

**Yu-Chen Lin v Board of Mgrs. of 111 Fulton St.
Condominium**

2024 NY Slip Op 34449(U)

December 13, 2024

Supreme Court, New York County

Docket Number: Index No. 154535/2024

Judge: Denise M. Dominguez

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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. DENISE M DOMINGUEZ PART 35M

Justice

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YU-CHEN LIN, ERIC WEI,

Plaintiffs,

- v -

THE BOARD OF MANAGERS OF 111 FULTON STREET
CONDOMINIUM, YUKYONG CHOI, ASHLEY BRUZAS,
TRAVIS WOOD, ADRIAN FRANKUM

Defendants.

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INDEX NO. 154535/2024

MOTION SEQ. NO. 002 003 004 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 38, 40, 41, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 104, 105, 107, 108, 109, 112, 113, 114, 119, 121, 122, 124, 127, 131

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 003) 30, 31, 32, 33, 34, 35, 36, 37, 39, 42, 43, 47, 48, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 106, 110, 111, 115, 116, 120, 123, 125, 128, 132

were read on this motion to/for DISCOVERY

The following e-filed documents, listed by NYSCEF document number (Motion 004) 44, 45, 46, 49, 50, 51, 52, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 117, 118, 126

were read on this motion to/for PARTIES - ADD/SUBSTITUTE/INTERVENE

The following e-filed documents, listed by NYSCEF document number (Motion 005) 129, 130, 133, 134, 135, 136

were read on this motion to/for SANCTIONS

For the following reasons, Defendants' cross-motion (Seq. 2) to dismiss this action as Plaintiffs did not serve a complaint is granted and upon the dismissal of Plaintiffs' action, Plaintiff's motions (Seqs. 2, 3, 4 and 5) are denied as moot.

This action arises out of a dispute between Plaintiffs, the apparent former owners of a residential condominium unit (PH210) in the building located at 111 Fulton Street in Manhattan,

and the building's condo board and various board members. These issues stem from a dispute about an apparent/suspected water leak from Plaintiffs' unit to another unit (PH110).

Initially, Plaintiffs move to direct non-party Orsid New York to comply with a subpoena duces tecum, dated May 21, 2024 (Seq. 2). Defendants cross-moved to dismiss this action pursuant to CPLR §3012(b), as the Plaintiffs did not serve a complaint, and §3211(a)(3), as Plaintiffs do not have standing as they were not the owners of the subject unit at the time the summons was filed (Seq. 2). Plaintiffs move to direct Defendants to respond to Plaintiffs' discovery requests and to extend the time to file the complaint until 20 days after Defendants provide discovery responses (Seq. 3). Plaintiffs also move to join non-party 111 Fulton LW LLC (the apparent current owner of unit PH210) as a Plaintiff (Seq. 4) and for sanctions against Defendants' counsel (Seq. 5).

Plaintiffs commenced this action by filing a summons with notice on May 15, 2024 (NYSCEF Doc. 1). Upon review, no affidavits of service reflecting service of the summons with notice on any of the Defendants appear to have been filed. Counsel for Defendants specifically advised Plaintiffs that counsel was not authorized to accept service on behalf of any of the Defendants (NYSCEF Doc. 59). Per CPLR §3012(b), by notice dated August 9, 2024, counsel for Defendants served Plaintiffs with a demand for the complaint to be served within 20 days (NYSCEF Doc. 21). No complaint has been served to date.

Plaintiffs' summons with notice asserts that the within action will assert numerous claims against the Defendants, including those for breach of fiduciary duty, unspecified discriminatory conduct, disclosure of privileged/confidential information, negligent infliction of emotional distress, intentional infliction of emotional distress, unspecified conspiracy and negligent hiring. Plaintiffs also assert that they seek compensatory and punitive damages and seek to have individual unspecified members of the board removed.

Defendants seek to have this action dismissed as Plaintiffs have failed to serve the complaint and as Plaintiffs' do not have standing as they apparently sold the unit to an LLC just prior to filing the summons in this action (NYSCEF Doc. 60). Plaintiffs oppose and move separately for additional time to serve the complaint (Seq. 3). As the motion to dismiss was filed prior to Plaintiffs' motion for additional time, this Court will analyze the failure to serve a complaint pursuant to CPLR §3012(b). (*See Fawn Second Ave. LLC v. First Am. Title Ins. Co.*, 192 A.D.3d 478 [1st Dept 2021]).

“A party who has commenced an action by service of a summons without complaint and fails to serve a complaint within 20 days of a demand must demonstrate the merits of the action and a reasonable excuse for the delay in order to avoid dismissal.” (*Nolan v. Lechner*, 60 A.D.3d 473 [1st Dept 2009]; *See Gear Up, Inc. v. City of New York*, 140 A.D.3d 515 [1st Dept 2016]).

