

Bleier v 32 E. 64th St. Corp.

2007 NY Slip Op 34050(U)

December 6, 2007

Supreme Court, New York County

Docket Number: 0600005/2004

Judge: Barbara Kapnick

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

BARBARA R. KAPNICK

PRESENT Index Number : 600005/2004

PART 12

— BLEIER, EDWARD

vs
32 EAST 64TH ST.

Sequence Number : 005

DISMISS

EX NO.

600005/04

ITION DATE

ITION SEQ. NO.

005

ITION CAL. NO.

The following papers, numbered 1 to _____ were read on 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

**MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION**

FILED

DEC 13 2007

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 12/6/07

BARBARA R. KAPNICK J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 12

-----X
EDWARD BLEIER,

Plaintiff,

-against-

32 EAST 64TH STREET CORP., RHETTA FELTON,
BRUCE CRAWFORD, KITTY HART, WILLIAM
INGRAM, HERBERT KASPER, NATHANIEL KRAMER,
NORMAN SCHORR, JONATHAN SOBEL and DONALD
FRANK, in their capacities as officers
and/or members of the Board of Directors
of 32 East 64th Street Corp., and
CHARLES H. GREENTHAL MANAGEMENT CORP.,

Defendants.

-----X
BARBARA R. KAPNICK, J.:

DECISION/ORDER
Index No. 600005/04
Motion Seq. No. 005

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In this action, plaintiff Edward Bleier seeks to recover compensatory and punitive damages against defendants (i) 32 East 64th Street Corp. ("the co-op"); (ii) Rhetta Felton, Bruce Crawford, William Ingram, Herbert Kasper, Nathaniel Kramer, Norman Schorr, Jonathan Sobel, and Donald Frank, in their capacities as officers and/or members of the Board of Directors of 32 East 64th Street Corp. ("the individual board members");¹ and (iii) Charles H. Greenthal Management Corp. ("the managing agent"), for:

(a) breach of contract against the co-op (first and second causes of action);

(b) breach of warranty of habitability against the co-op (third cause of action);

¹ Plaintiff has discontinued his claims against another board member, Kitty Hart, now deceased, and has agreed not to pursue any claims against her Estate.

(c) breach of covenant of quiet enjoyment against the co-op (fourth cause of action);

(d) partial constructive eviction against the co-op (fifth cause of action);

(e) breach of fiduciary duty against the individual board members (sixth cause of action);

(f) negligence against the individual board members (seventh cause of action); and

(g) tortious interference with a prospective business advantage against all the defendants (eighth cause of action).

Plaintiff also seeks a mandatory injunction against the co-op (ninth cause of action) and to recover attorneys' fees against all the defendants (tenth cause of action).

Background

Plaintiff claims that severe leaks originating from the roof, roofing surfaces, balustrade, flashing, membrane, window and exterior walls of the building began to penetrate his cooperative apartment, a 4,000 square feet combined unit on the top floor of a 10-story building located at 32 East 64th Street, New York, New York, in December 1990.

Plaintiff claims that despite his numerous complaints about the ongoing leaks, defendants willfully and negligently failed to maintain and effectuate necessary repairs, thereby causing damage to his apartment and personal property.

Plaintiff's Amended Verified Complaint dated October 2, 2005 alleges that defendants' continued failure to maintain the roof and its elements in good repair "[o]ver the last year," has led to a series of new leaks which have rendered a large portion of the apartment uninhabitable.

The Amended Complaint further alleges that defendants have negligently failed and refused to: (i) repair the exterior of the building and/or replace weather-decayed windows in the premises; (ii) eliminate incessant banging noises in the premises emanating from pipes in other areas of the building; (iii) eliminate offensive cooking odors that permeate the premises from other portions of the building; (iv) rid the kitchen area of machine and pigeon noises and filth; and (v) provide routine, building-wide services to plaintiff and his wife.

Plaintiff claims that as a result of defendants' conduct, he has been unable to utilize a large portion of his apartment and will be unable to realize its full value.

Defendants now move for an order pursuant to CPLR § 3211(a) (5) and (7):

(1) dismissing plaintiff's Amended Verified Complaint as against the individual board members and against the managing agent;

(2) dismissing all claims barred by the applicable Statute of Limitations; and

(3) dismissing the fourth, fifth and eighth causes of action against the co-op.²

Discussion

Defendants argue that plaintiff's claims must be dismissed to the extent that they rely upon alleged actions and damages which are barred by the applicable statute of limitations -- i.e., (i) six years for plaintiff's claims for breach of contract, the implied warranty of habitability, and breach of the covenant of quiet enjoyment; (ii) three years for plaintiff's claims for breach of fiduciary duty, negligence and tortious interference with a prospective business advantage; and (iii) one year for plaintiff's claim for constructive eviction.

² Defendants concede that there are issues of fact with respect to plaintiff's claims that the co-op breached its proprietary lease and the warranty of habitability because of leaks into his apartment.

Plaintiff argues that while the history of certain causes of action began prior to any applicable statute (and are therefore recited as background), each of the causes of action is well within any applicable statute of limitations.

This branch of the motion is denied without prejudice to renewal at the time of trial in the context of a motion in limine.

