SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32

Justice

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EMILE TOPILIN,

Plaintiff,

- v -

ISLAND HOUSE TENANTS CORP., UNITED NATIONS FEDERAL CREDIT UNION

Defendant.

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INDEX NO. 850655/2023

MOTION DATE

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123

were read on this motion to/for PREL INJUNCTION/TEMP REST ORDR.

Upon the foregoing documents, the motion and cross-motion are determined as follows:

Plaintiff is the owner of 1,211 shares in a co-operative apartment, as well as an appurtenant leaseholder, located at 575 Main Street, Apt 103, New York, New York. Plaintiff acquired the premises on December 12, 2016, from Defendant Island House Tenants Corp. ("Island"), the cooperative housing corporation and proprietary lessor of the apartment. To obtain the premises, Plaintiff obtained a loan in the original principal amount of $572,000.00 from Defendant United Nations Federal Credit Union ("Nations"). The indebtedness is memorialized by a note the same date as the lease and is secured by a loan security agreement which encumbers Plaintiff's cooperative shares of stock.

On April 29, 2017, an electrical fire erupted in the kitchen of the apartment. The premises and Plaintiff's personal belongings sustained heavy damage and the unit was rendered uninhabitable. Pursuant to section 3.2.5 of the proprietary lease, Plaintiff was required to obtain a "comprehensive personal liability insurance" and an "all-risk personal property insurance coverage" throughout the lease term. Section V of the security agreement mandates the borrower comply with all terms in the lease. It is undisputed that at the time of the fire, Plaintiff had not obtained any property insurance covering the premises. Not long before the fire, Nations notified Plaintiff that it had not received proof that a policy of insurance covering the property was obtained and that, in accordance with the security agreement, it would, in the case of continued non-compliance, force place a policy and charge Plaintiff the premium.

By letter dated February 5, 2018, Island offered to repair the damages to the apartment, despite the absence of any contractual obligation, from insurance proceeds it received from its underwriter. The offer was made without an indemnification provision but required Plaintiff to execute a release in Island's favor. Plaintiff rejected the offer, padlocked the premises and refused to pay maintenance as

required under the lease. The apartment remained in its damaged state for more than six-years thereafter. In July 2022, Nations claims it received a copy of a ten-day default notice served by Island to Plaintiff. On July 27, 2022, pursuant to its contractual rights under the loan documents, Nation advanced a maintenance arrears payment to Island on behalf of Plaintiff. Nations remitted another payment to Island on January 20, 2023. In March 2023, Nations issued a 90-day notice which declared Plaintiff in default of the loan security agreement based on the failure to pay maintenance. Further payments to secure its collateral were made by Nations in May 2023.

On May 1, 2023, Plaintiff commenced an action in a Housing Part of the New York City Civil Court seeking an order directing Island correct violations in the apartment. Violations were issued after Plaintiff's provided access to the apartment. On the same day, Plaintiff commenced a prior action in this Court against Island only with the filing of a summons with notice (*see Topilin v Island*, NY Cty Index No 100392/2023). In the notice, Plaintiff claimed negligence and breach of contract and sought money damages related to property damage to the unit and a maintenance abatement. Plaintiff filed, without leave of court, an amended summons with notice and complaint which attempted to add Nations as a party. Defendant Nation issued a notice of sale, dated June 7, 2023, pursuant to Article 9 of the Uniform Commercial Code. Plaintiff admitted he voluntarily ceased making loan payments as of July 17, 2023. By order of this Court dated November 9, 2023, Defendants' motion to dismiss Plaintiff's complaint was granted based on lack of personal jurisdiction and amending the pleadings without leave of court. Defendant Nation issued another notice of sale on November 17, 2023.

Plaintiff commenced this action against Island and Nation on December 7, 2023, and filed a complaint containing fourteen causes of action which are as follows: [1] breach of contract; [2] breach of fiduciary duty; [3] declaratory judgment; [4] a permanent injunction; [5] "legal fees"; [6] breach of the implied warranty of habitability; [7] "compensatory damages"; [8] "consequential damages"; [9] property damages; [10] negligence; [11] conversion; [12] "loss of property value"; [13] constructive eviction; [14] promissory estoppel. Before service was made, Plaintiff filed an order to show cause seeking a dozen types of injunctive relief. The Court signed the order and granted a limited temporary restraining order prohibiting a sale of the apartment. Both Defendants Island and Nation opposed the motion and cross-moved to dismiss the complaint pursuant to CPLR §3211[a][1], [5] and [7]. Plaintiff opposed the cross-motions.

