element of the building itself.

As set forth in the amended complaint, the plaintiffs alleged that the board, on May 14, 2018, delivered a notice terminating Orange's proprietary lease, based on Orange's purported default under the terms of the lease. The plaintiffs asserted, however, that Orange cured any purported breach of the proprietary lease, and that the termination notice was thus a nullity. They also claimed that, as shareholders in Gentry, they requested to inspect Gentry's books and records, but were denied access. In addition, they asserted that Gentry entered into the subject apartment without their knowledge and approval.

In the first cause of action, the plaintiffs sought a judgment declaring that the termination notice is null and void. In the second cause of action, the plaintiffs sought judgment declaring that their alteration plans must be approved. In the third cause of action, the plaintiffs sought a permanent mandatory injunction compelling the board to approve their plans. In the fourth cause of action, the plaintiffs sought damages for trespass. In the fifth cause of action, the plaintiff's sought damages for unlawful entry and eviction, trebled pursuant to RPAPL 853. In the sixth cause of action, the plaintiff sought a mandatory injunction compelling Gentry to provide access to its records concerning its procedures for hiring of contractors and construction professionals. In the seventh cause of action, the plaintiff sought a mandatory injunction compelling Gentry to provide access to its financial books and records. In the eighth cause of action, the plaintiffs sought a judgment declaring that the defendants violated their operating instruments by excluding Timothy Moore from their meetings. In the ninth cause of action, the plaintiffs sought an award of attorneys' fees, as permitted in paragraph 28 of the proprietary lease and Real Property Law § 234.

By order dated September 10, 2019, the court (Edmead, J.) granted the plaintiff's motion for leave to serve and file a second amended complaint to the extent of permitting them to name an additional board member as a party defendant, but denied the branches of the motion seeking to add a tenth cause of action, sounding in fraud, and an eleventh cause of action for disgorgement of certain revenue. The plaintiffs served and filed the second amended complaint on October 1, 2019. It essentially repeated the factual allegations set forth in the amended complaint, and added only allegations that the additional board member engaged in activities similar to those in which the other board members were alleged to have been engaged.

By order dated November 6, 2019, the court (Edmead, J.) denied those branches of the plaintiff's motion that sought to amend the second amended complaint so as to add causes of action sounding in fraud/misrepresentation, breach of contract, and some claims sounding in breach of fiduciary duty; she granted that branch of the plaintiffs' motion that sought to add a claim that the defendants breached their fiduciary duty to the plaintiffs by treating their application for renovations and alterations differently from similar applications submitted by more-favored shareholders. Specifically, the plaintiffs were permitted to assert that their application was denied, in large part, because their proposed wet-over-dry configuration was disapproved, while at least one other shareholder, board member Alisha Mahoney, was expressly granted permission to renovate her unit with a wet-over-dry configuration. In the November 4, 2019 transcript of proceedings that was incorporated by reference into the November 6, 2019 order, the court (Edmead, J.) stated:

> "In other words, [subparagraph iii] seems sufficient with respect to acting in bad faith and discriminating as against plaintiffs with respect to that representing that we don't want to approve a wet over dry condition but knowing full well that that had already been existing allegedly in somebody else's unit -- I don't need help.
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> *****
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> "At the end of the day, representing that this is a condition that they did not want to approach and representing that this is not something they would allow was in fact discriminatory in the sense that somebody else already had that and it existed. That's the claim. Those are the facts that have already been detailed already. That somebody else already had that even though it was represented

> that we never want to approve a wet over dry condition. That is treating the plaintiff differently and if the Board did that in denying or allegedly denying their wet over dry alteration plan, that is treating them differently.
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> *****
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> "I'm going to say it's not conclusory because when you start out a new cause of action and say you repeat and reaffirm all the facts stated alleged above, it picks up all of that.
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> *****
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> "In a minute I will recuse and you can take this case to someone else. When I say stop, you stop. I'm allowing [subparagraph] iii under -- 11th [later 10th] cause of action subsection three is a permitted and amended."

In the same order, the court granted the defendants' cross motion to dismiss the second amended complaint insofar as asserted against each of the individual members of the board.

After Justice Edmead recused herself, and the action was reassigned, this court, by order dated May 13, 2020, denied the plaintiffs' motion for leave to reargue those branches of their prior motion for leave to amend that previously had been denied, as well their request to reargue opposition to the defendants' cross motion to dismiss the complaint against the individual members of the board (SEQ 004). This court concluded that Justice Edmead had already permitted them to add a breach of fiduciary duty cause of action based on discriminatory treatment, and correctly determined the remainder of the motion and cross motion. By supplemental order dated June 1, 2020, this court, upon considering the plaintiff's reply papers, adhered to the determination in its May 13, 2020 order, and expressly noted that Justice Edmead had granted that branch of the plaintiffs' motion seeking leave to add a cause of action alleging breach of fiduciary duty based upon discriminatory treatment.

The plaintiffs also appealed the November 6, 2019 order. By decision and order dated February 25, 2021, the Appellate Division, First Department, modified the November 6, 2019 order "to grant plaintiffs' motion to the extent of permitting the addition of paragraph 204(iv) and (vii)," and otherwise affirmed the order (*Orange Orch. Props., LLC v Gentry Unlimited, Inc*., 191 AD3d 609, 609 [1st Dept 2021]). The Appellate Division concluded that the allegations of fraud were not sufficiently particularized to support the plaintiffs' claim that "defendants falsely

represented that there was a 'wet over dry' rule that precluded plaintiffs' proposed renovations to their unit in the cooperative" (*id.*). The Appellate Division, however, expressly ruled that

> "Subsections (iv) and (vii) of paragraph 204 of the proposed breach of fiduciary duty cause of action, which allege that defendants acted in bad faith by failing to cure illegal conditions and by intruding into plaintiffs' home, are pleaded with the requisite particularity for a breach of fiduciary claim"

(*id.*).

On March 31, 2021, the plaintiff served and filed their third amended complaint, omitting the individual board members as party defendants, and adding a tenth cause of action to recover for breach of fiduciary duty, as permitted by the Appellate Division's February 25, 2021 decision and order. That cause of action, however, did not include an allegation of discriminatory treatment, as previously permitted by Justice Edmead, but was limited to the allegations that the defendants acted in bad faith by failing to cure illegal conditions and by intruding into the plaintiffs' home. The third amended complaint was, in all other respects, virtually identical to the amended complaint and second amended complaint.

As relevant here, paragraph 21(a) of the proprietary lease provides that

> "[T]he Lessee shall not, without first obtaining the written consent of the Lessor, which shall not be unreasonably withheld, make in the apartment or the building, or any roof, penthouse, terrace or balcony appurtenant thereto, any alteration, enclosure or addition or any alteration of or addition to the water, gas or steam risers or pipes, or heating or air conditioning system or units, electrical conduits, wiring or outlets, plumbing fixtures, intercommunication or alarm system, or any other installation or facility in the apartment or building. The performance by Lessee of any work in the apartment shall be in accordance with any applicable rules and regulations of the Lessor and governmental agencies having jurisdiction thereof...Anything herein or in subparagraph (b) below to the contrary notwithstanding, the consent of the Lessor shall not be required for any of the foregoing alterations, enclosures or additions made by, or the removal of any additions, improvements, or fixtures, from the apartment by, a Holder of Unsold Shares."

Paragraph 21(b) provides, in relevant part, that

> "Without Lessor's written consent, the Lessee shall not remove any fixtures, appliances, additions or improvements for the apartment except as hereinafter provided. If the Lessee, or a prior lessee, shall have heretofore placed, or the Lessee shall hereafter place in the apartment, at the Lessee's own expense, any additions, improvements, appliances or fixtures, including but not limited to

> fireplace mantels, lighting fixtures, refrigerators, air conditioners, dish washers, washing machines, ranges, woodwork, wall paneling, ceilings, special doors or decorations, special cabinet work, special stair railings, or other built-in ornamental items, which can be removed without structural alterations or permanent damage to the apartment, then title thereto shall remain with the Lessee, and the Lessee shall have the right, prior to the termination of this lease, to remove the same at the Lessee's own expense"

Rule 6 of the house rules of the residential cooperative corporation provides that

> "[a]ll work decorative or otherwise and/or construction projects must at all times be approved by the Board. Owners wishing to alter their apartments in any way must complete an alteration agreement application in advance of work commencement and submit same to the Board for consent."

To obtain the board's approval for alterations, all shareholders must submit a completed alteration agreement, along with the requisite supporting documentation, including plans, proof of insurance, licenses, and permits.

