

Branscombe Invs., Ltd. v Board of Mgrs. of Olympic Tower Condominium
2008 NY Slip Op 30334(U)
January 22, 2008
Supreme Court, New York County
Docket Number: 0603543/2005
Judge: Doris Ling-Cohan
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. DORIS LING-COHAN
Justice

PART 36

Branscombe Investments Ltd.

INDEX NO. 603543/05

MOTION DATE _____

- v -

Bd. of Mgrs of the Olympic Tower Condominium

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Summary judgment

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 *by defendants' for summary judgment is consolidated for disposition with motion sequence #002 (plaintiffs' motion to disqualify defendants counsel) + decided in accordance with the attached memorandum decision.*

FILED

FEB 01 2008

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 1/22/08

[Signature]
HON. DORIS LING-COHAN J.S.C.

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: IAS PART 36

-----X
BRANSCOMBE INVESTMENTS, LTD., MUNRO
BANK, and AVRA BANK,

Plaintiffs,

Index No. 603543/05

Motion Seq. 001 & 002

- against -

BOARD OF MANAGERS of the OLYMPIC TOWER
CONDOMINIUM, EMECO NEW YORK, LTD.,
and ABBAS ABDULAZIZ,

Defendants.

-----X

LING-COHAN, J.:

Motion sequence numbers 001 and 002 are consolidated for disposition. In motion sequence number 001, defendants move for summary judgment dismissing the complaint. In motion sequence number 002, plaintiffs move to disqualify defendants' attorneys and to dismiss the counterclaims.¹

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

¹ The Court notes that it expended significant efforts to settle this matter, to no avail. As the parties are neighbors (or at least former neighbors) in a residential building, settlement, rather than litigation is the preferred method for resolving any differences. As aptly noted by former President Abraham Lincoln:

"Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often a real loser -- in fees, expenses, and waste of time. As a peacemaker the lawyer has a superior opportunity of being a good man. There will still be business enough."

Abraham Lincoln, Notes for a Law Lecture, July 1850. See <http://showcase.netins.net/web/creative/lincoln/speeches/quotes.htm>

This case concerns allegations that a resident of a condominium unit maintained surveillance devices in the common hallways that recorded his neighbors' movements and conversations. Plaintiffs consist of the record owner of units 46C and 47C, on the 46th and 47th floors respectively (Branscombe Investments, Ltd), and the beneficial owners, a married couple (Munro and Avra Bank), with children. Defendants consist of the record owner of units 46A, 46B, 46D, 46E, 46F, 47A, 47B, 47D, 47E, and 47F, Abbas Abdulaziz ("Abdulaziz), the beneficial owner and resident, and the Board of Managers (Board) of the condominium. Only plaintiffs and Abdulaziz own units on the 46th and 47th floors. It is not disputed that plaintiffs obtained a lessee for their unit in January 2006, and no longer reside in the subject building.

The Banks moved into the building in 2000. Abdulaziz purchased his unit in March 2001. Plaintiffs allege that in 2004, plaintiffs discovered that Abdulaziz had installed cameras and eavesdropping equipment in the common hallways of the 46th and 47th floors, in violation of state and federal law. Plaintiffs further allege that Abdulaziz installed entry doors that do not match the other entry doors in the condominium, and placed furnishings in the common hallways. Plaintiffs maintain that all of the complained-of actions are contrary to the condominium rules and by-laws and that the Board wrongly approved Abdulaziz's actions. Plaintiffs seek removal of the surveillance devices and damages for the violation of their privacy rights and the reduced value of their property.²

In their motion for summary judgment, defendants claim that the cameras installed by

² The Court notes that plaintiffs seek damages of "not less than \$20 million" on four (4) of their five (5) causes of action, in addition to punitive damages of over \$30 million.

Abdulaziz in the common hallways provide a view only of the space in front of his doors and are incapable of viewing other areas of the hallways. Defendants further argue that the Board's decision to allow what they refer to as camera door viewers is subject to the business judgment rule and may not be reviewed by the court.

The affidavits of the Board Vice-president and Abdulaziz allege as follows. When Abdulaziz purchased his unit, already mounted in the hallway ceilings on the 46th and 47th floors were ten (10) security cameras and two (2) intercom speakers, which had been installed by the predecessor owner, and which were present prior to the purchase by the Banks of their unit. Abdulaziz alleges that he did not use any of the previously installed cameras and speakers. He did not purchase or otherwise assume the systems to which those devices were attached; instead, Abdulaziz installed his own viewing system. He placed a dome-like camera door viewer in the ceiling above each of his three main entry doors in the hallways. The cameras are connected to a closed circuit television system (CCTV) in Abdulaziz's residence. Abdulaziz alleges that the three cameras only view what is immediately in front of his doors. They have no view of the parts of the hallways traversed by the Banks, nor their visitors. None of Abdulaziz cameras have microphones or audio capabilities of any sort. Moreover, Abdulaziz states in his affidavit that he has never used any devices to view, record, transmit, or listen to his neighbors' conversations or movements, or that of their children or guests.

