Kristiansen v Danish Athletic Props., Inc.
2023 NY Slip Op 31694(U)
May 18, 2023
Supreme Court, Kings County
Docket Number: Index No. 515322/2020
Judge: Delores J. Thomas
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At an IAS Term, Part 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 18th day of May, 2023.

P R E S E N T:

HON. DELORES J. THOMAS,
Justice.

- -X

BARBARA KRISTIANSEN and KJELL KITTELSEN in their derivative capacities as members of the DANISH ATHLETIC CLUB INC., a New York Non-Profit Corporation, pursuant to BCL Section 720,

Plaintiffs,

- against -

Index No. 515322/2020

DANISH ATHLETIC PROPERTIES, INC., DANISH ATHLETIC CLUB OF GREATER NEW YORK, INC., et. al.,

Defendants.

- -X

The following e-filed papers read herein:	NYSCEF Doc Nos.
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations)	11-20, 24-25, 43-50, 53-61, 109-115, 128-150
Opposing Affidavits (Affirmations)	44-50, 53-60, 90, 92-95 76, 79-85, 87, 89 117-118
Reply Affidavits (Affirmations)	101-105 124-127 119

Upon the foregoing papers in this derivative action to set aside and void the November 10, 2015 transfer of the commercial property at 735-741 65th Street in Brooklyn, the former headquarters and the sole asset of the Danish Athletic Club Inc., a New York not-for-profit corporation (DAC and the DAC Property), defendants DAC, Danish Athletic Club of Greater New York, Inc. (DAC of GNY), David M. Thorsen (David Thorsen) and

Erik Bjornson (Bjornson) (the DAC Defendants) move (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5) and (a) (7), dismissing the amended complaint for: (1) lack of standing as plaintiffs' "membership with D[AC] has been duly suspended pursuant to the bylaws" and/or they "lack standing to bring derivative claims . . ."; (2) documentary evidence refutes the alleged fraud; and (3) the fraud claims (the first, second and fourth causes of action) are time-barred (*see* NYSCEF Doc No. 11).[1]

Daniel J. Houlihan (Houlihan) "in his capacity as President of [defendant] 735 65th Street Funding Associates . . ." (735 Funding) moves (in mot. seq. two) for an order, pursuant to CPLR 3211 (a) (3) and (a) (7), dismissing the amended complaint for lack of capacity and failure to state a cause of action (NYSCEF Doc No. 24).

Plaintiffs Barbara Kristiansen (Kristiansen) and Kjell Kittilsen (Kittilsen) in their derivative capacities as members of [DAC] move (in mot. seq. four), by order to show cause (OSC), for an order enjoining defendants from "selling, hypothecating, mortgaging and/or otherwise encumbering the [DAC Property,]" imposing a constructive trust "for the sole benefit of DAC upon all bank accounts, funds and other forms of consideration that Defendants, their attorneys and/or escrow agents have already received and/or may receive in the future in connection with a pending and/or proposed sale of the DAC [Property]

[1] Although the DAC Defendants' notice of motion is addressed to the "complaint," they have elected to proceed with their pre-answer dismissal motion after plaintiffs' mid-motion amendment of the complaint. Thus, the DAC Defendants' dismissal motion is now deemed to be noticed as against the amended complaint.

and/or that otherwise rightfully belong to DAC . . ." and granting them an extension of time within which to oppose defendants' dismissal motions (*see* NYSCEF Doc No. 61).

Defendant Harbor Realty Group, Inc. (Harbor) moves (in mot. seq. five) for an order dismissing the original complaint, pursuant to CPLR (a) (3) and (a) (7), and awarding it attorneys' fees and costs, pursuant to NYCRR § 130-1.1 (a) and (c) (Part 130). Harbor also moves (in mot. seq. six) for an order, pursuant to CPLR 3211 (a) (1), dismissing plaintiffs' amended complaint.

Background

The Original Complaint

On August 19, 2020, plaintiffs Kristiansen and Kittelsen, in their derivative capacities as alleged members of DAC, commenced this action, pursuant to Article Six of the New York Not-For-Profit Law, by filing a summons, a complaint (mislabeled as a "verified" complaint without any verification) and a notice of pendency against the DAC Property (*see* NYSCEF Doc Nos. 1-3). The complaint alleges that DAC, a self-managed social club for Danish, Norwegian and other Scandinavians, is located at, and has owned, the DAC Property since 1972 (NYSCEF Doc No. 1 at ¶¶ 1, 13, 14 and 17).

The complaint alleges that defendant David Thorsen "has made and taken many unilateral decisions and actions that required the vote and approval by the DAC Board and/or the DAC general membership . . ." and "unduly influenced or coerced" the DAC Board (*id.* at ¶¶ 30 and 33). Specifically, David Thorsen allegedly presented a "plan" in or about September 2014 "to separate the business and assets from DAC and create a

subsidiary company called 'Danish Athletic Properties'" (DAP) (*id.* at ¶ 38). Specifically, the complaint alleges that "[a]t a September 19, 2014 DAC membership meeting . . . THORSEN represented that the only way to restore DAC's tax-exempt status [and] save it from insolvency was to transfer the DAC [Property] to a for-profit 'daughter company' called DAP, which he had not yet formed . . ." and that the DAC Board unanimously voted in favor of the plan without having the requisite quorum (*id.* at ¶¶ 43, 48 and 51). The complaint alleges that the DAC Board's unanimous vote to transfer the DAC Property to DAP was "null and void" because: (1) there was no quorum;[2] (2) the transfer required the approval of the Attorney General under the New York Not-For-Profit Law; and (3) the transfer was premised on materially false representations by David Thorsen about his "plan" (*id.* at ¶¶ 51-53).

The complaint alleges that when DAC's President, Anne Mette Wiseman[n] (Wisemann), objected to Thorsen's "plan" to transfer the DAC Property to DAP, she was removed and replaced in September 2015 with Erik Bjornson as President, who executed a November 10, 2015 deed transferring the DAC Property to DAP (*id.* at ¶¶ 62-68 and 69).

The complaint further alleges that "[o]n December 31, 2015, . . . THORSEN [ ] recorded a $1.2 Million dollar mortgage between DAP and 735 . . . FUNDING . . . secured by the DAC [Property]" without the prior approval by the DAC Board (*id.* at ¶¶ 70-71).

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[2] Article 3, Section 2 of DAC's By-Laws provides that "[a]t all meetings of the Club, Fifteen members shall constitute a quorum" and Article 5, Section 9, provides that "[a] majority of the Executive Board present at a regular or special meeting shall constitute a quorum" (NYSCEF Doc No. 19 at Article 3, § 2 and Article 5, § 9).

Thorsen allegedly encumbered the DAC Property with additional liens (totaling more than $2 million), which were consolidated in 2019 and assigned to Harbor (*id.* at ¶ 73). Allegedly, in the summer of 2020, Thorsen announced on Facebook that DAC was closing its doors without a vote by the DAC Board (*id.* at ¶ 078). The complaint further alleges that David Thorsen listed the DAC Property for sale for $5 million and that DAP is a for-profit company owned by Thorsen (*id.* at ¶¶ 79-80).

The complaint asserts seven causes of action for: (1) a judgment declaring that the November 10, 2015 deed transferring the DAC Property to DAP is null and void as a fraudulent conveyance under the Debtor and Creditor Law; (2) a judgment declaring that the $2 million consolidated mortgage (now held by Harbor) is null and void or voidable based on the fraudulent conveyance of the DAC Property to DAP under the Debtor and Creditor Law; (3) a judgment declaring that the $2 million consolidated mortgage is null and void or voidable because the lenders (735 Funding and Harbor) are not licensed lenders or brokers; (4) common law fraud and conspiracy to defraud based on the fraudulent transfer of the DAC Property to DAP for no consideration; (5) conversion of DAC's Property and assets; (6) an equitable accounting regarding the consideration received by DAC; and (7) a judgment quieting title to the DAC Property.

The DAC Defendants' Dismissal Motion

On November 20, 2020, the DAC Defendants filed a pre-answer motion to dismiss the complaint (mot. seq. one), pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5), and (a) (7), on the grounds that: (1) plaintiffs Kristiansen and Kittelsen lack standing to sue

derivatively on behalf of DAC "as their membership with D[AC] has been duly suspended pursuant to the bylaws" and they otherwise lack standing to commence an action on DAC's behalf since they "commenced the underlying action, admittedly without giving any prior notice to the [DAC] Board of Directors" (NYSCEF Doc No. 12 at ¶¶ 2 [i]-[ii] and 15); (2) documentary evidence refutes the alleged fraud; and (3) the fraud claims are time-barred.

The DAC Defendants submit an affidavit from David Thorsen, who attests that he has been an officer of DAP since its inception and is personally familiar with the business documents maintained by DAP and its "parent corporation" DAC (NYSCEF Doc No. 14 at ¶ 1). David Thorsen attests that "[i]n 2013, the then-Board of DAC, of which . . . KRISTIANSEN was a member, invited me to meet with them in order to discuss regaining DAC's tax exemption status . . ." which was lost in 2011 "due to [the DAC Board's] failure to seek professional legal and accounting advice and, further, failure to pay its taxes and other expenses in relation to the subject premises" (*id.* at ¶¶ 4-5). David Thorsen attests that he became a member of DAC in February 2014 "in order to effectuate the transactions necessary to regain DAC's tax-exempt status" and submits DAC Board meeting minutes from October 18, 2013 through March 21, 2014 (*id.* at ¶ 6 and NYSCEF Doc No. 15).

David Thorsen further attests that:

> "[o]n April 16, 2014, the DAC Board held a meeting whereby the Board, including Plaintiff KRISTIANSEN, unanimously voted to give me authority 'to take a loan of $100,000 from a Management Group and come up with an action plan' to regain DAC's tax-exempt status.

> "Shortly thereafter, the DAC held a Special Board Meeting whereby the Board, again including Plaintiff KRISTIANSEN, unanimously voted 'to appoint [me] as chairman of properties' and that such services rendered would be paid by the Board for a flat fee.
>
> "Through April 2014 and September 2014, I presented DAC with various professionals including a lawyer and accountant to the Board and other members of DAC in order to present various options to DAC to repay back-taxes on the property and regain its tax-exempt status.
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> "*On September 19, 2014, I presented a comprehensive plan* to the members of DAC which included the option to create a subsidiary corporation to hold onto the [DAC] property to the exclusive benefit of DAC, allowing DAP to exist as a for-profit entity and donate proceeds back to DAC.
>
> "Such plan was unanimous[ly] approved by all participating and voting members" (NYSCEF Doc No. 14 at ¶¶ 7-11 [emphasis added]).

David Thorsen attests that in August 2020, he advised the DAC Board and members that the DAC Property was to be sold in accordance with the Board's September 19, 2014 resolution and that the proceeds of the sale would go to DAP (*id.* at ¶ 12). David Thorsen further attests that plaintiffs, who are only 2% members of DAC,[3] commenced this action shortly thereafter without giving any prior notice to the DAC Board (*id.* at ¶¶ 13 and 16). David Thorsen asserts that upon receiving the complaint, he and defendant Bjornson reviewed DAC's corporate books and discovered that "[p]laintiffs have failed to pay their annual dues to DAC as of the January 2020 annual meeting and, thus, their memberships

[3] Thorsen attests that there are currently 76 recorded members of DAC (*id.* at ¶ 16).

to DAC ha[s] been suspended pursuant to the bylaws" (*id.* at ¶ 14).[4] Based on these purported "facts," David Thorsen asserts that "[p]laintiffs lack standing to bring the instant action derivatively and are otherwise barred from any individual claims that they may have alleged[,]" like their claim for an equitable accounting (*id.* at ¶ 17).

Defense counsel submits an affirmation arguing that dismissal is warranted, pursuant to CPLR 3211 (a) (1), because the documentary evidence submitted (i.e., the DAC Board meeting minutes and the DAC By-Laws) "largely refutes Plaintiffs' allegations contained in their complaint" (NYSCEF Doc No. 12 at ¶ 20).

Defense counsel contends that dismissal is also warranted, pursuant to CPLR § 3211 (a) (3), because Not-For-Profit Corporation Law (N-PCL) § 623 (a) requires that plaintiffs of a derivative claim must represent 5% or more of any class of members (*id.* at ¶ 25). Defense counsel asserts that "[p]laintiffs represent only two per cent (2%) of the membership" and "cannot possibly cure this fatal defect . . ." (*id.* at ¶ 27). Defense counsel also asserts that plaintiffs do not qualify to bring a derivative claim under the N-PCL because they are no longer DAC members (*id.* at ¶ 28). Defense counsel submits the DAC By-Laws and membership ledger reflecting that plaintiffs' failure to pay their membership dues for 2020 resulted in their automatic expulsion from DAC as of January 2020 (*id.* at ¶ 30 and NYSCEF Doc Nos. 19 and 20). Defense counsel argues that "[a]bsent an Active

[4] Article 2, Section 2 of the By-Laws provides that "[a]ll dues must be paid at or before the annual meeting in January, in order to retain voting rights; and any Member who has not paid his or her dues by the April meeting *shall be automatically suspended* until action by the Executive Board of Directors and all dues are paid" (*see* NYSCEF Doc No. 19 at Article 2, § 2 [emphasis added]).

Member as defined by the DAC by[-]laws, Plaintiffs have no standing to bring these derivative claims" (*id.* at ¶ 31).

Defense counsel also contends that plaintiffs' fourth cause of action for a conspiracy to defraud DAC is untimely because the DAC Board, including plaintiff Kristiansen, unanimously voted to authorize David Thorsen's allegedly fraudulent "action plan" to reacquire DAC's tax-exempt status and appointed him chairman of the DAC Property for a flat fee in April 2014 (*id.* at ¶¶ 36-38).[5] Defense counsel contends that "[h]aving actual notice of these alleged misrepresentations over six years prior to the commencement of the instant action bars Plaintiffs from any sort of recovery under a theory of fraud" (*id.* at ¶ 40). Defense counsel explains that:

> "Here, since no argument can be made by Plaintiffs that Thorsen's activities in regard to the [DAC] property were only discovered in the last two years, and this 'scheme' having accrued at the very latest as of April 24, 2014 (well over six years prior to commencement of this action), Plaintiffs' fourth cause of action for fraud/conspiracy to defraud should therefore be dismissed with prejudice" (*id.* at ¶ 42).

Defense counsel further argues that plaintiffs' sixth cause of action for an equitable accounting is barred, as a matter of law, because N-PCL § 621 (b) "gives standing only to those who 'have been *a member of record* of a corporation for at least six months immediately *preceding his demand* . . .'" (*id.* at ¶ 45 [quoting N-PCL § 621 [b] [emphasis

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[5] In contrast, David Thorsen also attested that he presented his "comprehensive plan" to DAC members and the DAC Board at a September 19, 2014 meeting (NYSCEF Doc No. 14 at ¶ 10), which would make plaintiffs' August 19, 2020, commencement of this action timely.

added]). Defense counsel asserts that because plaintiffs are suspended members of DAC who never made any demand upon DAC's Board for an accounting prior to commencement, the sixth cause of action is subject to dismissal (*id.* at ¶¶ 45-47).

735 Funding's Dismissal Motion

On December 3, 2020, defendant 735 Funding moved (in mot. seq. two) for an order, pursuant to CPLR 3211 § (a) (3) and (a) (7), dismissing the complaint based only on an attorney affirmation (*see* NYSCEF Doc Nos. 24 and 25). Defense counsel, who lacks personal knowledge, argues that 735 Funding is a private lender that loaned money to DAC "several years back" and was subsequently repaid in 2019 (NYSCEF Doc No. 25 at ¶ 2). Defense counsel affirms that DAP borrowed a total of $2 million from 735 Funding under three different loans, which were consolidated on January 24, 2018, and secured by a consolidated mortgage encumbering the DAC Property (*id.* at ¶¶ 3-12).

Defense counsel affirms that "[o]n March 14, 2019, in order to save approximately $57,000.00 in mortgage recording tax, D[AP] while repaying the 735 Funding Loan, requested [that] 735 Funding assign the Note and Mortgage to D[AP's] new lender, Harbor . . ." (*id.* at ¶ 13). Defense counsel asserts that "[a]s of March 14, 2019, the 735 Funding Loan was paid off and [735 Funding] holds no legal interest in the Note, Mortgage, the [DAC] Premises owned by D[AP], or the loan currently held by Harbor . . ." (*id.*). Defense counsel further argues that this purportedly "frivolous" action was needlessly commenced as against 735 Funding, which has no interest at stake here (*id.* at ¶ 17). Defense counsel asserts that plaintiffs lack standing to sue because "shareholders of a corporation cannot

bring an action alleging claims that only the corporation may make" and certainly cannot assert claims against the corporation's prior mortgagee (*id.* at ¶¶ 2 and 19-20).

Plaintiffs' Opposition to the Dismissal Motions

Plaintiffs, in opposition, filed an attorney affirmation (*see* NYSCEF Doc No. 90) with four exhibits (NYSCEF Doc Nos. 92-95).[6] Plaintiffs' counsel contends that "the minimum standing requirements for defendants to assert derivative claims on behalf of . . . D[AC] to recover the Clubhouse and other damages is controlled by N-PCL § 720 . . ." which provides that "only one or more members of the D[AC] are required for standing to bring this derivative action and there are two derivative Plaintiffs here" (NYSCEF Doc No. 90 at ¶¶ 6-8). Plaintiffs' counsel notes that David Thorsen is not a member of DAC's board of directors or even a member of DAC, and thus, "he is not competent to testify or authenticate exhibits regarding [DAC's] roster of members . . ." (*id.* at ¶ 9).

Plaintiffs' counsel argues that it is unclear how many members DAC had when this action was commenced because DAC's Board of Directors voted at an April 5, 2016 meeting to cease operations due to mass resignations and the inability for DAC to maintain a quorum (*id.* at ¶ 10). Plaintiffs' counsel admits that she received a copy of the meeting minutes from one of DAC's Board, Ingeborg Rupinski, and thus, she lacks personal knowledge of the April 5, 2016 DAC meeting (*id.* at ¶ 10, fn. 2). Plaintiffs' counsel also asserts that defendants' claim that plaintiffs lack standing because their membership was

[6] Plaintiffs' counsel also e-filed two duplicate copies of her opposing affirmation and duplicate copies of the exhibits referenced therein (*see* NYSCEF Doc Nos. 91 and 96-100).

suspended in April 2020 for failure to pay annual membership dues is false because DAC's March 2022 newsletter identified plaintiffs as members in good standing (*id.* at ¶ 16), however, the DAC March 2022 newsletter is not in the record.

Regarding the statute of limitations, plaintiffs' counsel contends that "it is absurd to presume that the statute of limitations began to run at any point before September 19, 2014, when Defendant THORSEN purportedly duped the D[AC's] Board of Directors into voting to create a subsidiary holding company to transfer title to the Clubhouse[,]" which was the first time that David Thorsen suggested his fraudulent "plan" (*id.* at ¶¶ 20-21). Plaintiffs' counsel asserts that the fraud claim could not have accrued any earlier than when defendant Bjornson fraudulently conveyed the DAC Property to Thorsen's company, DAP, for no consideration (*id.* at ¶ 22). Plaintiff's counsel asserts that plaintiffs' fraud claims "are timely because they filed their Complaint only a month after anyone except the THORSEN Defendants even knew that the Clubhouse had been stolen and mortgaged for $2.5Million" (*id.* at ¶ 25).

Plaintiffs' OSC

On January 14, 2022, plaintiffs moved, by OSC (in mot. seq. four), for an order granting them an injunction enjoining the DAC defendants from selling, mortgaging or otherwise encumbering the DAC Property, imposing a constructive trust for DAC and extending their time within which to oppose defendants' dismissal motions (*see* NYSCEF

Doc No. 61).[7] Plaintiff Kittilsen submits a two-page affidavit attesting that he has been a member of DAC for over 20 years and that he and his wife, Kristiansen, "commenced this action after we and DAC's board discovered that David Thorsen and Erik Bjornson had fraudulently transferred DAC's Brooklyn Building to [DAP] and after DAC's board refused to take any action to recover it *despite our demand* to do so" (NYSCEF Doc No. 53 at ¶¶ 1 and 4 [emphasis added]).

Plaintiffs also submit an affidavit from Alice Sorensen-Bauman (Sorensen), a member of DAC since 2013 and the owner of Parkview Terrace Accounting in Brooklyn since 1985 (NYSCEF Doc No. 54 at ¶¶ 1 and 3). Sorensen attests that:

> "In 2013 the DAC Board asked me to help it reinstate its IRS 501 (c) (7) tax exempt status, which was revoked by the IRS after an audit based on its finding that DAC had earned more then thirty-five percent of its revenue from its restaurant sales to the public
>
> "I first contacted the IRS to try to reopen the audit and to show that the club was in compliance, but I needed to get formal books and records to show them for their review and possible reinstatement.
>
> "I recommended CPA Sam Susser to DAC around the spring of 2014 because I knew he had worked for the IRS for thirty-seven years and was familiar with the process involved in reinstating DAC's tax-exempt status.
>
> "The task of filing DAC's past tax returns was extremely time consuming because its records were disorganized and had to be reconstructed from handwritten ledgers and bank records.

[7] Plaintiffs' counsel also asserts, without objection, that plaintiffs' OSC and the supporting affidavits were also submitted in opposition to defendants' pending dismissal motions.

> "Although Sam told the DAC board that it would have to provide me with the records I needed before they could apply to reinstate its tax-exempt status, I was never provided with the information we needed.
>
> * * *
>
> "[In September 2014] I told [David Thorsen] that transferring DAC's building was not necessary since I had already called the IRS and [had] been told to file the past three years of tax returns and [that I] was already working on getting the books and records in order and contacting the auditors to get them to re-open the audit so that any taxable event would be placed on an IRS form 990T unrelated business tax return and the nonprofit activity would remain on the IRS 990 tax return, and that Sam was going to negotiate with the IRS once I had completed the work.
>
> * * *
>
> "Approximately a month later, I received an aggressive demand letter from David Thorsen's lawyer . . . in which she thanked me but terminated my services and demanded all of DAC's books and records in files and threatened legal action if I did not comply . . .
>
> "The next time I tried to renew my DAC membership, David Thorsen's hand-picked President, Erik Bjornson, sent me a letter rejected my renewal check, which had been held for several months before it was returned to me because I allegedly had violated my duties as a DAC member.
>
> "I have no doubt I was expelled as a member because I objected to David Thorsen's fraudulent proposal and stood in the way of him carrying out his plan" (*id.* at ¶¶ 4-8, 10 and 14-16).

Plaintiffs submit an affidavit from Sam Susser (Susser), a CPA who formerly worked at the IRS, who attests that he was contacted by Sorenson in spring 2014 about reinstating DAC's tax-exempt status (NYSCEF Doc No. 56 at ¶¶ 1-2). Susser attests that

he attended a May 2014 DAC board meeting regarding reinstatement of DAC's tax-exempt status, after which he primarily communicated with David Thorsen "who appeared authorized to speak for DAC" (*id.* at ¶¶ 3-4). Susser attests that "[a]lthough Mr. Thorsen told me for the next several months that DAC was going to retain me for curing DAC's IRS 501 (c) (7) problem, he never followed up [with the formal retention]" (*id.* at ¶ 5). Susser, who reviewed Thorsen's 2014 proposal to reinstate DAC's tax-exempt status, attests that "I am not aware [of] any provision in [the] IRS tax code that supports the Thorsen Proposal and I would not have recommended any plan that involved a $0 consideration transfer of real property from one entity to another" (*id.* at ¶ 11).

Plaintiffs also submit an affidavit from Wisemann, who attests that she was DAC's President from 2012 "until I was unlawfully 'removed' by Defendants in August of 2015 after my lawyer advised DAC, DAVID THORSEN and his lawyer . . . that his proposed plan to transfer DAC's building to [DAP] . . . 'suggested self-dealing and a conversion of DAC's property'" (NYSCEF Doc No. 58 at ¶ 1). Wisemann attests that David Thorsen and his lawyer approached the DAC board in October 2013, after which he began to control the board and membership meetings "despite the fact that he has never ever been admitted as a general member of DAC or elected to its Board of directors" (*id.* at ¶¶ 2-6).

