

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANDREA MASLEY
Justice

PART

Index Number : 650120/2017
600-602 10TH AVENUE REALTY
vs.
ESTATE OF HY NUSIMOW
SEQUENCE NUMBER : 007
DISMISS

INDEX NO.
MOTION DATE
MOTION SEQ. NO.

The following papers, numbered 1 to , were read on this motion to/for

Notice of Motion/Order to Show Cause — Affidavits — Exhibits No(s).

Answering Affidavits — Exhibits No(s).

Replying Affidavits No(s).

Upon the foregoing papers, it is ordered that this motion is

granted in part and denied in part for the reasons stated on the second draft. Plaintiff shall submit the proposed to be so ordered.

Plaintiff shall select a mediator from the court's list on line.

Comply 2/18/2020

Dated: 1/30/2020

HON. ANDREA MASLEY, J.S.C.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

- 1. CHECK ONE: CASE DISPOSED, NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED, DENIED, GRANTED IN PART, OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER, SUBMIT ORDER, DO NOT POST, FIDUCIARY APPOINTMENT, REFERENCE

1 SUPREME COURT OF THE STATE OF NEW YORK  
2 COUNTY OF NEW YORK : CIVIL TERM : PT. 48

3 -----x

4 600-602 10th AVENUE REALTY CORPORATION,

Index: 650120/2017

5  
6 Plaintiff.  
7 -against-

8 THE ESTATE OF HY NUSIMOW, AVI NUSIMOW  
9 individually and in his capacity as  
10 Representative of the Estate of Hy Nusimow,  
11 and LARISSA OKUN NUSIMOW, appearing through  
12 AVI NUSIMOW as attorney-in-fact, personally  
13 and derivatively on behalf of 600-602 10th  
14 AVENUE REALTY CORPORATION,

15 Defendants.

16 -----x

17 January 30, 2020  
18 60 Centre Street  
19 New York, New York 10007

20 B E F O R E:

21 HONORABLE ANDREA MASLEY  
22 Justice of the Supreme Court

23 A P P E A R A N C E S:

24 WOODS LONERGAN PLLC  
25 Attorneys for the Plaintiff  
280 Madison Avenue, Suite 300  
New York, NY 10016  
BY: ANNIE E. CAUSEY, ESQ.

JOSEPH MCMAHON  
Attorney for the Defendants  
200 Garden City Plaza, Suite 408  
Garden City, NY 11530

Monica A. Martinez  
Senior Court Reporter

*Searched*  
*AM*  
*3/18/2020*  
*See*  
*#170*

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2 COUNTY OF NEW YORK : CIVIL TERM : PT. 48

3 -----x

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5 Index: 650120/2017

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Senior Court Reporter

25

Proceedings

1 (Time noted 10:01 a.m.)

2 THE COURT: In the matter of 600-602 10th  
3 Avenue Realty Corporation against the Estate of Hy  
4 Nusimow.

5 Who is here for the plaintiff?

6 MS. CAUSEY: Annie Causey, Woods Lonergan.

7 THE COURT: Okay. And for the defendant?

8 MR. MCMAHON: Yes, Joseph McMahon, here on  
9 behalf of Michelle Chang. Counsel for the defendants,  
10 counterclaim, third-party counterclaims I should say.

11 THE COURT: Thank you.

12 So we have a motion to dismiss the  
13 counterclaims and affirmative defenses. So I need to  
14 start with Mr. McMahon.

15 MR. MCMAHON: Yes.

16 THE COURT: The second counterclaim for breach  
17 of fiduciary duty on behalf of ARC.

18 MR. MCMAHON: Okay. This is in the second  
19 amended complaint, correct?

20 THE COURT: Sorry, what?

21 MR. MCMAHON: This is -- you are referring to  
22 the second amended answer, just want to pull out the  
23 right --

24 THE COURT: Well, we're here, right, on your  
25 second amended answer with counterclaims.

Proceedings

1 MR. MCMAHON: The second counterclaim.

2 THE COURT: Yes, that is why we're here today.

3 MR. MCMAHON: Okay. Thank you.

4 THE COURT: Okay. So now that we're all on the  
5 same page, as to the second counterclaim for breach of  
6 fiduciary duty, is it stated derivatively on behalf of  
7 ARC?

