Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DAVID ELLIOT Justice — IA PART 14

DAVID D. ZARGAROFF, et al.

-against-

QUEENS BOULEVARD TOWER CONDOMINIUM, et al.

Index Number 16622 2005

Motion Date August 14, 2007

Motion Cal. Numbers 30 and 31

Motion Seq. Nos. 2 and 3

QUEENS BOULEVARD TOWER CONDOMINIUM, et al.

-against-

CON EDISON COMPANY OF NEW YORK, INC.

The following papers numbered 1 to 28 read on this motion by defendants Queens Boulevard Tower Condominium and Dimensions 18 Realty, Inc. for an order dismissing the complaint and all cross claims and counterclaims. Plaintiffs David D. Zargaroff and Shahrzad Zargaroff cross-move for an order granting summary judgment in their favor against all of the defendants on the issue of liability, and setting the matter down for a trial as to damages. Defendant Sam Chang separately moves for an order granting summary judgment dismissing the complaint, and all cross claims and counterclaims.

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Memorandum of Law .....

Upon the foregoing papers these motions are consolidated for the purpose of a single decision and are determined as follows:

At the outset, the court notes that these motions are timely, as they were made returnable on June 19, 2007 in compliance with the so-ordered stipulation of March 16, 2007.

Plaintiffs David D. Zargaroff and Shahrzad Zargaroff are the owners of a condominium unit known as Suite C–A in defendant Queens Boulevard Tower Condominium (Queens Boulevard), located at 92–29 Queens Boulevard, Rego Park, New York, and Mr. Zargaroff maintains a gynecology/obstetric office in said unit. Defendant Brisam Corp. (Brisam) was the owner of the condominium unit known as 3A in the subject building on the date of the incident. Defendant Sam Chang (Chang) is the sole shareholder of Brisam. Defendant Dimensions 18 Realty, sued herein as Dimension 10 Realty (Dimensions 18), performs management services for Queens Boulevard. Plaintiffs allege that they sustained damage to their personal property and economic damage to Mr. Zargaroff's medical practice on January 12, 2004 when a pipe in defendant Brisam's apartment burst, causing water damage to their unit. Plaintiffs allege that the water pipe burst because Consolidated Edison had turned off the electricity in Brisam's apartment.

In the first cause of action against Queens Boulevard and Dimensions 18, plaintiffs allege that pursuant to the condominium's bylaws, these defendants had a duty to maintain pipes located in the floors and ceilings of adjoining apartments, and that they breached said duty. In the second cause of action against defendants Brisam and Chang, plaintiffs allege that Brisam had a duty to maintain and repair its condominium unit, and that pursuant to the bylaws, it is responsible for any and all damages to other units and the common elements. It is also alleged that Chang, as a shareholder of Brisam, had a duty to ensure that Brisam maintained the unit. In the third cause of action, plaintiffs seek to pierce the corporate veil in order to assert a claim against Chang, and allege that Brisam is a dummy corporation, without a separate identity from Chang; that Brisam failed to maintain insurance on its condominium unit; that Chang had a fiduciary relationship to Brisam; and that Chang's failure to ensure that Brisam maintained insurance on the unit constitutes a breach of Chang's fiduciary duty to Brisam. Plaintiffs in all three causes of action seek to recover property damages in the sum of

$60,000.00, and economic damage to Mr. Zargaroff's medical practice in the sum of $500,000.00, plus interest, reasonable attorneys' fees and costs.

Defendants Queens Boulevard and Dimensions 18 served an answer in which they interposed affirmative defenses and a cross claim against Brisam and Chang for indemnification and contribution. Defendants Brisam and Chang served an answer in which they interposed five affirmative defenses and a cross claim against Queens Boulevard and Dimensions 18 for indemnification and contribution. Queens Boulevard and Dimensions 18, commenced a third-party action against Con Edison of New York (Con Ed) for indemnification and contribution. Con Ed served an answer in which it asserted a counterclaim against Queens Boulevard and Dimensions 18 and a cross claim against Brisam and Chang for contribution and indemnification.

Defendants Queens Boulevard Tower Condominium and Dimensions 18 Realty's motion for summary judgment dismissing the complaint and all cross claims and counterclaims, and plaintiffs' cross motion for summary judgment as to these defendants:

It is well settled that a party seeking summary judgment "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (Ayotte v Gervasio, 81 NY2d 1062, 1063 [1993]; see Alvarez v Prospect Hosp., 68 NY2d 320, 324 [1986]). A prima facie showing shifts the burden to the opposing party to produce evidentiary proof in admissible form sufficient to establish the existence of a material question of fact (see Alvarez v Prospect Hosp., supra).

Defendants Queens Boulevard and Dimensions 18 have sustained their initial burden. The parties have submitted copies of the 1986 Offering Plan for the subject condominium and seek to rely upon its definitions of the common elements and the duties of the Board of Managers. None of the parties, however, have established that the Offering Plan is binding on anyone other than the sponsor, who is not a party to this action. Plaintiffs' reliance upon the language contained in the Offering Plan, therefore, is misplaced. However, Article I, Section 3 of the subject condominium's bylaws specifically provides that "[a]ll present and future owners, mortgagees, lessees and occupants of units and their employees...are subject to these By-Laws, the Declaration and the Rules and Regulations set forth in Schedule A hereto."

