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

PRESENT: **HON. PAUL WOOTEN**
Justice
PART 7

J. ARMAND MUSEY,
Plaintiff,

-against-

425 EAST 86 APARTMENTS CORP., DOUGLAS ELLIMAN PROPERTY MANAGEMENT, FRANK CHANEY, PATRICIA CARBON, DAVID MUNVES, MICHAEL CONSIDINE, SUZANNE KEANE a/k/a SUZANNE JULIG, JENNIFER KRUEGER, GEORGE GREENBERG, ALEXANDER SHAPIRO and LESLIE SPITALNICK,
Defendants.

INDEX NO. 157316/14

MOTION SEQ. NO. 001

The following papers were read on this motion and cross-motion by defendants to dismiss the complaint and cross-motion by the plaintiff for summary judgment.

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits (Memo)	
Reply Affidavits — Exhibits (Memo)	

Cross-Motion: ☒ Yes ☐ No

In this action concerning the sale of the stock and proprietary lease representing exclusive ownership of apartment PHA (the Apartment) at 425 East 86th Street, New York County (the Building), defendants 425 East 86 Apartments Corp. (425 East), Douglas Elliman Property Management (Elliman), Frank Chaney (Chaney), Patricia Carbon (Carbon), David Munves (Munves), Michael Considine (Considine), Suzanne Keane a/k/a Suzanne Julig (Keane), Jennifer Krueger (Krueger), Alexander Shapiro (Shapiro) and Leslie Spitalnick (Spitalnick) (together, the Cooperative) move, pursuant to CPLR 3211, to dismiss the complaint as against them, or, in the alternative, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against them. Defendant George Greenberg (Greenberg) cross-

moves, pursuant to CPLR 3211, to dismiss the complaint as against him, or, in the alternative, pursuant to CPLR 3212, for summary judgment dismissing the complaint as against him. In turn, plaintiff J. Armand Musey cross-moves, pursuant to CPLR 3212, for summary judgment in his favor on the third and fourth causes of action in his complaint.

BACKGROUND

425 East is the corporation that owns the Building and Elliman is the Building's property manager. All of the individually named defendants are shareholders in 425 East and were allegedly members of its board of directors (the Board) at the relevant time.

Plaintiff entered into a contract to buy the ownership interest in the Apartment on December 13, 2012 (Peterson aff, exhibit E). He understood that certain roof and terrace areas were deemed to be part of the Apartment. They were under repair and allegedly unavailable for inspection at the time of the real estate transaction. The deal closed on February 27, 2013.

In April 2013, the Board allegedly approved plaintiff's plans to add two more doors to the three that connected the Apartment to the roof and terrace areas, and to install an air-conditioning compressor on the roof, as well. Plaintiff considered these approvals to be additional recognition of his ownership of the roof and terrace areas. His other plans to alter the terrace were disrupted when, on July 23, 2013, the Board adopted revised house rules that obliged "all shareholders owning an apartment with an adjoining roof terrace" to pay for "a secondary membrane over the existing roof membrane, or installation of a separator pad," if they planned to place, erect or install any planters, deck coverings or other objects on the roof (Complaint, exhibit 2 [House Rules]). The services of a professional engineer, if needed for this purpose, would also be at plaintiff's expense (*id.*). Additionally, plaintiff had to agree to "accept[] full responsibility for and indemnify[] the Corporation against the cost of repairing any and all damage to the underlying roof membrane and any damage to the public areas and/or apartment(s) below" caused by plaintiff's use or misuse of the roof and terrace (*id.*, ¶ 5).

This action commenced on July 25, 2014 with the filing of a complaint asserting causes of action against the named Board members for breach of fiduciary duty and fraud; for a declaratory judgment invalidating certain sections of the House Rules, and commanding that 425 East make the roof habitable; and against 425 East and Elliman for breach of contract (Peterson aff, exhibit A). In summation, plaintiff declares that, had he known that the repairs to the terrace would make it unusable, and that the upcoming revision of the House Rules would substantially shift the responsibility for maintenance of the terrace to him from 425 East, he would not have purchased the Apartment.

Plaintiff claims that the Board deceived him from at least the time of the purchase approval interview when he alleges that he was told that the extensive work being done on the terrace would produce "a lovely new terrace," solely for his enjoyment (Complaint, ¶ 14). He was not informed that additional work would be needed, at his expense, to protect the roof. He also states that the Board failed to disclose the forthcoming change to the House Rules regarding the roof terraces abutting the Building's two penthouses, his and another.

Plaintiff states that the Board's failure to inform him of this information before he purchased the Apartment was a material omission that impeded the negotiation of a fair bargain in the purchase of the Apartment. He contends that the Board acted consciously in withholding information because then "any rational buyer would have likely purchased the Unit at a significantly lower price. This would have reduced the 2% flip-tax 425 East shareholders (including the Board Members) enjoyed" (Complaint, ¶ 45).

Considine participated in plaintiff's approval interview with other Board members, which also included plaintiff's partner Margaret Janicek (Janicek). Considine recalls that the applicants planned renovations to address "aesthetic issues, but nothing more than that" (Considine aff, ¶ 5). He states that neither applicant "ma[de] inquiry about the roof area immediately outside of PH-A. Neither of them inquired about whether it was considered part of

PH-A, whether they had exclusive use of the space, what the condition of the space was, or whether there were any rules in place addressing permitted uses thereof." *Id.*, ¶ 6. Munves and Kreuger also participated in plaintiff's approval interview, and provide affidavits that essentially duplicate Considine's. Plaintiff confirms these accounts, but explains that he and Janicek had no reason to inquire, "because the above information was volunteered to us without us asking!" Complaint, ¶ 4.

An Elliman executive states that, after searching its files, he has "not located any documents demonstrating that any portion of the Building's roof area is allocated specifically to PH-A [the Apartment]" (Narine aff, ¶ 7). Further, the "roof area that Mr. Musey appears to believe is part of his apartment, functioning as a terrace for his exclusive use and enjoyment, can be accessed not only from this apartment, but also from the Building stairwell which goes from the ground level all the way to the roof level" (*id.*, ¶ 8). Elliman claims that the roof outside the Apartment was "a 'service' rather than an 'entertainment' roof. . . . it was set up in such a way so as to facilitate access to building apparatus in the event necessary, but that it was not improved so as to invite or enable comfortable use thereof for dining, entertaining, relaxing, etc" (DeBoer aff, ¶¶ 3-4). The prior owner allegedly only used the doors connecting the Apartment to the roof "to let some fresh air into the apartment" (*id.*, ¶ 6).

The issue is clouded by an email to plaintiff from Chaney, then Board president, dated September 19, 2013, as the parties tried to negotiate a settlement to the brewing dispute about the roof and terrace areas. Chaney wrote: "As I'm sure you know and understand, while you have exclusive use of the roof adjacent to your penthouse, you don't own it; it is the commonly held property of all the shareholders," and its use may be regulated by the Board (Musey aff, exhibit 9 at 2). Defendant Greenberg owns the Building's second penthouse. He has access and makes use of the roof space adjacent to his unit in a fashion close to what plaintiff imagined for himself. Greenberg installed thick rubber tiles over the roof membrane, in 1990,

with the Board's permission (Narine aff, ¶ 17). This, in the words of an Elliman witness, "allow[ed] him to make use of this roof space as a 'terrace.'"[1] (*id.*). Photographs provided by plaintiff show Greenberg's terrace equipped with outdoor tables and chairs and a cooking appliance (Musey aff, exhibit 4).

The Cooperative moves first for dismissal of the complaint, in whole or in part, pursuant to CPLR 3211, under several theories: the claims are time-barred; plaintiff lacks standing; no actionable conduct is cited against individual Board members; the Board owed no duty to plaintiff; plaintiff and Elliman had no contractual relationship; and plaintiff fails to point to any specific contractual provision allegedly breached by 425 East.

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), a court must look to make sure the plaintiffs' statements can sustain a cause of action (*Ambassador Factors v Kandel & Co.*, 215 AD2d 305, 306 [1st Dept 1995]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977] ["the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one"]). In doing so, the Court must "accept as true the facts alleged...and any submissions in opposition to the dismissal motion" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 151-152 [2002]; *see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]) as well as "accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 87-88; *see Guggenheimer*, 43 NY2d at 275 ["the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action

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[1] In Greenberg's cross-motion, he generally adopts the Cooperative's legal position, except that he insists that this "should not be construed as, and is in fact expressly not, an admission that Greenberg himself does not have an ownership interest in his terrace" (Sestack affirmation, ¶ 13).

cognizable at law a motion for dismissal will fail"]; *see also Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *511 W. 232 Owners Corp.*, 98 NY2d at 152; *Sokoloff*, 96 NY2d at 414; *Bonnie & Co. Fashions v Bankers Trust Co.*, 262 AD2d 188, 189 [1st Dept 1999] ["The opposing party needs only to assert facts which 'fit within any cognizable legal theory'"]; *Kliebert v McKoan*, 228 AD2d 232, 232 [1st Dept 1996]). "It is well settled that bare legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence...are not presumed to be true on a motion to dismiss for legal insufficiency" (*O'Donnell, Fox & Gartner v R-2000 Corp.*, 198 AD2d 154, 154 [1st Dept 1993]; *see also Mark Hampton, Inc. v Bergreen*, 173 AD2d 220, 220 [1st Dept 1991]; *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

As the Cooperative notes, only individual Board members are named as defendants, not the Board itself, yet the actions complained of were all collectively undertaken by the Board. The two causes of action asserted against Board members, breach of fiduciary duty and fraud, repeatedly address the conduct of "the Board" and "Board Members," without naming any defendant.[2] Generally, "individual directors and officers may not be subject to liability absent the allegation that they committed separate tortious acts" (*DeCastro v Bhokari*, 201 AD2d 382, 383 [1st Dept 1994]). None of the individual Board members are liable here under any cognizable legal theory. Under any circumstances, Keane, Carbon, and Spitalnick would be dismissed from the instant action, because it is undisputed that they were not on the Board when plaintiff was considering purchase of the Apartment, or in his early days of possession when he first offered renovation plans to the Board.

The Cooperative maintains that the proper challenge to the decisions of a residential

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2 Greenberg is mentioned in the first cause of action to illustrate the alleged difference in the Board's treatment of plaintiff and Greenberg. The third cause of action requests a declaratory judgment, and the fourth cause of action for breach of contract is asserted against 425 East (the cooperative corporation) and Elliman.

corporation's board is a CPLR article 78 proceeding (*Villanova Estates, Inc. v Fieldston Prop. Owners Assn., Inc.*, 23 AD3d 160, 162 [1st Dept 2005] ["the failure of defendants to abide by their bylaws . . . is properly a claim for mandamus that should have been brought as an article 78 proceeding and not in this plenary action"]). The statutory time limit defined by CPLR 217(1) to commence an article 78 proceeding has now lapsed (*Katz v Third Colony Corp.*, 101 AD3d 652, 653 [1st Dept 2012] ["Plaintiffs are now prohibited from challenging the propriety of those amendments [to the cooperative corporation's by-laws and proprietary leases] because they are required to have done so via a proceeding pursuant to CPLR article 78 within four months thereof"]); *Matter of Dobbins v Riverview Equities Corp.*, 64 AD3d 404, 404 [1st Dept 2009] [challenge to cooperative corporation's policy as violative of proprietary lease dismissed as time barred, because article 78 proceeding was "commenced more than four months after respondents' determination became final and binding upon petitioner"]).

