SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 48

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LARISSA OKUN NUSIMOW,

Plaintiff,

- v -

ESTER PINCHEVSKY and 600-602 10TH AVENUE REALTY CORPORATION,

Defendants.

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INDEX NO. 651435/2021

MOTION DATE ______

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

HON. ANDREA MASLEY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 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, 34, 36, 37

were read on this motion to/for DISMISS.

Upon the foregoing documents, it is

Defendant Ester Pinchevsky moves, pursuant to CPLR 3211(a), to dismiss plaintiff Larissa Okun Nusimow's complaint and seeks sanctions, pursuant to 22 NYCRR 130-1.1, against plaintiff.

Plaintiff's Allegations

The court accepts the allegations as true for the purposes of the motion to dismiss. (*Davis v Boeheim*, 24 NY3d 262, 268 [2014].) Plaintiff brings this shareholder derivative action on behalf of nominal defendant 600-602 10th Avenue Realty Corporation (ARC) against Pinchevsky, President of ARC, for financial misconduct, self-dealing, and gross mismanagement since 2008. (*See* NYSCEF Doc. No. [NYSCEF] 2, compl. ¶¶ 1-3.) ARC's sole asset is a mixed-use building located at 602 10th Avenue in Manhattan (Building). (*Id.* ¶ 10.) Plaintiff's late husband, Hy Nusimow, owned 50% of the shares of ARC, which is now owned by plaintiff. (*Id.* ¶¶ 11-12.) Pinchevsky has

served as the President of ARC since April 1993 and is a 50% shareholder. (*Id.* ¶ 7.) "There are no other officers or directors of ARC." (*Id.* ¶ 14.)

Plaintiff brings her first cause of action for breach of fiduciary duty and second cause of action for corporate waste derivatively. She alleges that Pinchevsky breached her duties by, among other acts, (1) improperly subleasing an apartment in the Building with a rental value of approximately $2,000/month for less than rental value; (2) taking reimbursements of approximately $350 without proper receipts for telephone and fax expenses; (3) improperly adjusting her own salary; (4) taking a wrongful $64,000 distribution purportedly for 2019 taxes in December 2020; and (5) refusing to hold shareholder or board meetings as required by the by-laws or providing plaintiff required corporate information. (*Id.* ¶¶ 20, 22, 33, 38.) According to plaintiff, demand on ARC's board would be futile for several reasons: "Pinchevsky would be required to approve the initiation of the suit by [ARC], particularly as there are no other officers or directors of [ARC]. Given that this lawsuit relates to misconduct by Pinchevsky, making a demand upon her would be futile." (*Id.* ¶ 27.) Demand would further be futile in plaintiff's view because the misappropriation of corporate assets was "so egregious it could not have possibly been the product of sound business judgment." (*Id.* ¶ 29.) Finally, demand is futile because, "as a result of Pinchevsky's failures to hold corporate meetings to elect new board members, there is no currently constituted board to whom Plaintiff could even submit a demand other than Pinchevsky herself." (*Id.* ¶ 28.)

Plaintiff brings her third, fourth, and fifth causes of action for books and records, an accounting, and removal of Pinchevsky as President of ARC, respectively, in her individual capacity as a shareholder. (*Id.* ¶¶ 31-56.) With respect to plaintiff's demand

for books and records, plaintiff complains that Pinchevsky has denied plaintiff access to ARC's books and records of despite written demand on July 23, 2016 and on December 9, 2020 for annual balance sheets and profit and loss statements. (*Id.* ¶¶ 18, 44.) To determine the amounts Pinchevsky allegedly misappropriated and/or funds owed to plaintiff, plaintiff seeks an accounting. (*Id.* ¶ 52.) Lastly, as to plaintiff's fifth cause of action to remove Pinchevsky as President of ARC and barring her from re-election, plaintiff alleges that she is entitled to bring an action seeking Pinchevsky's removal as a director and as President for cause under BCL § 706(d). (*Id.* ¶¶ 54, 56.)

The complaint includes a section titled "ALLEGATIONS COMMON TO ALL CLAIMS," which alleges that Pinchevsky has failed to hold either a shareholder meeting, or a meeting to elect new directors or officers since at least 2008. (*Id.* ¶ 16.) Additionally, plaintiff complains that Pinchevsky has failed to

> "1) provide shareholder stock certificates; 2) negotiate a shareholder agreement as required by a 2008 judicial settlement entered with the then shareholders; 3) maintain the minimum required number of corporate directors; 4) chair all corporate meetings as required by the Corporations by-laws; and 5) appoint a treasurer and secretary of the corporation as required by the by-laws."

(*Id.* ¶ 17.)

The Related 2017 Action

There is a related action, *600-602 10th Avenue Realty Corporation v Estate of Hy Nusimow, et al*, Index No. 650120/2017, pending before this court (2017 Action). ARC is the plaintiff in the 2017 Action and the defendants are the Estate of Hy Nusimow, Larissa Nusimow (plaintiff in this action), and Avi Nusimow (collectively, the Nusimow Defendants). Generally, the 2017 Action concerns whether ARC's Shareholders'

Agreement was terminated. Initially, in the 2017 Action, the Nusimow Defendants filed an answer with no counterclaims, but after ARC amended its complaint, the Nusimow Defendants amended their answer and asserted five counterclaims (First Amended Answer): (1) breach of fiduciary duty to Larissa; (2) derivative claim by Larissa on behalf of ARC for breach of fiduciary duty; (3) judicial dissolution of ARC pursuant to New York Business Corporation Law § 1104(a)(1); (4) appointment of a temporary receiver; and (5) breach of contract. (NYSCEF 17, First Amended Answer.) The five counterclaims were dismissed in their entirety, and the Nusimow Defendants were granted leave to serve an amended answer to replead only their second and third counterclaims. (NYSCEF 18, Decision and Order [mot. seq. nos. 005, 006].) The Nusimow Defendants appealed, and the appeal was dismissed for procedural defects. (*600-602 10th Ave. Realty Corp. v Estate of Nusimow*, 193 AD3d 402 [1st Dept 2021].)

On August 19, 2019, the Nusimow Defendants filed a second amended answer asserting three counterclaims (Second Amended Answer): (1) derivatively on behalf of ARC, breach of fiduciary duty to ARC; (2) judicial dissolution; and (3) Pinchevsky's breach of fiduciary duty and damages owed to Larissa. (NYSCEF 19, Second Amended Answer.) This court dismissed, on the record, the counterclaims asserted in the Second Amended Answer. (NYSCEF 20, tr at 9:10-12 [dismissing first counterclaim for the same reasons in the prior decision]; *id.* at 10:22-23 [dismissing second counterclaim in the second amended answer in the absence of opposition]; *id.* at 13:2-5 [dismissing third counterclaim in the second amended answer on consent].) The Nusimow Defendants did not appeal the dismissal.

Legal Standard

On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [citation omitted].)

To prevail on a CPLR 3211(a)(1) motion to dismiss, the movant has the "burden of showing that the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim." (*Fortis Fin. Servs. v Filmat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted].) "A cause of action may be dismissed under CPLR 3211(a)(1) only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Art and Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014] [internal quotation marks and citation omitted].)

Under CPLR 3211(a)(4), "[a] party may move for judgment dismissing one or more causes of action asserted against [it] on the ground that ... there is another action pending between the same parties for the same cause of action in a court of any state of the United States . . . ." New York courts generally adhere to the "first-in-time" rule, which provides "'the court which has first taken jurisdiction is the one in which the matter should be determined, and it is a violation of the rules of comity to interfere.'" (*Syncora Guarantee Inc v J.P. Morgan Securities LLC*, 110 AD3d 87, 95 [1st Dept 2013] [citations omitted].)

Discussion[1]

Demand Futility

Under BCL § 626(c), a shareholder bringing a derivative action seeking to vindicate the rights of the corporation must make a demand first upon the board of directors to initiate an action or show that such an effort would be futile. As outlined above, plaintiff commenced this shareholder derivative action against ARC without first demanding that the board initiate the lawsuit. (NYSCEF 2, Compl. ¶ 30.) Pinchevsky argues that plaintiff fails to plead with particularity the requirements for demand futility.

Demand on the board of directors is excused if making such a demand would be futile and when the complaint alleges with particularity that: (1) a majority of the board of directors is interested in the challenged transaction, or (2) the directors did not fully inform themselves about the challenged transactions to the extent reasonably appropriate under the circumstances, or (3) the challenged transaction was so egregious on its face that it could not have been the product of sound business judgment of the directors. (*Marx v Akers*, 88 NY2d 189, 200-201 [1996] [internal quotation marks and citations omitted].)

Here, there is no dispute by either party that ARC has no board of directors on which to serve a demand. Thus, the requirement to serve a demand on the board of directors, which does not exist, is futile and is excused. (*See Abrams ex rel Malia Mills Inc. v Mills, et al.*, 2009 WL 5841636, *4 [Sup Ct, NY County 2009]; *Cheng ex rel Garden View Ltd. v Yang*, 67 Misc 3d 1241[A], *8 [Sup Ct, Queens County 2020].)

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[1] Pinchevsky no longer argues that bringing both derivative and direct claims warrants dismissal of the complaint. (NYSCEF 37, tr [mot. seq. no. 001] at 26:11-18.) Thus, the court will not address this argument.

Derivative Claim for Breach of Fiduciary Duty (First Cause of Action)

Pinchevsky contends that the breach of fiduciary duty claim should be dismissed pursuant to CPLR 3211 (a)(1), (4), and (7).

Dismissal Under CPLR 3211(a)(4) and Res Judicata

As a preliminary matter, Pinchevsky conflates CPLR 3211(a)(4) with the doctrine of res judicata and fails to distinguish the legal arguments supporting the two bases for dismissal. The two concepts are distinct. In fact, CPLR 3211(a)(5) provides the basis for dismissal under the doctrine of res judicata. “Paragraph 4 of CPLR 3211(a) is designed to avoid duplicative litigation. . . . It implements its purpose by permitting the court to dismiss the action wherever it is shown that another action between the same parties on the same cause is pending elsewhere.” (David D. Siegel & Patrick M. Connors, New York Practice § 262 [6th ed June 2023 update].) Nevertheless, the court will analyze both grounds.

Pinchevsky argues that the dismissal of the counterclaims alleged in the First and Second Amended Answers in the 2017 Action bars plaintiff’s claim for breach of fiduciary duty in this action pursuant to CPLR 3211(a)(4). However, Pinchevsky concedes that plaintiff has no remaining counterclaims claims left in the 2017 Action; they were dismissed. The three counterclaims asserted by Larissa in the Second Amended Answer were dismissed, an appeal was not sought, which leaves her with no claims in that action. Thus, CPLR 3211(a)(4), does not apply.

Pinchevsky also argues that, aside from four new allegations (New Allegations),[2] plaintiff's derivative claim for breach of fiduciary duty is barred by res judicata. In Pinchevsky's view, plaintiff should not be permitted to bring claims based on allegations relating to Pinchevsky's failure to hold shareholder meetings and elections, denying access to books and records, misappropriation of corporate funds and assets for her own benefit, and adjustment of her salary, because plaintiff has already failed twice to bring a derivative claim premised on the above acts or omissions in the 2017 Action. (*Compare* NYSCEF 19, Second Amended Answer with Counterclaims ¶ 35, *with* NYSCEF 2, Compl. ¶ 33.)

"Under the doctrine of res judicata, a final judgment on the merits of an action by a court of competent jurisdiction is binding upon the parties and their privies in all other actions or suits on points and matters litigated and adjudicated in the first suit or which might have been litigated therein." (*Paramount Pictures Corp. v Allianz Risk Transfer AG*, 141 AD3d 464, 466 [1st Dept 2016] [internal quotation marks and citation omitted].)

Dismissal of the second counterclaim in the 2017 Action was granted for the "same reasons that were stated in the prior decision." (*See* NYSCEF 20, tr at 9:10-12.) The court's prior decision dismissed the second counterclaim for failing to plead wrongdoings with sufficient detail, failing to name the Corporation as a nominal defendant, and failure to allege that demand was made or that demand would have been futile. (NYSCEF 18, Decision and Order at 5-6.)

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[2] These new allegations are related to the apartment subleasing, taking reimbursements, adjusting salary, and taking a wrongful distribution in the amount of $64,000 in December 2020. (NYSCEF 2, Compl. ¶ 33.)

In the derivative action context, where there has been a determination on demand futility on a motion to dismiss, subsequent derivative actions are barred on the ground of res judicata. (*Wietschner ex rel JPMorgan Chase & Co. v Dimon*, 139 AD3d 461, 461-62 [1st Dept 2016] [dismissals for failure to adequately allege demand futility were on the merits and entitled to res judicata effect].[3]) Here, that is not the case with respect to the 2017 Action. The court dismissed the second counterclaim in the First Amended Answer because the complaint was devoid of allegations of demand made or demand futility. The second counterclaim alleged in the Second Amended Answer was also dismissed for this reason.[4] Dismissal on the face of the complaint because there were no allegations as to demand made on the board of demand futility is not a

[3] The court in *Wietschner* examined two derivative actions, brought in the Southern District of New York, that arose from the "same series of transactions involving the directors' oversight of a corporate anti-money laundering program, and, aside from the different time periods alleged regarding the director's lack of oversight, had the same origin and formed a convenient trial unit" as in *Wietschner*. (*Wietschner ex rel. JP Morgan Chase & Co.*, 139 AD3d at 461, citing *Steinberg v Dimon*, 2014 WL 3512848, US Dist LEXIS 96838 [SD NY, July 16, 2014, 14 CIV 688, Crotty, J.], *Central Laborers' Pension Fund v Dimon*, 2014 WL 3639182, US Dist LEXIS 100874 [SD NY, July 23, 2014, 14 CIV 1041, Crotty, J.], *affd* 638 Fed Appx 34 [2d Cir 2016]. For example, in *Steinberg*, the District Court analyzed whether plaintiff had pleaded particularized facts that created a reasonable doubt that a majority of the board could have exercised disinterested and independent business judgment in considering demand. (2014 WL 3512848, *2-5, US Dist LEXIS 96838, *5-15.) The District Court concluded that plaintiff had not done so and demand was not excused. (*Id.*)

[4] During argument on the motion to dismiss the counterclaims alleged in the Second Amended Answer, counsel for Pinchevsky pointed to paragraph 35(e) to support the contention that demand was made on the board. (NYSCEF 20, decision and order on Second Amended Answer at 9:3-9.) However, paragraph 35(e) of the Second Amended Answer states that "Ms. Pinchevsky has repeatedly breached that duty by . . . . [r]efusing repeated demands by her fellow shareholder, Larissa Okun Nusimow, that she make available for inspection all corporate documents pertaining to the Company[.]" (NYSCEF 19, Second Amended Answer ¶ 35 [e].) Demands for "corporate documents" is not the same demand required for a derivative action.

determination on the merits. Thus, res judicata does not bar this action without a valid and final judgment on the merits in a prior action.

In *Landau v LaRossa, Mitchell & Ross*, the Court of Appeals held that the doctrine of res judicata did not bar a subsequent action where there was a judgment dismissing the complaint in the initial action without prejudice on the basis of the litigant-entity's lack of capacity. (11 NY3d 8, 13-14 [2008].) The Court of Appeals reasoned that there was no final judgment deciding the merits of the claim and the deficiency was later cured by plaintiff. (*Id.* ["when the disposition of a case is based upon a lack of standing only, the lower courts have not yet considered the merits of the claim."].) In *Landau*, the Court of Appeals also "remain[ed] mindful that if [the doctrine is] applied too rigidly, res judicata has the potential to work considerable injustice." (*Id.* at 14.) While lack of capacity or standing is not the same as standing in the derivative shareholder action context, *Landau* is nevertheless instructive in light of the allegations in this action and the dismissals in the 2017 Action. (*See Levin ex rel Tyco Intern. Ltd. v Kozlowski*, 13 Misc 3d 1236 [A] [Sup Ct, NY County 2006].) In this action, plaintiff alleged that making a demand to bring a derivative suit would be futile. In contrast, as was stated on the record, there was no such allegation of demand made or demand futility to bring a derivative suit in the 2017 Action.[5] (*See* NYSCEF 19, Second Amended Answer; NYSCEF 20, tr at 7:6-9:12.) Thus, the derivative claim for breach of fiduciary duty in this action is not barred by the doctrine of res judicata as the plaintiff now has corrected the defect by alleging demand futility. (*Rapp v Lauer*, 200 AD2d 726, 727-28 [2d Dept 1994]; *cf. Papa v Burrows*, 186 AD2d 375, 375 [1st Dept 1992] [complaint barred by res

[5] *See supra* n 4.

judicata because previous complaint was almost identical to the present complaint and the second complaint had no new or different factual allegations].) Accordingly, the court denies dismissal of the complaint based on the doctrine of res judicata.

Dismissal Under CPLR 3211(a)(7)

Pinchevsky argues that the breach of fiduciary duty claim is not plead with the requisite specificity under CPLR 3016(b) and that plaintiff continues to assert the same conclusory allegations that have been previously dismissed. For example, Pinchevsky argues that paragraph 16 in this complaint is virtually identical to the allegation that was previously rejected by the court. Paragraph 16 states: "Pinchevsky has failed to hold either a shareholder meeting, or a meeting to elect new directors or officers, since at least 2008. According to the Corporation's by-laws, an annual meeting is supposed to be held every July." (NYSCEF 2, Compl. ¶ 16.) In the 2017 Action, the Nusimow Defendants alleged that Pinchevsky breached her duty by "[f]ailing to establish and conduct appropriate corporate formalities in the day-to-day operations of the Company, including regularized recordkeeping and periodic meetings of the board and shareholders." (NYSCEF 17, First Amended Answer ¶ 31 [c].) Pinchevsky contends these claims fail yet again for lack of specificity if the claims are not barred by the statute of limitations.

Plaintiff fails to meaningfully address the challenges to these identical allegations in her opposition brief and only argues why the New Allegations are pleaded with specificity (discussed below).[6] By failing to address Pinchevsky's arguments, plaintiff

[6] The court notes that plaintiff argues that "Even the allegations in this action that are similar to issues raised in the 2017 Action, such as, for example, Pinchevsky's failure to hold a shareholder meeting since 2008, necessarily includes the new allegations that

has conceded the correctness of the movant's legal argument. Thus, plaintiff's derivative breach of fiduciary duty claim based on Pinchevsky's failures to

> "1) provide shareholder stock certificates; 2) negotiate a shareholder agreement as required by a 2008 judicial settlement entered with the then shareholders; 3) maintain the minimum required number of corporate directors; 4) chair all corporate meetings as required by the Corporations by-laws; and 5) appoint a treasurer and secretary of the corporation as required by the by-laws[ ]"

are dismissed in addition to the allegation that Pinchevsky failed to hold shareholder meetings. (NYSCEF 2, Compl. ¶ 17.)

Dismissal of New Allegations Under CPLR 3211(a)(1)

Pinchevsky argues that documentary evidence conclusively refutes the New Allegations, found in paragraph 33 of the complaint. First, Pinchevsky argues that the apartment, being subleased by her grandson, is rent controlled (currently at $517.74), and thus, plaintiff's speculation that the rent value is $2,000/month is refuted by the renewal lease agreement. Pinchevsky submits the lease agreement (NYSCEF 11, notice of renewal of lease), as proof that the apartment is rent stabilized, and thus, plaintiff's contention that Pinchevsky has improperly subleased the apartment for personal gain is erroneous and, in any event, does not support her cause of action for breach of fiduciary duty.

The court finds that the lease agreement does not utterly refute plaintiff's allegations that the apartment is being improperly subleased to Pinchevsky's grandson

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Pinchevsky has not held such a meeting from August 2019 to the present. It is settled law that res judicata cannot bar such claims." (NYSCEF 28, Memo in Opp at 8.) However, this argument does not address Pinchevsky's contention that the allegations are still not pleaded with specificity.

at a rate below which apartment could be rented. The lease agreement merely shows who is living there, duration of tenancy, monthly rent, and that the apartment is rent stabilized. (NYSCEF 11, Notice of Renewal of Lease.) For the reasons below, the lease agreement does not utterly refute allegations that the apartment is being subleased to Pinchevsky or her grandson a rate less than market value.

In fact, other documentary evidence submitted by Pinchevsky appears to show that there are residents in the Building paying anywhere between $645.38 to $2,239.86 while the rent for “E Pinchevsky/D Zilberman” is $505.11 as of April 2020. (NYSCEF 13, Management Report Package [Mgmt. Report], Collection Status for Period Ended 4/30/2020 at 4.) Pinchevsky does not proffer documentary evidence showing the apartments in the Building are not rent stabilized so as to unequivocally show that that a rent stabilized apartment cannot be rented at those rates. Moreover, on reply, Pinchevsky cites to Rent Stabilization Code (9 NYCRR) § 2522.1, which states that a rent stabilized unit cannot be rented above its legal maximum. That may be true, but the Rent Stabilization Code also provides that rent adjustments are permitted upon vacancy. (9 NYCRR § 2522.8.) As Pinchevsky concedes in her brief, she does not live there, but her grandson resides in the unit. The notice of lease renewal also includes a letter dated May 21, 2021 from Matthew Warwick, Property Manager, stating that “E Pinchevsky/D Zilberman has resided at the above-referenced unit since June 2008.” (NYSCEF 11, Notice of Lease Renewal at 3.) This raises, at least, a concern that Pinchevsky has remained on the lease to prevent rental increases due to vacancies so that her grandson could rent out the unit at a much lower rate as compared to other residents of the building.

Further, Pinchevsky argues that the parties' 2008 Settlement Agreement[7] utterly refutes plaintiff's allegations that Pinchevsky is taking monthly reimbursements in the amount of $350 without proper receipts. The 2008 Settlement Agreement, the terms of which were read into the record before Justice Cahn (ret.), provided that Pinchevsky would be paid $350/month as a management fee. (NYSCEF 15, Dec. 2, 2008 tr at 5:12-13.) Pinchevsky submits the Management Report Package to demonstrate that she was paid $350 for April 2020 in connection with the 2008 Settlement Agreement. Plaintiff, however, disputes this charge as being paid in connection to the 2008 Settlement Agreement as the $350 disbursement is listed as "MISC. OPERATING EXP." with a remark "TELEPHONE & FAX." (NYSCEF 13, Mgmt. Report, Statement of Disbursements 3/31/2020 at 25.) The Mgmt. Report does not say that this $350 amount was paid to Pinchevsky under the 2008 Settlement Agreement; it says something else entirely different, and thus, Pinchevsky has not satisfied her burden under CPLR 3211(a)(1) warranting dismissal.

Finally, Pinchevsky contends that a letter from a corporate accountant utterly refutes plaintiff's allegation that Pinchevsky took a wrongful distribution of $64,000, and in any event, Pinchevsky argues there is no harm to the Corporation because the amount was returned to the corporation. Pinchevsky explains that she took the distribution on the advice of the accountant, but Pinchevsky failed to mention that the accountant relied on Pinchevsky's information, raising an issue of fact that cannot be

[7] This Settlement Agreement was read into the record in *Hy Nusimow v Ester Pinchevsky and 600-602 10th Ave. Realty Corp.*, Index No. 101648/2008.

determined on this motion. The accountant, Jack L. Baumgarten, CPA, wrote to Pinchevsky on April 27, 2021, that

> "I was told that the income of the corporation in 2019 was $132,820 which was allocated equally to the two shareholders. Thus, your half was $66,410 as was the half for the estate of Hy Nusimov. I was told that Hy's estate withdrew $64,000 and that you had not withdrawn any of the 2019 income distribution. Based on this information, I advised you that you were entitled to an equal distribution."

(NYSCEF 14, Baumgarten letter at 2.)

Dismissal of New Allegations Under CPLR 3211(a)(7)

With respect to the New Allegations, Pinchevsky argues that (1) the improper sublease allegation is woefully deficient because plaintiff did not specify the apartment, no details are provided on how the subleasing is occurring, and plaintiff did not provide details on why the subleasing is improper; (2) the wrongful $350 reimbursements without proper receipts allegation fails to allege harm to the corporation; (3) the allegation concerning the improper adjustment of Pinchevsky's salary is conclusory because it fails to detail the differential, why the salary was improper and what alleged procedures were not followed; and (4) the allegation regarding the $64,000 payment does not contain an allegation of harm to the corporation because the amount has been returned to the corporation.

The court agrees that plaintiff's allegation that she improperly adjusted her salary is conclusory and lacks specificity under CPLR 3016. This threadbare allegation is not pleaded with specificity—there is no detail. Plaintiff's breach of fiduciary duty premised on this allegation is therefore dismissed.

The court rejects Pinchevsky's first, second, and fourth arguments. Plaintiff need not provide granular detail, such as the apartment number, to sufficient plead a breach of fiduciary duty. "The purpose of section 3016(b)'s pleading requirement is to inform a defendant with respect to the incidents complained of. We have cautioned that section 3016(b) should not be so strictly interpreted . . . ." (*Pludeman v Northern Leasing Systems, Inc.*, 10 NY3d 486, 491 [2008] [internal citations and quotation marks omitted].)

Plaintiff has also sufficiently pleaded a harm to the corporation when she alleged that Pinchevsky improperly withdrew $350 for reimbursement purposes without receipts. "In order to distinguish a derivative claim from a direct one, the court considers '(1) who suffered the alleged harm (the corporation or the suing stockholders, individually); and (2) who would receive the benefit of any recovery or other remedy (the corporation or the stockholders individually).'" (*Serino v Lipper*, 123 AD3d 34, 40 [1st Dept 2014] [citation omitted].) "[A]llegations of mismanagement or diversion of assets by officers or directors to their own enrichment, without more, plead a wrong to the corporation only, for which a shareholder may sue derivatively but not individually." (*Abrams v Donati*, 66 NY2d 951, 953 [1985].) Thus, plaintiff's allegation sufficiently alleges a harm to ARC.

However, plaintiff's allegation that Pinchevsky "took an owner distribution from [ARC] of $64,000 . . . . without making any distribution to ARC's other 50% owner[,]" does not allege a harm to ARC but rather a harm to plaintiff. (NYSCEF 2, Compl. ¶ 22.) Thus, plaintiff's claim grounded on this allegation is dismissed.

Derivative Claim for Corporate Waste (Second Cause of Action)

Pinchevsky argues that this cause of action is duplicative of the breach of fiduciary duty claim. Plaintiff argues she is permitted to plead her corporate waste and breach of fiduciary duty claims in the alternative and cites to *Lemle v Lemle* in support. (2017 NY Slip Op 30811[U], *12 [Sup Ct, NY County 20107].) However, *Lemle* is not completely analogous because the court in *Lemle* denied dismissal on the basis that the claims are duplicative because defendants failed to provide case law. (*Id.*) That is not the case here; Pinchevsky has supplied the court with case law. Pinchevsky cites to the holding of *770 Owners Corp v Spitzer*, wherein the court dismissed the corporate waste cause of action as duplicative of the breach of fiduciary duty claim, reasoning that corporate waste is a potential component of a breach of fiduciary duty. (25 Misc 3d 1204[A], *7 [Sup Ct, Kings County 2009].) In this case, the allegations in support of plaintiff's breach of fiduciary duty claim and the claim for corporate waste are nearly identical and both seek the same relief. (*Compare* NYSCEF 2, Compl. ¶¶ 31-34, *with id.* ¶¶ 36-40.) Thus, the corporate waste claim is duplicative of the breach of fiduciary duty claim and is dismissed. (See *Yuan San Shih v Ji Yong Kim*, 54 Misc 3d 1223[A] [Sup Ct, Queens County] [noting that "waste is merely one potential component of breach of fiduciary duty" and dismissing waste as duplicative], citing *770 Owners Corp*, 25 Misc 3d 1204[A] [Sup Ct, Kings County 2009].)

Demand for Books and Records (Third Cause of Action)

Pinchevsky contends that the demand for books and records is not procedurally proper under the prescribed methods in BCL § 624(d), which requires the plaintiff to seek relief by order to show cause.

Plaintiff effectively concedes that her requested relief pursuant to BCL § 624(d) should have been brought by order to show cause but argues that she has a common-law right to books and records with no such procedural requirement. Upon this concession, plaintiff's claim for books and records under BCL § 624(d) is dismissed.

"Under New York law, shareholders have both statutory and common-law rights to inspect a corporation's books and records so long as the shareholders seek the inspection in good faith and for a valid purpose." (*Retirement Plan for General Employees of City of North Miami Beach v McGraw-Hill Companies, Inc.*, 120 AD3d 1052, 1055 [1st Dept 2014].) There is no requirement under the common-law right to books and records to commence the action by order to show cause and thus the motion to dismiss the third cause of action is denied. (*Hafeez v American Exp. Co.*, 2023 WL 2916595, *2 [Sup Ct, NY County 2023].)

On reply, Pinchevsky raises numerous arguments that plaintiff's request to inspect the books and records could not have been made in good faith and for a valid purpose, for example, because the only relevant demand was made five years ago or because plaintiff failed to identify with particularity the wrongful transactions that would give rise to a proper purpose for the inspection. As these arguments about lack of good faith and valid purpose were raised for the first time on reply, the court will not consider them. (See *Erdey v City of New York*, 129 AD3d 546, 546 [1st Dept 2015].)

Demand for an Accounting (Fourth Cause of Action)

"To prevail on a cause of action for an accounting, in addition to being a shareholder, a party must show that he or she demanded an accounting and that the demand was refused by the corporation, or that such demand would have been futile."

(*World Ambulette Transportation, Inc. v Kwan Haeng Lee*, 161 AD3d 1028, 1032 [2d Dept 2018] [citation omitted].) "In the absence of an allegation that plaintiffs demanded an accounting, the claim for an accounting fails to state a cause of action." (*New York Studios, Inc. v Steiner Digital Studios*, 151 AD3d 454, 455 [1st Dept 2017] [citations omitted].)

Pinchevsky argues that plaintiff did not make a demand for an accounting, warranting dismissal. In opposition, plaintiff concedes that she does not specifically allege that plaintiff demanded an accounting, however, she argues that it is clear that she made several written requests for books and records, which were denied. The court agrees with Pinchevsky and the claim for an accounting must be dismissed. Here, plaintiff alleges that "Plaintiff made a written demand for records relating to the Corporation on July 23, 2016, and again made a demand for the annual balance sheet and profit and loss statement pursuant to BCL § 624(e) on December 9, 2020." (NYSCEF 2, compl. ¶ 18.) Those requests were denied by Pinchevsky. (*Id.*) Plaintiff concedes she did not make a demand for an accounting, but rather she made demands for books and records. A demand for books and records is not the same as a demand for an accounting. (*See Behrman v Red Flower, Inc.*, 61 Misc 3d 1217[A], *6 [Sup Ct, NY County] [finding that a demand for a corporation's books and records is failure to demand an accounting warranting dismissal of accounting claim].)

Plaintiff's reliance on *Non-Linear Trading Co. v Braddis Assocs*. and *Banker v Banker*, two distinguishable cases, is misplaced. (243 AD2d 107 [1st Dept 1998] [plaintiff made verbal demands for an accounting in a sworn affidavit]; 23 Misc 3d 1111[A] [Sup Ct, Delaware County 2009] [a demand for an accounting made in the

complaint was evidently sufficient under the Surrogate's Court Procedure Act and the Estates Powers and Trusts Law].) Thus, the claim for an accounting is dismissed.

Removal of Pinchevsky as President (Fifth Cause of Action)

Pinchevsky argues that plaintiff's cause of action seeking her removal as President under BCL § 706(d) is brought under the wrong statute and dismissible because plaintiff should have brought the claim under BCL § 716(c). BCL § 706 provides:

> "(d) An action to procure a judgment removing a director for cause may be brought by the attorney-general or by the holders of ten percent of the outstanding shares, whether or not entitled to vote. The court may bar from re-election any director so removed for a period fixed by the court."

Plaintiff contends that she is seeking the removal of Pinchevsky as both an officer and director of the Corporation. In any event, plaintiff argues, she can seek leave to amend her complaint to add in BCL § 716(c) as a basis for relief.

For two reasons, this claim is dismissed. First, plaintiff cannot have it both ways. By alleging that demand is excused on the basis that there is no board to serve a demand on, plaintiff cannot now argue that she is seeking Pinchevsky's removal as a director. Second, implicit in plaintiff's argument that she can seek leave to amend her complaint to plead her cause of action under the appropriate statutory provision is a concession that her claim was brought under the incorrect statutory provision.

Pinchevsky's Motion for Sanctions and Plaintiff's Cross-Motion for Sanctions

Pinchevsky seeks sanctions against plaintiff for bringing these claims for the third time, which, in her view, would be otherwise barred if brought in the 2017 Action. Plaintiff cross-moves for sanctions because, in plaintiff's view, bringing a sanctions

motion but recognizing the existence of plaintiff's New Allegations, allegations that were not included in the 2017 Action as these allegations post-date the pleadings there, is a form of frivolous conduct warranting sanctions.

NYCRR 130-1.1 provides defines frivolous conduct, which is sanctionable, as conduct if

> "(1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false."

Neither party is entitled to sanctions: plaintiff's complaint in this action is not completely without merit and this is consistent with the court's holding as to the applicability of the doctrine of res judicata. Additionally, as a general matter "the imposition of sanctions involves a more persistent pattern of repetitive or meritless motions." (*Sarkar v Pathak*, 67 AD3d 606, 607 [1st Dept 2009].) Plaintiff is also not entitled to sanctions because Pinchevsky's basis for the sanctions motion is primarily premised on the duplicative claims, not the New Allegations.

Accordingly, it is

ORDERED that defendant's motion to dismiss is granted in part as follows: (a) granted on the first cause of action for breach of fiduciary duty arising from allegations concerning (1) failure to provide shareholder stock certificates, negotiate a shareholder agreement, maintain the minimum required number of corporate directors, chair all corporate meetings as required by the corporate by-laws, and appoint a treasurer and secretary as required by the corporate by-laws; (2) failure to hold shareholder meetings and elections, denying access to books and records, misappropriation of corporate

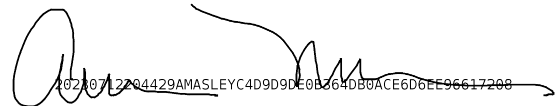
funds and assets for her own benefit, and adjustment of her salary and (3) the $64,000 distribution; (b) second cause of action for corporate waste; (c) third cause of action arising out of plaintiff's statutory right to books and records (d) fourth cause of action for an accounting; (e) fifth cause of action for Pinchevsky's removal as President. Otherwise, the motion is denied; and it is further

ORDERED that defendant's motion for sanctions is denied; and it is further

ORDERED that plaintiff's cross-motion for sanctions is denied; and it is further

ORDERED that defendant is directed to serve an answer within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that within 30 days, counsel shall submit a joint proposed PC order, and in the event the parties cannot agree, shall submit competing proposed PC orders consistent with Part 48 Procedures.



7/12/2023						
DATE				ANDREA MASLEY, J.S.C.		
CHECK ONE:	☐	CASE DISPOSED		X	NON-FINAL DISPOSITION	
	☐	GRANTED	☐ DENIED	X	GRANTED IN PART	☐ OTHER
APPLICATION:	☐	SETTLE ORDER		☐	SUBMIT ORDER	
CHECK IF APPROPRIATE:	☐	INCLUDES TRANSFER/REASSIGN		☐	FIDUCIARY APPOINTMENT	☐ REFERENCE