

SCM

SHORT FORM ORDER

MOD

SUPREME COURT - STATE OF NEW YORK

Present:

HON. ROY S. MAHON

Justice

THERESA A. MILANA,

TRIAL/IAS PART 11

INDEX NO. 6971/04

Plaintiff(s),

MOTION SEQUENCE  
NO. 1

- against -

ABM MANAGEMENT CORP. and  
30-34 PEARSALL OWNERS CORP.,

MOTION SUBMISSION  
DATE: September 14, 2007

Defendant(s).

The following papers read on this motion:

Notice of Motion

X

Affirmation in Opposition

X

Upon the foregoing papers, the motion by plaintiff for an Order (a) disqualifying defendants' attorneys for conflict of interest (b) pursuant to CPLR Rule 3025, granting plaintiff leave to amend the Summons and Complaint to add Siegrid Martone, Michael Milonas, Gloria Howard, Kathleen Friend, Pat Gazley, Evelyn Blocchle, Felicia A. Palumbo, Gisela Malitius, Emmet Whitlock, Carlos Nayar, Ken Grau, Robert Ellis, Fortelli, Curto, Schwartz, Mineo, Carlino and Cohen, LLP and Robert Chicco, Esq., as additional defendants; (c) pursuant to CPLR Rule 3025, amending the caption of this action to reflect the addition of Siegrid Martone, Michael Milonas, Gloria Howard, Kathleen Friend, Pat Gazley, Evelyn Blocchle, Felicia A. Palumbo, Gisela Malitius, Emmet Whitlock, Carlos Nayar, Ken Grau, Robert Ellis, Fortelli, Curto, Schwartz, Mineo, Carlino and Cohen, LLP and Robert Chicco, Esq., as defendants in the action; (d) pursuant to CPLR Rule 3025, granting plaintiff leave to amend the Summons and Complaint to add a separate and distinct cause of action for punitive damages with regard to the willful, knowing, and malicious conduct of the defendants; (e) pursuant to CPLR Rule 3025, granting plaintiff's leave to amend the Complaint in the form annexed as Plaintiff's Exhibit "O" and (f) directing the manner of service of the proposed Supplemental Summons and Amended Complaint, annexed as Exhibit "O" to these moving papers, is determined as hereinafter provided:

This action involves a co-operative building located at 30 Pearsall Avenue, Glen Cove, NY. The plaintiff is the owner of certain shares representing the plaintiff's ownership interest in apartment 4D at the location. The building is owned by the defendant 30-34 Pearsall and managed by the defendant ABM Management Corp.

In substance, the plaintiff contends that there was a leak in the roof/ceiling of her unit that caused

water damage in the unit including the build-up and accumulation of mold which the plaintiff argues caused the unit to be uninhabitable. The plaintiff further argues that the defendant 30-34 Pearsall Owners Corp. received insurance compensation for the alleged damage in the plaintiff's unit but that the proceeds were not applied to the plaintiff's units and were used for other alleged purposes by the defendant 30-34 Pearsall Owners Corp.

A review of the management agreement between the defendant 30-34 Pearsall Owners Corp. and the defendant ABM Management Corp (plaintiff's Exhibit E) sets forth that the latter defendant acts as agent for the former defendant in the daily operations of the building in issue and as such are united in interest. The Verified Answer through which both defendants have appeared was verified by the President of the defendant 30-34 Pearsall Owners, Siegrid Martone and does not assert any cross claims between the parties. The Court further notes that the plaintiff does not offer any submission from a representative of either defendant that would indicate a conflict between the defendants that would substantiate the requested relief as to a conflict of interest in the defendants' counsel. As such, that part of the plaintiff's application which seeks an Order disqualifying defendants' attorneys for conflict of interest, is denied.

The respective members of the defendant 30-34 Pearsall Owners Corp's Board of Directors have a fiduciary duty to the respective shareholders of the corporation. (see, **Alpert b 28 Williams St. Corp.**, 63 NY2d 557, 483 NYS2d 667, 473 NE2d 19). As such, since the plaintiff contends that the proposed amended pleadings, that the proposed additional defendants, the members of the Board of Director violated this duty, that portion of the plaintiff's application which seeks an Order (b) pursuant to CPLR Rule 3025, granting plaintiff leave to amend the Summons and Complaint to add Siegrid Martone, Michael Milonas, Gloria Howard, Kathleen Friend, Pat Gazley, Evelyn Blocchle, Felicia A. Palumbo, Gisela Malitius, Emmet Whitlock, Carlos Nayar, Ken Grau, Robert Ellis, Fortelli, Curto, Schwartz, Mineo, Carlino and Cohen, LLP and Robert Chicco, Esq., as additional defendants; © pursuant to CPLR Rule 3025, amending the caption of this action to reflect the addition of Siegrid Martone, Michael Milonas, Gloria Howard, Kathleen Friend, Pat Gazley, Evelyn Blocchle, Felicia A. Palumbo, Gisela Malitius, Emmet Whitlock, Carlos Nayar, Ken Grau, Robert Ellis, Fortelli, Curto, Schwartz, Mineo, Carlino and Cohen, LLP and Robert Chicco, Esq., as defendants in the action; (d) pursuant to CPLR Rule 3025, granting plaintiff leave to amend the Summons and Complaint to add a separate and distinct cause of action for punitive damages with regard to the willful, knowing, and malicious conduct of the defendants, is granted to the extent that the plaintiff seeks to add said members of the Board of Directors as proposed defendants. To the extent that the plaintiff seeks to add the lawyer and law firm representing the corporation, said application is denied as the plaintiff has not advanced a theory upon which relief can be predicated (see, **McKiernan v McKurnan**, 207 AD2d 825, 616 NYS2d 629 (Second Dept., 1994).

The plaintiff shall serve the plaintiff's Amended Complaint consistent with this Order within 45 days of the date of this Order.

SO ORDERED.

DATED:

11/16/2007

*R. S. Walker*  
**ENTERED**

NOV 21 2007

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**