A motion to dismiss pursuant to CPLR §3211[a][1] may only be granted where "documentary evidence" submitted decisively refutes plaintiff's allegations (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 590-91 [2005]) or "conclusively establishes a defense to the asserted claims as a matter of law" (*Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *see also Beal Sav. Bank v Sommer*, 8 NY3d 318, 324 [2007]). To be accepted, the submitted "documentary evidence" "must be explicit and unambiguous" (*see Dixon v 105 West 75th Street LLC*, 148 AD3d 623 [1st Dept 2017] *citing Bronxville Knolls v Webster Town Ctr. Partnership*, 221 AD2d 248 [1st Dept 1995]). The scope of evidence that is statutorily "documentary" is exceedingly narrow and "[m]ost evidence" does not qualify (*see* Higgitt, CPLR 3211[a][1] and [7] Dismissal Motions—Pitfalls and Pointers, 83 New York State Bar Journal 32, 34-35 [2011]; *see also* (*see Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]).

On a motion to dismiss a cause of action as barred by the statute of limitations, the movant bears the initial burden of showing *prima facie* that the time to sue has expired (*see Wilmington Sav. Fund Socy., FSB v Alam*, 186 AD3d 1464 [2d Dept 2020]; *Benn v Benn*, 82 AD3d 548 [1st Dept 2011]). To meet its burden, "the Defendant must establish, *inter alia*, when the Plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016], *quoting Cottone v Selective Surfaces, Inc.*, 68

AD3d 1038, 1041 [2d Dept 2009]). Where the movant demonstrates preliminarily that a claim is time barred, the plaintiff must establish that either a toll, stay or extension is applicable or that an issue of fact exists (*see eg Matter of Schwartz*, 44 AD3d 779 [2d Dept 2007]).

Generally, when evaluating a pleading on a motion to dismiss under CPLR §3211[a][7], "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 cognizable at law" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In evaluating a pleading in this procedural context, the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *219 Broadway Corp. v Alexander's, Inc.*, 46 NY2d 506 [1979]; *Foley v D'Agostino*, 21 AD2d 60 [1st Dept 1964]). Further, "whatever may be implied from [the] statements [in the pleading] by reasonable intention" is required to be accepted (*Natixis Real Estate Capital Trust 2007-HE2 v Natixis Real Estate Holdings, LLC*, 149 AD3d 127 [1st Dept 2017]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove [his or her] claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]). Nevertheless, when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted the presumption falls away (*see Guggenheimer, supra*; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). If the evidence reaches this threshold, the court must determine whether the proponent of the pleading has a cause of action, not whether they have stated one (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

At the outset, the "causes of action" titled fifth, seventh, eighth, ninth and twelfth are, by definition, demands for relief, not independent causes of action (CPLR §3017).

The first cause of action claiming breach of contract fails to state a claim against either Island or Nation. A cause of action for breach of contract is stated by pleading "the existence of a contract, the Plaintiff's performance thereunder, the Defendant's breach thereof, and resulting damages" (*see Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, Plaintiff fails to state his full performance under the lease or loan documents. He admits failing to pay maintenance since 2017 and defaulting in loan repayment in 2023. Further, it is undisputed that Plaintiff never obtained the required liability insurance mandated by the proprietary lease, an occurrence that would have obviated virtually all the disputes herein. To the extent Plaintiff claims Island breached the lease by not providing a maintenance abatement or that Nations violated the loan documents by fulfilling his maintenance obligations, both are unavailing. Island and Nation had the express right under the applicable agreements to take those actions.

Concerning the second cause of action, "[t]o state a claim for breach of fiduciary duty, [defendant] must allege that (1) [plaintiff] owed him a fiduciary duty, (2) [plaintiff] committed misconduct, and (3) [defendant] suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). Such a claim must be pled with particularity as defined by CPLR §3016[b] (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011]). Failure to allege any individual wrongdoing by members of a cooperative board separate and apart from their collective actions made for the benefit of the cooperative renders a cause of action against a board collectively defective as a matter of law based upon application of the business judgment rule (*see eg Granirer v Bakery, Inc.*, 54 AD3d 269 [1st Dept 2008]; *see Board of Mgrs. of*

Honto 88 Condominium v Red Apple Child Dev. Ctr., a Chinese Sch., 160 AD3d 580, 582 [1st Dept 2018]). The business judgment rule "' bars 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'" (*Fe Bland v Two Trees Management Co.*, 66 NY2d 556, 565 [1985], *citing Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Indeed, "it is presumed that the actions of a cooperative's directors are [made in good faith]" (*40 W. 67th St. v Pullman*, 296 AD2d 120, 126 [1st Dept 2002], *aff'd* 100 NY2d 147 [2003]). In the present case, Island demonstrated *prima facie* that its actions after the fire in Plaintiff's unit were taken without malice and in furtherance of its purposes. Plaintiff's allegations in the complaint and in opposition to the motion were too conclusory and lacked sufficient corroboration to raise an issue of fact. the other causes of action are additionally barred by the business judgment rule.