Beginning in 2004, the Banks complained to the Board that Abdulaziz had placed audio and video recording devices in the common hallways of the 46th and 47th floors. They also complained about the non-conforming doors and the furnishings in the hallways. The Board communicated with Abdulaziz. In response to the Board's directions, Abdulaziz alleges that he

removed the furnishings and the previously installed cameras from the hallways of the 46th and 47th floors, except for two previously installed cameras that were embedded in the ceilings.

The Board approved the camera door viewers that Abdulaziz had installed above his doors. The Board approved the non-conforming doors, pending the renovation of the hallways. According to the Board Vice-president, the same approval was extended to the Banks's entry doors, which are also non-conforming. The parties do not expressly state how Abdulaziz's and the Banks's doors differ from the other doors in the condominium, except that they allege that Abdulaziz's doors are equipped with card access systems.

The Banks continued to express concerns that they were being spied upon, and in July 2005, the Board retained the investigative firm of Kroll Schiff & Associates ("Kroll"). Kroll came to the building four times, issuing a written report each time. Two of the visits included entry into Abdulaziz's apartment to examine the surveillance equipment. According to Kroll's reports, which defendants include with their papers, Kroll determined that: 1) the three camera door viewers, installed in the ceilings above Abdulaziz's main entry doors, were the only working cameras on the 46th and 47th floors; 2) a fourth camera found on the 46th floor and a fifth on the 47th floor were non-functional and not attached to any video system; 3) the three camera door viewers that Abdulaziz installed were attached to his CCTV system; 4) the door viewer on the 46th floor provided a view up to six feet from the front of the door; 5) the one on the 47th floor provided a view up to two and a half feet from the front of the door; 6) the other one on the 47th floor provided a view up to seven feet from the front of the door; and 7) each camera could see only the area immediately surrounding the door, and did not provide a view of the Banks's entryways or the path between the elevators and the Banks's entryways.

Kroll performed a technical surveillance investigation on the 46th and 47th floors employing thermal imagers and several other kinds of equipment. Kroll found no clandestine surveillance equipment. Kroll did find intercom speakers, one on each floor. Kroll determined that the speakers were part of an old security system that had not been in use recently, and were not connected to any operable intercom master station or any functioning system. Kroll permanently removed the two non-functioning cameras and the two intercoms.

Kroll concluded that the door viewers provided very limited fields of view, that they could not be used to monitor activity at the neighbors' doors or along any shared corridors to the elevator, that they had no ability to pan, tilt, zoom or provide additional views, and that they had no local motion detection or audio recording features.

The foregoing is evidence of defendants' contentions that the camera door viewers provide limited fields of view, and that Abdulaziz has never maintained surveillance devices that could watch or listen to his neighbors in the common hallways. In opposition, plaintiff Munro Bank's affidavit insists that Abdulaziz conducted surveillance of he and his family. Plaintiffs fail, however, to submit any evidence or additional facts to support their claims. Plaintiffs fail to even address Kroll's report in the submitted papers.

Generally, issues of fact and credibility may not be determined on a motion for summary judgment (*Santos v Temco Serv. Indus., Inc.*, 295 AD2d 218, 218-219 [1st Dept 2002]). However, when the proponent of the motion alleges material facts and supports them with admissible evidence and the opponent does not deny the facts, they are deemed admitted (*Kuehne & Nagel v Baiden*, 36 NY2d 539, 544 [1975]; *Johnsen v ACP Distribution., Inc.*, 31 AD3d 172, 179 [1st Dept 2006]; *Schneider Fuel Oil, Inc. v DeGennaro*, 238 AD2d 495, 496 [2d Dept 1997]).

Moreover, conclusory and unsubstantiated assertions of facts are insufficient to show the existence of factual disputes (*Dembitzer v Chera*, 305 AD2d 531, 532 [2d Dept 2003]). Here, plaintiffs' conclusory statements do not raise any factual issues as to the capability of the cameras, as asserted by the Kroll investigative firm. Therefore, the summary judgment motion will be determined based on defendants' undisputed contentions about the cameras: that they are door viewers that cannot and have not been used to watch or listen to plaintiffs.