The condominium's Declaration provides, in pertinent part, that the Common Elements "consist of the entire Property (including all parts of the Building other than the Units), and including,

without limitation, the following:...(f) All central and appurtenant installations for services such as power, chutes and ducts, master TV antenna, water, heating (including all pipes, ducts, wires, cables and conduits used in connection therewith, whether located in common areas or in the Units), and all other mechanical equipment spaces."

In view of the terms set forth in the Declaration, the court finds that there is no issue of fact that the subject pipe contained in the baseboard heating system, located within unit 3A, constitutes an appurtenant installation for heating, and, therefore, is a common element.

The condominium's Board of Managers, pursuant to Article II, Section 2 of the bylaws are charged with the "(a) [o]peration, care, upkeep and maintenance of the common elements," and pursuant to Article II, Section 3 the Board of Managers may employ a managing agent to perform such duties. It is undisputed that on January 12, 2004, the subject pipe burst, causing water damage to plaintiffs' unit. However, the fact that the pipe burst, in itself, is insufficient to establish that the condominium or its property manager, breached their duty to care for, upkeep, and maintain the common elements, including the subject pipe. There is no evidence regarding whether the subject pipe was in a defective or deteriorated condition, requiring its repair or replacement prior to January 12, 2004.

It is undisputed that on December 15, 2003, Con Ed disconnected electrical service to apartment 3A, owned by Brisam. There is no evidence that Con Ed informed the condominium, or its manager, that the electricity had been shut off in apartment 3A. It is also undisputed that an air conditioning unit in 3A had been removed from the sleeve, which allowed cold air to enter the apartment. However, there is no evidence that the condominium or its property manager were aware of the fact that the air conditioning sleeve in apartment 3A was empty. The empty sleeve was not readily observable from the street, and could only be seen from the third floor of the garage, provided that someone peered through the outer grating. Mr. Castillo, the building superintendent, testified that the subject pipe froze and then burst, due to the lack of electricity in the apartment, which caused the heating system to turn off. He stated that cold air had entered the apartment through the empty air conditioner sleeve. Although plaintiffs assert that Mr. Castillo is not an engineer, and, therefore, is not qualified to state such an opinion, they have not established that expert testimony is needed in order to establish that the subject pipe froze and then burst. In addition, plaintiffs have neither offered an expert opinion as to what caused the pipe to break, nor have they demonstrated that the subject pipe

could not ordinarily break under the circumstances presented here. To the extent that plaintiffs now seek to claim that the cause of the accident is unknown, in order to proceed against the condominium and the management company under the doctrine of res ipsa loquitur, this claim is rejected. Plaintiffs may not rely upon this doctrine, as they have not shown that the defendants had exclusive control over the pipe in unit 3A, as well as the other offending instrumentalities within the apartment-- the electricity, and empty air conditioning sleeve, and have not shown that the accident would not ordinarily occur in the absence of negligence (see Gorgoni v Sideris Plumbing & Heating Corp., 18 AD3d 201, 202 [2005]; Kambat v St. Francis Hosp., 89 NY2d 489, 494 [1997]; J.E. v Beth Israel Hosp., 295 AD2d 281 [2002], lv denied 99 NY2d 507 [2003]).

The court further finds that contrary to plaintiffs' assertions, the fact that defendant Chang, the sole shareholder of Brisam, served on the Board of Managers in January 2004, does not form a basis for liability on the part of the condominium or its property manager. Article II, Section 13 of the bylaws provides that "[t]he members of the Board of Managers shall not be liable to the unit owners for any mistake of judgment, negligence or otherwise, except for their own individual willful misconduct or bad faith." Thus, plaintiffs' claims that defendant Chang's conduct was willful, would only give rise to a claim against Chang and not the condominium or its property manager. Furthermore, although the law provides that members of the board of managers of a condominium owe a fiduciary duty to the owners of the units when engaged in the business of management (Board of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills, 193 AD2d 322 [1993]), plaintiffs have not presented any evidence that Chang was engaged in the condominium's business of management, when, as alleged, he failed to pay the electric bills for unit 3A and, knew or caused the air conditioning unit to be removed from its sleeve.

Finally, the affirmation submitted by counsel for defendants Brisam and Chang is insufficient to raise a triable issue of fact which would warrant the denial of summary judgment to defendants Queens Boulevard and Dimensions 18. Although Con Ed's employee gained access to the building in order to turn off the electricity to 3A, Brisam and Chang's claim that the utility must have informed some employee of the condominium or its manager, such as a doorman or porter, that it was turning off the electricity to the apartment, is purely speculative. In addition, Brisam and Chang's invocation of the doctrine of last clear chance, as regards the condominium or property manager's ability to shut off or open valves, does not raise a triable issue of fact, as this doctrine is clearly inapplicable (see 4 Weinstein-Korn-Miller, NY Civ Prac ¶ 1411.06).

