SUPREME COURT – STATE OF NEW YORK
TRIAL TERM, PART 56 SUFFOLK COUNTY

PRESENT:
Hon. Carmen Victoria St. George
Justice of the Supreme Court

ORIGINAL

RICHARD BONATI and DOLORES BONATI,

Plaintiffs,

-against-

SARAFINA PRIMIANI, JOHN PRIMIANI, DONALD HAN, EDDIE GUIAMBAO and OAKWOOD ON THE SOUND, INC., GERALD C. WATERS a/k/a JERRY WATERS and GENE KOLLMER,

Defendants.

Index No.
610360/2018

Motion Seq:
001 MG
002 MD
Decision/Order

The following numbered papers were read upon this motion:

Notice of Motion/Order to Show Cause.....	10-21; 34-38
Answering Papers.....	31; 40-41
Reply.....	32; 42
Briefs: Plaintiff's/Petitioner's.....	
Defendant's/Respondent's.....	

Ultimately this is an action for breach of fiduciary duties related to the management of a cooperative of bungalows in Wading River, NY. The plaintiffs are shareholders in that cooperative and sue the board, and its representatives, for failing to follow the board's regulations and they also sue co-shareholders for causing damage to the plaintiffs' bungalow. The issue before this Court triggered by these motions is one of preliminary justiciability - standing.

Defendants Oakwood on the Sound, Inc., Gerald C. Waters, and Gene Kollmer, together the corporate defendants, move this Court for an Order pursuant to CPLR §§ 3211 and 3212, dismissing the plaintiffs' complaint or in the alternative granting summary judgment in their favor and dismissing plaintiffs' complaint for lack of standing (Sequence 001). Plaintiffs

separately move this Court for a default judgment pursuant to CPLR § 3215 against defendant John Primiani for failing to answer (Sequence 002). For these reasons below Sequence 001 is granted and Sequence 002 is denied.

CPLR § 3212

This Court recognizes that summary judgment is a drastic remedy and as such should only be granted in the limited circumstances where there are no triable issues of fact (***Andre v. Pomeroy,*** 35 NY2d 361 [l974]). Summary judgment should only be granted where the court finds as a matter of law that there is no genuine issue as to any material fact (***Cauthers v. Brite Ideas, LLC,*** 41 AD3d 755 [2d Dept 2007]). The Court's analysis of the evidence must be viewed in the light most favorable to the non-moving party, herein the plaintiff (***Makaj v. Metropolitan Transportation Authority***, 18 AD3d 625 [2d Dept 2005]).

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issue of fact from the case (***Alvarez v. Prospect Hosp.***, 68 NY2d 320 [1986]; ***Sillman v. Twentieth Century-Fox Film Corp.***, 3 NY2d 395 [1957]). Failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (***Winegrad v. New York Univ. Med. Ctr.***, 64 NY2d 851 [1985]). Once such proof has been offered the burden then shifts to the opposing party, who, in order to defeat the motion for summary judgment, must proffer evidence in admissible form and "must show facts sufficient to require a trial of any issue of fact" (**CPLR § 3212[b]; *Zuckerman v. City of New York***, 49 NY2d 557 [1980]). As the court's function on such a motion is to determine whether issues of fact exist, not to resolve issues of fact or to determine matters of credibility, the facts alleged by the opposing party and all inferences that may be drawn are to be accepted as true (***see Roth v. Barreto***, 289 AD2d 557 [2d Dept 2001]; ***O'Neil v. Town of Fishkill***, 134 AD2d 487 [2d Dept 1987]).

In support of corporate defendants' motion, defendants submit, *inter alia*, the pleadings, the bylaws and board regulations, and shareholders' agreement.

Corporate defendants raise standing as a preliminary question for failing to bring the instant action as a derivative action. A derivative action proceeds not on the basis of any individual right, but as an assertion of the interest of the entity by one or more of its owners or members when the management of the entity fails to act to protect that interest (*see* ***Abrams v. Donati***, 66 NY2d 951 [1985]; *see also* ***Prunty, The Shareholder's Derivative Suit: Notes on its Derivation***, 32 NYU L Rev 980, 989 [1957]). In the corporate context, where a wrong has been committed by corporate officers, directors or managers that adversely affects the corporation (*see* ***Abrams v. Donati***, *supra,* 66 N.Y.2d at 953–954; ***Elenson v. Wax***, 215 AD2d 429, [2d Dept 1995]), and the corporation fails to act in its own best interest, the derivative action permits a shareholder to protect his or her interest by asserting the cause of action on the corporation's behalf (*see* ***2 White, New York Business Entities ¶ B626.01 [14th ed.]***; ***Prunty***, *supra* at 991).

Statutory authority to bring a derivative action is found in Business Corporation Law (***BCL § 626***), the Not–for–Profit Corporation Law (*see* ***NPCL § 623***) and the Partnership Law

(*see* ***Partnership Law § 115***). As a result, the capacity of shareholders in a cooperative apartment building to bring a derivative action is without question, since cooperatives are organized as corporations under the Business Corporation Law (*see* ***Fe Bland v. Two Trees Mgt. Co.***, 66 NY2d 556, 567 [1985]).

The derivative action, however, is not solely a creature of statute. Rather, the derivative action originated at common law as an equitable proceeding by which shareholders could assert claims necessary to protect their interest in a corporation (*see* ***Cohen v. Beneficial Indus. Loan Corp.***, 337 US 541, 548–549 [1949],; *see also* ***Brinckerhoff v. Bostwick***, 88 NY 52, 59 [1882], *cert. denied* 106 US 3 [1882]; ***Hawes v. Oakland***, 104 US 450, 452 [1881]; ***Koral v. Savory, Inc.***, 276 NY 215, 218 [1937]; ***Robinson v. Smith***, 3 Paige Ch. 222, 232 [NY Ch. 1832]; ***Strain v. Seven Hills Assoc.***, 75 AD2d 360, 365 [1st Dept 1980]; *see generally* ***2 White, New York Business Entities ¶ B626.01 [14th ed.]***; ***15 N.Y.Jur. 2d, Business Relationships § 1144***), even in the absence of statutory authority to do so.

