Dundy v Hanover River House, Inc.

2008 NY Slip Op 33227(U)

December 1, 2008

Supreme Court, New York County

Docket Number: 108394/06

Judge: Joan A. Madden

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

PRESENT: HON. JOAN A. MADDEN J.S.C. Justice

PART 11

Index Number : 108394/2006
DUNDY, ALISON
vs
HANOVER RIVER HOUSE
Sequence Number : 001
PARTIAL 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: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion and cross-motion are determined in accordance with the annexed decision and order.

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

FILED
DEC 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: December 1, 2008

HON. JOAN A. MADDEN J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[* 2]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

---------------------------------------X

ALISON DUNDY and RICHARD DUNDY,

Plaintiffs,

Index No.: 108394/06

-against-

HANOVER RIVER HOUSE, INC., and
MIDBORO MANAGEMENT, INC.,

Defendants.

---------------------------------------X

FILED
DEC 04 2008
COUNTY CLERK'S OFFICE
NEW YORK

JOAN A. MADDEN, J.

In this action for damages and injunctive relief, plaintiffs are the shareholders and proprietary lessees of apartment 12B at 335 Greenwich Street in Manhattan, defendant Hanover River House, Inc. ("Hanover") is the cooperative corporation that owns the building, and defendant Midboro Management, Inc. (Midboro), is Hanover's managing agent. Plaintiffs are moving for an order pursuant to CPLR 3212 granting partial summary judgment on the issue of liability as to their causes of action for breach of the proprietary lease, for breach of the implied warranty of habitability and constructive eviction.[1] Defendants oppose the motion and are cross-moving for summary judgment dismissing the complaint in its entirety.

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[1]That portion of plaintiffs' motion for summary judgment on their Eighth Cause of Action for an injunction directing defendants to remediate the mold condition in their apartment and to repair the water damaged conditions in the apartment, was granted on consent pursuant to an Interim Order of this court dated May 1, 2008.

The following facts are not disputed, unless otherwise noted. Plaintiffs purchased their cooperative apartment in 1985. Plaintiff Alison Dundy submits an affidavit stating that "from time to time" they experienced leaks when it rained. In April and October 2004, Hanover's engineer/architect, Joseph Humann of Rand Engineering, P.C.,[2] inspected the ongoing work at the building and issued reports which, *inter alia*, recommended the installation of a suspended scaffolding on the exterior east wall of the building to determine the location of the leaks into plaintiffs' bedroom.

Alison Dundy states that "major water infiltration problems began in late 2004," when during a "period of heavy rainfall, a large amount of water cascaded into the apartment, from outside, significantly damaging our bedroom's east wall as well as several of our paintings." On January 25, 2005, Dundy wrote to Hanover's president at the time, Catherine Lanier, and Midboro's account executive assigned to the building, Julie Roberts, advising of the "significant water damage on [their] east bedroom wall resulting from the 'nor-easter' in late 2004. . . . I would like to schedule inspection and repair work and understand that the expense should be borne by the co-op." Dundy received an immediate e-mail response from Roberts, explaining that the

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[2]It is unclear whether Humann is an engineer and/or an architect, since generally, plaintiffs refer to him as an architect, and defendants as an engineer.

"repairs to the east wall have not been completed due to the weather," the repairs are "scheduled to be completed in early Spring, since masonry work cannot be completed in freezing temperatures," and when the building repairs "are completed, we will have the building's contractor make the necessary wall repairs (at the building's expense)."

According to Allison Dundy, during a rain storm on or about March 28, 2005, "massive amount of water again entered the apartment, resulting in further water damage to the east bedroom wall." The following day, Dundy sent an e-mail to Midboro's new account executive for the building, Luisa Pichardo, stating that "[w]e had very significant water damage again through our east bedroom wall in yesterday's storm. The water was flowing down the wall, soaked the mattress, pooled on the window sill and floor. Our home is now on the market to be sold. We request a written letter from Midboro Management stating that the damage to the east wall of this building will be repaired this spring." Pichardo responded with an e-mail that "[w]e advised the building architect regarding the leak, and we requested a scheduled of the work ASAP. Once the exterior repairs are completed, we will schedule [the] contractor to make necessary repairs within your unit."

Two days later, on March 31, 2005, the building's engineer/architect Humann, inspected plaintiffs' apartment and

reported: "It appears that water is entering the master bedroom at the roof slab and traveling down the east wall. Mascon [the contractor] needs to obtain access to the adjacent property along the east facade to hang a suspended scaffold for inspection of this area and subsequent repair."

On April 1, 2005, Alison Dundy received a e-mail from Lanier (Hanover's president), explaining that the

> reason that we didn't get to the east wall last fall is that our neighbors at 16 Jay would not give permission to stage the scaffold drop from their roof - which is necessary to do it. Our contractor is negotiating with them to get this permission now. One way or another we will get in there and do it during the next several weeks. I wanted to get a more definite schedule before I wrote to you, but I certainly am willing to go on record that fixing this leak is the coop's responsibility, and that it is a very high priority for this spring. Your potential buyers should know that waterproofing is something that the board takes very seriously. It is an ongoing maintenance issue in a building like this, that we address on a continuing, if sometimes frustratingly delayed, basis. I will keep you posted as to the repair schedule.

Plaintiffs then asked Lanier for a letter formally acknowledging the coop's responsibility for repairing the building's exterior and the damage within their apartment resulting from the leaks. On April 2, 2005, Lanier sent plaintiffs a letter stating as follows:

> This letter will affirm the coop's responsibility to fix leaks into the building from the outside.
> We are near the end of a major round of waterproofing that included replacing the roof and repairing leaks throughout the building. Included in the contract with the waterproofing company are repairs on the east wall of the building. This drop was not accomplished before the weather got too cold this winter, but is scheduled

for this spring. When this work is being done, the contractors will attend to the area around your easternmost window on the north facade as well. I appreciate your patience in this matter.

On April 28 and May 11, 2005, Alison Dundy e-mailed Pichardo at Midboro, inquiring about the status of the repairs to the bedroom wall. Pichardo responded: "[w]e are still waiting for permission to access the roof at (16 Jay Street). Hopefully by next week, we will have an answer."

On May 23, 2005, Alison Dundy e-mailed Lanier and Pichardo for an update; the next day she received a response from Robert Grant, at Midboro, advising that "we have written an agreement with your neighbor building which covers all their stated concerns" and that they were waiting for confirmation that the agreement had been finalized by that building's board. On May 23, Dundy also received an e-mail from Lanier explaining that "[p]art of what's going on is that we've run through 3 managing agents in the last several weeks. . . . I can appreciate that you are fed up. I'm really ripped about the lack of progress on the east wall and bring it up every time I talk to these guys."

According to Alison Dundy, in

late summer of 2005, the coop did arrange to have its contractor Mascon Restoration, LLC . . . try to perform some repairs to the building's wall outside our apartment. At that time the coop's architect [Humann] rode a crane to inspect the east wall, two workers from Mascon suspended themselves on a wooden platform, secured by a rope to the roof of the building, and applied some mortar to the wall. . . . [A]t or about the same time workers were sent to our apartment by

> Midboro to perform sheet rocking, plastering, priming and painting work.

Plaintiffs allege that Hanover and Midboro "were fully aware that these exterior patchwork repairs were temporary at best, and probably inadequate, although they conveniently chose not to disclose these facts to us at that time." To support these allegations, plaintiffs point to the deposition testimony of Bonnie Yochelson (the board president who succeeded Lanier), that "it was understood by the building at the time that it was not adequate and that it was best, the best we could do under the circumstances."

Plaintiffs also point to Lanier's testimony that in July 2005 a "crane was ordered and the engineer, Joe Humann, rode it to inspect the east wall and determine where the water infiltration was occurring." Lanier also testified that "[w]e were told that they could do a rope drop," and that "repairs [were] made to the area that Joe Humann had specified based upon his observation from the crane." When asked if Rand or any architect inspected those repairs, Lanier answered that she knew there wasn't any inspection because Humann told her that "he wasn't going to go over the edge on the rope scaffolding," because of "safety reasons." Lanier answered, "yes," when asked if she understood that those repairs "by rope . . . were just temporary repairs." She also answered "yes," when asked if "the board still intended to perform more extensive permanent repairs

on the east wall later on." Lanier testified that she thought the Dundys were "very aware of what was going on."

Alison Dundy states that by mid-October 2005, "our bedroom was again immersed with torrents of rainwater, again causing severe damage to the apartment." On October 16 2005, Dundy e-mailed board president Yochelson:

> Our apartment was to go back on the market tomorrow with a new broker but I have had to cancel those plans because water damage again makes it impossible to show or sell our place. The water damage is as extensive as ever: large areas of paint have peeled off the wall, other areas have bubbled and are about to peel, a musty smell of wet plaster threatens health problems with mold. . . I guess it's safe to say that the managing agent's repair to this problem - which took more than one year of constant wrangling - was inept.

Yochelson immediately responded:

> The delays on the east facade and the inadequacy of the repair to your wall are not simply a matter of incompetence. As you know, we have not been given access to our neighbor's roof, which is the precondition of an engineer's survey of the facade. Our effort to get access accounts for much of the delay. When that failed, we repaired your wall locally, but the recent rain shows that a local repair is not enough. We must now go back to our neighbors with this new evidence and insist that we get access, which apparently they are required by law to grant us. Unfortunately this is going to take some time.

That same day, Yochelson e-mailed David Lozano at Midboro, that Dundy "has major leaks again, which is a disaster [that] we can't fix overnight."

On October 18, 2005, Alison Dundy e-mailed Yochelson about the "leaks, peeling paint, falling plaster, and I suspect mold,"

and the problems she was having dealing with Midboro. Dundy states that during rainstorm on October 25, 2005, "huge amounts of water again entered our apartment, pouring down the . . . bedroom wall, soaking our mattress, causing wet plaster to fall on our bed, and causing further damage to the window sill, walls and floors." The next day, Yochelson e-mailed Robert Grant at Midboro that plaintiffs' apartment was "an emergency situation."

Dundy alleges that at this time, "no steps were taken to perform any repairs, even emergency repairs," and the coop took no legal measures "to compel 16 Jay Street to provide access to its roof." Dundy further alleges that

> by this time, my husband Richard had been suffering from a cold or respiratory infection for several months that we suspected was the result of a mold condition in the apartment and/or the building." On October 26, 2005, plaintiffs wrote a letter to Hanover's board of directors, that the "conditions in our apartment are intolerable and repairs cannot be delayed. We were doused by cold water pouring down our bedroom wall at 4:00 a.m. yesterday. . . . We cannot go through another winter like this. It is urgent that the East wall be repaired now. . . . Our health has been compromised.

Also on October 26, plaintiffs and four other shareholders wrote a letter to the board,

> urg[ing] the Board to take immediate action to repair leaks to the East and North walls of our building. It is of upmost important that these leaks be repaired now, in the few remaining weeks before winter sets in and freezing temperatures preclude masonry work and waterproofing work. . . . The structural integrity of the building, as well as the health, quality of life, and financial assets of shareholders are threatened.

On October 31, 2005, board president Yochelson sent Alison Dundy an e-mail that the coop had "resolved to make a 100% effort to work on the east wall now, before the winter" and "[a]s a result, we cannot afford to wait at all for access to 16 Jay's roof, and we need Ken [the coop's attorney] to seek permission for immediate access, by court order if necessary." Plaintiffs assert that no legal action was taken against the neighboring building.

Alison Dundy explains that in October and November 2005, she organized a committee, with the Board's approval, to interview architects and engineers, and make a recommendation for the coop to hire a new architect or engineer "to supervise the project." She explains that one company, FSI Architecture, conducted a site visit at the building and issued a report dated November 21, 2005, expressing "concern[s] that the moisture or water conditions have existed long enough to have caused environmental problems within the affected units," and "strongly recommend[ing] that mold testing be conducted in all units that have experienced water infiltration."

According to Alison Dundy, at that time, the building took no steps to test for mold in her apartment or other areas of the building, but before the end of 2005, Hanover fired Rand, and hired a new architect, Chuck DiSanto of Walter B. Melvin Architects, LLC, "to supervise the east wall repair job that

Hanover still was nowhere near ready to begin."

