

**7-11 E. 13th St. Tenants Corp. v New Sch.**

2024 NY Slip Op 32295(U)

July 3, 2024

Supreme Court, New York County

Docket Number: Index No. 151743/2013

Judge: Mary V. Rosado

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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. MARY V. ROSADO PART 33M**

*Justice*

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**INDEX NO.** 151743/2013

**MOTION DATE** 11/15/2023

**MOTION SEQ. NO.** 005

7-11 EAST 13TH STREET TENANTS CORP., 7-11 EAST 13TH STREET CONDOMINIUM, HARLEYSVILLE WORCESTER INSURANCE COMPANY, AS SUBROGEE OF 7-11 EAST 13TH STREET CONDOMINIUM, DAVID MASENHEIMER, JAMES MORGAN, ASAF YOGEV, EVAN OPPENHEIMER, LIA LEVENSON, MATT ONER, DANIELLA VAN GENNEP, PETER NAKADA, DONALD WILMOTT, SEAN FARQUHARSON, JOHN DONAHUE, CHARLES STIMSON, ADAM SINGER, JAMES MCCARTHY, JOSHUA KESSLER, BETTINA MICHELI, PHILLIP LIU, LESLEY SKILLEN, LAURENCE CANTOR, RICHARD MARTIN, PATRICIA WHITE, ROBERT ANGERT, SHANA SCHWARTZ, and THE ESTATE OF BARBARA JEAN THOMPSON, by its co-executors SARAH THOMPSON, STEFAN THOMPSON and EDWARD C. KLINE,

Plaintiffs,

**DECISION + ORDER ON MOTION**

- v -

THE NEW SCHOOL, TISHMAN CONSTRUCTION CORPORATION OF NEW YORK, THE DURST ORGANIZATION, INC., URBAN FOUNDATION/ENGINEERING, LLC, DESIMONE CONSULTING ENGINEERS, SKIDMORE, OWINGS AND MERRILL, LLP, LANGAN ENGINEERING & ENVIRONMENTAL SERVICES, INC.,

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 005) 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 281, 282, 283, 286, 287, 288

were read on this motion to/for LEAVE TO FILE

Upon the foregoing documents, Defendants The New School, Durst Organization, Inc., Tishman Construction Corporation of New York, and Urban Foundation/Engineering, LLC's (together "Defendants") motion for an Order granting Defendants leave to amend their answers to include the affirmative defense of lack of capacity is granted.

## **I. Background and Procedural History**

The underlying action involves a negligence claim brought by Plaintiffs against Defendants for property damage to 7-11 East 13<sup>th</sup> Street, New York, NY (the “Subject Property”) (NYSCEF Doc. 249). Plaintiff 7-11 East 13<sup>th</sup> Street Condominium (the “Condominium”) is an unincorporated association comprised of commercial and residential occupants (NYSCEF Doc. 249 at ¶ 2). The named plaintiffs are some, but not all of the individuals who held shares in the residential portion of the Condominium at the time of the alleged damage (NYSCEF Doc. 248 at ¶ 5).

On January 31, 2022 Defendants filed a motion seeking, *inter alia*, partial summary judgment dismissing Plaintiff’s claims for damages to the common elements of the Condominium on the ground that the Condominium lacked standing pursuant to N.Y. Real Prop. Law § 339-dd (NYSCEF Doc. 256).

On May 5, 2022 Plaintiffs filed a cross-motion to strike the portions of Defendants’ motion seeking summary judgment premised on the theory that the Condominium’s lack of standing to sue defense had been waived pursuant to CPLR 3211(3) (NYCEF Doc. 257). Plaintiffs’ cross-motion also sought to amend the caption substituting “The Board of Managers of The 7-11 East 13th Street Condominium” as a plaintiff in place of “7-11 East 13th Street Condominium,” substituting the “Estate of Barbara Thompson, by its co-executors, Sarah Thompson, Stefan Thompson and Edward C. Kline” in place of Plaintiffs Barbara Thompson and Sara Thompson, and to withdraw the separate claim of Sara Thompson (*Id.*)

By Decision and Order dated June 15, 2022, the Court held that Defendants had waived standing as an affirmative defense and denied the portion of Defendants’ motion to dismiss based on lack of standing and granted Plaintiff’s motion to amend the caption to include The Board of Managers of The 7-11 East 13th Street Condominium as a plaintiff (NSYCEF Doc. 258). The

Court further held that “[t]his waiver is applicable whether the parties characterize the alleged corporate deficiencies as one of lack of capacity or standing” (NYSCEF Doc. 258 at 21). Defendants appealed.

On appeal, the First Department issued a decision (the “Appellate Decision”) modifying this Court’s Order

to the extent of vacating so much of the order that denied defendants’ motion seeking dismissal of the condominium’s claims and granted the related cross-motion substituting The Board of Managers of the 7-11 East 13th Street Condominium as a plaintiff in place of the condominium, amending the caption accordingly, and remanding the matter to the Supreme Court for further proceedings consistent with this decision, and otherwise affirmed....  
(NYSCEF Doc. 259 at 3).

The First Department held that the “Supreme Court erred in finding that defendants waived their argument that unit owners lack standing under Real Property Law § 339-dd to assert a claim for damages to ‘common elements’ of the building” because “their answers assert lack of standing as an affirmative defense (*Id.*). The Appellate Division further held that because the Supreme Court found this argument waived and did not address Defendants’ substantive arguments for dismissal on the basis of that argument or the related evidentiary challenges to the evidence proffered by the condominium in support of the claims, the Supreme Court must consider these issues on remand (*Id.*).