Upon review, it is uncontroverted that Defendants duly served a notice on Plaintiffs to serve the complaint within 20 days as per CPLR §3012(b) and that the complaint has not been served to date.

Plaintiffs' explanation for the delay in serving the complaint is that Plaintiffs need the Defendants' discovery responses in order to form the complaint. Specifically, Plaintiffs claim that “... the requested documents are essential to identify the specific causes of action and establish the factual basis needed for the complaint.” (NYSCEF Doc. 31). This explanation is not reasonable. First, there is no evidence that Defendants were served with these discovery demands. The affidavit of service regarding the discovery demands at issue upon any of the Defendants in this action has not been submitted. In fact, there is no affidavit of service reflecting service of the summons on any of the Defendants in this matter. Counsel for the Defendants (who represents the Board of Managers of 111 Fulton Street Condominium in a separate action) specifically advised

Plaintiffs that counsel was not authorized to accept service in the instant action. (NYSCEF Doc. 41). Moreover, the purported discovery demands essentially seeks pre-action discovery from the Defendants. However, it has long been held that pre-action discovery is not permitted where it is sought by the plaintiff to explore plaintiff has a cause of action. (*see Liberty Imports v Bourguet*, 146 AD2d 535 [1st Dept 1989]; *White v New York City Transit Authority*, 198 AD3d 557 [1st Dept 2021]). Plaintiffs do not establish that any discovery is necessary to set forth their claims/causes of action in a complaint. Thus, Plaintiffs have not demonstrated a reasonable excuse for the delay in serving the complaint.

Additionally, Plaintiffs have not demonstrated meritorious claims against any of the Defendants named in this action. Plaintiffs simply argue that they have a meritorious claim sounding against the Defendants sounding in breach of fiduciary duty and infliction of emotional distress because the claims arise out of the collective Defendants' wrongful conduct (NYSCEF Doc. 108). Plaintiffs submit no evidence and make no further argument to make a showing of a meritorious claim(s). Plaintiffs' reliance on *Frydman & Co. v. Credit Suisse First Bos. Corp.*, 272 A.D.2d 236 (1st Dept 2000) for the argument that they may provide further details concerning their allegations in a complaint once discovery is conducted is misplaced. *Frydman* makes no such ruling as it concerns a motion to dismiss a complaint, not a motion regarding the failure to serve a complaint. Plaintiffs' reliance upon "Morse v. Brody, 273 A.D.2d 176 (1st Dep't 2000)" is also unpersuasive as no such case was located by this Court.

Accordingly, as Defendants duly served Plaintiffs with a demand to serve the complaint and as Plaintiffs have admittedly not served the complaint, and instead insist that they need discovery from Defendants in order to form their causes of action, Defendants' cross-motion is granted and the action is dismissed due to the Plaintiffs failure to timely serve a complaint. (*See*

Nolan v. Lechner, Gear Up, Inc. and Fawn Second Ave. LLC). As the action is dismissed for failure to serve a complaint, this Court does not reach that branch of the Defendants' cross-motion which seeks dismissal on the grounds that Plaintiffs do not have standing in light of the sale of the unit (PH210) just prior to the filing of the summons. Upon the dismissal of this action, Plaintiffs' motions (Seq. 2, 3, 4 and Seq. 5) are denied as moot.

It is hereby

ORDERED that Defendants' cross-motion (Seq. 2) to dismiss this action is granted; and it is further

ORDERED that Plaintiff's motion (Seq. 2), to direct non-party Orsid New York to comply with a subpoena duces tecum is denied as moot; and it is further

ORDERED that Plaintiff's motion (Seq. 3), for discovery from Defendants and for an extension of time to file the complaint until after discovery is received denied as moot; and it is further

ORDERED that Plaintiff's motion (Seq. 4) to join non-party 111 Fulton LW LLC is denied as moot; and it is further

ORDERED that Plaintiff's motion (Seq. 5), for sanctions against Defendants' counsel is denied as moot; and it is further

ORDERED that counsel for Defendants shall serve a copy of this order with notice of entry upon Plaintiff via NYSCEF, as well as non-party Orsid New York by certified mail return receipt requested, within 20 days, and upon the Clerk of the Court and the Clerk of the General Clerk's Office, who are directed to mark the court's records to reflect the change in the caption herein; and it is further

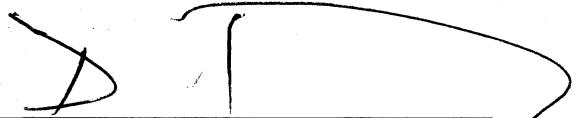
ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website).

Any requested relief not expressly addressed herein has nonetheless been considered by the Court and is hereby expressly denied.

This constitutes the decision and order of the court.

12/13/2024

DATE



DENISE M DOMINGUEZ, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE