

Bet-Mansour v Springer
2007 NY Slip Op 31036(U)
April 20, 2007
Supreme Court, New York County
Docket Number: 0119509/2003
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

A. EUNICE BET-MANSOUR and E. RAMAN BET-MANSOUR,
Plaintiffs,

Index No.: 119509/03

- v -

STEVEN SPRINGER, MELANIE SPRINGER, THE
34557 CORPORATION, PENMARK REALTY
CORPORATION, SUSAN COOPER, GEORGE DANDRIGE,
ELIZABETH STOLL, PAULINE SHEARMAN, MARVIN
ALEXANDER and LEE MILLER,

Motion Date: 11/21/06

Motion Seq. No.: 04

Defendants.

Motion Cal. No.: _____

STEVEN SPRINGER and MELANIE SPRINGER,
Third-Party Plaintiff,

- v -

TLS INTERIORS, INC.,

Third-Party

Third-Party Defendant.

Index No.: 590285/04

THE 34557 CORPORATION, PENMARK REALTY
CORPORATION, SUSAN COOPER, GEORGE DANDRIGE,
ELIZABETH STOLL, PAULINE SHEARMAN, MARVIN
ALEXANDER and LEE MILLER,
Second Third-Party Plaintiffs,

Second Third-Party

- v -

TLS INTERIORS, INC.

Index No.: 590919/05

Second Third-Party Defendant.

THE 34557 CORPORATION, PENMARK REALTY
CORPORATION, SUSAN COOPER, GEORGE DANDRIGE,
ELIZABETH STOLL, PAULINE SHEARMAN, MARVIN
ALEXANDER and LEE MILLER,
Third Third-Party Plaintiffs,

Third Third-Party

- v -

CHARTER OAK FIRE INSURANCE COMPANY and
UTICA FIRST INSURANCE COMPANY

Index No.: 590974/05

Third Third-Party Defendants.

THE 34557 CORPORATION and PENMARK REALTY,
Fourth Third-Party Plaintiffs,

- v -

TLS INTERIORS, INC.

Fourth Third-Party

Fourth Third-Party Defendant.

Index No.: 590410/06

The following papers, numbered 1 to 7 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits - Exhibits _____

Answering Affidavits - Exhibits _____

Replying Affidavits - Exhibits _____

PAPERS NUMBERED

1, 2

3, 4

5 - 7

Cross-Motion: Yes No

Upon the foregoing papers,

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

FILED
MAY 03 2007
NEW YORK
COUNTY CLERKS OFFICE

[* 2]

Defendant cooperative board members SUSAN COOPER, GEORGE DANDRIGE, ELIZABETH STOLL, PAULINE SHEARMAN, and MARVIN ALEXANDER move for summary judgment dismissing the complaint against them in this property damage action brought by residents of the cooperative building. The plaintiffs previously discontinued their action against defendant LEE MILLER. Defendants argue that the individual directors cannot be held liable because plaintiffs have failed to allege any independent tortious act on the part of the Board and have failed to show a breach of the business judgment rule. The court agrees and shall grant relief to the individual movants.

"Individual directors cannot be held liable for breach of fiduciary duty absent an allegation of tortious conduct." Kravtsov v Thwaites Terrace House Owners Corp., 267 AD2d 154, 155 (1st Dept 1999). "That the cooperative corporation's board of directors may have taken action that "deliberately singles out individuals for harmful treatment" (Matter of Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 540 [1990]) does not, ipso facto, expose the individual board members to liability." Konrad v 136 East 64th Street Corp., 246 AD2d 324, 326 (1st Dept 1998).

Plaintiffs here fail to allege any independent tortious act on the part of the individual board members that is outside the protection of the business judgment rule. Even assuming for purposes of this motion that the Board members authorized the

continuation of the work on the Springer's apartment, plaintiffs have failed to allege or proffer any facts tending to show that such conduct has "no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority." Levandusky v One Fifth Ave. Apartment Corp., 75 NY2d 530, 540 (1990). That is, plaintiffs fail to state what duty, if any, the Board breached by allowing the work to continue upon the recommendation of the building's architect who stated "we recommend that the required repairs be put off until basic construction is completed." Therefore, the court shall grant the relief sought.