8 MR. MCMAHON: Yes. I thought that was the  
9 first counterclaim.

10 MS. CAUSEY: Your Honor, I believe that the  
11 first counterclaim is the derivative breach of fiduciary  
12 duty. The second counterclaim is dissolution. The  
13 third is direct. It used to be that the second  
14 counterclaim in the first admitted counterclaim was the  
15 counterclaim your Honor is speaking of.

16 THE COURT: Okay. Sorry. So let's start with  
17 the --

18 MR. MCMAHON: First count.

19 MS. CAUSEY: I think the judge was referencing  
20 the third.

21 THE COURT: I'm talking about the first  
22 affirmative defense. Sorry. The first counterclaim in  
23 the amended complaint, right. The first counterclaim  
24 should be dismissed. This is the argument, for failure  
25 to state a cause of action. The claim was previously

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1 dismissed without leave to replead.

2 MR. MCMAHON: Without leave to -- but that, I  
3 believe how this was done was that this claim, first the  
4 first counterclaim is now the derivative breach of  
5 fiduciary duty claim, and that was dismissed by your  
6 Honor for the reason of not being brought in derivative  
7 capacity.

8 MS. CAUSEY: The first counterclaim, your  
9 Honor, the second amended counterclaim reappears as the  
10 third counterclaim in the second amended counterclaims.  
11 So it was the first, now it is the third. That is the  
12 direct that your Honor dismissed without leave to  
13 replead.

14 THE COURT: I'm just going down your table of  
15 contents. So why don't you get started.

16 MS. CAUSEY: Okay, your Honor.

17 THE COURT: All right.

18 MS. CAUSEY: I apologize for any confusion.

19 The third counterclaim in the second amended  
20 counterclaims is a direct, is a cause of action for  
21 breach of fiduciary duty for direct injury to the  
22 estate.

23 Your Honor dismissed this cause of action. It  
24 is Exhibit 4 to my affirmation, at Page 4 of your  
25 decision. You dismissed it because there is no direct

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1 injury alleged to the estate. They were not given --  
2 estate was not given leave to replead. So in addition  
3 there is preclusion under 3211(a)(5). They still do not  
4 allege any direct injury. These are the same  
5 allegations that are conclusory allegations that are  
6 made in support of the derivative breach of fiduciary  
7 duty claim.

8 It is all mismanagement for diversion of  
9 corporate assets, which plead along to the corporation  
10 only, and not to an individual shareholder or person  
11 with a beneficial interest in the shares.

12 THE COURT: Okay. Thanks.

13 Let's go back to my first question, which was,  
14 is this a derivative claim and where is the corporation?

15 MR. MCMAHON: The derivative claim now, if I  
16 may, is in the amended, second amended answer to the  
17 counterclaims, the derivative. Breach of fiduciary duty  
18 claim is now the first counterclaim, and that is in that  
19 document which was the equivalent of the first  
20 counterclaim.

21 THE COURT: Back to my first question.

22 Do you have a derivative claim, yes or no?

23 MR. MCMAHON: Yes. It is the first  
24 counterclaim in this amended --

25 THE COURT: Where is the corporation?

## Proceedings

1 MR. MCMAHON: The corporation is stated, listed  
2 in Paragraph 32 and then also --

3 THE COURT: If it is a derivative claim, are  
4 you not required to have the corporation listed as a  
5 party?

6 MR. MCMAHON: They are listed in the caption  
7 listed, and list it again in Paragraph 32 and Paragraph  
8 38, the relief paragraph of this particular cause of  
9 action. It says Larissa Okun Nusimow acted in her  
10 capacity as a 50 percent shareholder, demands judgment  
11 derivatively on behalf of company in that amount.

12 THE COURT: Okay.

13 MR. MCMAHON: So that is how it was pled.

14 MS. CAUSEY: Your Honor, may I respond?

15 THE COURT: Yeah.

16 MS. CAUSEY: They are actually -- the  
17 corporation is not in the caption as a nominal --

18 THE COURT: Defendant.

19 MS. CAUSEY: Yeah. That is Exhibit 2 to my  
20 affirmation. And the answer doesn't assert that it is  
21 on their behalf. There is some context in the pleading  
22 where the estate purports to do it on behalf of ARC, but  
23 because ARC is not a nominal counterclaim defendant. In  
24 the caption, this is defective. Your Honor,  
25 specifically directed that if they were repleading to



## Proceedings

1 cure the defect and it is not cured.

2 And, your Honor, if I might, there are other  
3 issues with the derivative breach of fiduciary duty,  
4 first counterclaim.

5 THE COURT: Uh-huh.

6 MS. CAUSEY: There is still no demand. They  
7 didn't allege a demand was made on the board or  
8 articulate any facts at all or conclusory allegations as  
9 to why it would be futile, it is not --

10 THE COURT: What about the alleged demands on  
11 Ms. Nusimow for corporate books and records. That is  
12 alleged.

13 MS. CAUSEY: That is not a demand to bring a  
14 derivative --

15 THE COURT: Claim.

16 MS. CAUSEY: That is not a demand for the  
17 corporation to bring action against Ester Pinchevsky.  
18 That is a demand for corporate books and records and  
19 also that allegation in support of fiduciary duty was an  
20 allegation that this court previously found insufficient  
21 because it is not sufficient to state any particular  
22 facts that she actually did or how she did or any date  
23 that she did, and also as your Honor is aware, this  
24 court ordered, even during the pendency of the viability  
25 of these counterclaims for ARC and Pinchevsky to make

## Proceedings

1 document productions, which they've done. It is a  
2 matter of record, based on this court's order.

3 So, Larissa has all the management records and  
4 all of the books and records of the corporation, in any  
5 event. But to the point of needing to make a demand  
6 pursuant to BCL-626 that has not been done. It is not  
7 alleged that that was done.

8 THE COURT: Okay. So let's hear about the  
9 demand.

10 MR. MCMAHON: The issue about dissolution and  
11 demand for dissolution, this is the claim for breach of  
12 fiduciary duty.

13 THE COURT: Hold on. Demand to bring a  
14 derivative action. In order to have standing to bring a  
15 derivative action, you have to make a demand on the  
16 board of directors to initiate the action on behalf of  
17 the corporation. We're not talking about dissolution.  
18 We're talking about bringing a derivative action on  
19 behalf of a corporation.

20 Was that done?

21 MR. MCMAHON: Yes, in this instance, how it is  
22 pled, if you look at Paragraph 35 of the second amended  
23 answer, the demands were made on Ms. Pinchevsky who is  
24 the only --

25 THE COURT: So where is that?

## Proceedings

1 MR. MCMAHON: The only officer and director of  
2 the company.

3 THE COURT: Where is that in Paragraph 35.

4 MR. MCMAHON: E.

5 THE COURT: Where does it say demand was read?

6 MR. MCMAHON: Refusing repeated demands by  
7 fellow shareholder Larissa Nusimow, that she make  
8 available for all inspect all corporate documents  
9 pertaining to the company.

10 THE COURT: Okay. So the motion to dismiss  
11 that counterclaim is granted for the same reasons that  
12 were stated in the prior decision.

13 Let's move onto the next counterclaim.

14 The second counterclaim in, just so we're on  
15 the same page, the second amended answer with  
16 counterclaims, that is dated August 2, 2019. The second  
17 counterclaim is on Page 7 of 11.

18 Are we all talking about the same counterclaim?

19 MR. MCMAHON: Yes, we are.

20 THE COURT: Okay. So let's hear the argument  
21 to dismiss that one.

22 MS. CAUSEY: Your Honor, this is the  
23 counterclaim for dissolution. I want to point out first  
24 that there is no opposition in their opposition  
25 memorandum as to why the dissolution counterclaim should

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1 not be dismissed. They didn't even mention it.

2 THE COURT: In addition to the fact it needs to  
3 be a special proceeding and petition, but go ahead.

4 MS. CAUSEY: Yes, your Honor. Yes. And also  
5 the allegations are conclusory. They are total copy and  
6 paste job of the allegations that were made in the first  
7 admitted counterclaims, the court found insufficient.  
8 They are -- there are no allegations that show an  
9 internal distension which resulted in a deadlock that  
10 precluding successful and profitable conduct of the  
11 affairs of the corporation. So there is no basis under  
12 1104 (a)(1) through (a)(3) concerning the shareholders  
13 and director of factions or dissensions that would  
14 warrant sustaining this cause of action for the  
15 dissolution of the corporation.

16 Certainly, the case precedent is a failure to  
17 hold shareholder meetings which is one of the  
18 allegations is not a basis.

19 MR. MCMAHON: Your Honor, I will note that in  
20 Ms. Cheng's opposition, she did not oppose that  
21 particular relief.

22 THE COURT: Okay. So in the absence of  
23 opposition, it is granted.

24 Thank you.

25 MR. MCMAHON: I was going to point out, in the

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1 pleading itself, it is addressed that it would be futile  
2 to make a demand and to Mr. --

3 THE COURT: The second amended complaint or the  
4 second amended answer?

5 MR. MCMAHON: Second amended answer, second  
6 counterclaim of the second amended answer. He drafted  
7 the entire document. Just pointing out, it was not  
8 opposed. I agree with that, but does point out in the  
9 second counterclaim that making a demand in this  
10 scenario, only two share holders, obviously a bit of a  
11 dispute for making a demand would have been futile.

12 THE COURT: What paragraph?

13 MR. MCMAHON: Fifty-one, paraphrasing what he's  
14 saying, but created a deadlock by -- Ms. Pinchevsky's  
15 created a deadlock by her refusal to recognize  
16 Ms. Nusimow's co-equal ownership and her insistence on  
17 obtaining Mr. Nusimow's shares based on terminating  
18 shareholders agreement.

19 THE COURT: I still don't see with all due  
20 respect in Paragraph 51 a demand with a date and  
21 circumstances.

22 MR. MCMAHON: No, that I would agree. You  
23 don't see.

24 THE COURT: Okay. So let's move onto the third  
25 counterclaim on Page 9 or beginning on Page 9 of 11,

## Proceedings

1 second amended answer with counterclaims.

2 Sir, you can have a seat.

3 MR. MCMAHON: Yeah.

4 MS. CAUSEY: Your Honor, this third  
5 counterclaim alleges direct injury.

6 Well, let me put it a different way. It is a  
7 counterclaim for the estate to recover damages as  
8 incurred directly to the estate as opposed to  
9 derivatively on behalf of ARC. The issue is the only  
10 allegations that are made are the same allegations that  
11 are made, that would be on behalf of the corporation  
12 where the corporation would sustain injury. This is  
13 also the same cause of action that this court found did  
14 not plead an injury, that was recognizable for injury  
15 to the estate. It would only plead injury to the  
16 corporation. Mismanagement and waste of corporate  
17 assets, plead injuries to the corporation only, and not  
18 to the shareholders. Therefore, your Honor, did not  
19 even give leave to replead this cause of action. It was  
20 dismissed with prejudice based on these allegations, and  
21 so therefore it is also precluded by 3211(a)(5).

22 MR. MCMAHON: I would -- I was looking at it  
23 myself. I would say that it is brought on behalf of  
24 Larissa Okun Nusimow solely based on your Honor's  
25 previous rulings, this particular cause of action cannot

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1 be brought.

2 THE COURT: You're conceding it?

3 MR. MCMAHON: Yes.

4 THE COURT: Okay. So the third is dismissed,  
5 on consent. I think that is it. Fourth on Page 10 --  
6 no, there are no affirmative defenses. Sorry. Lack of  
7 standing. Okay. Go ahead.

8 Lack of standing in the first affirmative  
9 defense.

10 MS. CAUSEY: Your Honor, this is the portion  
11 of the motion that is by the corporation.

12 The first affirmative defense should be  
13 dismissed because ARC clearly does have beneficial  
14 interest in the shareholders agreement. It is the  
15 Paragraph 7 of the shareholders agreement. That is  
16 Exhibit 3 to my Exhibit 5. It is not tabbed. It is the  
17 prior exhibit of Ester Pinchevsky which was on behalf of  
18 the corporation in support of the prior motion to  
19 dismiss the affirmative defenses. Paragraph 7 says  
20 clearly, in the event of the death of a shareholder, the  
21 legal representative of his estate shall forthwith offer  
22 the deceased shareholder shares at first for sales to  
23 the corporation, which the court is well aware, that is  
24 the crux of the complaint in this action, is to enforce  
25 the compulsory buyout.

## Proceedings

1                   So whether that, whether the shareholders  
2                   agreement is ultimately found operative, due to the 1980  
3                   meeting, a 1990 attempt to enforce the same shareholders  
4                   agreement, and a 2008 stipulation of settlement that did  
5                   not concern the shareholders agreement, but touched on  
6                   certain of it's provisions, is not going to eradicate  
7                   standing for ARC to maintain this cause of action.