Dundy further states that in early January 2006, she and her husband "observed more damage to our bedroom wall as a result of rain" and that "both of us were experiencing various physical ailments, including sore, itchy, red eyes, congested nasal and sinus cavities, sore throats, coughs, intermittent rashes, and low-grade fevers." On January 4, 2006, Dundy e-mailed Yochelson and other board members:

> There was more visible water damage to our east bedroom wall as a result of the rain over the last two days. There are new areas of bubbling, cracking, and peeling paint on the east bedroom wall and ceiling. Plaster from the wall beneath the paint cracked and fell on our bed. There are also new areas of discoloration . . . What's the news on a plan and schedule for repairs? Anything further I can do to help move this along.

Yochelson immediately responded that she forwarded Dundy's e-mail to the coop's new architect Chuck DiSanto, who "is drafting a proposal and will apply for permits this month," and the "board decided not to do work without a thorough inspection of the wall, and that won't happen until we have permits."

On January 5 and 11, 2006, Dundy e-mailed Yochelson for an "update on the situation with 16 Jay" and the "projected time frame for DiSanto to inspect the wall and for repair work to begin." Dundy also asked if the "co-op's attorney successfully negotiated terms with the neighbor to stage the scaffolding for inspection and repair," and if not, "are we going to court?" Yochelson responded on January 11, stating that "[w]e rejected

the quick-fix plan of working on the wall incrementally during the cold months," and that they were "working on document production and permits in anticipation of hiring for March when the weather is milder."

On January 26, 2006, Yochelson e-mailed Dundy with an update about the east wall repair. She wrote that she "exchanged emails with Chuck [DiSanto, the architect] yesterday and got a pretty good update [that he] is working on the plans and will put the job out to bid and apply for permits soon." Yochelson also said that DiSanto "expects the work to take place between March and May," and that he "does not feel he needs an initial examination of the wall, so rigging will only have to go up once, not twice, as we had originally thought." As to 16 Jay Street, Yochelson said that the "situation . . . is in flux because Chuck doesn't think he needs access to their roof at all." She included the following quote from DiSanto:

> I am of the opinion that we will be rigging from 335 Greenwich and not from the Jay building roof. We will need to access Jay to protect their roof, however, which they can refuse and we will need to send them a legal letters advising them that they have waived rights to that protection. (I would be surprised if they did that). It will be necessary to access your own building 'private' terraces to do this.

On January 31, 2006, Yochelson e-mailed Dundy, forwarding an e-mail she received from the coop's attorney, Kenneth Jacobs. The attorney explained that he did not think Dundy had "all of the information that we have," and that "[w]e have been asking

for some special access rights that they [16 Jay] were not legally required to give, because that would save 335 Greenwich a lot of money in rigging costs. We could force 16 Jay to give us access, but not the kind of access we wanted. That's why we have to negotiate." The attorney also explained that DiSanto "has given his opinion that we will not need the special access rights; we just need to install protective covering on the roof," which "changes the equation substantially from us negotiating to us 'demanding.'" The attorney noted that "even Chuck [DiSanto] has hedged his opinion, saying we would have to wait until a contractor is selected before we know for sure whether we will need limited access or extensive access."

Based on these e-mails, plaintiffs allege that "it was apparent . . . that the repairs could have been done all along without access to 16 Jay, although in a manner that perhaps would have cost the co-op more in rigging costs."

Alison Dundy states that she and her husband attended a board meeting on February 20, 2006, and expressed their concerns that "visible areas of water damage in the apartment had changed, with new areas of staining, including black spots which appeared to be evidence of mold." Dundy says that she asked the board to inspect their apartment "that same day," but the architect DiSanto did not conduct an inspection until more than a month later, on March 27, 2006.

Dundy explains that while DiSanto was standing on a ladder inspecting the bedroom's east wall, he said. "That is mold." The next day, Dundy e-mailed the board about DiSanto's inspection, stating that the

> black stains on our east bedroom wall is mold, on the inside of our apartment wall, caused by the external leak. There is no point in my bringing a mold abatement person into our apartment until the source of the problem - the leak on the east wall - is repaired. At that time however, I will bring a mold abatement person in and I expect the co-op to pick up the cost of tearing apart the wall, removing the mold, and building a new wall. In the meantime Richard and I will be tested by pulmonologists. Any medical costs incurred by us in this process will also be passed on to the co-op. . . . It is almost April. What is happening with the repairs?

Yochelson immediately responded by an e-mail stating that "[a]t the board meeting this evening I will mention your desire for mold inspection and reimbursements and get back to you." She also explained that she had gotten more bids from DiSanto, which the board would discuss that evening, and that she had asked DiSanto "for a final recommendation on the means of east wall access, but he wants to abstain until we choose a contractor, which should be in the next couple days. The permit process is in progress but not yet complete."

Plaintiffs submit the minutes of the March 28, 2006 board meeting, which indicate that the board reviewed DiSanto's "revised spreadsheet" submitted for the "next round of exterior building repairs." The minutes state that a committee, including

Alison Dundy, would meet with the proposed contractors, and "make a hiring recommendation to the Board," and after the selection of a contractor, "the owners of 16 Jay St. will be notified of the date when we will begin the work and will need access to their property." The minutes, however, mention nothing about mold in plaintiffs' apartment.

On March 31, 2006, plaintiffs received an e-mail from board member, Stuart Gold, explaining that Yochelson had asked him to contact them about their "possible claim relating to alleged mold growth on your east bedroom wall." Gold stated that "[a]lthough we have not received any information that indicates that your situation poses a health hazard, prudence dictates that environmental testing be done immediately and that all affected areas be cleaned as soon as possible thereafter."

Alison Dundy states that they responded to Gold's e-mail by "arranging" for Microecologies, Inc. to conduct environmental testing and inspection of their apartment on April 4, 2006. In a report dated April 21, 2006, Microecologies made the following findings:

> The east wall below the top 12 inches has been covered with sheet rock, and at the interface of the plaster and the sheet rock, two small areas . . . displayed dense levels of visible black mold growth. We took a wipe sample from this mold growth for laboratory analysis, and the enclosed . . . laboratory report . . . indicates the presence of very high levels of fungal (mold) growth at these sites. The mold growth is predominated by *Stachybotrys chartarum*, a potentially highly toxic fungus, exposure to which may be

> associated with severe adverse health effects in humans. . . . We recommend that the sheet rock on this east wall be removed, and that the water damaged painted plaster surfaces behind and above be wet scraped to remove any paint displaying any water damage or mold growth. These surfaces should not be replaced, covered or repainted until the source of the water infiltration is definitively identified and demonstrably corrected. The determination of the source of the water damage is not the responsibility of Microecologies, Inc. and may require the service of an architect, engineer or plumber. If the underlying water damage problems that caused the mold growth on the surfaces described above are not corrected, then mold growth on these surfaces can be expected to recur.

At the April 24, 2006 board meeting, the board approved resolutions "[t]o enter into a contract with Nova Restoration to undertake the repair and restoration project as per specs drawn up by Walter Melvin Associates," and to have Midboro "make a claim with our insurance company related to the conditions in apartment 12B and to Micro Ecology [Microecologies] to do any necessary remediation work while reserving our rights on the $2500 deductible with our insurance company."

The next day Gold e-mailed Alison Dundy about the board's decisions for the coop to "make a claim with its insurer to have the remediation recommended by Microecologies performed," and for the coop to pay for the inspection of the Dundys' apartment.[3] Gold also explained that "the contract for the work on the various walls is with the contractor Nova and we hope to have the

[3]Dundy acknowledges that she received a check in the amount of $525, covering the cost of the inspection.

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necessary permits by the end of next week so work can commence."

According to Alison Dundy, "[i]n the meantime, living in our mold-contaminated apartment had become physically unbearable," as on April 26, 2006, she "awoke with severely swollen lips, red eyes, swollen eyelids, and badly congested." She states that she was examined by an allergist that same day, "tested highly allergic to all molds for which she was tested," was prescribed five medications, and advised "to stay away from the mold." Dundy states that after those "severe allergic reactions" on April 26, "Richard and I could not occupy the bedroom . . . and we slept on the living room floor while searching for temporary housing. Several days later, an internist, Dr. David Hammer, also advised me to move out of the apartment." According to Dundy, by the end of April, they "vacated the apartment," and for "several months we stayed with friends," and for almost two years they have been renting an apartment, because "the co-op has still not abated the mold condition in our apartment."

On May 4, 2006, plaintiffs' attorney wrote to Yochelson, stating that the firm had been retained for the purpose of commencing legal action against Hanover and Midboro, "as a result of the co-op's unconscionable failure to perform building repairs that are urgently necessary to prevent water from entering" plaintiff's apartment. After summarizing the events underlying the action, the attorney wrote: "Please consider this letter to

constitute the notice required by Paragraph 46 of the proprietary lease."[4]

On June 16, 2006, plaintiffs commenced the instant action seeking compensatory and punitive damages, and injunctive relief. The amended complaint asserts a first cause of action against Hanover for breach of the proprietary lease; a second cause of action against Hanover and Midboro for breach of the implied warranty of habitability; a third cause of action against Hanover for negligence; a fourth cause of action against Midboro for negligence; a fifth cause of action against Hanover and Midboro for gross negligence; a sixth cause of action against Hanover for breach of the duty of good faith and fair dealing; a seventh cause of action against Hanover for constructive eviction; an eighth cause of action against Hanover and Midboro for injunctive relief; and a ninth cause of action against Hanover for attorney's fees.

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[4]Paragraph 46 of the proprietary lease is entitled "Notice to Lessor before Action or Counterclaim," and provides in pertinent part as follows:

> The Lessee may not institute an action or proceeding against the Lessor or defend, or make a counterclaim in any action by the Lessor related to the Lessor's failure to pay rent, if such action, defense or counterclaim is based upon the Lessor's failure to comply with its obligations under this lease or any law, ordinance or governmental regulation unless such failure shall have continued for thirty (30) days after the giving or written notice thereof by the Lessee to the Lessor.

The amended complaint alleges that defendants "have willfully disregarded their contractual, statutory and common law obligations owed to Plaintiffs by failing to properly maintain the building and failing to effectuate building repairs that are urgently needed to prevent water from entering Plaintiffs' apartment." The complaint further alleges that "[a]s a result of the massive amounts of water that have flooded into Plaintiffs' apartment, a condition that Defendants have failed to remedy, Plaintiffs' apartment has been severely damaged. . . , plaintiffs have suffered damaged to their personal property, . . . [and] the apartment has become mold infested . . . by a potentially highly toxic fungus, resulting in a severe risk to Plaintiffs' health and safety, . . . diminishing the value of the apartment, and forcing Plaintiffs to move out."

Plaintiffs are now moving for partial summary judgment as to liability on their causes of action for breach of the proprietary lease, breach of the implied warranty of habitability and constructive eviction, and defendants are cross-moving for summary judgment dismissing the complaint.

First, as to defendants' cross-motion, defendants argue that they are entitled to summary judgment dismissing the complaint, based on the business judgment rule. This argument is without merit.

Under the business judgment rule, courts will not inquire into the actions of the board of a cooperative corporation, as long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith. See Matter of Levandusky v. One Fifth Avenue Apartment Corp., 75 NY2d 530, 537-738 (1990). However, the business judgment rule does not protect a cooperative board from liability for its own breach of contract. See Anderson v. Nottingham Village Homeowner's Ass'n, Inc., 37 AD2d 1195, 1197 (4th Dept 2007); Whalen v. 50 Sutton Place South Owners, Inc., 276 AD2d 356, 357 (1st Dept 2000); Dinicu v. Groff Studios Corp., 257 AD2d 218, 222-223 (1st Dept 1999); see also 40 West 67th Street Corp. v. Pullman, 100 NY2d 147, 157 FN8 (2003).

In this case, the business judgment rule does not shield defendants from liability, as plaintiffs' claims are based upon their contractual relationship with Hanover as a proprietary lessee, their rights, contractual and otherwise, as derived from that relationship, and defendants' alleged violation of those rights. See e.g. Anderson v. Nottingham Village Homeowner's Ass'n, Inc., supra (business judgment rule does not apply to breach of contract claim based on coop's failure to repair leaky roof); Whalen v. 50 Sutton Place South Owners, Inc., supra (business judgment rule not applicable to shareholders' claim to enforce specific rights granted to them by the alteration

agreement approved by the cooperative board); Dinicu v. Groff Studios Corp., supra (business judgment rule does not protect cooperative from liability for breach of the proprietary lease, where cooperative failed to execute the application for an altered certificate of occupancy to reflect plaintiff's joint residential and commercial use, as specifically contemplated under the proprietary lease); Shapiro v. 350 East 78th Street Tenants Corp., 2008 WL 700846 (Sup Ct, NY Co 2008)(business judgment rule does not protect board from shareholder's breach of contract claim for interference with her use of the roof, based on offering plan, the proprietary lease and the house rules); Jackson v. Westminster House Owners, Inc., 2004 WL 5487453 (Sup Ct, NY Co 2004)(business judgment rule not a defense to situations where coop board breached the implied warranty of habitability by creating an unsafe or hazardous condition, destroyed personal property, and breached agreement with shareholders to protect the safety of shrubbery and planters and to reimburse resulting damages); 49 West Tenants Corp. v. Seidenberg, 2003 WL 25516152 (Sup Ct, NY Co, 2003), aff'd 6 AD3d 243 (1st Dept 2004) (business judgment rule not applicable to board action taken in violation of the cooperative's own rules as embodied by the proprietary lease or by-laws).

Thus, since the business judgment rule is not a defense to plaintiffs' claims, defendants' cross-motion for summary judgment

dismissing the complaint is denied.

Turning to plaintiffs' motion, plaintiffs seek partial summary judgment on the issue of liability as to their causes of action for breach of the proprietary lease, breach of the implied warranty of habitability and constructive eviction. In support of the motion, plaintiffs submit a 56-page affidavit from plaintiff Alison Dundy, the pleadings, portions of the deposition testimony of Catherine Lanier and Bonnie Yochelson on behalf of Hanover, the deposition testimony of David Lozano on behalf of Midboro, and numerous documents including engineer and architect reports, environmental inspection reports, a "Mold Survey" report, a contractor's estimate for "Mold Remediation," minutes of board meetings, and more than 60 separate e-mails and letters.

In opposing plaintiffs' motion, defendants assert that "there are real, genuine and triable issues on the question of the nature and extent of plaintiffs' allege damages and the measures taken by the defendants to rectify the alleged damage." Specifically, defendants argue that the deposition testimony of board presidents Yochelson and Lanier, "demonstrates that defendant took actions in good faith that were reasonably calculated to resolve the very conditions about which the plaintiffs are complaining," and that "[w]hether these actions were, in fact, reasonable under the circumstances are questions of fact that require resolution by a jury."

It is not disputed that under Paragraph 2 of the Proprietary Lease, defendant Hanover, as the "lessor," is obligated "at its own expense [to] keep in good repair all of the building including . . . the roof." Under Paragraph 18, plaintiffs as the "lessee" are obligated to "keep the interior of the apartment (including interior walls . . .)in good repair."

As discussed in detail above, the undisputed record establishes that from 2004 through 2006, Hanover and its managing agent Midboro, sent plaintiffs numerous e-mails acknowledging the recurring leaks in plaintiffs' bedroom, and Hanover's obligation to repair the source of the leaks, i.e. the exterior east wall of the building. The e-mail correspondence likewise documents the coop's efforts during this two-year period, to deal with and resolve the leaks, including hiring an engineer and architect, and taking measures to inspect and repair the exterior east wall. While it appears that such efforts were largely ineffectual, the reasonableness of defendants' actions raises issues of fact which preclude summary judgment on plaintiffs' claim for breach of the proprietary lease. See 34-35th Corp. v. 1-10 Industry Assocs, LLC, 16 AD3d 579 (2nd Dept 2005).

Plaintiffs' second cause of action is for breach of the implied warranty of habitability. "Pursuant to Real Property Law §235-b, every residential lease contains an implied warranty of

