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

PRESENT: _____ PART 2

Justice

Index Number : 102272/2005
ZACHRY, NANCY GREER
VS
VILLAGE POINTE CONDOMINIUM
Sequence Number : 004
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 004
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the accompanying decision.

FILED

JUL 30 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 7/24/07

Ley
J.S.C.
LOUIS B. YORK

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

Supreme Court of the State of New York
County of New York

Index No. 102272/2005

Part 2

Decision/Order

ZACHRY, NANCY GREER,

Plaintiff,

- against -

VILLAGE POINT CONDOMINIUM,

Defendants.

Present:
Hon. Louis B. York
Justice, Supreme Court

Louis B. York, J:

Motion sequence numbers 03, 04, and 05 are consolidated for decision.

Plaintiff Nancy Zachry is a former resident of 350 West 14th Street Penthouse G ("PH-G"), New York, NY. She has brought seven causes of action against Defendants. Defendants include Village Point Condominium ("VPC," the condominium association), members of the Board of Managers (Peter Hughes, Michael Dees, Gabrielle Machinist, Ron Auriana, Marisa Zalabak, John Assali, George Watson), and fellow condominium owners "John Doe" and/or "Jane Doe," and Jullieta Pizzini. Defendants Assali and "Doe" or "Doe's" are not involved in the current motions.

While Plaintiff lived in PH-G, several greenhouses were constructed on the roof in the terraces of other tenants. After they were built, water, allegedly from these greenhouses, leaked

into her condominium and caused mold and bacteria. She hired contractors to replace two doors due to the water damage and to waterproof one wall. Sometime after the mold was discovered she developed an avium complex, which is similar to tuberculosis. She alleges that this disorder arose from the mold in her condominium. Plaintiff also claims that her condominium is now unliveable and she has not resided there since March 2003.

In order to build a greenhouse on a tenant's terrace, tenant must receive authorization from the Board. Plaintiff does not argue that any of the greenhouses were built without authorization. Her allegation is that they were never "legalized" by the Department of Buildings ("DOB"). Plaintiff also states that the members of the Board who have greenhouses were unfairly granted authorization since they were a member of the group who gave authorization.

Plaintiff claims that the greenhouses impede on her mode of egress from the roof. Plaintiff's Architect Arthur Atlas states that every floor must have two means of egress (Atlas Aff. ¶ 22). Currently there is a set of scissor stairs and a bulkhead door leading to another staircase. When Plaintiff moved to the building there was a fire ladder on one of the terraces but the owner of that terrace removed it; said owner is not involved in this action. Plaintiff and Atlas argue that the current exits are not adequate fire exits and this inadequacy put the tenants and any firemen that would need to enter the roof in danger.

This action contains three motions for summary judgment.

In motion sequence number o3, Defendant Pizzini moves for summary judgment requesting that the Court dismiss the action. She asserts that Plaintiff has failed to establish a cause of action. Defendant Pizzini claims that she has not done anything improper and that Plaintiff does not ask for relief from her. PIzzini is only a part of the fourth cause of action in

the complaint. In this cause of action, Plaintiff requests "That Board should be ordered to require...Pizzini to cause the above-described greenhouses to be properly and lawfully removed from their respective penthouses and from the roof of the building forthwith." (Compl. ¶ 43). Plaintiff believes that Defendant's greenhouse is illegal and impedes her mode of egress; therefore, it should be removed. Prior to building the greenhouse, Defendant obtained authorization from the Board according to the Rules and Regulations of VPC. If the Board erred by allowing Pizzini to construct her greenhouse, that still does not institute a wrong doing by her.

Plaintiff also claims that Defendant Pizzini's greenhouse obstructs her path of egress. However, since Pizzini received authorization from the Board to construct her greenhouse, she is not responsible for any impact on the alleged obstruction.

Plaintiff only requests action of the Board in her fourth cause of action, therefore, she has failed to seek relief against Pizzini directly in that cause of action. However, she is a necessary party who is properly a defendant in this suit based on joinder rules. CPLR § 1001 (a) states that "Persons...who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants." Defendant Pizzini is subject to this compulsory joinder rule because the action may result in a change in the value of her property. "The purpose of the compulsory joinder rule is...to protect the rights of persons who may be adversely affected by the outcome." Buechel v. Bain, 275 A.D.2d 65, 72, 713 N.Y.S.2d 332, 339 (1st Dept. 2000). See also Eclair Advisor Ltd. v. Jindo Am., Inc., 39 A.D.3d 240, 244-245, 833 N.Y.S.2d 440 (1st Dept. 2007).