Relating to Nations, there is no representation that is was in confidential relationship or position of reciprocal trust with Plaintiff. The relationship between a bank and its customer is nothing more than an arm's length, debtor and creditor association (*see Max Markus Katz, P.C. v Sterling Natl. Bank*, 206 AD3d 533, 534 [1st Dept 2022]; *MBF Clearing Corp. v JPMorgan Chase Bank, N.A.*, 189 AD3d 546, 547 [1st Dept 2020]).

Regarding the third cause of action, the court may render a declaratory "judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed" (CPLR §3001). "The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations" (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]; *see* Siegel, NY Prac §436, at 738 [4th ed]). In other words, objective is to declare the legal rights of each party based on a given set of facts, not to declare findings of fact (*see Thome v. Alexander & Louisa Calder Found.*, 70 AD3d 88 [1st Dept 2009]). "'A cause of action for declaratory relief accrues when there is a bona fide, justiciable controversy between the parties'" (*Westhampton Beach Assoc., LLC v Incorporated Vil. of Westhampton Beach*, 151 AD3d 793, 796, [2d Dept 2017], *quoting Zwarycz v Marnia Constr., Inc.*, 102 AD3d 774, 776 [2d Dept 2013]). In the present case, the origin of the parties' dispute arose when the fire occurred because Plaintiff failed to obtain the insurance coverage required by the lease. As such, by operation of six-year statute of limitations, this action, and for that matter the earlier one, is time-barred (*see* CPLR §213[1]).

Similarly, the sixth, tenth, eleventh, thirteenth and fourteenth causes of action all accrued when the fire occurred and were, therefore, untimely pursuant to the applicable one, three and six-year statutes of limitations (CPLR §213[1]; §214 and §215; *see also Kent v 534 E. 11th St.*, 80 AD3d 106, 112 [1st Dept 2010]). Certain of these claims also fail to state a cause of action as explained, infra.

The conversion cause of action fails as there is no allegation Island or Nation intentionally and without authority exercised control over Plaintiff's shares in the cooperative or other personal property (*see generally Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49–50 [2006]). Indeed, it was Plaintiff who deprived Island access to the apartment for years. Nation, as the secured party, simply acted within its contractual and statutory rights. In any event, this claim is duplicative of the breach of contract cause of action (*see Lynn v Maida*, 170 AD3d 573 [1st Dept 2019]; *see also Johnson v Cestone*, 162 AD3d 526 [1st Dept 2018]).

A constructive eviction does not lie as there was no wrongful act by Island that deprived Plaintiff of the use of his apartment (*see generally Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]; *see also Shackman v 400 E. 85th St. Realty Corp.*, 161 AD3d 438, 439 [1st Dept 2018]). The

fire was Plaintiff's reason for abandoning and padlocking the unit, and despite the protests to the contrary, Island had no obligation, contractual or otherwise, to repair the unit.

The claim for promissory estoppel against Nation does noy lie as there is a contract between the parties (*see Susman v Commerzbank Capital Mkts. Corp.*, 95 AD3d 589, 590 [1st Dept 2012]). Moreover, the purported promise, to force place insurance, was nothing more than a recitation of its rights under the security agreement, and, therefore, duplicative of the breach of contract claim (*see Kim v Francis*, 184 AD3d 413, 414 [1st Dept 2020]). Also missing are sufficient facts to support that Nation not enforcing this contractual provision resulted in and "unconscionable injury" to Plaintiff (*see Dunn v. B&H Assocs.*, 295 AD2d 396, 397 [2d Dept 2002]). Plaintiff's injury was the consequence of his breach of the proprietary lease and loan documents in neglecting to obtain insurance despite repeated notices.

Lastly, as noted supra, Plaintiff's failure to allege any individual wrongdoing by members of a cooperative board or directors separate and apart from their collective actions made for the benefit of the cooperative corporation renders the other causes of action against the board collectively defective as a matter of law (*see eg Granirer v Bakery, Inc.*, supra).

Accordingly, it is

ORDERED that Plaintiff's motion is denied and the temporary restraining order contained in the order to show cause dated December 12, 2023, is vacated; and it is

ORDERED that the cross-motions are granted, and Plaintiff's complaint is dismissed based upon the reasons stated supra.

11/8/2024
DATE

FRANCIS A. KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III J.S.C.

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