Wisemann attests that she and plaintiff Kristiansen opposed David Thorsen's unauthorized actions taken on behalf of DAC (*id.* at ¶ 8). According to Wisemann, David Thorsen presented the DAC Board with a written proposal to transfer the DAC Property for the first time at the September 19, 2014 DAC membership meeting (*id.* at ¶ 10).

Wisemann attests that "David's proposed plan was never approved because I vehemently refused to vote in favor of it until he finally managed to push me out [in August 2015] through intimidation" (*id.* at ¶ 12). Wisemann attests that "David also alienated Alice Sorensen, DAC's accountant, and Fran Wells, who acted as its bookkeeper, and instructed Defendant Erik Bjornson to 'revoke' their membership[s] because they were also suspicious and oppose the transfer of the [DAC] building" (*id.* at ¶ 16).

Plaintiffs also submit an *unexecuted* and *unnotarized* affidavit from plaintiff Kristiansen in support of their OSC (*see* NYSCEF Doc No. 74) with an exhibit, both of which *will not be considered* by the court as they are not in admissible form.[8]

Plaintiffs submit an attorney affirmation arguing that an injunction is necessary because David Thorsen has "a June 11, 2021 Contract of Sale between DAP and Wei Qiang to sell the Brooklyn [DAC] Building for $4.125 while this case [is] pending, and without obtaining NYS AG prior approval" (NYSCEF Doc No. 44 at ¶ 20).[9] While plaintiffs' counsel affirms that a copy of the Sales Contract is "attached hereto as Exh. G" (*see id.*), there is no such exhibit e-filed. However, the June 11, 2021 Sales Contract was previously e-filed by the DAC Defendants as an exhibit to their prior OSC, so it can be considered (*see* NYSCEF Doc No. 38). Notably, plaintiffs' counsel advised in her supporting

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[8] *See Lillo-Arouca v Masoud*, 163 AD3d 646 [2018]; *cf Collins v AA Truck Renting Corp.*, 209 AD2d 363 [1994]).

[9] Plaintiffs' counsel e-filed several duplicate copies of her affirmation in support of plaintiffs' OSC (*see* NYSCEF Doc Nos. 63 and 67).

affirmation that she is currently drafting an amended complaint to add additional defendants amongst other amendments (*id.* at ¶ 19, fn. 2).

Counsel for the DAC Defendants and 735 Funding, in opposition to plaintiffs' OSC, submit attorney affirmations arguing that plaintiffs failed to demonstrate the elements necessary for injunctive relief – a likelihood of success on the merits, irreparable harm and that the equities lie in their favor (NYSCEF Doc Nos. 76 and 79).

Harbor's Dismissal Motion

On July 5, 2022, Harbor moved (in mot. seq. five) for an order dismissing the complaint, pursuant to CPLR 3211 (a) (3) and (a) (7) (*see* NYSCEF Doc No. 109). Harbor's dismissal motion is based on similar arguments as those asserted by the DAC Defendants but is supported only by an attorney affirmation. Defense counsel argues that plaintiffs lack standing to commence this derivative action on behalf of DAC because they do not represent at least 5% of the DAC membership (*see* NYSCEF Doc No. 110 at ¶¶ 4-5 and 10). Harbor annexes a copy of Thorsen's moving affidavit (submitted by the DAC Defendants) and "adopts" and incorporates it by reference into its own motion (*id.* at ¶ 6). Defense counsel further argues that the complaint fails to state a cause of action as against Harbor because DAC is not the fee owner of the DAC Property and the complaint does not allege any mortgage transaction between DAC and Harbor (*see id.* at ¶ 15).

Plaintiffs' Amended Complaint

On August 3, 2022, plaintiffs amended their complaint as of right by e-filing a Supplemental Summons and a "First Amended Verified Complaint," which is not verified

and is similar to the original complaint except: (1) it adds Sorensen and Wisemann, alleged members of DAC with 2.6% of the DAC membership, as additional "derivative plaintiffs" (*see* NYSCEF Doc No. 120 at ¶¶ 2, 23 and 89); (2) it adds Theodore Thorsen, the sole shareholder of DAP and David Thorsen's father, and Christine Thorsen, David Thorsen's mother, as additional defendants (*id.* at ¶¶ 6-7, 14, 16-17 and 83); and (3) it clarifies and adds additional factual allegations regarding the alleged fraud regarding the transfer of the DAC Property (*see* NYSCEF Doc No. 120). Under the "Summary of the Case," the amended complaint alleges that:

> "[t]his First Amended Complaint is to supplement two new derivative Plaintiffs, two new Defendants, to incorporate new and critical facts and allegations that Plaintiffs have learned since they filed their original Complaint, and to incorporate numerous critical admissions by Defendants in the affirmations, affidavits, and exhibits they filed in support of their motions to dismiss the original Complaint
>
> "This First Amended Complaint alleges a transparent case of affinity fraud and fraudulent 2015 conveyance and subsequent fraudulent mortgages for more than $2.5 Million and secured by [DAC's] only asset, a valuable Brooklyn Building by insider Defendants DAVID M. THORSEN and ERIK BJORNSON to D[AP], a company formed and operated by its President, Defendant DAVID M. THORSEN and solely owned by his father, Defendant THEODORE THORSEN.
>
> "Between 2015 and April of 2016 Defendants DAVID M. THORSEN also looted [DAC's] bank account by gaining access and making unauthorized electronic payments to his mother and Defendant CHRISTINE THORSEN for a total amount at least equal to $25,000" (*id.* at ¶¶ 15-17).

The amended complaint asserts seven causes of action, which are nearly identical to the claims asserted in the original complaint: (1) a judgment declaring that the fraudulent conveyance of the DAC Property to DAP for no consideration in violation of the Debtor & Creditor Law is null and void (*id.* at ¶¶ 87-88); (2) a judgment declaring that the consolidated mortgage encumbering the DAC Property is null and void based on the fraudulent conveyance of the DAC Property under the Debtor & Creditor Law (*id.* at ¶¶ 92-96); (3) a judgment declaring that the mortgages encumbering the DAC Property are null and void because the lenders were not licensed mortgage lenders or brokers (*id.* at ¶¶ 99-102); (4) common law fraud and conspiracy to defraud based on allegations that David Thorsen "knowingly misrepresented that the only way to restore [DAC's] tax-exempt status was to transfer the [DAC Property] to a subsidiary or daughter company . . ." and that the DAC Defendants, instead, transferred the DAC Property to DAP, which is wholly owned and controlled by Thorsen and encumbered the DAC Property with mortgages executed by DAP (*id.* at ¶¶ 105-110); (5) conversion of the DAC Property and DAC's other assets (*id.* at ¶ 113); (6) an equitable accounting of DAC's books and records (*id.* at ¶¶ 116-117); and (7) a judgment declaring that DAC has unencumbered title to the DAC Property (*id.* at ¶¶ 119-120).