The plaintiffs' first alteration proposal, which included architectural plans, indicated that they wished to perform the following work:

> "Removal of existing loft bed and existing furniture, removal of materials to expose brick walls, replace worn out and rotten floorboards, replace all kitchen units and counters, replace bathroom fixtures and bathtub, upgrade electrical panel to code, install overhead LED lighting, replace window jam[b]s and trims, install new air conditioning, refinish floors and possibly alter door. Total Cost of Project: 30-40K."

According to the defendants, however, after the board approved that work, the defendants discovered that, without the knowledge even of the plaintiffs' retained architect, the plaintiffs' contractors had re-routed a gas riser without obtaining permits, installed ceiling segments and walls that were not fire-rated, improperly installed frames around certain windows, and planned to install an HVAC drain in a manner that had not been approved by the board. The defendants further contended that the plaintiff Timothy Moore prevented board representatives from entering the apartment to review or inspect any of the work.

The plaintiffs thereafter submitted a second alteration proposal that included re-routing of the gas riser and waste lines, and relocation of the kitchen so that it would be located above a room in another apartment that was neither a kitchen, bathroom, nor laundry room. On May 11,

2017, the board rejected the second proposal on the grounds that the kitchen relocation would create a wet-over-dry configuration, and because the kitchen sink, dishwasher, refrigerator, and waste line would be located dangerously close to the building's electrical system. By letter dated July 21, 2017, the board, after reconsidering the issue of the gas-line relocation, rejected that proposal as well.

The board concluded that the plaintiffs had undertaken unauthorized work for at least three years, determined that they were in default of their obligations under the proprietary lease, and issued a notice of default on March 23, 2018, directing them to restore the re-routed gas line to its original location by April 27, 2018. On May 14, 2018, the board served the plaintiffs with a notice of termination, informing them that the proprietary lease would expire on May 24, 2018 if they did not cure their default by that date. The defendants contend that, in accordance with paragraph 31 of the proprietary lease, all of the plaintiffs' "right, title, and interest" in the proprietary lease expired on May 24, 2018.

III. THE MOTION TO DISMISS--DISCUSSION

In lieu of answering the third amended complaint, the defendants made the instant motion to dismiss it. In support of their motion, the defendants submitted the amended complaint, second amended complaint, and third amended complaint, a copy of the proprietary lease, house rules, and by-laws, the relevant alteration agreements, architectural drawings, a notice of default under the proprietary lease, the notice of termination of the proprietary lease, and correspondence. They contended that Timothy Moore and Mary Moore lack standing to prosecute the action, as Orange is the relevant shareholder, and that only Orange may allege that it was injured by any conduct of the defendants. They further contended that the business judgment rule precludes all of the causes of action challenging the denial of the renovation application, while the remaining causes of action do not allege facts sufficient to state a cause of action.

A. Lack of Standing

To establish standing, a claimant must demonstrate that he or she suffered an injury in fact that fell within the relevant zone of interests sought to be protected by law (*see Matter of Fritz v Huntington Hosp.*, 39 NY2d 339, 346 [1976]; *see also Warth v Seldin*, 422 US 490, 498 [1975]; *New York State Assn. of Nurse Anesthetists v Novello*, 2 NY3d 207, 211 [2004]; S*ociety of Plastics Indus. v County of Suffolk*, 77 NY2d 761, 769 [1991]; *Dairylea Cooperative, Inc. v Walkley*, 38 NY2d 6, 9-10 [1975]). "For a wrong against a corporation a shareholder has no individual cause of action," unless "the wrongdoer has breached a duty owed to the shareholder independent of any duty owing to the corporation wronged" (*Abrams v Donati*, 66 NY2d 951, 953 [1985]; *see Tzolis v Wolff*, 10 NY3d 100, 103-106 [2008] [applying the same rule to limited liability companies, as well as articulating the right of LLC members to commence derivative actions under the same circumstances as corporate shareholders]; *Jacobs v Cartalemi*, 156 AD3d 605, 607 [2d Dept 2017]; *MatlinPatterson ATA Holdings, LLC v Federal Express Corp.*, 87 AD3d 836, 839 [1st Dept 2011]; *New Castle Siding Co. v Wolfson*, 97 AD2d 501, 502 [2d Dept 1983], *affd* 63 NY2d 782 [1984]; *Peddy v 468 Prop. Owner, LLC*, 2020 NY Slip Op 34029[U], 2020 NY Misc LEXIS 10394 [Sup Ct, N.Y. County, Dec. 7, 2020]). The fact that an individual closely affiliated with a corporation or limited liability company, even a sole shareholder or member, is incidentally injured by an injury to the corporation, does not confer on the injured individual standing to sue on the basis of either that indirect injury or the direct injury to the corporation (*see New Castle Siding Co. v Wolfson*, 97 AD2d at 502).

Other than the eighth cause of action, in which the plaintiffs assert that Timothy Moore was personally excluded from relevant board meetings, the complaint alleges only causes of action belonging to Orange, in its capacity as the shareholder, and no injuries to Timothy Moore or Mary Moore that are distinct from those allegedly sustained by Orange. Hence, the complaint must be dismissed in its entirety for lack of standing insofar as asserted by Mary Moore, and all

of the causes of action other than the eighth cause of action must be dismissed for lack of standing insofar as asserted by Timothy Moore.

B. Complete Defense Founded Upon Documentary Evidence

Under CPLR 3211(a)(1), a dismissal is warranted "if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" *(Leon v Martinez*, 84 NY2d 83, 88 [1994]; *see Ellington v EMI Music, Inc.*, 24 NY3d 239 [2014]). In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and "essentially undeniable" (*Dixon v 105 W. 75th St., LLC,* 148 AD3d 623, 629 [1st Dept 2017], citing *Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). In other words, to be considered "documentary," evidence not only must be unambiguous, but of undisputed authenticity (*see* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22; *Fontanetta v John Doe 1*, 73 AD3d at 86). Documents such as deeds, which reflect out-of-court transactions and are essentially unassailable, qualify as "documentary evidence" (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996, 997 [2d Dept 2010]; *Suchmacher v Manana Grocery*, 73 AD3d 1017, 1017 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d at 86). Conversely, affidavits do not qualify as documentary evidence (*see Serao v Bench-Serao,* 149 AD3d 645, 646 [1st Dept 2017]; *Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]; *Granada Condominium III Assn. v Palomino*, 78 AD3d at 997; *Suchmacher v Manana Grocery*, 73 AD3d at 1017; *Fontanetta v John Doe 1*, 73 AD3d at 85). Nor do e-mail messages or transcripts of trial testimony constitute documentary evidence (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]). If the evidence contained in records may be controverted, the evidence cannot be considered "documentary" (*see Phillips v Taco Bell*, 152 AD3d 806, 807 [2d Dept 2017]).

The documentary evidence relied upon by the defendants here includes the proprietary lease and the house rules. Inasmuch as they both require board approval for certain alteration work, but provide that approval shall not be unreasonably withheld, the documents themselves

do not establish whether the approvals sought by the plaintiff here were unreasonably withheld, even in light of the deference afforded to cooperative boards by the business judgment rule, as is discussed below.

C. Failure to State a Cause of Action

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" *(511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, accord it "the benefit of every possible favorable inference" (*id*. at 152; *see Romanello v Intesa Sanpaolo, S.p.A.*, 22 NY3d 881 [2013]; *Simkin v Blank*, 19 NY3d 46 [2012]), and determine only whether the facts, as alleged, fit within any cognizable legal theory (*see Hurrell-Harring v State of New York*, 15 NY3d 8 [2010]; *Leon v Martinez*, 84 NY2d 83 [1994]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc*., 10 AD3d 267 [1st Dept 2004]; CPLR 3026). "The motion must be denied if from the pleading's 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 NY2d at 152 [internal quotation marks omitted]; *see Leon v Martinez*, 84 NY2d at 87-88; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]).

Where, however, the court considers evidentiary material beyond the complaint, as it does here, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, 43 NY2d at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" (*id*.). Nonetheless, "conclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]).

Three of the ten causes of action asserted in the third amended complaint seek declaratory relief.

"'A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration'" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011], quoting *Staver Co. v Skrobisch*, 144 AD2d 449, 450 [2d Dept 1988]). "Thus, 'where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied'" (*DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725, 728 [2d Dept 2013], quoting *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150). Generally, a court may not summarily determine the merits of a properly pleaded declaratory judgment cause of action based on the pleadings alone (*see Matter of 24 Franklin Ave. R.E. Corp. v Heaship*, 74 AD3d 980, 980-981 [2d Dept 2010]).

Nonetheless, a court may reach "the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where 'no questions of fact are presented [by the controversy]'" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150, quoting *Hoffman v City of Syracuse*, 2 NY2d 484, 487 [1957]; *see Columbia Mem. Hosp. v Hinds*, 188 AD3d 1337, 1338 [3d Dept 2020]; *Minovici v Belkin BV*, 109 AD3d 520, 524 [2d Dept 2013]). Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action "should be taken as a motion for a declaration in the defendant's favor and treated accordingly" (Siegel, NY Prac § 440 [5th ed]; *see Lanza v Wagner*, 11 NY2d 317, 334 [1962]; *Columbia Mem. Hosp. v Hinds*, 188 AD3d at 1338; *Minovici v Belkin BV*, 109 AD3d at 524; *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150).

1. First, Second, Third, and Tenth Causes of Action—Declaration That Termination Notice is Void, Declaration That Alteration Plans Must Be Approved, Injunction Compelling Approval of Alteration Plans, and Breach of Fiduciary Duty

Crucially, this court is without authority to dismiss the claims sounding in breach of fiduciary duty (tenth cause of action) for failure to state a cause of action, as the Appellate Division has already held that the allegations were sufficiently particularized to comport with the requirements of CPLR 3016(b) (*see Orange Orch. Props., LLC v Gentry Unlimited, Inc*., 191 AD3d 609, 609 [1st Dept 2021]). Nonetheless, a corporation such as a residential cooperative corporation does not itself owe its shareholders a fiduciary duty (*see Kleinerman v 245 E. 87 Tenants Corp*., 105 AD3d 492, 493 [1st Dept 2013]). Rather, only the board of directors of the corporation owes such a duty to the corporation's shareholders (*see Demas v 325 West End Ave. Corp*., 127 AD2d 476, 478 [1st Dept 1987]). Hence, the tenth cause of action must be dismissed insofar as asserted against Gentry, but not insofar as asserted against the board.

Moreover, the viability of the tenth cause of action against the board, as confirmed by the Appellate Division, is directly related to whether Orange may be entitled to the declaratory and injunctive relief requested in the first, second, and third causes of action against both Gentry and the board. The court concludes that, both for that reason, and in light of the provisions of the proprietary lease subjecting renovation approvals to a "reasonableness" standard, the business judgment rule does not bar these causes of action.

The business judgment rule, applicable to residential cooperative corporations, and relied upon by the defendants,

> "prohibits judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes. So long as the corporation's directors have not breached their fiduciary obligation to the corporation, the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient"

(*Levandusky v One Fifth Ave. Apt. Corp*., 75 NY2d 530, 537-538 [1990] [citations and internal quotation marks omitted]). "In adopting this rule, [the Court] recognized that a cooperative

board's broad powers could lead to abuse through arbitrary or malicious decisionmaking, unlawful discrimination or the like" (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153-154 [2003]). Hence, the business judgment rule is inapplicable to conduct undertaken or decisions made by a coop board that are unauthorized by the corporate by-laws or the proprietary lease (*see Fe Bland v Two Trees Management Co*., 66 NY2d 556, 565 [1985]; *Ludwig v 25 Plaza Tenants Corp*., 184 AD2d 623, 624-625 [2d Dept 1992]), beyond or outside the scope of the board's authority (*see 40 W. 67th St. Corp. v Pullman,* 100 NY2d at 155; *Board of Mgrs. of Amherst Condominium v CC Ming (USA), Ltd. Partnership,* 17 AD3d 183, 185 [1st Dept 2005]; *Board of Mgrs. of 229 Condominium v J.P.S. Realty Co*., 308 AD2d 314, 316-317 [1st Dept 2003]), or made in bad faith or evincing self-dealing (*see Board of Mgrs. of 229 Condominium v J.P.S. Realty Co*., 308 AD2d at 316; *see also Board of Mgrs. of the 1835 E. 14th St. Condominium v Singer*, 186 AD3d 1477, 1480 [2d Dept 2020]).

Contrary to the plaintiffs' contention, board approval was required for all of their proposed renovations, as they sought to do more than merely remove and replace existing fixtures and appliances, and the proposal would, in fact, have required significant structural alterations. In addition, Orange was not a holder of unsold shares. "'A holder of unsold shares is the sponsor or any individual designated to hold unsold shares by the sponsor. Such shares shall cease to be unsold shares when purchased by a purchaser for occupancy'" (*Thompson v 490 West End Apts. Corp*., 252 AD2d 430, 434 [1st Dept 1998], quoting 13 NYCRR 18.3[w][1]). Hence, Orange was not authorized by paragraph 21(a) of the proprietary lease to undertake alterations without board approval.

Under most circumstances, deference must be given, by virtue of the business judgment rule, to a coop board's denial of a shareholder's plans to renovate or alter a unit, and any remedial or disciplinary actions it takes in connection with unauthorized renovations or alterations (*see Levandusky v One Fifth Ave. Apt. Corp*., 75 NY2d at 540; *Patel v Gardens at Forest Hills Owners Corp*., 181 AD3d 611, 613 [2d Dept 2020]). "However, where, as here, a

proprietary lease provides that a governing board's actions in giving consent to alterations to the 'unit or building' are to be reviewed under a reasonableness standard, the board's actions are not protected by the business judgment rule" (*Perrault v Village Dunes Apt. Corp.,* 164 AD3d 847, 848 [2d Dept 2018]). As the Appellate Division, First Department, explained in *Rosenthal v One Hudson Park, Inc*. (269 AD2d 144, 145 [1st Dept 2000]), "[i]n view of the language in paragraph 21(a) of the proprietary lease, plainly indicating that consent to plaintiffs' requests" to alter their unit "could not be unreasonably withheld," the "preconditions imposed by [the] board upon the grant of plaintiffs' requests had to be reasonable and, accordingly, were not sheltered from review by the business judgment rule." The subject proprietary lease includes precisely such language and, hence, causes of action challenging the board's refusal to grant approval to the second alteration proposal, and its termination of the proprietary lease as to Orange as a consequence of allegedly unauthorized work, may not be dismissed as barred by the business judgment rule.

Moreover, inasmuch as the Appellate Division has permitted the plaintiffs to assert, as their tenth cause of action, claims premised upon the defendants' alleged bad faith in failing to cure illegal conditions and by intruding into plaintiffs' home, the third amended complaint essentially alleges that the issuance of the termination notice (first cause of action) and the failure to approve the second alteration plan (second and third causes of action) were tainted by those instances of bad faith and, thus, cannot be shielded from scrutiny by the business judgment rule in any event.

Hence, the defendants have not established that the first, second, and third causes of action should be dismissed insofar as asserted by Orange for failure to state a cause of action.

2. Fourth Cause of Action—Trespass

Interference with a person's property constitutes a trespass (see 61 NY Jur, Trespass, § 8, p 12; *Sporn v McA Record*s, 58 NY2d 482, 487 [1983]). The elements of a trespass cause of action are an intentional entry onto the land of another without permission (*see Ivory v*

International Bus. Machines Corp., 116 AD3d 121, 129 [3d Dept 2014]). This definition applies not only to land or a structure, but to a unit in a residential cooperative apartment building as well (*see Hill v Raziano*, 63 AD3d 682, 682-683 [2d Dept 2009]). The complaint states the necessary elements of a cause of action sounding in trespass to property. Moreover, the coop corporation has not established that a fact alleged by the plaintiff in connection with the trespass cause of action is not actually a fact, and there is a significant dispute regarding whether and when the defendants unlawfully entered into the subject apartment and interfered with work that was in fact authorized. Hence, Orange has a cause of action sounding in trespass, and there is no basis upon which to dismiss that cause of action for failure to state a cause of action.

3. Fifth Cause of Action---Unlawful Eviction

RPAPL 853 provides that

> "[i]f a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer."

A cause of action to recover under that statute is stated where a tenant is wrongfully locked out of premises that it is entitled to occupy (*see Danica Group, LLC v Kent Realty, LLC*, 41 AD3d 419, 420 [2d Dept 2007]). Contrary to the defendants' contention, the termination of the proprietary lease is subject to judicial scrutiny in this action and, hence, if the court ultimately concludes that the termination was wrongful, the defendants may be liable for wrongful eviction under RPAPL 853. Hence, the third amended complaint states a cause of action to recover for wrongful eviction.

4. Sixth and Seventh Causes of Action—Injunction Compelling Defendants to Produce Procedures for Retaining Vendors and Contractors and Financial Books and Records

The sixth and seventh causes of action also state valid claims for relief, as, "[u]nder New York law, shareholders have both statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid

purpose" (*Retirement Plan for Gen. Empls. of City of N. Miami Beach v McGraw-Hill Cos., Inc.,* 120 AD3d 1052, 1055 [1st Dept 2014]; *see* Business Corporation Law § 624[b], [e]; *Matter of Dwyer v Di Nardo & Metschl, P.C.*, 41 AD3d 1177, 1178 [4th Dept 2007]; *Matter of Peterborough Corp. v Karl Ehmer, Inc.*, 215 AD2d 663, 664 [2d Dept 1995]). The statutory right of inspection supplemented, but did not replace, the common-law right (*see Matter of Crane Co. v Anaconda Co.*, 39 NY2d 14, 19-20 [1976]; *Retirement Plan for Gen. Empls. of City of N. Miami Beach v McGraw-Hill Cos., Inc.,* 120 AD3d at 1055).