Even though plaintiffs have the statutory ability to bring a derivative action, they do not. As such, on the issue of capacity they bring this action as individuals. Therefore, in order to survive the preliminary issue of standing this Court views it in their individual capacity to bring suit.

A plaintiff generally has standing only to assert claims on behalf of himself or herself. Although there are situations in which representative or organizational standing is permitted (*see* ***CPLR § 1004***; ***Rudder v. Pataki***, 93 NY2d 273, 278 [1999]; ***Matter of Dairylea Coop. v. Walkley***, 38 NY2d 6, 9 [1975]), one does not, as a general rule, have standing to assert claims on behalf of another (*see* ***Society of Plastics Indus. v. County of Suffolk***, 77 NY2d 761, 773 [1991]; ***Matter of Hebel v. West***, 25 AD3d 172, 175 [3d Dept 2005]). As explained by the Court of Appeals: "'Whether a person seeking relief is a proper party to request an adjudication is an aspect of justiciability which, when challenged, must be considered at the outset of any litigation' (***Matter of Dairylea Coop.***, *supra* at 9). Standing is a threshold determination, resting in part on policy considerations, that a person should be allowed access to the courts to adjudicate the merits of a particular dispute that satisfies the other justiciability criteria (*see* ***Comment, Standing of Third Parties to Challenge Administrative Agency Actions***, 76 Cal L Rev 1061, 1067–1068 [1988]; *see also* ***Warth v. Seldin***, 422 US 490, 498 [1975])" (***Society of Plastics Indus.***, *supra* at 769). The Court of Appeals has defined the standard by which standing is measured, explaining that a plaintiff, in order to have standing in a particular dispute, must demonstrate an injury in fact that falls within the relevant zone of interests sought to be protected by law (*see* ***Matter of Fritz v. Huntington Hosp.***, 39 NY2d 339, 346 [1976]). Specifically, this familiar two-part test requires a plaintiff first to establish that he or she will actually be harmed by the challenged action, and that the injury is more than conjectural. Second, the injury a plaintiff asserts must fall within the zone of interests or concerns sought to be promoted or protected by the statutory provision or recognized common-law relationship pursuant to which a defendant has acted (*see* ***New York State Assn. of Nurse Anesthetists v. Novello***, *supra* at 211 [2014]; ***Matter of Mahoney v. Pataki***, 98 NY2d 45, 52 [2002]; ***Society of Plastics Indus.***, *supra*

at 773; ***Matter of Colella v. Board of Assessors***, 95 NY2d 401, 409–410 [2000]; ***Gifford v. Guilderland Lodge***, 272 AD2d 721, 723 [3d Dept 2000]).

On the basis of their shareholder interest as outlined in state statute and the agreement between the parties, each bungalow owner, has a shareholder's interest, "suing as a stockholder the plaintiff's right of action is a derivative one. He sues, not primarily in his own rights, but in the right of the corporation. The wrongs of which he complains are wrongs to the corporation. They were not aimed at him and did not involve his personal, individual rights. He suffers as a member of the corporation, and it is the party to sue for and recover damages for the wrongs, or equitable relief against the frauds alleged. The complaint is that all the alleged frauds . . . in the end culminated in final wrong and injury to the corporation, and for relief on account of such wrong and injury a stockholder could only sue in case the corporation upon his demand, or what is equivalent thereto, refused or neglected to sue" (***Alexander v. Donohoe***, 143 NY 203, 211 [1894]). The plaintiffs here sue as individuals and therefore either the interests, possessory or monetary or both, that potentially suffers "injury in fact" as a result of harm are that of the cooperative. They were not affected individually but rather as shareholders and therefore it was the corporation that was harmed, and this action should have been brought derivatively. In addition to injury, standing requires that the law will recognize the injured party, here the individual shareholders, as persons who may seek redress for that injury, in this case, damage to the common interest and property held by the cooperative. Both elements of the standing equation are lacking here.

In light of these considerations, we conclude that the shareholder and owner of an individual bungalow unit is without standing to assert a claim for damages as those asserted here. As such, the plaintiffs lack standing and the corporate defendants motion is granted.

CPLR § 3215

The plaintiffs lack of standing renders the action in its entirety as disposed. Therefore, Sequence 002, where plaintiffs seek default judgment is rendered academic (***Chanos v. MADAC, LLC***, 74 AD3d 1007, 1008 [2d Dept 2010]). As such, the issue having been rendered academic, the motion is denied (*see*, ***People ex rel. Smalls v. Tekben***, 193 AD2d 828 [2d Dept 1993]; ***Matter of Niagara Mohawk Power Corp. v. New York State Department of Envtl. Conservation***, 169 AD2d 943 [3d Dept 1991]).

Corporate defendants' motion for summary judgment is granted because the plaintiffs lack standing. The issue of standing not being met the plaintiffs' default motion is rendered academic and therefore is denied. The action is disposed in its entirety.

The foregoing constitutes the Order of this Court.

Dated: May 6, 2020
Riverhead, NY

HON. CARMEN VICTORIA ST. GEORGE

CARMEN VICTORIA ST. GEORGE, J.S.C.

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FINAL DISPOSITION [X] NON-FINAL DISPOSITION [ ]