Defendants next argue that plaintiff's sixth, seventh and eighth causes of action, to the extent they are asserted against the individual board members, must be dismissed on the grounds that: (i) the Amended Complaint conclusorily alleges that the board members are individually liable for breach of fiduciary duty, negligence and tortious interference with a prospective business opportunity, without setting forth a theory of personal liability; and (ii) the board members are protected under the "business judgment rule" which prohibits judicial inquiry into the actions of the cooperative corporation's directors which are "'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.'" Levandusky v. One Fifth Avenue Apartment Corp., 75 N.Y.2d 530, 538 (1990), quoting Auerbach v. Bennett, 47 N.Y.2d 619, 629 (1979). See also, Messner v. 112 East 83rd Street Tenants Corp., 42 A.D.3d 356 (1st Dep't 2007).

Plaintiff, however, contends that the board's decisions in this case were not taken in good faith, had no legitimate relationship to the welfare of the co-op, and deliberately singled him out for harmful treatment.

Specifically, the Amended Complaint alleges that the individual board members were provided with services which were denied to plaintiff and his wife. It further alleges that the board members neglected to repair the roof of the building, even though they knew that it consistently leaked into plaintiff's apartment, because they decided to use the co-op's available funds to construct an addition to the superintendent's apartment.

Plaintiff also alleges that the board members maliciously retaliated against him and ignored his requests because he attempted to enforce his rights, and that they condoned the managing agent's denial to him of the privileges afforded to other tenants in the building.

However, it is well settled that

[i]n bringing an action against the individual members of a cooperative or condominium board based on allegations of discrimination or similar wrongdoing, plaintiffs [are] required to plead with specificity independent tortious acts by each individual defendant in order to overcome the public policy that supports the business judgment rule (see *Murtha v. Yonkers Child Care Assn.*, 45 N.Y.2d 913, 411 N.Y.S.2d 219, 383 N.E.2d 865 [1978]; *Konrad v.*

[* 8]
136 E. 64th St. Corp., 246 A.D.2d 324, 667 N.Y.S.2d 354
[1998]).

Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1, 9-10 (1st Dep't
2006).

Based on the papers submitted and the oral argument held on the record on September 19, 2007, this Court finds that the Amended Complaint fails to plead individual tortious acts allegedly committed by each individual defendant with any specificity.

Accordingly, the motion is granted to the extent of dismissing the sixth and seventh causes of action entirely and the eighth cause of action as against the individual defendants.

Defendants next argue that plaintiff's claims against the managing agent must also be dismissed because the managing agent was acting at all times as an agent for a disclosed principal (i.e., the co-op).

Plaintiff opposes this branch of the motion on the ground that the managing agent treated him and his wife less favorably than other shareholders in the building by denying them access to the public portions of the roof. Plaintiff further claims that the managing agent 'unilaterally' compelled plaintiff to dismantle his roof garden which, according to plaintiff, had been enjoyed by other tenant-shareholders for years, and to remove all of his belongings from the roof.

Plaintiff claims that at the same time, the managing agent permitted other shareholders, as well as the superintendent, to continue using the roof for their own personal enjoyment, and permitted other shareholders, including four board members, to retain equipment on the roof.

However, plaintiff admits that the managing agent's actions were taken with prior notice to and approval of the Board. Moreover, plaintiff has not pleaded or shown circumstances that would demonstrate that the managing agent owed him a duty or that it was affirmatively negligent. See, Pelton v. 77 Park Ave. Condominium, supra at 11-12. Therefore, that portion of the motion seeking to dismiss plaintiff's claims against the managing agent is granted.

Plaintiff alleges in his eighth cause of action against the co-op for tortious interference with a prospective business advantage that the Board maliciously interfered with and thwarted a proposed contract of sale in 2004 between plaintiff and a prospective purchaser of his cooperative apartment, by failing to properly maintain and repair the building.

To establish such a claim [for tortious interference], a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff (citations omitted). 'Wrongful means' includes physical violence, fraud, misrepresentation, civil suits, criminal prosecutions and some degree of economic pressure, but

more than simple persuasion is required (citation omitted).

Snyder v. Sony Music Entertainment, Inc., 252 A.D.2d 294, 299-300 (1st Dep't 1999).

Defendants contend that plaintiff has failed to establish that the purchaser backed out of the deal solely as a result of the co-op's actions or inactions, or to outline any timetable or information about the repairs which would have been necessary for said sale. Moreover, the Amended Complaint fails to allege sufficient facts to establish that said interference was accomplished through "wrongful means" or for the sole purpose of harming plaintiff.

Accordingly, that portion of the motion seeking to dismiss the eighth cause of action against the co-op is granted.

Defendants next argue that the fourth and fifth causes of action, which seek damages against the co-op for breach of the covenant of quiet enjoyment and partial constructive eviction, respectively, must be dismissed because they are duplicative of plaintiff's causes of action for breach of the proprietary lease and breach of the warranty of habitability.

Although plaintiff argues the Amended Complaint properly asserts these causes of action in the alternative, this Court finds that

[p]laintiffs' causes of action for 'constructive eviction' are dismissible as duplicative of those for breach of the covenant of quiet enjoyment (citation omitted), and their cause of action for breach of the lease is dismissible as duplicative of those for breach of the covenant of good faith and fair dealing and the covenant of quiet enjoyment.

See, Phoenix Garden Restaurant, Inc. v. Chu, 245 A.D.2d 164, 166 (1st Dep't 1997).

Therefore, that portion of the motion seeking to dismiss the fourth and fifth causes of action against the co-op is granted.

A pre-trial conference shall be held in IA Part 12, 60 Centre Street, Room 341 on January 16, 2008 at 9:30 a.m.

This constitutes the decision and order of this Court.

Dated: December 6, 2007


Barbara R. Kapnick
J.S.C.

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BARBARA R. KAPNICK
J.S.C.