Plaintiffs' first cause of action alleges that defendants violated Real Property Law § 339-j, which provides that each condominium owner must comply strictly with the by-laws and with rules and decisions adopted pursuant thereto. Plaintiffs allege that the following rules were allegedly violated: 1) that corridors should only be used to enter and exit units; 2) that all radio, television, or other electrical equipment installed or used in a unit must comply with all the rules of public authorities having jurisdiction; and 3) that no unit owner shall interfere with the rights or comforts or conveniences of other unit owners. Plaintiffs further allege that the Board violated the by-laws in that it failed to properly attend to the upkeep and care of common elements, failed to enforce the obligations of unit owners to contribute to the sound management of the condominium, failed to levy fines against defendants for violating rules, failed to enforce the by-law banning objects from being placed in the vestibules, and failed to exercise its power of removing or abating any structure in a unit that exists contrary to the by-laws or laws.

Defendants maintain that the business judgment rule protects the Board's decision to allow the door viewers and the non-conforming doors. The business judgment rule limits the court's power to pronounce upon the decisions made by a condominium's board of managers (*Quinones v Board of Managers of Regalwalk Condominium I*, 242 AD2d 52, 54 [2d Dept

1998]). Pursuant to the rule, the court is to question only whether the board's action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium (*id.*). If the answer to these questions is yes, the court's inquiry stops. To obtain further judicial review of a board's decision, a complainant must present evidence that the board acted in bad faith, that it deliberately singled the complainant out for disparate treatment, that the board did not act upon proper notice (*Smukler v 12 Lofts Realty, Inc.*, 178 AD2d 125, 125 [1st Dept 1991]), or that the board demonstrated fraud, self-dealing, unconscionability or other misconduct (*Frisch v Bellmarc Mgt., Inc.*, 190 AD2d 383, 389 [1st Dept 1993]).

The affidavit of Barry L. Wray, the Board's Vice-president, states that, on or about January 29, 2004, after the Banks complained, he wrote to Abdulaziz asking him to remove security cameras, card access systems, and planters from the hallways on the 46th and 47th floors. The Vice-president wrote again on February 6, 2004, requesting that Abdulaziz meet with a member of the Board to discuss the alterations in the hallways. On February 17, 2004, the Board's attorney wrote directing Abdulaziz to remove the same items from the hallways.

The Vice-president states that Abdulaziz, the Board president, and a member of the Board met on March 10, 2004. Thereafter, the Board president conferred with the rest of the Board, and wrote a letter to Abdulaziz. The Board president's April 26, 2004 letter stated that the Board discussed Abdulaziz's concerns at a meeting. The letter expressed the Board's desire to balance Abdulaziz's security concerns with the Banks's privacy concerns. The Board determined that Abdulaziz could maintain one camera at each main entry door, that the cameras would have to serve only as the "functional equivalent" of door viewers, and just focus on the area immediately in front of the doors, and not the other side of the hallway. Thereupon, as stated above,

Abdulaziz removed eight of the cameras that had been installed by a previous owner. Kroll removed the remaining two cameras and the intercoms.

Upon the submitted papers, the Board has established that it acted properly, in good faith, and in furtherance of the legitimate interests of the condominium. The evidence indicates that the Board quickly addressed the Banks' concerns, by directing Abdulaziz to remove surveillance devices and hiring Kroll to investigate the Banks' concerns. The evidence fails to show that defendants violated Real Property Law § 339-j, as alleged in plaintiffs' first cause of action; thus, a prima facie showing has been established to warrant dismissal.

In opposition, Munro Bank's affidavit indicates that he "understand[s]" that the Board never voted on or otherwise approved the installation and use of the spy equipment. However, the president's April 26, 2004 letter, as introduced by the Vice-president's affidavit, indicates that the Board approved the installation. In any event, plaintiffs have not established that voting or any particular style of decision making was required by the Board; nor has a factual issue been raised with respect to plaintiffs first cause of action against defendants.

Bank also alleges that the Board has no minutes for the meeting during which it purportedly approved the camera door viewers. Real Property Law § 339-v (d) states that condominium by-laws must include provision for "a secretary who shall keep a record wherein actions of such board and of meetings of the unit owners shall be recorded." The Board is obligated to keep records of its meetings. However, a failure to do so does not necessarily compromise a board of managers' authority to act (*see Board of Mgrs. of Madison Med. Bldg. Condominium v Rama*, 249 AD2d 140, 141 [1st Dept 1998]; *Caruso v Board of Mgrs. of Murray Hill Terrace Condominium*, 146 Misc 2d 405, 408-409 [Sup Ct, New York County 1990]).

Given the circumstances here, the Board's authority to approve the doors would not be compromised by omitting to take minutes of a meeting. Plaintiffs have not put forth any evidence of wrongdoing on the Board's part, nor any evidence that plaintiffs suffered injuries. There is no evidence that plaintiffs were singled out for mistreatment or that Abdulaziz was singled out for positive treatment. The fact that only Abdulaziz has camera door viewers, by itself, is not an indicator of bad faith or favorable treatment. It is significant that, prior to the purchase by the Banks of their unit, security cameras in fact existed in the hallways, which were installed by the predecessor owner, and not Abdulaziz.

As for the non-conforming doors, the Banks do not deny defendants's allegation that their doors are also non-conforming and have been allowed to remain, pending the renovation of the hallways. Again, there is no evidence that the Board is showing favoritism to Abdulaziz, or that the Board violated the rules or by-laws.

Based upon the above, summary judgment is granted in favor of defendants upon plaintiffs' first cause of action.

The second cause of action alleges violation of Real Property Law § 339-k, that no unit owner shall do any work which would jeopardize the soundness or safety of the property or reduce the value. As "evidence that the value of their unit has been reduced, plaintiffs submit a letter from a realty firm. [*See Exh. C, Affirmation of R. Scott Greathead in Support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment*]. The letter states that their apartment will not sell as long as there are cameras invading the privacy of the common areas of the corridors. The letter, however, is unsworn and not in admissible form and therefore cannot be considered (*see Zuckerman v City of New York*, 49 NY2d 557 [1980]). Moreover, the letter is

based on plaintiffs' original contention that their neighbor was spying on them. However, it has been established that spying or invasion of privacy did not take place. In addition, plaintiffs do not deny defendants' allegation that plaintiffs have rented their unit for \$37,000 a month. Thus, as plaintiffs failed to raise an issue of fact with respect the alleged reduced value of the property, defendants are entitled to summary judgment of dismissal of plaintiffs' second cause of action.

The complaint further alleges, not in any particular cause of action, that defendants violated Penal Law § 250.05, which forbids persons from unlawfully engaging in "wiretapping, mechanical overhearing of a conversation, or intercepting or accessing of an electronic communication." As stated previously, there is no evidence of such activity on defendants' part. In addition, plaintiffs have not established the availability of a civil cause of action based on violations of such criminal statute (*see generally Sheehy v Big Flats Community Day, Inc.*, 73 NY2d 629, 633-634 [1989]). Thus, summary judgment is granted in favor of defendants on plaintiffs' claim based upon Penal Law §250.05.

The third cause of action seeks damages pursuant to a federal statute, 18 USC § 2520, which authorizes civil damages for violations of 18 USC § 2511, entitled "[i]nterception and disclosure of wire, oral, or electronic communications prohibited." Here, no evidence has been submitted that defendants violated such statutes. Thus, defendants are entitled to summary judgment on plaintiffs' third cause of action.

The fourth cause of action alleges that defendants intentionally interfered with plaintiffs' prospective business relations; plaintiffs claim that because of the cameras, they were not able to sell or lease their apartment. A cause of action for tortious interference with prospective contract requires an allegation that plaintiff would have entered into an economic relationship with a third

party, but for the defendant's wrongful conduct (*Vigoda v DCA Productions Plus, Inc.*, 293 AD2d 265, 266 [1st Dept 2002]). Wrongful conduct includes physical violence, fraud, and lawsuits (*American Para Professional Sys., Inc. v Hooper Holmes, Inc.*, 13 AD3d 167, 169 [1st Dept 2004]). In addition, there must be an allegation of a specific prospective relationship that defendants prevented (*Business Networks of New York, Inc. v Complete Network Solutions, Inc.*, 265 AD2d 194, 195 [1st Dept 1999]). Here, plaintiffs failed to allege facts sufficient to support plaintiffs' fourth cause of action, or raise a factual issue with respect to such claim, in the submitted papers. As stated previously, nor have plaintiffs denied defendants' claim that plaintiffs have rented their unit for the monthly rate of \$37,000.00. Therefore, defendants are granted summary judgment on plaintiffs' fourth cause of action.

The fifth cause of action states that the Board acted arbitrarily and capriciously by initially seeking to remove the spy devices and then abandoning those efforts. Based upon the undisputed facts before this Court, such cause of action is worthy of dismissal on summary judgment. At best, the record shows that the Board changed its mind after discovering that the Abdulaziz's camera door viewers were not being used as spy devices.

Plaintiffs argue that defendants' motion should not be granted because they have not conducted discovery. Ordinarily, summary judgment will not be granted before the parties have had a chance to conduct discovery. In this case, however, plaintiffs have not provided any basis, other than speculation, for this Court to conclude that discovery will yield information inconsistent with the affidavits provided by defendants (*see Gruppo v London*, 25 AD3d 486, 487 [1st Dept 2006]). Plaintiffs do not allege anything that would tend to support their claims that defendants acted wrongly or that plaintiffs were injured. The lack of disclosure does not

preclude summary judgment in this case (*see Jean v Zong Hai Xu*, 288 AD2d 62, 62 [1st Dept 2001]). Thus, summary judgment is granted in favor of defendants, as detailed above.

Plaintiffs' motion seeks to disqualify defendants' counsel from representing any of the defendants or, alternatively, from representing Abdulaziz. Plaintiffs also move to dismiss the counterclaims. The first counterclaim alleges that plaintiffs have caused discomfort and inconvenience to Abdulaziz and violated condominium rules by allowing their children to play hockey and football in the common hallways, and seeks \$1 million in damages. According to plaintiffs, this is a baseless and frivolous claim made with the sole purpose of harassing them and in retaliation. Munro Bank asserts that the Banks never received any complaints regarding the alleged behavior.

In opposition, Abdulaziz only states that the children's activities constituted a nuisance that caused him great discomfort and inconvenience. The elements of a cause of action for a private nuisance are: (1) an interference, substantial in nature; (2) intentional in origin; (3) unreasonable in character; (4) with plaintiff's right to use and enjoy land; (5) caused by the defendant's conduct (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977]). Defendants' conclusory allegations do not state a cause of action for nuisance. In addition, it is undisputed that that the Board never gave the Banks notice of this claim, prior to this lawsuit. Thus, the first counterclaim is dismissed.

The second counterclaim is for the Board's attorneys' fees. Under the by-laws, if a unit owner sues the Board for violation of condominium rules and receives an adverse determination or the complaint is dismissed, the Board is entitled to recover its attorneys' fees and disbursements from the plaintiff. Here, plaintiffs seek to dismiss the counterclaim on the ground

that such a request cannot constitute a separate cause of action. A separate cause of action for attorneys' fees, however, is in fact permissible (*see Sagittarius Broadcasting Corp. v Evergreen Media Corp.*, 243 AD2d 325, 326 [1st Dept 1997]).

Moreover, based upon the above decision which dismisses the complaint in favor of defendants, and the applicable by-laws, defendants are entitled to attorneys' fees. Thus, within 30 days of entry of this order, defendants are directed to serve papers in support of their claim for attorneys' fees. Plaintiffs shall respond to defendants' submissions within 21 days of receipt, with any objections to the fees/services claimed by defendants, with specificity.³ The Court will make a determination based upon such submissions, or, if necessary shall schedule a hearing with respect to any disputed fees. Alternatively, defendants may receive the costs and disbursements associated with the expense of their motion, without any further submissions.

Failure to timely submit papers, as provided herein, will constitute a waiver or default on the attorneys' fees claim, as appropriate.

Plaintiffs' motion to disqualify defendants' counsel on the grounds that a conflict of interest exists between the Board and Abdulaziz, and that defendants' counsel is a necessary witness to plaintiffs' case, is denied as moot, since all the causes of action and counterclaims have been dismissed (*see Tally v 885 Real Estate Assoc.*, 11 AD3d 242, 242 [1st Dept 2004]).

Based upon the above, it is

ORDERED that defendants' motion for summary judgment is granted (motion sequence number 001) and the complaint is dismissed with costs and disbursements to defendants as taxed

³ Defendants' counsel shall sent submissions to the Court in one packet, to Part 36, Supreme Court, Room 279, 80 Centre Street, NY, NY 10013, with a copy of this order attached on top; Attn: Donna Albano.

by the Clerk of the Court upon the submission of an appropriate bill of costs; and it is further

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

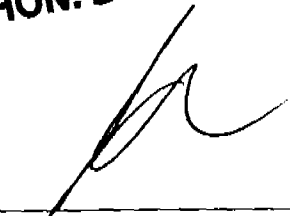
ORDERED that plaintiffs' motion (motion sequence number 002) to dismiss the counterclaims and disqualify defendants' attorney is granted as to the first counterclaim which is dismissed, and is otherwise denied; and it is further

ORDERED that defendants' second counterclaim which seeks the recovery of attorneys' fees is severed pending timely submissions of additional papers as provided above; such issue shall be determined by the Court; and it is further

ORDERED that within 14 days of entry of this order, defendants shall serve a copy upon plaintiffs with notice of entry.

HON. DORIS LING-COHAN

Dated: January 22, 2008



Hon. Doris Ling-Cohan, J.S.C.

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