

Kirby v Davidowitz

2007 NY Slip Op 30080(U)

March 6, 2007

Supreme Court, New York County

Docket Number: 0602476

Judge: Karen S. Smith

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

DECEMENT.

MEM. KAREN SMITH

PART 461

Index Number : 602476/2006

KIRBY, ROGER W.

vs

DAVIDOWITZ, NEIL B.

Sequence Number : 002

DISMISS

INDEX NO. _____

MOTION DATE 12/13/06

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to 5 were read on this motion to ~~for~~ dismiss the complaint

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1-2

Answering Affidavits — Exhibits _____

3-4

Replying Affidavits _____

5

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached memorandum decision and order

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

FILED
MAR 15 2007
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/6/07

AS
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

-----X

ROGER W. KIRBY,

Plaintiff,

Index No. 602476/06

-against-

NEIL B. DAVIDOWITZ, ORSID REALTY CORP.,
and 322 REALTY CORP.,

Defendants.

-----X

PRESENT: KAREN S. SMITH, J.S.C.:

Defendants', Neil B. Davidowitz's and Orsid Realty Corp.'s, motion to dismiss the complaint, as it relates to them, is granted as more fully set forth below.

In this action, *pro se* plaintiff, Roger W. Kirby (Kirby), an attorney, seeks compensation for water damage in his cooperative apartment allegedly caused by water infiltration from the exterior of the apartment building (the "Building") owned by the defendant cooperative corporation, 322 Realty Corp. (322). Kirby also seeks injunctive relief against 322 to permit Kirby to perform renovations to his cooperative apartment.

The complaint purports to assert six causes of action as follows: 1) estoppel, 2) breach of the warranty of habitability, 3) breach of fiduciary duty, 4) tortious misconduct, 5) private nuisance and 6) conversion. Of those causes of action, 1 and 3 are asserted only against 322, 4 and 5 are asserted only against defendants, Neil B. Davidowitz (Davidowitz) and Orsid Realty

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Corp.(ORC) and 2 and 6 are asserted against all defendants. Davidowitz and ORC now move to dismiss the complaint as it relates to them based upon documentary evidence and for failure to state a cause of action. 322 has submitted no papers in connection with this motion.

Facts

The factual allegations set forth below have been taken from the complaint.

Kirby is a shareholder of 322 and the proprietary lessee in apartment 15A in the Building. Davidowitz is a principal and employee of ORC. ORC is the property management company which has served as 322's managing agent for the Building for more than fifteen years.

322's "Building Guidelines" state that 322; "... would respond to internal damage caused by problems on the exterior of the building by both plastering and painting" (Complaint, Paragraph 10). Beginning in March 2001, Kirby reported to Davidowitz and ORC that water leaks from the Building's exterior had damaged the interior of Kirby's apartment. Kirby continued to make complaints during the following years.

In October of 2005, Kirby; "...told ORC in writing to repair the exterior walls..." of the Building (Complaint, Paragraph 9). Davidowitz and ORC denied that there was any water damage for

which 322 was responsible. In November of 2005; "...the building's architect confirmed the interior damage and that external lack of waterproofing had caused it" (Complaint, Paragraph 15). In January of 2006; "Davidowitz and ORC told plaintiff [Kirby] that the masonry repairs to the exterior walls would begin mid-March 2006..." (Complaint Paragraph 17) and that 322; "...was not responsible for painting interior walls damaged by building leaks" (Complaint, Paragraph 18.) On January 25 of 2006, Kirby notified Davidowitz, ORC and 322 that; "...if at least an undertaking to resolve the outstanding issues by April 1, 2006 were not forthcoming, formal proceedings would be taken against Davidowitz, and the Corporation [322]..." (Complaint, Paragraph 21.)

On March 2 of 2006, Kirby; "...wrote Davidowitz and ORC to say that he would be withholding \$10,000.00 of maintenance payments until the problems... had been resolved" (Complaint, Paragraph 25). On March 3 of 2006, Kirby; "...wrote Davidowitz to advise that certain work would be done in the apartment in June of 2006" (Complaint, Paragraph 26.) On March 9 of 2003; "Davidowitz wrote plaintiff [Kirby]... that 'withholding of maintenance is not permissible' and... 'that late fees will be assessed'" (Complaint, Paragraph 30). Sometime thereafter, all three defendants denied Kirby approval to proceed with his proposed renovations unless he obtained New York City Department

of Buildings approval for the work, notwithstanding the fact that, some time before November of 2005, the defendants had given Kirby approval to undertake the very same renovations without the requirement that he obtain New York City Building Department approval. In May of 2006, Davidowitz and ORC wrote Kirby and advised him that permission to conduct renovations to his apartment would not be given unless he paid up his maintenance charges and the late fees which had been assessed. From 1990 through 2006 there were no prior instances where 322 had required apartment lessees to seek New York City Building Department approval for renovations with a scope that were as limited as the renovations proposed by Kirby. On or before May 31, 2006, Kirby resubmitted the plans for his proposed renovations and a copy of the contract with his contractor as well as \$10,000.00 and; "...informed Davidowitz that time was of the essence" (Complaint, Paragraph 41). On June 7 of 2006; "...Davidowitz wrote that the plans were approved *provided that* plaintiff [Kirby] seek DOB approval and pay additional fees of \$1,000.00 and a \$2,500.00 security deposit" (Complaint, Paragraph 42). Throughout June of 2006, Kirby disputed that New York City Department of Buildings approval was required for the renovations he proposed. During the course of this dispute, Kirby; "...offered to indemnify defendants against the possibility of a DOB penalty for failure to file for approval" (Complaint Paragraph 50). Additionally,

Kirby submitted a letter from his contractor to the effect that, in the contractor's experience, DOB approval was not "conventionally sought" for the type of work contemplated by Kirby (Complaint Paragraph 51). On July 5, 2006, Kirby advised Davidowitz and ORC that Kirby's contractor could no longer wait for approval for the work so that it was not going to occur and requested that the \$3,500.00 in fees and security he had paid to ORC be refunded.

Kirby commenced this action by filing his summons and complaint on July 13, 2006.

Discussion

The branch of Davidowitz's and ORC's motion which seeks dismissal pursuant to CPLR §3211(a)(1) is denied as their moving papers do not contain any documentary evidence which would conclusively establishes their entitlement to judgment as a matter of law.

As for the portion of Davidowitz's and Orc's motion which seeks dismissal pursuant to CPLR § 3211(a)(7) the standard for review is; "...if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law..." the motion must be denied (511 West 232nd Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002] [internal quotations and citations omitted]). While the

complaint is liberally construed so that the facts alleged in the complaint are accepted as true and the plaintiff is accorded the benefit of every possible inference; "...the rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom ... does not apply to allegations... consisting of bare legal conclusions..." (Mobil Oil Corporation v Joshi et al, 202 AD2d 318,319 [1st Dept, 1994] [internal quotations and citations omitted]).

In Kirby's affidavit in opposition to the motion, he acknowledges that the funds he paid as fees and security in connection with his proposed renovations were returned on or about September 25, 2006. In fact, ORC's letter dated September 25, 2006 (which Kirby attaches to his affidavit as "Exhibit G-2") indicates that, \$3,000.00 was returned to him in the form of the original checks he submitted and the remaining \$500.00 was in the form of a check labeled "Orsid Realty Corp A/A/F 322 Realty Corp", thus indicating ORC was acting in a representative capacity for 322. Therefore, Kirby's affidavit establishes he cannot prevail on his sixth cause of action (conversion) and it must be dismissed.

Kirby's fifth cause of action (private nuisance) must also be dismissed. In a cause of action for nuisance; "...a degree of permanence is an essential element" (*Hempstead v S. Zara & Sons Contracting Co., Inc.*, 173 AD2d 536, 537 [2nd Dept 1991] [internal

citations and quotations omitted]). Kirby's complaint contains no factual allegations of any injuries which have any degree of permanence.

With respect to Kirby's second (breach of the warranty of habitability) and fourth ("tortious misconduct") causes of action, Davidowitz and ORC argue that the action should be dismissed against them because ORC was, at all times, merely an agent of 322. The fact of ORC's agency relationship with 322 is conceded by Kirby as it is alleged in his complaint. However, in opposition to the motion, Kirby argues that agents may be liable for malfeasance (as such activities are beyond the scope of their authority as an agent and, thus, become the agent's personal activities) or where the agents have complete control and authority over their principal.

None of the factual allegations of Kirby's complaint support his conclusion that Davidowitz and ORC had complete control and authority over 322. Kirby's allegations to the effect that he only dealt with ORC concerning his complaints about the Building do not satisfy the requirement. The complaint contains no factual allegations to support a legal conclusion that either; 1) Davidowitz or ORC had any relationship with 322 other than as an agent for a disclosed principal, 2) Davidowitz or ORC had any influence or control over the determinations or directives of 322 or its Board of Directors or, 3) ORC otherwise undertook any

activity beyond the scope of work one would ordinarily expect of a company engaged to manage a building on behalf of a cooperative corporation. Therefore, to the extent that Kirby's claims against Davidowitz and ORC are based upon his conclusory allegations of ORC's authority and control over 322 they must fail (see eg: *Metropolitan Transp. Auth. v Triumph Adv. Prod., Inc.*, 116 AD2d 526, 528 [1st Dept 1986] "[m]ere conclusory allegations that the corporate structure is a sham are insufficient to warrant piercing the corporate veil").

With respect to Kirby's allegations of malfeasance, it has long been held that a servant (employee or agent) is not liable to a third party when acting on behalf of his master unless the servant; "committed an independent tort upon the plaintiffs such as fraud, conversion, trespass, etc" (*The Greyhound Corporation et al v Commercial Casualty Insurance Company et al*, 259 AD 317, 321 [1st Dept 1940]).

In the instant matter, the factual allegations of Kirby's complaint do not support Kirby's conclusory allegations to the effect that Davidowitz's and ORC's actions were "unreasonable", "willful", "malicious", "false", "discriminatory", "undertaken in bad faith", "retaliatory", "motivated by improper purposes", or "tortious". "[U]se of familiar tort language in the pleading does not change the cause of action to a tort claim" (*New York Univ. v Continental Ins. Co.*, 87 NY2d 308, 319-320 [1995]). When

stripped of these incendiary modifiers, the factual allegations of Kirby's complaint indicate nothing more than a dispute (albeit one of long duration) between an owner of a cooperative apartment (representing his own interests) and the Board of Directors of the cooperative corporation (whose interests were being represented by the managing agent of the building), as to whether a water infiltration issue existed and, if so, what the respective responsibilities of the parties were. Thus, Kirby's complaint also fails to state causes of action against Davidowitz or ORC to the extent that Kirby's claims are based upon the assertion that Davidowitz's or ORC's alleged "malfeasance" was beyond the scope of their agency.

To the extent that Kirby's second cause of action (alleging a breach of the warranty of habitability) seeks to assert a direct contract claim against Davidowitz and ORC, this claim too must be dismissed. The warranty of habitability arises pursuant to section 235-b (1) of New York's Real Property Law. Under this statute; "[i]n every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises ... are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." (New York State Real Property

Law §235-b). The courts consider the breach of the implied warranty of habitability based upon traditional contract standards with the result; "... that the breach of this warranty gives rise to the usual remedies for breach of contract" (*Javins v First National Realty Corp.*, 428 F2d 471 [DC Circuit Court of Appeals, 1970], cf. *Curry v New York City Housing Authority*, 77 AD2d 534, 535 [1st Dept 1980]). In contract law; "... an agent for a disclosed principal will not be personally bound unless there is clear and explicit evidence of the agent's intention to substitute or superadd his personal liability for, or to, that of his principal." *Crimmins v Handler & Co.*, 249 AD2d 89, 91-92 (1st Dept 1998) (internal quotation marks and citations omitted). Kirby does not claim that ORC is a party to the Proprietary Lease and nothing contained in the complaint alleges that ORC or 322 intended for ORC to be personally bound for ORC's actions on behalf of 322. Therefore, the complaint contains no factual allegations to support the necessary element of privity between ORC and Kirby or an intent that ORC add its personal liability to that of 322 (ORC's disclosed principal) as would be necessary in order to enable Kirby to establish a breach of warranty of habitability claim directly against ORC.

The court infers that Kirby intends to state a claim for tortious interference with contractual relations in his fourth cause of action (labeled "tortious misconduct"). Kirby alleges

that Davidowitz and ORC each interfered with fiduciary and contractual relations between Kirby and 322. It is an essential element of a cause of action for tortious interference with contract that the defendants, acting on their own behalf, caused a third party to breach a valid contract between the third party and the plaintiff (see *Israel v Wood Dolson Company, Inc. and Gross*, (1 NY2d 116 [1956])). Davidowitz's and ORC's activities, as agents for 333, do not subject them to direct liability for 322's alleged breach of any agreements it may have had with Kirby (see *Waterfront Realty Corp. v Weber et al*, 281 AD2d 180 [1st Dept 2001]). Thus, this cause of action must also be dismissed.

For the foregoing reasons, Davidowitz's and ORC's motion to dismiss Kirby's tort and contract claims is granted.

With its reply papers, ORC submits a copy of 322's Proprietary Lease. Kirby submits a sur-reply objecting to ORC's submission as violating a stipulation between the parties. The stipulation states that ORC's reply papers "shall not contain any additional evidentiary materials." Moreover, by submitting the Proprietary Lease with its reply papers, ORC has deprived Kirby of an opportunity to respond to the submission. Accordingly, the court's decision is not based upon the Proprietary Lease submitted by ORC.

In his opposition papers, Kirby requests leave to replead in the event that his claims are dismissed. However, effective

January 1, 2006, CPLR 3211 (e) was amended to omit the provision which states; "[w]here a motion is made on a ground set forth in paragraph seven of subdivision (a), or on the ground that a defense is not stated, if the opposing party desires leave to plead again in the event the motion is granted, he shall so state in his opposing papers and may set forth evidence that could properly be considered on a motion for summary judgment in support of a new pleading; leave to plead again shall not be granted unless the court is satisfied that the opposing party has good ground to support his cause of action...". While this could be construed to mean that the legislature intended to eliminate the authorization to allow re-pleading, the 2005 Recommendations of the Advisory Committee on Civil Practice indicate that the legislative intent was to liberalize the requirements for a request to replead to prevent unwary litigants from becoming mired in technical traps. Nevertheless, in the instant matter, Kirby offers no indication as to how he would amend the complaint to state sustainable causes of action. Based on the papers before the court, the court is not convinced that Kirby can support any of his claims against Davidowitz or ORC. Kirby's claims are, in reality, contract claims arising from his relationship with 322 as a Proprietary Lessee of a cooperative apartment. If he is able to prove his claims, he may have a full and complete remedy as against 322. Therefore, Kirby's request

for leave to replead is denied.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted and the complaint is dismissed with costs and disbursements to defendants Neil B. Davidowitz and Orsid Realty Corp. as taxed by the Clerk of the Court; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the remainder of the action shall continue with respect to defendant 322 Realty Corp; and it is further

ORDERED that the parties are directed to serve a copy of this decision on the County Clerk at 60 Centre Street (basement) and on the part clerk for Justice Milton Tingling in 60 Centre Street as this case has been reassigned to Justice Tingling.

Dated: March 6, 2007

ENTER:



Hon. Karen S. Smith, J.S.C

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