In view of the foregoing, the motion by defendants Queens Boulevard Tower Condominium and Dimensions 18 Realty, Inc. for summary judgment dismissing the complaint and all cross claims and counterclaims as against them is granted. Plaintiffs' cross motion for summary judgment as to these defendants is denied.

Defendant Sam Chang's motion for an order granting summary judgment dismissing the complaint, and all cross claims and counterclaims:

Defendant Chang has sustained his initial burden of establishing his entitlement to judgment as a matter of law. Plaintiffs' second cause of action as against defendant Chang is dismissed. There is nothing in the condominium's Declaration, bylaws or the bylaws' Schedule A which makes the shareholders of a corporate owner of a unit responsible for the upkeep, maintenance or repair of the unit, or liable for damages to any other unit owner.

Plaintiffs' third cause of action to disregard the corporate form in order to hold defendant Chang liable is also dismissed. Piercing the corporate veil is an equitable doctrine which allows courts to disregard the corporate form whenever necessary to prevent fraud and hold corporate owners liable for the corporation's obligations (see Matter of Morris v New York State Dept. of Taxation & Fin., 82 NY2d 135, 140-141 [1993]; State of New York v Robin Operating Corp., 3 AD3d 769, 771 [2004]). This is a fact-based determination which generally requires a showing that the owners exercised complete domination of the corporation with respect to the transaction or matter at issue, and used that control to perpetrate a fraud or wrong against the plaintiff which led to the plaintiff's injury (see Matter of Morris v New York State Dept. of Taxation & Fin., supra at 141; Bartkowski v Lemcke, 25 AD3d 894 [2006]; Rebh v Rotterdam Ventures, 252 AD2d 609, 610 [1998]; Lally v Catskill Airways, 198 AD2d 643, 644-645 [1993]). "The party seeking to pierce the corporate veil must establish that the owners, through their domination, abused the privilege of doing business in the corporate form to perpetrate a wrong or injustice against that party such that a court in equity will intervene" (Matter of Morris v New York State Dept. of Taxation & Fin., supra at 142; Ventresca Realty Corp. v Houlihan,28 AD3d 537 [2006]; Heim v Tri-lakes Ford Mercury, Inc., 25 AD3d 901 [2006]; Treeline Mineola, LLC v Berg, 21 AD3d 1028 [2005]). No such showing has been made here by the plaintiffs.

To the extent that plaintiffs claim, that after Brisam sold unit 3A on February 19, 2004, Chang transferred the proceeds of the sale to an undisclosed account, in order to prevent the plaintiffs from satisfying any potential money judgment against Brisam, this claim may form the basis for an action under the Debtor Creditor

Law (see Solow v Domestic Stone Erectors, Inc., 269 AD2d 199 [2000]). However, it does not form a basis for holding defendant Chang personally liable for Brisam's failure to properly maintain its property, unit 3A.

The court notes that plaintiffs have not alleged any cause of action against defendant Chang in his capacity as a member of the condominium's Board of Managers. Article V, Section 19 of the bylaws provides that electricity shall be supplied by Con Ed through a submeter and each unit owner is required to pay the bills for electricity used or consumed in his unit directly to the Board of Managers. There is nothing in this provision that requires a shareholder of a corporate owner to personally pay the utility bills. It is undisputed that the owner of apartment 3A was Brisam, and not Chang. Defendant Chang testified that Brisam purchased four units in the subject building and that two of the units were occupied at the time of the purchase, but that he could not recall if 3A was one of the occupied units. He stated that the occupants of the two units paid their own utility bills, and that at some time he instructed his employee, Jimmy Chao, to contact Con Ed and that the utility put Chao's name on the bill for 3A, although Chao did not occupy this unit. Con Ed's witness, John Martin, testified that the utility did not bill anyone in unit 3A for electricity consumption between May 16, 2003 and February 2004. Thus, there is no evidence that defendant Chang actually received any bills from Con Ed after May 16, 2003 which he failed to pay. In addition, there is no evidence that Chang received the termination of services notices which Con Ed asserts were mailed to the "occupant" of 3A in July and August 2003. Finally, there is no evidence that defendant Chang was aware of the fact that the air conditioning sleeve in 3A was empty. Plaintiffs, thus, are unable to establish any willful acts on the part of defendant Chang, which would render him personally liable to the plaintiffs as a member of the Board of Managers.

Accordingly, defendant Sam Chang's motion for summary judgment dismissing the second and third causes of action as against him is granted and all cross claims and counterclaims as against defendant Chang are also dismissed. The motion by defendants Queens Boulevard Tower Condominium and Dimensions 18 Realty, Inc. for summary judgment dismissing the complaint and all cross-claims and counterclaims is granted. Plaintiff's cross-motion for summary judgment as to these defendants is denied.

Dated: October 22, 2007

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J.S.C.