Harbor's Motion to Dismiss the Amended Complaint

On August 31, 2022, Harbor, again, moved (in mot. seq. six) for an order, *only* pursuant to CPLR 3211 (a) (1), dismissing the amended complaint based on an affidavit from Lee S. Wiederkehr, Esq., Harbor's co-defense counsel (NYSCEF Doc No. 129).

Defense counsel asserts that "[d]ocumentary proof exists to establish that Defendant HARBOR . . . is a bona fide purchaser for value and the holder of a $2,350,000 first mortgage encumbering the [DAC Property]" (*id.* at ¶ 3). Defense counsel attests that the amended complaint "is substantially the same as the original complaint, except for the addition of two additional plaintiffs in its derivative action [to] purportedly overcome the issue of standing" (*id.* at ¶ 7). Defense counsel claims that the amended complaint does not allege any fraud or wrongdoing by Harbor, which is "<u>simply a lender in a secured mortgage refinance transaction</u>" (*id.* at ¶ 28).

Defense counsel submits a number of unauthenticated documents, including DAC and DAP's incorporation documents and By-Laws, copies of the mortgage loans allegedly obtained by DAP and secured by the DAC Property, which were ultimately consolidated and assigned to Harbor, and a redacted title report disclosing that DAP was the fee owner of the DAC Property (NYSCEF Doc Nos. 130-150).

In addition to an attorney affidavit, Harbor submits a moving memorandum of law arguing that Real Property Law (RPL) § 266 "protects the priority status of good faith purchasers and lenders against unknowing later claims of fraud or other challenges to their lien priorities" if the lender shows that valuable consideration was given for its interest in the subject property and the lender lack *actual* knowledge of any alleged fraud by its grantor (NYSCEF Doc No. 151 at 3).

Harbor claims that the documentary evidence indisputably evidences that it is a bona fide lender that gave valuable consideration for its consolidated mortgage (*id.* at 4). Harbor

asserts, at the outset, that the amended complaint "does not plead any affirmative wrongdoing against HARBOR . . . nor does it allege that it had notice of any fraud by its borrower, D[AP]" (*id.*). Harbor further argues that it has made a prima facie showing that it is a bona fide lender by submitting a redacted copy of the title report it obtained in connection with the mortgage (*id.* at 5). Harbor, in its memorandum of law, claims that it reasonably relied on DAP's Board's Resolution authorizing the consolidated mortgage encumbering the DAC Property (*id.* at 6).

Discussion

(1)

Defendants' Dismissal Motions

As a preliminary matter, defendants' motions to dismiss the original complaint "could not be defeated or rendered academic by filing an amended pleading" (*Hutchins v Palmer*, 176 AD3d 1037, 1039 [2019]). As the Second Department has held, "a motion to dismiss which is addressed to the merits may not be defeated by an amended pleading" (*Livadiotakis v Tzitzikalakis*, 302 AD2d 369, 370 [2003]); *see also Terrano v Fine*, 17 AD3d 449, 452 [2005]). "The original motion pursuant to CPLR 3211 (a) to dismiss the original complaint extended the defendants' time to answer (*see* CPLR 3211 [f]) until 10 days after service of notice of entry of the order determining th[e] motion, and similarly extended the time within which the plaintiffs could serve an amended complaint *as of right*" (*Poly Mfg. Corp. v Dragonides*, 109 AD3d 532, 534-535 [2013] [citing CPLR 3025 [a] [emphasis added]). It is the moving defendants' option to withdraw the pre-answer

dismissal motions addressed to the original complaint or to proceed with their dismissal motion against the amended pleading.

Rather than withdraw their dismissal motions when plaintiffs e-filed the amended complaint on August 3, 2022 (*see* NYSCEF Doc No. 120), defendants (with the exception of Harbor) took the position that plaintiffs' amendment does not render their dismissal motions moot because the amendment failed to correct the defects in the pleadings, and thus, defendants elected to apply their dismissal motions, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5) and (a) (7), to the amended complaint. Harbor, in contrast, specifically moves (in mot. seq. six) to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1).

Harbor's Motion to Dismiss the Amended Complaint

"A motion to dismiss made pursuant to CPLR 3211 (a) (1) will fail unless the documentary evidence that forms the basis of the defense resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Shaya B. Pacific*, *LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 37 [2006]). "In order for evidence submitted in support of a CPLR 3211 (a) (1) motion to qualify as documentary evidence, it must be unambiguous, authentic, and undeniable" (*Feldshteyn v Brighton Beach 2012, LLC*, 153 AD3d 670, 670-671 [2017] [internal quotations omitted]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, [and] contracts" constitute documentary evidence for CPLR 3211 (a) (1) (*Ralex Servs., Inc. v Sw. Marine & Gen. Ins. Co.*, 155 AD3d 800, 801-802 [2017]).

Harbor moves to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1),

based only on an attorney affirmation and a memorandum of law in which it argues that the amended complaint fails to allege any wrongdoing by Harbor or that Harbor had notice of the alleged fraudulent conveyance of the DAC Property to DAP, the borrower. Harbor relies on RPL § 266, which protects the rights of a purchaser or encumbrancer for value "unless it appears that he had previous notice of the fraudulent intent of his immediate grantor, or of the fraud rendering void the title of such grantor" (*see* RPL § 266). Contrary to Harbor's assertion, the amended complaint specifically alleges that Harbor had both actual and constructive notice of the fraudulent conveyance of the DAC Property to DAP (*see* NYSCEF Doc No. 120 at ¶¶ 20 and 86).