In motion sequence number 04 Defendant Zalabak moves for summary judgment on all causes of action. Also, in motion sequence number 05 the remaining six Defendants (VPC,

Hughes, Dees, Machinist, Auriana and Watson) move for summary judgment on causes of action two through seven. The fourth and fifth cause of action pertain to the legalization of the greenhouses and means of egress. Plaintiff is incorrect in her assertion that the legalization has not yet occurred because the permit was issued by the DOB on December 13, 2004 (Def.'s Ex. B). After a permit has been issued by the DOB, anyone contesting said permit has to appeal the decision to the Board of Standards and Appeals ("BSA"). See Wilkins v. Babbar, 294 A.D.2d 186, 187, 742 N.Y.S.2d 224, 225 (1st Dept. 2002). After a decision by the BSA, then an unsatisfied party may bring the action to court, but that is not the situation here. Plaintiff has failed to follow the proper appeals process. She would typically have thirty days to appeal the decision of the DOB to the BSA. See Brause v. 2968 Third Avenue Inc., 41 Misc.2d 348, 349, 244 N.Y.S.2d 587, 589 (Bronx Cty. 1963). It has now been over two and a half years since the DOB's decision to issue a permit. Therefore, her time has expired and all requests for review of this decision must be dismissed. Plaintiff's complaint was filed on February 16, 2005, which means that even the improper action to start this case was not within the thirty day standard. Because the proper appeals process was not followed, the Court must honor the DOB's decision and motions for summary judgment on causes of action four and five must be granted. See Comm. for Environmentally Sound Dev. v. City of New York, 190 Misc.2d 359, 376, 737 N.Y.S.2d 792, 805 (New York Cty. 2001), Weissman v. New York, 96 A.D.2d 454, 456, 464 N.Y.S.2d 765, 767 (1st Dept. 1983).

It is established that the greenhouses and means of egress are legal and approved by the DOB. Therefore, any authorization given by the Board to make these changes was not improper. Causes of action three and six ask for damages based on Plaintiff's claim that VPC and the

Board failed to remove greenhouses, failed to reinstall fire ladder, and that they did not contest the legalization plan implemented by the DOB. These claims have no merit as the Court has already established that the legalization cannot be questioned.

For Defendants' (except Pizzini) motion regarding the seventh cause of action, the motion must be granted. Plaintiff has not given any evidence to indicate that VPC is on the verge of bankruptcy or that any the Board's actions may have led to a financial problem for the condominium association. Plaintiff accuses Board members of breaching their fiduciary duty owed to her according to the Bylaws. However, she has the burden to give some evidentiary proof at this stage in order to withstand Defendants' motions for summary judgment. See Jones v. Surrey Coop. Apts., Inc., 263 A.D.2d 33, 37-38, 700 N.Y.S.2d 118, 122 (1st Dept. 1999).

In the first cause of action, Plaintiff asks for damages of $954, 695.92 plus interest for the former value of her condominium, costs of repairs, storage, moving expenses and rent for the alternate housing she has needed because she says her condominium is unliveable. She alleges that "VPC and Board have failed to adequately repair, maintain, replace, care for and preserve the common elements of the building, in order to eliminate said water and moisture penetration into PH-G...." (Compl. ¶ 15). While the existence of the greenhouses is not illegal, the maintenance of the building by VPC and the Board could have caused the leakage problem Plaintiff incurred.

Defendants (except Pizzini, who is not involved in this cause of action) try to argue that the court should grant them summary judgment using the business judgment doctrine. However, this is only used in cases where no fraud or misconduct is alleged, as Plaintiff has clearly done in her complaint. See Schoninger v. Yardarm Beach Homeowners' Assoc., Inc., 134 A.D.2d 1, 10,

523 N.Y.S.2d 523, 529 (2d Dept. 1987). Instead, the reasonableness review is appropriate. That test "[R]equires the board to demonstrate that its decision was reasonable..." and "[P]ermits...the court itself to evaluate the merits or wisdom of the board's decision...." Levandusky v. One Fifth Ave. Apartment Corp., 75 N.Y.2d 530, 539, 554 N.Y.S.2d 807, 812 (1990). Plaintiff has raised an adequate question of fact regarding VPC and the Board's actions pertaining to the prevention and termination of the leakage problem. Therefore, this cause of action will continue. If the Court finds that they were negligent in their duties to uphold the proper living standards of the building, and their actions led to the mold problem, then Plaintiff would be entitled to damages.

For Defendants' (except Pizzini) motion regarding the second cause of action, the motion is also denied. While Plaintiff's medical tests did not indicate that she currently has the avium disorder, she asserts in her Affidavit and Depositions that she was medically diagnosed with the condition in 2002. Even though she has not shown that the mold/bacteria caused her medical problems, "[I]n order to withstand summary judgment, a plaintiff need only raise a triable issue of fact regarding whether defendant's conduct proximately caused plaintiff's injuries." Burgos v. Aqueduct Realty Corp., 92 N.Y.2d 544, 550, 684 N.Y.S.2d 139, 141 (1998). Plaintiff's claims in her Affidavit can be enough to establish enough for a triable issue of fact. Id. at 552, 684 N.Y.S.2d at 142. Although Plaintiff has not yet shown proximate cause, she has raised a question of fact regarding VPC and the Board's actions, which is enough to deny the motion. Similar to the first motion, if Plaintiff can prove negligence and proximate cause in relation to her condition, she will be entitled to damages. Therefore it is

ORDERED that all motions for summary judgment on causes of action three, four, five, six, and seven are granted; and it is further

ORDERED that all motions for summary judgment on causes of action one and two are

denied; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: 7/24/07

ENTER:

LOUIS B. YORK
Louis B. York, J.S.C.
J.S.C.

FILED
JUL 30 2007
NEW YORK
COUNTY CLERK'S OFFICE