On November 14, 2023 Defendants brought the instant motion for an Order, pursuant to CPLR 3025(b), granting Defendants leave to amend their answer to include the affirmative defense of lack of capacity (NYSCEF Doc. 247). Plaintiffs<sup>1</sup> oppose Defendants’ motion on the grounds

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<sup>1</sup> “Plaintiffs” refers to all plaintiffs in this action other than Harleysville Worcester Insurance Company, which is no longer in this action (NYSCEF Doc. 245).

that (1) Defendants' motion is patently devoid of merit; and (2) that Defendants waived the affirmative defense of lack of capacity to sue (NYSCEF Doc. 271).

## II. Discussion

Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]). Further, on a motion for leave to amend an answer to assert an affirmative defense the movant is "not required to establish the merits of each of the affirmative defenses or cross-claims, so long as they were not palpably insufficient or patently devoid of merit, and did not surprise or prejudice any opposing party" (*Goodwin v Empire City Subway Co., Ltd.*, 124 AD3d 559, 559-560 [1st Dept 2015]).

Plaintiffs' opposition papers do not assert any prejudice that would result from granting Defendants' leave to amend (NYSCEF Doc. 271). Instead, Plaintiffs argue that the affirmative defense of lack of capacity is patently devoid of merit and has been waived by Defendants (*Id.*).

### a. **Defendants Have Not Waived the Affirmative Defense of Lack of Capacity to Sue**

It is well established that, pursuant to CPLR 3211(e) "the defense of lack of capacity must be raised in a pre-answer motion to dismiss or the answer, or else it will be waived" (*Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 280 [1st Dept 2006]). However, the First Department has held that a defendant does not waive the defense of lack of capacity to sue where it moved to dismiss for lack of standing and included lack of standing as an affirmative defense in its answer (*Matter of Part 60 RMBS Put-Back Litig.*, 155 AD3d 482, 483-484 [1st Dept 2017]). The First Department

has further held that “[w]hile capacity to sue and standing are different legal concepts..., this Court has used the terms interchangeably... Thus, [a] defendant should not be penalized for using the term ‘standing’ instead of ‘capacity’” (*Id.*).

Here, the First Department held that Defendants’ affirmative defense of lack of standing was not waived because the affirmative defense was asserted in their Answers (NYSCEF Doc. 259 at 3). In accordance with the First Department precedent referenced above, because Defendants asserted the affirmative defense of lack of standing in their Answer, they have not waived the defense of lack of capacity to sue.

**b. Defendants’ Affirmative Defense of Lack of Capacity is Not Patently Devoid of Merit**

It is well settled that “[c]apacity to sue is a threshold question involving the authority of a litigant to present a grievance for judicial review” (*Town of Riverhead v N.Y. State Bd. Of Real Prop. Servs.*, 5 NY3d 36, 41 [2005]). Moreover, capacity may depend on a litigant’s status or on their authority to sue or be sued (*Silver v Pataki*, 96 NY2d 532, 537 [2001]).

Defendants’ lack of capacity defense is premised on Real Property Law § 339-dd which states that “[a]ctions may be brought or proceedings instituted by the board of managers in its discretion, on behalf of two or more of the unit owners, as their respective interests may appear, with respect to any cause of action relating to the common elements or more than one unit.”

In opposition, Plaintiffs contend that the capacity of the Condominium to sue in this action is based on authority afforded to its Board of Managers under its by-laws (NYSCEF Doc. 271 at 5). Conversely, Defendants argue that the Condominium lacked capacity to sue because no Board of Managers Existed at the time of Plaintiffs’ alleged property damage (NYSCEF Doc. 272 at 3).

In support of their opposition, Plaintiffs cites to the affidavits of several present and past officers of the Condominium (NYSCEF Docs. 281, 283, 286). However, the affidavits submitted

by Plaintiffs fail to establish conclusively that a Board of Managers existed at the time this action was commenced.

Plaintiff has annexed minutes from the Condominium Board meetings held on April 22, 2022 and continued April 24, 2022 (NYSCEF Doc. 287) which state that the Condominium Board ratified a resolution dated April 22, 2022 (the “April 2022 Resolution”) (NYSCEF Doc. 288) which purports to ratify retroactively prior actions taken by the Board to address the remediation of the damage to the Subject Property. However, it is well settled that ratification requires the ratifying parties’ “assent with ‘full knowledge of the material facts relating to the transaction” (*Board of Mgrs. Of the Club at Turtle Bay v McGown*, 210 NYS3d 41, 41 [1st Dept 2024] quoting *Matter of 148 S. Emerson Partners, LLC v 148 S. Emerson Assoc., LLC*, 157 AD3d 887, 889 [2d Dept 2018]). Here, Plaintiffs have failed to provide any evidence that the April 2022 Resolution was made with full knowledge of the material facts relating to the transaction.

In light of the foregoing the Court finds that questions of fact remain regarding whether a Board of Managers existed at the time this action was commenced and whether the Board of Managers April 2022 Resolution properly ratified the commencement of this action. As such, the Defendants’ affirmative defense of lack of capacity is not patently devoid of merit.

Accordingly, it is hereby,

ORDERED that Defendants The New School, Durst Organization, Inc., Tishman Construction Corporation of New York, and Urban Foundation/Engineering, LLC’s motion to amend their answer herein is granted, and Movants’ Amended Answers (NYSCEF Doc. 260) shall be deemed served upon service of a copy of this Decision and Order with notice of entry; and it is further

ORDERED that within ten days of entry, counsel for Movants shall serve a copy of this Decision and Order, with notice of entry on all parties to this action; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This constitutes the Decision and Order of the Court.

7/3/2024  
DATE

Mary V. Rosado JSC  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: