

Infantino v Shahani

2008 NY Slip Op 31921(U)

July 2, 2008

Supreme Court, New York County

Docket Number: 0102842/2007

Judge: Judith J. Gische

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: _____

PART 10

Justice

Index Number : 102842/2007

INFANTINO, CARMINE

vs.

SHAHANI, LILA R.

SEQUENCE NUMBER : 002

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

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

FILED
JUL 10 2008

COUNTY CLERK'S OFFICE
NEW YORK

JUL 07 2008

Dated: _____



J.S.C.

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):

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10**

-----X
Carmine Infantino,

Plaintiff,

-against-

Lila R. Shahani, Mark Downey, Turtle Bay
House, LLC, Charles H. Greenthal
Management Corp., *et al*

Defendants.
-----X

DECISION/ ORDER
Index No.: 102842/07
Seq. No.: 002

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of
this (these) motion(s):

Papers	Numbered
Def Greenthal n/m §3212 w/BJM affirm, exh	1
Pltf Cl opp w/Cl affid, JS affirm, exh	2
Def Greenthal reply w/VK affid, exh	3
Transcript 5/8/08	4

FILED
JUL 10 2008
COUNTY CLERK'S OFFICE
NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

This is an action by plaintiff Carmine Infantino against Lila R. Shahani and others, including Charles H. Greenthal Management Corp., the managing agent ("Greenthal") of the residential condominium where they both live. The managing agent now moves for summary judgment dismissing the complaint against it. Issue was joined by the moving defendant. Plaintiff has yet to file the note of issue, therefore this motion is timely and will be decided on the merits. CPLR § 3212; Brill v. City of New York, 2 NY3d 648 (2004).

Previously, in a short form order dated February 7, 2008, this case was

consolidated with Infantino v. Wolaner and Leticia Shahani under Index No. 115362/05 (see also Order filed 4/3/08). This motion was brought, however, before the consolidation and therefore only "exists" under now disposed index number 102842/07. Therefore the court will file a copy of this decision/order under each index number for cross referencing.

This action has been discontinued against defendant Robin Wolaner a/k/a Robin Wolander, but it continues against the other named defendants, all of whom have apparently appeared in this action. The only party opposing the managing agent's motion is the plaintiff¹. None of the other parties have taken any position on the motion.

The court's decision is as follows:

Arguments presented

Mr. Infantino is the rent stabilized tenant of apartment 9J located at 249 East 48th Street, New York. Apartment 9J is located directly below, and is identical to, apartment 10J. Apartment 10J is a residential condominium unit presently occupied by Lila R. Shahani ("Ms. Shahani") and Mark Downey. Leticia Shahani is Ms. Shahani's mother and the owner of 10J. Turtle Bay House LLC ("Turtle Bay") owns the building which is managed by Greenthal. Turtle Bay is also the sponsor, and owner of apartment 9J.

Mr. Infantino asserts five (5) causes of action. The first cause of action is asserted against Greenthal, and therefore the subject matter of this motion by it for summary judgment. Mr. Infantino alleges that Ms. Shahani is a noisy upstairs neighbor

¹In connection with a prior cross motion by Greenthal, also for summary judgment, which was withdrawn before this motion was brought, plaintiff sought Part 130 sanctions. Although sanctions are addressed by Greenthal, plaintiff agrees that application raised in opposition, and not by motion, is not before the court to decide at this time.

[* 4]

and that the vibrations caused by her activities, including hauling around furniture and dropping heavy objects, have damaged his apartment. The damages alleged include a cracked wall unit/ bookcase, a stains from a seeping liquid substance. According to Mr. Infantino, Ms. Shahani is required to, but does not, have floor covering. Despite complaints to management, Mr. Infantino claims the noise and vibrations have continued relentlessly. The claims against Greenthal are that the managing agent owes him a fiduciary duty and that it has breach this duty by failing to address his complaints, enforce house rules about floor covering, and repair the physical damages sustained to his apartment².

In support of its motion for summary judgment, Greenthal relies upon the Turtle Bay House Condominium By-Laws ("by-laws") and Greenthal's management agreement with Turtle Bay made March 31, 1987, as modified ("management agreement"). Greenthal also offers the affidavit of Victor Kavy, its account executive. Greenthal argues that as a matter of law, Mr. Infantino lacks standing to enforce the by-laws because he is a rent stabilized tenant, and not a unit owner. Further, Greenthal argues that there is no privity between itself and Mr. Infantino, and therefore no duty to support a breach of fiduciary duty claim against it.

Greenthal also contends that it is the agent of a disclosed principal (Turtle Bay) and there cannot be liable for actions taken (or not taken) while acting within the scope of its authority. Mr. Kavy states that any renewal leases for apartment 9J were signed by Greenthal in that capacity.

Mr. Infantino argues that it is precisely because Greenthal is the managing agent

²The claims against Turtle Bay (2nd cause of action) are virtually identical.

[* 5]

for Turtle Bay that has standing to assert a claim against the managing agent. He argues that although the management agreement expressly excludes services to "purchasers of occupied units in the building," (management agreement ¶13), he is rent stabilized non-purchasing tenant of Turtle Bay, and therefore not within that exception, but protected under ¶ 2 (k) of the agreement, requiring Greenthal to "attend to complaints of Unit Owners, tenants, and subtenants." Alternatively, Mr. Infantino argues he is at least the 3rd party beneficiary of that agreement, even if he is not a party thereto.

Mr. Infantino separately argues since discovery is not yet completed in this case the motion is premature.

Discussion

At the outset, the court considers whether, as Mr. Infantino argues, Greenthal's motion is premature and should be denied because discovery is incomplete. CPLR § 3212 (f). Not only has plaintiff failed to describe what information he needs to oppose Greenthal's motion that he does not presently have [Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 (1st dept. 2004); Global Minerals and Metals Corp. v. Holme, 35 AD3d 93 (1st dept 2006) (internal citations omitted)], this motion presents issues of law. When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing. See: Hindes v. Weisz, 303 A.D.2d 459 (2nd Dept 2003). Therefore, the court disagrees with plaintiff that this motion is premature and will decide on the record before it.

While each side wrangles over whether Mr. Infantino's apartment is owned by

the sponsor or the condominium board, this is a distinction without a difference. There is no dispute that Greenthal is the managing agent for the building. The more important issue is whether Mr. Infantino, a non-party to the management agreement between the Turtle Bay and Greenthal has the right to assert claims against the managing agent. The answer is two fold.

An agent is not liable to a third party for nonfeasance of duties that were delegated to it by its principal, but only its "affirmative acts of negligence or other wrongs." Greco v. Levy, 257 A.D. 209, 211 (1st Dept 1939) *affd* 282 N.Y. 575 (1939). Thus, the management agreement Turtle Bay and Greenthal protects Greenthal from direct liability, provided it was exercising its obligations thereunder (even if imperfectly). On the other hand, if there is evidence tending to show that Greenthal undertook duties or obligations, other than on behalf of its principal, then the claims against Greenthal defeat defendant's motion for summary judgment. Pelton v. 77 Park Ave. Condominium, 38 A.D.3d 1 (1st Dept 2006). Since Mr. Infantino further contends that he and Greenthal have a fiduciary relationship, and therefore, the failure to address his noise violations are a breach of those duties, not only does he have to establish such a relationship of trust and confidence exists, but also that there is some tortious conduct on the part of the breaching party. Kravtsov v. Thwaites Terrace House Owners Corp., 267 A.D.2d 154 (1st Dept.1999). For the reasons that follow, the court finds that there is no fiduciary relationship between Mr. Infantino and Greenthal, but even if there were such a relationship, plaintiff has failed to set forth issues of fact whether the agent engaged in tortious conduct.

The managing agent is a fiduciary as to the condominium, but not as to the

individual unit owners. Caprer v. Nussbaum, 36 A.D.3d 176 (2nd Dept 2006). Mr. Infantino is not a unit owner, but a statutory tenant. In any event, Mr. Infantino's claims are that management failed to take his complaints seriously, and therefore, ignored them. The letters, however, that plaintiff himself provides to this court in opposition show that Greenthal did, in fact, address his complaints. Even assuming the responses were imperfect, or not to Mr. Infantino's satisfaction, they do not rise to the level of a tort.

In the alternative, Mr. Infantino contends he is the third party beneficiary of the management agreement, relying on certain provisions in that agreement. A party asserting rights as a third-party beneficiary must establish "(1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost." State of California Public Employees' Retirement System v. Sherman & Sterling, 95 NY2d 427, 435 (2000); Edge Management Consulting, Inc. v. Blank, 25 AD3d 364 (1st Dept 2006). At best, Mr. Infantino is an incidental beneficiary of the agreement, not a third party beneficiary.

In connection with this motion for summary judgment Greenthal has the burden of showing its entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 (1985). Once met, this burden shifts to the opposing party to demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d

557 (1980). A party may not defeat a motion for summary judgment with bare allegations of unsubstantiated facts. Zuckerman v. City of New York, supra at 563-64.

Greenthal has proved it is the disclosed principal for Turtle Bay. It has also proved that Mr. Infantino's claims come within the scope of the management agreement Greenthal has with the sponsor and the condominium. Thus, Greenthal has also proved that even assuming it negligently executed those duties, it is answerable to its principal (Turtle Bay), and not Mr. Infantino. Although Mr. Infantino contends he is the intended beneficiary of the contract between Greenthal and Turtle Bay, the facts necessary to establish such a claim are missing. While he may be the incidental beneficiary of the agreement, the agreement was not entered into for his direct benefit, but for the benefit of Turtle Bay. Mr. Infantino has failed to raise issues of fact that require a trial as to this moving defendant. Although discovery is incomplete, the issues before the court are issues of law which do not rely on unresolved issues of fact. Therefore, defendant Greenthal's motion must be granted and the claims in the complaint against it dismissed. The clerk shall enter judgment in favor of defendant Charles H. Greenthal against plaintiff.

Though Greenthal and Mr. Infantino heatedly argue whether Greenthal should be sanctioned, any request for sanctions is denied. Not only were sanctions first raised in connection with a now withdrawn cross motion, there is simply no basis for them to be imposed. Although plaintiff argues this motion by Greenthal is without basis, and premature, the court has decided otherwise.

Conclusion

Defendant Greenthal's motion for summary judgment is granted. The clerk shall

enter judgment in favor of defendant Charles H. Greenthal against plaintiff.

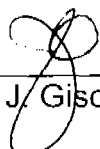
Since this motion was brought before this case and Index Number 102842 were consolidated under Index Number 115362, the court will file a copy of this decision/order under each index number for cross referencing.

Any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
July 2, 2008

So Ordered:



Hon. Judith J. Gische, J.S.C.

FILED
JUL 10 2008
COUNTY CLERK'S OFFICE
NEW YORK