The plaintiffs alleged facts sufficient to establish that they wish to inspect Gentry's books and records to ascertain whether certain contractors and professionals are given favor by the board in connection with alteration and renovation projects, and whether there is any financial connection between board members and potentially favored contractors and professionals.

Insofar as the defense to these causes of action is founded upon the defendants' contention that Orange's rights in this regard had been revoked when the proprietary lease was terminated, the argument is premature. As explained above, Orange has stated a valid cause of action for a judgment declaring that the termination was wrongful, a claim that cannot be disposed of on the merits in connection with the instant motion.

5. Eighth Cause of Action—Declaration That Timothy Moore Was Wrongfully Prevented From Attending Board Meetings

For the same reasons as apply to the sixth and seventh causes of action, the board has not established, at this juncture, that it has the right to exclude Timothy Moore, as a member of Orange, from attending board meetings on the ground that Orange no longer has the rights of a proprietary lessee. Consequently, the eighth cause of action states a cause of action. Moreover, because Timothy Moore attempted to attend the meeting in his capacity as a member of Orange, it was Orange itself that was effectively excluded, and it has standing to assert this cause of action together with Timothy Moore.

6. Ninth Cause of Acton---Attorneys' Fees

Contrary to the defendants' contention, the courts do indeed recognize the right to assert a cause of action to recover attorneys' fees where the fees may be recovered pursuant to contract or statute (*see Heywood Condominium v Wozencraft*, 148 AD3d 38, 46 [1st Dept 2017] ["Supreme Court properly denied defendant's motion to dismiss plaintiff's third cause of action, for attorneys' fees"]; *Matter of Setters v AI Props. & Devs. (USA) Corp*., 139 AD3d 492, 492 [1st Dept 2016] [reinstating "cause of action for attorneys' fees under Debtor and Creditor Law § 276-a]; *Estate of Del Terzo v 33 Fifth Ave. Owners Corp*., 136 AD3d 486, 486 [1st Dept 2016] [modifying motion court's order "to the extent of granting plaintiffs summary judgment on the fourth cause of action for attorneys' fees]).

Real Property Law § 234 provides that when a lease allows for a landlord's recovery of attorneys' fees resulting from a tenant's failure to perform a covenant under the lease, a reciprocal right is implied for the landlord to pay attorneys' fees incurred by the tenant as a result of the either the landlord's failure to perform a covenant under the lease or the tenant's successful defense. This statute applies to proprietary leases issued by a residential cooperative corporation to a tenant-shareholder (*see Matter of Kotler v 979 Corp*., 191 AD3d 473, 475 [1st Dept 2021]). Since the proprietary lease provides that Gentry, as landlord, is entitled to recover attorneys' fees in connection with any action or proceeding that it prosecutes or defends successfully in connection with the enforcement of the proprietary lease, Real Property Law § 234 permits a successful tenant-shareholder to recover attorneys' fees where it successfully prosecutes or defends such an action or proceeding.

Hence, there is no basis at this juncture for dismissing the ninth cause of action insofar as asserted by Orange.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the defendants' motion to dismiss the third amended complaint is granted only to the extent that

(a) the third amended complaint is dismissed insofar as asserted by Mary Moore, both individually and in her capacity as a member of Orange Orchestra, LLC, for lack of standing,

(b) the first, second, third, fourth, fifth, sixth, seventh, ninth, and tenth causes of action in the third amended complaint are dismissed insofar as asserted by Timothy Moore, both individually and in his capacity as a member of Orange Orchestra, LLC, for lack of standing, and

(c) the tenth cause of action in the third amended complaint is dismissed insofar as asserted by the plaintiff Orange Orchestra, LLC, only as against the defendant Gentry Unlimited, Inc., for failure to state a cause of action,

and the motion is otherwise denied.

This constitutes the Decision and Order of the court.

12/23/2021
DATE

JOHN J. KELLEY, J.S.C.

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