Here, Harbor failed to submit documentary evidence that establishes prima facie that it and its predecessor, 735 Funding, took their mortgage interests in the DAC Property without notice that the DAC Property was fraudulently transferred from DAC to DAP, the borrower/mortgagee. The amended complaint specifically alleges that Harbor and 735 Funding had both actual and constructive notice of the fraudulent conveyance, and the documentary evidence produced by Harbor does not utterly refute those factual allegations, as required for dismissal pursuant to CPLR 3211 (a) (1) (*see Lucia v Goldman*, 68 AD3d 1064, 1065-1066 [2009]).

Furthermore, Harbor's submission of unauthenticated documents, such as DAC and DAP's corporate documents, a Board of resolution regarding the transfer of the DAC Property to DAP and a redacted title search for the DAC Property, all of which are annexed to an attorney affidavit/affirmation without providing any foundation, are inadmissible and

insufficient to support a CPLR 3211 (a) (1) dismissal motion, as a matter of law (*see Mew Equity LLC v Sutton Land Services, L.L.C.*, 34 Misc.3d 1224 [A] [Sup Ct Kings County 2012]). Consequently, Harbor's motion to dismiss the amended complaint, pursuant to CPLR 3211 (a) (1), is denied.

Plaintiffs' Standing to Maintain This Derivative Action

"Where a CPLR 3211 (a) (3) motion is based upon an alleged lack of standing, the burden is on the moving defendant to establish, prima facie, the plaintiff's lack of standing as a matter of law" and "[t]o defeat a defendant's motion to dismiss, the plaintiff has no burden of establishing its standing as a matter of law, but *must merely raise a question of fact* as to the issue" (*Wilmington Sav. Fund Soc'y, FSB v Matamoro*, 200 AD3d 79, 89-90 [2021] [emphasis added]).

Here, defendants contend that the addition of derivative plaintiffs Sorenson and Wisemann is "insufficient to cure [the original plaintiffs'] lack of standing because the new plaintiffs are admittedly not members of good standing of [DAC]" (*see* NYSCEF Doc No. 123 at 3). However, Wisemann's affidavit testimony that David Thorsen instructed Bjornson to revoke her and Sorenson's DAC membership because they were suspicious of David Thorsen's proposed "plan" and openly opposed the transfer of the DAC Property to DAP (see NYSCEF Doc No. 58 at ¶¶ 8-16), raises material issues of fact regarding plaintiffs' actual DAC membership status, whether their DAC membership was illegitimately revoked by the alleged fraudsters and plaintiffs' standing to sue derivatively on DAC's behalf, despite their alleged failure to pay January 2020 dues to the DAC

Defendants who allegedly control and/or previously looted DAC's bank account. Consequently, dismissal of the amended complaint, pursuant to CPLR 3211 (a) (3), based on plaintiffs' purported lack of standing is unwarranted because there are multiple factual issues regarding plaintiffs' standing.

Plaintiffs' Fraud Claims Are Not Time-Barred

A party who seeks dismissal of a claim, pursuant to CPLR 3211 (a) (5), on the ground that it is barred by the statute of limitations bears the initial burden of proving, prima facie, that the time in which to sue has expired (*Benjamin v Keyspan Corp.*, 104 AD3d 891, 892 [2013]). The burden then shifts to the nonmoving party to raise a question of fact as to the applicability of an exception to the statute of limitations, whether the statute of limitations was tolled (*Shalik v Hewlett Assoc., L.P.*, 93 AD3d 777, 778 [2012]), or whether the claim was actually interposed within the applicable limitations period (*Williams v New York City Health & Hosps. Corp.*, 84 AD3d 1358 [2011]).

The DAC Defendants contend that plaintiffs' fraud claims (the first, second and fourth causes of action) are barred by the six-year statute of limitations because, according to David Thorsen, the claim accrued on April 16, 2014, when the DAC Board of Directors purportedly hired him for a fee. Since this action can best be characterized as one sounding in the fraudulent conveyance of real property, the six-year Statute of Limitations set forth in CPLR 213 (8) applies to plaintiffs' fraud claims (*see Modin Assocs., Inc. v City of New York*, 136 AD2d 530, 530 [1988]). CPLR 213 (8) explicitly provides that:

> "an action based upon fraud; the time within which the action must be commenced shall be the greater of six years from the date the cause of action accrued or two years from the time the plaintiff . . . discovered the fraud, or could with reasonable diligence have discovered it."

Thus, a cause of action for fraud must be commenced within six years from the time of the fraud, or within two years from the time the fraud was or could have been discovered, "whichever is longer" (*Coleman v Wells Fargo & Co.*, 125 AD3d 716, 716 [2015]).

Here, the amended complaint alleges that the DAC Property was fraudulently conveyed from DAC to DAP for no consideration by a November 10, 2015 deed, within six years of the commencement of this action on August 19, 2020. While the DAC Defendants contend that plaintiffs' fraud claims accrued for statute of limitation purposes in April 2014, when David Thorsen was allegedly hired by DAC's Board of Directors to reinstate DAC's tax-exempt status, the DAC meeting minutes in the record reflect that DAC's membership and DAC's Board actually voted to proceed with David Thorsen's proposed "plan" to transfer the DAC Property to DAP at the *September 19, 2014* meeting, less than six years before this action was commenced.

Since it is unclear at this early stage of the litigation when plaintiffs should have first been aware that David Thorsen's "plan" to reinstate DAC's tax-exempt status by transferring its sole asset, the DAC Property, to DAP, his family's company, for no consideration was fraudulent, defendants have failed to conclusively establish that plaintiffs' fraud claims are time-barred (*cf. Felshman v Yamali*, 106 AD3d 948, 949 [2013] [same reasoning applied under the Debtor & Creditor Law]). Consequently, that branch of

defendants' motions to dismiss plaintiffs' first, second and fourth causes of action for fraud as time-barred, pursuant to CPLR 3211 (a) (5), is denied.

The Amended Complaint States A Cause of Action

Finally, in considering a motion to dismiss, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action "the pleadings must be liberally construed" and "[t]he sole criterion is whether from [the complaint's] four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*Gershon v Goldberg*, 30 AD3d 372, 373 [2006], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). "The facts as alleged in the complaint are accepted as true, with the plaintiff accorded the benefit of every favorable inference (*Ginsburg Development Companies, LLC v Carbone*, 85 AD3d 1110, 1111 [2011]; *see also Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2010]). A dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has stated a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2010]).