8                   THE COURT: So really for the same reasons that  
9                   the counterclaims were dismissed, this would have to be  
10                  dismissed too, don't you think?

11                  MR. MCMAHON: Well, I thought the basis of the  
12                  denial, excuse me, dismissal of this particular  
13                  affirmative defense in your decision, previous decision,  
14                  your Honor, was lack of factual detail to the  
15                  affirmative defense, because then the last, in the first  
16                  answer they, that was submitted, this affirmative  
17                  defense was stated as lack of standing without any  
18                  further detail. Now, he's giving the exact details.

19                  THE COURT: What you are doing is relying on  
20                  this court's, on a statement in a decision as your  
21                  factual predicate. So what I said is your factual  
22                  predicate?

23                  MR. MCMAHON: At this stage of the litigation,  
24                  is enough to put in the affirmative defense, facts that  
25                  it is based upon as opposed to having to prove it.



## Proceedings

1 THE COURT: That was a motion to dismiss.  
2 Therefore, I accept everything as true. I don't have  
3 any factual information here.

4 MR. MCMAHON: Right.

5 THE COURT: What I do is take the complaint,  
6 take the pleadings under 3211, I'm obliged to assume the  
7 truth of the allegations. So to rely on what I said in  
8 the decision is circular.

9 MR. MCMAHON: Excuse me. This is also motion  
10 to dismiss.

11 THE COURT: Right.

12 MR. MCMAHON: The standard is not to prove your  
13 affirmative defense, but just that there is -- you have  
14 to have pled --

15 THE COURT: The allegation --

16 MR. MCMAHON: Under --

17 THE COURT: The allegation in your pleading is  
18 something that the court said in a decision where it was  
19 obliged to assume something as true. I have no  
20 firsthand information.

21 MR. MCMAHON: I understand. Putting in the  
22 affirmative defense is the factual basis. Whether it  
23 gets proven or not, the trial of this case is a separate  
24 matter. Purpose of today is, is there enough  
25 information for the, in this case, plaintiff to

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1 understand what the affirmative defense is and to defend  
2 the entity. That is the purpose of, cite the  
3 affirmative. If the standard for affirmative defense is  
4 you have to be able to prove it at this juncture of  
5 litigation in essence you have to have summary judgment  
6 standard for every affirmative defense. Affirmative  
7 defense is to put the opposing, the plaintiff on notice  
8 as to what your defense is going to be. We have a  
9 particular defense that you think could act as a  
10 surprise later on and be precluded it later on from  
11 using it.

12 THE COURT: I just -- sorry.

13 MR. MCMAHON: So he's doing that --

14 THE COURT: This first affirmative defense has  
15 two paragraphs. The first one says she lacks, that the  
16 company lacks standing. And the second paragraph is  
17 based on a decision where the court was compelled to  
18 assume facts as true.

19 MR. MCMAHON: Right. That is the standing of  
20 the case at the moment, right.

21 THE COURT: The standing is that --

22 MR. MCMAHON: Isn't that the law of the case at  
23 this particular point?

24 THE COURT: No. Law of the case is not based  
25 on a decision on a motion to dismiss. No.

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1 MR. MCMAHON: You're finding that the --

2 THE COURT: I didn't make any findings. I  
3 assumed the facts as alleged to be true.

4 MR. MCMAHON: Right. So repeating that here,  
5 she is the real party in interest. That is the basis --

6 THE COURT: You are not calling me as a witness  
7 at your trial.

8 MR. MCMAHON: We're not.

9 THE COURT: I don't know anything about this.

10 MR. MCMAHON: Right.

11 THE COURT: Okay. Have a seat.

12 MR. MCMAHON: I understand, your Honor. What  
13 I'm saying is that it is an affirmative defense that is  
14 being brought for the giving the details to what basis  
15 of it is whether or not that can be proved at trial is a  
16 separate issue, is what I'm saying. As opposed to being  
17 dismissed. This is the pleading stage of the case.

18 THE COURT: Okay. Let's move onto the second,  
19 the argument that the plaintiff is making is for the  
20 court to make a finding that ARC has capacity to  
21 maintain the action.

22 For the reasons I just stated, I think it is  
23 an improper affirmative defense based on a decision the  
24 court made on 3211, but I don't agree with the  
25 plaintiff's argument and I'm not making -- I think I now

## Proceedings

1 understand what you are saying. The plaintiff is  
2 holding you to a summary judgment standard, and you are  
3 correct that that is not proper.

4 So the motion to dismiss the first affirmative  
5 defense is denied.

6 Go ahead.

7 What is the second.

8 MS. CAUSEY: The second affirmative defense,  
9 your Honor, is not being a fact, it is failure to state  
10 a cause of action.

11 THE COURT: Moving onto the third.

12 MS. CAUSEY: The third is res judicata and  
13 collateral estoppel. This argument is based on a 2008  
14 stipulation of settlement so ordered by Judge Kahn, and  
15 res judicata and collateral estoppel cannot apply  
16 because there were no issues identified in this  
17 affirmative defense for collateral estoppel that were  
18 necessarily decided in the 2008 litigation, and in fact  
19 there were no issues decided in the 2008 litigation. It  
20 was a settlement. Also, res judicata cannot be  
21 applicable. There was a settlement. There was no  
22 judgment. There were no findings. The shareholder  
23 agreement also was not at issue.

24 The stipulation of settlement being discussed  
25 in their defense is the untabbed Exhibit 4 to my

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1 affirmation's Exhibit 5, which is Ms. Pinchevsky's  
2 affidavit on behalf of the corporation that was  
3 previously submitted on the prior motion to dismiss, the  
4 first amended answer in affirmative defenses. It is not  
5 a very long transcript, but this is the basis of their  
6 third affirmative defense for res judicata and  
7 collateral estoppel. There haven't been any issues  
8 identified which is necessary to state a collateral  
9 estoppel defense. Just to state, not to prove, to  
10 state, and because we have this transcript, and we have  
11 the whole record, there were no -- they don't even  
12 allege there were any decisions made controlling, so you  
13 could have issue preclusion on any of the legal  
14 arguments being raised in this action.

15 The shareholders agreement also is not an issue  
16 in that action. It is evidence from the stipulation of  
17 settlement, and there was a settlement, so there is no  
18 res judicata.

19 MR. MCMAHON: Your Honor, I would point out  
20 that the factual basis for the affirmative defense  
21 unlike in the first answer has been laid out in four  
22 paragraphs, and again whether or not it is proven at  
23 trial is a separate issue, but for the sake of making  
24 out the affirmative defense, and advising the plaintiff  
25 as to what it is, the issue is going to be raised, I

## Proceedings

1 think it is more adequate based on counsel's response  
2 and certainly she was arguing the summary judgment  
3 standard again, disagreeing as to what was at issue in  
4 that particular litigation, what the transcript holds.  
5 Settlements are the basis for the res judicata, not  
6 just -- settlements are also the basis the basis for  
7 res judicata, but again, this particular point of the  
8 litigation, the issue is whether or not the affirmative  
9 defense was pleaded with enough facts for the plaintiff  
10 to determine what it is that is being argued and raises  
11 a defense by the defendants, which I believe is more  
12 than adequately does at this point.

13 Again, this is -- in the first answer this was  
14 raised as just simply, it was stated as affirmative  
15 defense, it was stated as just res judicata. One  
16 sentence.

17 THE COURT: Okay. The motion is denied as to  
18 the third affirmative defense. I think again that the  
19 plaintiff is holding the defendant to a summary judgment  
20 standard. And actually, the issue regarding Judge  
21 Kahn's, I don't think it is as clear as the plaintiff is  
22 asserting. So I'm not prepared to dismiss it at this  
23 time. Whether the defendant has stated the affirmative  
24 defense or not is the issue before the court today.

25 So the fourth affirmative defense, breach of

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1 fiduciary duty, it is duplicative of the counterclaim,  
2 don't you agree, sir?

3 MR. MCMAHON: It is, but it is -- the  
4 counterclaim is now dismissed. It would be a separate  
5 defense. She breached the fiduciary duty as a defense  
6 as opposed to a counterclaim would be a different  
7 standard. Counterclaim was dismissed because it was  
8 failed to allege. Demand was made to the corporation to  
9 bring the action. And that would not necessarily be  
10 what the defense. The defense saying breach of  
11 fiduciary duty precludes her from -- dirties her hands,  
12 unclean hands. She is a shareholder.

13 THE COURT: Oh, right.

14 MR. MCMAHON: She doesn't have clean hands.  
15 She shouldn't be entitled to.

16 THE COURT: But that is not what -- well, okay.

17 MS. CAUSEY: Your Honor, these are ARC's, this  
18 is ARC's motion to dismiss the affirmative defenses. It  
19 has nothing to do with Ester Pinchevsky as a  
20 shareholder. There are no allegations that make any  
21 sense for ARC to have unclean hands or for their to be  
22 in pari delicto. And they subsequently, I know they  
23 alleged underneath it is by Esther's breaches of  
24 fiduciary duty, I think that is, is what my opponent is  
25 talking about. But this is defense for unclean hands

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1 and in pari delicto. I don't see even any elements of  
2 unclean hands or in pari delicto stated in support of  
3 this defense. And I think it should be dismissed.

4 THE COURT: Basically, your unclean hands  
5 defense presumes that she was acting on behalf of the  
6 corporation.

7 MR. MCMAHON: Well, she was the only -- is the  
8 only shareholder other than the defense. It is a 50/50  
9 company. So any action she was taking was obviously on  
10 behalf of herself and on behalf of the company.

11 Obviously, this is a closed corporation. The  
12 only shareholder, one of the two shareholders, whatever  
13 actions are taken are on behalf of herself and the  
14 corporation. It would be very hard to split those  
15 halves as to when they are acting for themselves and  
16 when they are acting on behalf of the company.

17 Again, refers to all the allegations in the  
18 counterclaim that was stressed, but does give you the  
19 facts upon which it is based.

20 THE COURT: I really do think it is duplicative  
21 and, therefore, you can't respin it as an affirmative  
22 defense.

23 MR. MCMAHON: In light of your Honor's decision  
24 to dismiss that counterclaim, no longer be duplicative,  
25 did you find it duplicative because --



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1 THE COURT: No. I don't mean duplicative. I  
2 mean basically for the same reasons. For the same  
3 reasons you can't state the conflict, you can't state  
4 the affirmative defense, you can't reframe it as the  
5 same thing.

6 MR. MCMAHON: Again, I would think that would  
7 be more of a summary judgment standard.

8 MS. CAUSEY: Your Honor, it is not a summary  
9 judgment standard. The same standard that applies to  
10 the counterclaims applies to the affirmative defenses on  
11 a motion to dismiss. They have to state a claim or  
12 state a defense. In pari delicto and unclean hands even  
13 if construed as fiduciary duty is not stated. It is not  
14 a -- there is not a summary judgment standard being  
15 proffered here.

16 THE COURT: You know, I'm suppose to read this  
17 broadly though. I see what you are saying about the  
18 breach of fiduciary duty. I'll let it go at this point  
19 on the -- it will go forward.

20 The fact that defendants characterized it as a  
21 breach of fiduciary duty, I think is shorthand for the  
22 acts that they are alleging she committed.

23 So the motion is denied as to the fourth, at  
24 this point. You maybe right on summary judgment. At  
25 this point, I think it is premature.

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1 MS. CAUSEY: Thank you, your Honor.

2 THE COURT: So the fifth.

3 MR. MCMAHON: Fifth and final.

4 THE COURT: Okay. Statute of frauds. Isn't  
5 this all about that agreement?

6 MS. CAUSEY: Yes, your Honor.

7 THE COURT: I think these are all the facts at  
8 issue here.

9 MS. CAUSEY: Yes, your Honor.

10 MR. MCMAHON: Yes, your Honor.

11 THE COURT: So that motion is denied as to the  
12 dismissal of the fifth. And we're done.

13 So would you get the transcript. Who made the  
14 motion? Ms. Causey made the motion to dismiss. Get the  
15 transcript. Also order it. What is next. Do we have a  
16 conference date?

17 MS. CAUSEY: I believe we do, your Honor. I  
18 don't have it with me right now. I believe we have a  
19 conference coming up.

20 Your Honor, the last conference that we had, it  
21 was the depositions on the counterclaims were held to be

22 --

23 THE COURT: In abeyance until this motion.

24 MS. CAUSEY: Yes, your Honor.

25 THE COURT: Okay.

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1 MS. CAUSEY: That's right. All of the  
2 documents though that would be relevant to the  
3 counterclaims and now in some ways relevant to the  
4 affirmative defenses have been produced. There are  
5 over a thousand pages produced by the company and  
6 Esther so I, but I don't know right off the top if we  
7 have another conference.

8 THE COURT CLERK: February 18th is the  
9 conference.

10 MS. CAUSEY: Thank you.

11 THE COURT: So does that date make sense at  
12 this point? What is left?

13 MR. MCMAHON: Your Honor, I was appearing on  
14 behalf of Michelle Chang who is celebrating Chinese New  
15 year this week. She'll be back in the office tomorrow.  
16 I hesitate to say what is left or not left to be done as  
17 far as discovery and things like that. I was inquiring  
18 about, I believe there was going -- the court directed  
19 for mediation to take place between the parties and I  
20 was asking Ms. Causey this morning if that had been set  
21 up or what was happening with that. I'm not sure if  
22 that is -- where that is.

23 MS. CAUSEY: Your Honor, both sides have  
24 submitted ADR forms. I'm not exactly sure why that is  
25 not going forward. We will look back at it.

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1 THE COURT: You submitted ADR forms. Did you  
2 pick a mediator?

3 MS. CAUSEY: I don't think it has gotten that  
4 far, your Honor, no.

5 THE COURT: So what does it mean you submitted?

6 MS. CAUSEY: It is not private ADR. It is  
7 through the court, and there were submissions, and there  
8 has not been a response or any deadlines given to the  
9 parties.

10 THE COURT: Do you have a mediator?

11 MS. CAUSEY: Based on those submissions, no,  
12 your Honor.

13 THE COURT: You didn't pick a mediator?

14 MS. CAUSEY: I don't think so your Honor. My  
15 understanding is that it was to be through a roster  
16 selected or offered by the court first for us to select  
17 and we never received that.

18 THE COURT: It is online.

19 MS. CAUSEY: Your Honor, if I could be very  
20 frank, I was not personally involved in doing it. Other  
21 attorneys at my office were.

22 THE COURT: You need to talk to the attorneys  
23 in your office and go online and look at the list for  
24 the commercial division. It is online. I'm not going  
25 to pick that person. You are going to agree to someone.

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1 If you can't agree to someone, you can submit names, and  
2 although I am not really sure how we're going to do  
3 this. I'm not suppose to know who the mediator is.

4 However, if you can't pick someone, I am sort  
5 of compelled, I may ask my principal court attorney to  
6 do it so that I don't know, but the reason I don't know  
7 what to do in this situation is because every single one  
8 of my 150 cases that have gone to ADR have agreed to the  
9 mediator on the list. There are great people on that  
10 list that you should be able to agree to.

11 So the holdup maybe that you didn't agree to  
12 someone. And you really don't want to leave it to the  
13 coordinator down there. A, I don't know when you  
14 submitted these documents to the mediation coordinator,  
15 but you really want to be in control of who the mediator  
16 is to make sure that it is a person that has the  
17 appropriate background, right. If you submitted -- I  
18 don't know when you submitted this and you don't either,  
19 but currently when it is submitted to me, I will not  
20 sign it unless it has -- the parties have agreed to  
21 someone. I don't need to know who it is. But we're not  
22 forwarding it if there is no person identified.

23 MS. CAUSEY: That is probably what happened,  
24 your Honor. There wasn't a mediator selected.

25 THE COURT: I have nothing pending. When I

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28

1 have an ADR form it goes that day. So, no, and we  
2 contact you right away and tell you, you know, all the  
3 cases, everyone knows I need to pick someone. So why  
4 wouldn't you. Why would you leave it to the clerk. She  
5 is lovely, but she doesn't know your case.

6 So thank you for bringing that up.

7 Take a look and get that done. If you want a  
8 30 day stay while you do, once you have a mediator, you  
9 can stipulate to a 30 day stay to get it done, but not  
10 unless there is a mediator on board, and you are  
11 actually doing something.

12 See you in February.

13 Hopefully this issue of mediation will be  
14 resolved.

15 Thank you so much.

16 MS. CAUSEY: Thank you.

17 MR. MCMAHON: Thank you, your Honor.

18 (Time noted 10:43 a.m.)

19 I, Monica A. Martinez, do hereby certify the  
20 foregoing to be a true and accurate verbatim  
21 transcription of the original stenographic record.

22   
23 Monica A. Martinez

24 Senior Court Reporter