The court shall also grant the cooperative defendants summary judgment on their cross-claims against Steven Springer and Melanie Springer for conditional contractual indemnification only as to the indemnification under the Proprietary Lease. Both the Proprietary Lease and the Alteration Agreement have hold harmless and indemnification provisions running in favor of the movants. In Manning v J.A. Jones Constr. Group, LLC (16 AD3d 235, 236-237 [1st Dept 2005]), the First Department stated that a contract provision "allowing for partial indemnification does not run afoul of General Obligations Law § 5-322.1, since it contains the requisite language limiting [the indemnitor's] obligation to

that permitted by law." The indemnification clause in the Proprietary Lease at issue here does not require the Springers to indemnify the defendants for the defendants' own negligence and are therefore is enforceable. However, the indemnification clause in the Alteration Agreement does run afoul of General Obligations Law § 5-322.1, because it does not contain language excluding the cooperative's own negligence from its coverage. Therefore, summary judgment must be denied as to that indemnification because defendants have not established their freedom from negligence so as to be entitled to a conditional order of indemnification under the Alteration Agreement. See Linarello v City University of New York, 6 AD3d 192, 193-194 (1st Dept 2004) ("An indemnification clause that runs afoul of General Obligations Law § 5- 322.1 (1) is enforceable in the event the indemnitee is found not negligent but nevertheless held vicariously liable to the plaintiff).

The court on its own motion shall dismiss the third-party action and all claims thereunder as abandoned under CPLR 3215 (c) as the third-party defendant never answered and no party timely moved for a default judgment.

Finally, the court shall deny the cross-motion of fourth third-party defendant TLS Interiors to sever the fourth third-party action. TLS Interiors has been provided with all of the discovery heretofore conducted in this action and therefore the

only discovery requests outstanding are any depositions TLS would wish to notice. Severance would be prejudicial to the other parties in this action as it is conceded that TLS performed the work that is at the heart of this dispute. TLS on the other hand fails to demonstrate how it would be prejudiced were the court to allow the action to proceed with TLS being permitted to complete appropriate discovery on an expedited schedule. See Stark v Greenberg, Dauber & Epstein, 219 AD2d 571 (1st Dept 1995) ("denying that part of the cross motion seeking to sever the third-party claim and directing that discovery on that claim be completed on an expedited basis . . . the main action and the third-party action involve common issues of law and fact and should proceed together).

ORDERED that the motion for summary judgment dismissing the complaint against defendants SUSAN COOPER, GEORGE DANDRIGE, ELIZABETH STOLL, PAULINE SHEARMAN, and MARVIN ALEXANDER is GRANTED, the complaint is DISMISSED against the aforementioned defendants and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that motion of defendants THE 34557 CORPORATION, PENMARK REALTY CORPORATION, SUSAN COOPER, GEORGE DANDRIGE, ELIZABETH STOLL, PAULINE SHEARMAN, and MARVIN ALEXANDER for summary judgment is GRANTED to the extent of declaring that said defendants are entitled to conditional contractual

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indemnification against defendants STEVEN SPRINGER and MELANIE SPRINGER based solely upon the indemnification clause in the Proprietary Lease, and otherwise the motion of the defendants for contractual indemnification is otherwise DENIED; and it is further

ORDERED that the third-party action under Index No. 590285/2004 is hereby DISMISSED pursuant to CPLR 3215 (c) as the third-party defendant never answered and no party timely moved for a default judgment; and it is further

ORDERED that the cross-motion of fourth third-party defendant TLS INTERIORS, INC., seeking severance is DENIED; and it is further

ORDERED that TLS INTERIORS is directed to serve any discovery demands, to the extent not already served and answered, forthwith; and it is further

ORDERED that the parties are directed to attend a conference on May 22, 2007, at 11:00 A.M., at Part 59, Room 1254, 111 Centre Street, to schedule any outstanding discovery to be completed by the June 29, 2007; and it is further

ORDERED that the parties are to attend the previously scheduled mediation conference before Part Mediation-1 on May 9, 2007, at 9:30 A.M.

This is the decision and order of the court.

Dated: April 20, 2007

ENTER:

[Signature]
J.S.C.

DEBRA A. JAMES
J.S.C.

FILED
MAY 03 2007
NEW YORK
COUNTY CLERK'S OFFICE