"A plaintiff asserting a cause of action alleging fraud must plead all of the following elements: (1) a material misrepresentation or a material omission of fact which was false and which the defendant knew to be false, (2) made for the purpose of inducing the plaintiff to rely upon it, (3) the plaintiff's justifiable reliance on the misrepresentation or material

omission, and (4) injury" (*Nabatkhorian v Nabatkhorian*, 127 AD3d 1043, 1043-1044 [2015]).

The amended complaint sufficiently asserts a cognizable cause of action for fraud because it specifically alleges that David Thorsen misrepresented to the DAC Board of Directors and the DAC membership at the September 19, 2014 meeting that DAC could regain its tax-exempt status if it followed his proposed "plan" to transfer the DAC Property to a new daughter company, DAP. David Thorsen allegedly removed and replaced and/or "unduly influenced and/or coerced" members of the DAC Board of Directors who opposed his proposed plan, after which defendant Bjornson fraudulently transferred the DAC Property to DAP, a company that is wholly owned by David Thorsen's father, Theodore Thorsen, by a November 10, 2015 deed in exchange for no consideration. Soon thereafter, David Thorsen caused DAP to encumber the DAC Property with over $2 million in mortgage loans from an unlicensed hard lender, 735 Funding, and then assigned to Harbor. The amended complaint alleges that David Thorsen and his mother, Christine Thorsen, looted DAC's bank account and made unauthorized transactions totaling at least $25,000.00. (*see*, *e.g.*, NYSCEF Doc No. 120 at ¶¶ 47-52, 57, 63, 67-85 and 70-73).

The detailed allegations of fraud and conversion of DAC's assets in the unverified amended complaint, which are presumed true for purposes of this dismissal motion, combined with the supporting affidavit testimony from Wisemann, Sorensen and Kittelsen, submitted both in support of plaintiffs' OSC and in opposition to defendants' pre-answer dismissal motions, sufficiently allege a fraudulent scheme by defendants to transfer the

DAC Property to DAP, encumber the DAC Property with over $2 million in mortgages and loot the DAC bank account. These fact affidavits considered together with David Thorsen's competing affidavit testimony, raise several material factual issues that warrant discovery. Presuming plaintiffs have the requisite standing, they may be entitled to declaratory relief as well as an equitable accounting of DAC's allegedly converted assets. Consequently, defendants' motions to dismiss the amended complaint for failure to state a cause of action, pursuant to CPLR 3211 (a) (7), are denied.

(2)

Plaintiffs' OSC For a Preliminary Injunction

"In order to be entitled to a preliminary injunction, plaintiffs had to show a probability of success, danger of irreparable injury in the absence of an injunction, and a balance of the equities in their favor" (*Aetna, Ins. Co. v Capasso*, 75 NY2d 860, 862 [1990]). "The purpose of a preliminary injunction is to maintain the status quo and prevent the dissipation of property that could render a judgment ineffectual" (*Perpignan v Persaud*, 91 AD3d 622, 622 [2012] [quoting *Ruiz v Meloney*, 26 AD3d 485, 486 (2006)]). The decision to grant or deny a motion for an injunction lies within the sound discretion of the trial court (*id.* at 486).

An injunction maintaining the status quo pending the conclusion of this derivative action to void an allegedly fraudulent conveyance of the DAC Property from DAC to DAP is warranted, particularly in light of the indisputable fact that DAP (by David Thorsen as its President) executed a June 11, 2021 contract to sell the DAC Property to Wei Qiang

Lin, a third party, during the pendency of this action for more than $4million (*see* NYSCEF Doc No. 38). Plaintiffs have alleged fraud against the DAC Defendants with sufficiently detailed allegations and there is no question that DAC would be irreparably harmed if the DAC Property, DAC's sole asset, were transferred and/or further encumbered by the DAC Defendants while this action to quiet title to the DAC Property is pending. The DAC Defendants and DAP admit that they have executed a June 11, 2021 Contract of Sale between DAP and Wei Qiang Lin to sell the DAC Property for $4.125 million, and David Thorsen and the DAC Defendants intend to proceed with that contracted sale despite the pendency of this action involving their allegedly fraudulent transfer of the DAC Property (*see* NYSCEF Doc Nos. 33-39).[10] As a matter of equity, and to maintain the status quo, this court has determined that an injunction preventing the sale and/or further encumbrances upon the DAC Property is warranted during the pendency of this action.

Plaintiffs have failed to demonstrate that they are entitled to the imposition of a constructive trust for the benefit of DAC. Accordingly, for the reasons discussed herein, it is hereby

ORDERED that the DAC Defendants' motion to dismiss the amended complaint (mot. seq. one) is denied; and it is further

[10] On October 5, 2021, after David Thorsen executed the contract of sale, the DAC Defendants moved (in mot. seq. three), by order to show cause, for an order moving up the return date on their dismissal motion (mot. seq. one) so that they could proceed with the mid-action sale of the DAC Property. The court declined to sign the OSC (see NYSCEF Doc No. 40).

ORDERED that 735 Funding's motion to dismiss the amended complaint (mot. seq. two) is denied; and it is further

ORDERED that plaintiffs' OSC (mot. seq. four) is only granted to the extent that defendants are hereby enjoined from selling, mortgaging and/or otherwise further encumbering the DAC Property during the pendency of this action; the remaining branches of plaintiffs' OSC is otherwise denied; and it is further

ORDERED that Harbor's motion to dismiss the original complaint (mot. seq. five) is denied as moot,[11] and it is further

ORDERED that Harbor's motion to dismiss the amended complaint (mot. seq. six) is denied; and it is further

ORDERED that defendants shall e-file their answers to the supplemental summons and the amended complaint (NYSCEF Doc No. 120) within 30 days after service of this decision and order with notice of entry thereof, if they have not done so already.

This constitutes the decision and order of the court.

E N T E R,

Hon. Delores J. Thomas, J.S.C.

[11] Harbor, having specifically moved to dismiss the amended complaint (mot. seq. six), rendered its prior dismissal motion (mot. seq. five), which was directed at the original complaint, academic.