Dismissal of a complaint is warranted under CPLR 3211(a)(5) when an action was commenced after the appropriate statute of limitations has run (*Huynh v Greene, Brian & Stern Partnership*, 34 AD3d 363, 363 [1st Dept 2006] ["Plaintiff's cause of action for breach of contract was barred for any claims arising more than six years prior to commencement of the action"]). Here, the instant plenary action is not the proper vehicle to challenge the actions of the Board, and the commencement of an article 78 proceeding is time-barred. Therefore, the first and second causes of action (breach of fiduciary duty and fraud) are dismissed in their entirety.

Plaintiff cross-moves for summary judgment in his favor on the complaint's third and fourth causes of action (declaratory judgment and breach of contract against 425 East and Elliman). The party moving for summary judgment must make a prima facie case showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (*see Ostrov v Rozbruch*, 91 AD3d 147,

152 [1st Dept 2012], citing *Alvarez*, 68 NY2d 320, 324 [1986]; *Santiago v Filstein*, 35 AD3d 184, 185-86 [1st Dept 2006], quoting *Winegrad*, 64 NY2d 851, 853 [1985]; CPLR 3212[b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*see Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof of inadmissible form of sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Mazurek v Metro. Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; *Zuckerman v City of NY*, 49 NY2d 557, 562 [1980], *DeRosa v City of NY*, 30 AD3d 323, 325 [1st Dept 2006].

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (*see Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The Court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (*see Negri v Stop & Shop, Inc.*, 65 NY2d 625, 626 [1985]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978], *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 [1st Dept 2002]; CPLR 3212[b]).

The complaint requests that the court declare "that Paragraphs 4 and 5 of the New House/Terrace Rules violate the terms of the Proprietary Lease and are null and void," and that "425 East [shall] take all actions required to make the terrace habitable, . . . make the roof habitable; and . . . replace the exterior doors to the Unit" (Complaint at 16-17). As discussed above, judicial review of 425 East's House Rules must be undertaken by an article 78 proceeding. A declaratory judgment on the amendation of the House Rules cannot come from this plenary proceeding. That prong of the third cause of action is dismissed, as moved by the Cooperative, and plaintiff's cross-motion denied to that extent.

The complaint states that "a declaration is necessary directing 425 East to take all actions required to make the terrace habitable, including but not limited to, the installation of flooring surface over the terrace membrane enabling it to withstand ordinary expected use" (Complaint, ¶ 56). While plaintiff would like to overturn the House Rules, they govern in this instance, and they make no provision for 425 East, or any other defendant, to take the actions sought by plaintiff. The House Rules for terraces apply only to plaintiff and Greenberg, and are consistent with the agreement executed by the Board and Greenberg in 1990, when Greenberg upgraded the adjoining roof area, at his own expense (Narine aff, exhibit H). It is only plaintiff's reading of the proprietary lease that would oblige 425 East to favor him as it has no other owner. The Court cannot declare adherence to an agreement that does not exist.

Plaintiff also asks for a declaratory judgment that 425 East is responsible for maintaining the exterior doors to the Apartment, pursuant to the terms of the proprietary lease. When plaintiff moved into the Apartment, three doors led from the Apartment to the roof. The Cooperative contends that the three doors "were installed by a prior owner of the Apartment in replacement of the original doors. Accordingly, they were thereafter the property and responsibility of the shareholder and all successors in interest" (Chaney aff, ¶ 24). It concedes that it agreed to replace one of the doors, as plaintiff originally requested, "to demonstrate the Board's good faith willingness to work cooperatively with Plaintiff" in resolving the dispute over the roof and terrace areas (*id.*, ¶ 25).

The issue of the doors is fact-dependent. It cannot be summarily dismissed, as requested by the Cooperative, nor summarily resolved, as requested by plaintiff. It must continue to be litigated.

The fourth cause of action charges 425 East and Elliman with breach of contract. Plaintiff bases this on his reading that the "Proprietary Lease provides that Musey is entitled to the exclusive quiet enjoyment of the terrace and roof." The proprietary lease that he signed

identified the demised premises as the designated rooms, "together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the apartment" (Complaint, exhibit 1 at 1). Elliman is properly dismissed on this cause of action, because it is not a party to this lease, and it is not liable in its role as managing agent (*Brasseur v Speranza*, 21 AD3d 297, 299 [1st Dept 2005] ["the managing agent may not be held liable for breach of its contractual duties since it was at all times acting as agent for a disclosed principal"]).

The issue of exclusivity of use of the terrace is unsettled. Chaney, while Board president, conceded that "you have exclusive use of the roof adjacent to your penthouse." The Cooperative argues that plaintiff's use of the terrace, to any degree, depends on adherence to the House Rules, which he has defied, so far. Summary judgment in plaintiff's favor is unwarranted, at present, as is dismissal of the claim, as moved by the Cooperative.

Greenberg's cross-motion is granted in its entirety. No cause of action cites Greenberg's conduct, as an individual, in violation of a duty to plaintiff. Additionally, the complaint's charges against the Board, of which Greenberg is a member, must be pursued as an article 78 proceeding, now time-barred.

CONCLUSION

Accordingly, it is

ORDERED that the motion to dismiss the complaint, pursuant to CPLR 3211, by defendants 425 East 86 Apartments Corp., Douglas Elliman Property Management, Frank Chaney, Patricia Carbon, David Munves, Michael Considine, Suzanne Keane a/k/a Suzanne Julig, Jennifer Krueger, Alexander Shapiro and Leslie Spitalnick is denied in regard to the cause of action for a declaratory judgment on the replacement of the three doors connecting the Apartment to the adjacent roof, and the cause of action for breach of contract as against 425 East 86 Apartments Corp., and is granted in regard to all other causes of action in the

complaint, and those causes of action are dismissed; and it is further,

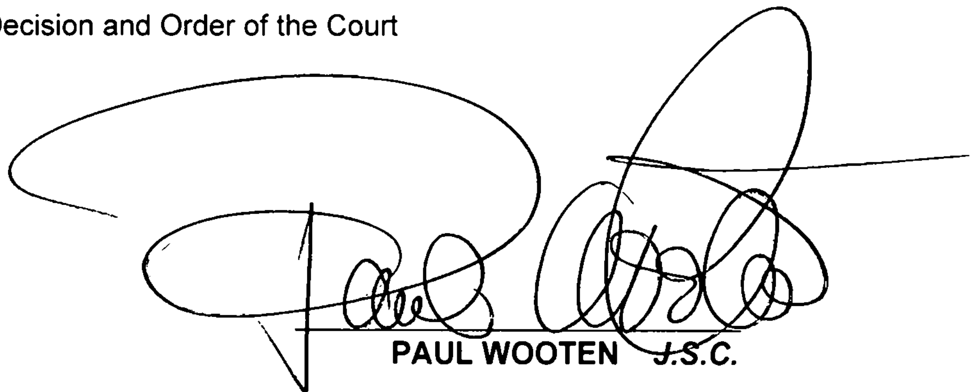
ORDERED that the cross-motion to dismiss the complaint, pursuant to CPLR 3211, by defendant George Greenberg is granted, and the complaint is severed and dismissed as against said defendant, with costs and disbursements to said defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that the cross-motion by plaintiff J. Armand Musey for summary judgment in his favor on the third and fourth causes of action in the complaint is denied; and it is further,

ORDERED that counsel for the remaining parties shall appear for a preliminary conference on September 23, 2015 at 11:00 a.m. in Part 7, 60 Centre Street, Room 341; and it is further,

ORDERED that counsel for the Cooperative is directed to serve a copy of this Order with Notice of Entry upon all parties and the Clerk of the Court who is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court



Dated: 7/16/15

PAUL WOOTEN ~~J.S.C.~~

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

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