habitability which is limited by its terms to three covenants: (1) that the premises are 'fit for human habitation', (2) that the premises are fit for 'the uses reasonably intended by the parties', and (3) that the occupants will not be subjected to conditions that are 'dangerous, hazardous or detrimental to their life, health or safety.'" Solow v. Wellner, 86 NY2d 582, 587-588 (1995)(quoting RPL §235-b). The statute protects both residential tenants and owners of cooperative apartments. See Granirer v. Bakery, Inc., 54 AD3d 269 (1st Dept 2008); Suarez v Rivercross Tenants' Corp., 107 Misc 2d 135 (App Term 1st Dept 1981). If a breach of the implied warranty of habitability is established, the landlord or cooperative's good faith attempts to provide the services or correct the defective condition do not constitute a defense. See Genovese v. Finger Lakes Manor, 2007 WL 2814023 (Sup Ct, Ontario Co 2007); Meader v. Francy, 2001 WL 1117443 (Just Ct, West Co, 2001); Tower West Assocs v. Derevnuk, 114 Misc2d 158 (Civ Ct, NY Co 1982); McBride v. 218 E70th St Assocs, 102 Misc2d 279, 283 (App Term, 1st Dept 1979); Leris Realty Corp. v. Robbins, 95 Misc2d 712 (Civ Ct, NY Co 1978).

The uncontroverted facts in this case establish a breach of the implied warranty of habitability, based on the persistent problem of water penetrating though east wall of the building, leaking into plaintiffs' bedroom, and damaging the walls, ceiling and floor. Even though the leaks continued to recur over a two-

year period, the problem remained uncorrected and eventually led to the presence of mold, which created a condition detrimental to plaintiffs' health. See e.g. McGuinness v. Jakubiak, 106 Misc2d 317 (Kings Co, Sup Ct 1980)(breach of implied warranty of habitability where apartment rendered uninhabitable by floods caused by latent roof defects); McBride v. 218 E70th St Assocs, supra (plaintiff awarded summary judgment on breach of warranty of habitability claim based on the latest of eights floods, in which apartment flooded with six inches of water).

Plaintiffs' apartment was rendered uninhabitable by both the water leaking into their bedroom, and the potentially harmful health effects of being exposed to mold. Notably, the presence of mold is confirmed by the reports of three professional mold inspections and testings, including the most recent inspection and testing in March 2007 by MoldPro, who defendants hired. The ModPro report states that "there is evidence of fungal infestation that will require remediation. It appears that the remediation conducted by GAC Environmental was inadequate at best. There is clearly a significant mold contamination that needs additional remediative work."

Even assuming without deciding that defendants made good faith efforts to correct the conditions, those efforts are not a defense to plaintiffs' claim for breach of warranty of habitability. See Genovese v. Finger Lakes Manor, supra; Meader

v. Francy, supra; Tower West Assocs v. Derevnuk, supra; McBride v. 218 E70th St Assocs, supra; Leris Realty Corp. v. Robbins, supra. Moreover, while defendants argue that issues of fact exist as to the nature and extent of plaintiffs' damages, plaintiffs are merely seeking partial summary judgment as to liability, so the issue of damages will be determined at trial. Plaintiffs, therefore, are entitled to judgment as a matter of law as to the issue of liability on their claim for breach of the implied warranty of habitability.

Finally, as to plaintiffs' constructive eviction claim, the Appellate Division First Department holds that such a claim should be dismissed as duplicative of a claim for breach of the implied warranty of habitability. See Elkman v. Southgate Owners Corp., 233 AD2d 104, 105 (1st Dept 1996). Based on this authority and upon a search of the record, plaintiffs' seventh cause of action for constructive eviction is dismissed, as duplicative of their second cause of action for breach of the implied warranty of habitability. Id.

Accordingly, it is

ORDERED that plaintiffs' motion is granted only to the extent that plaintiffs are entitled to partial summary judgment on issue of liability as their second cause of action for breach of the implied warranty of habitability; and it is further

ORDERED that plaintiffs' motion is denied as to the first cause of action for breach of the proprietary lease and the seventh cause of action for constructive eviction, and upon a search of the record the seventh cause of action is severed and dismissed; and it is further

ORDERED that defendants' cross-motion for summary judgment is denied.

Dated: December 1, 2008

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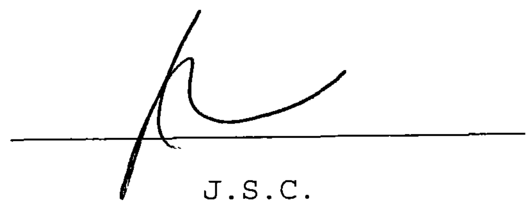

J.S.C.

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