

<b>Loss v 407-413 Owners Corp.</b>
2009 NY Slip Op 30622(U)
March 24, 2009
Supreme Court, New York County
Docket Number: 105897/07
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **CAROL EDMEAD**  
J.S.C.

PART 5

Index Number : 105897/2007  
**LOSS, GREGORY M.**  
vs.  
**407-413 OWNERS CORP.**  
SEQUENCE NUMBER : 002  
PARTIAL SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

n 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 sequence 002 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

**FILED**  
MAR 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 3/24/09

*[Signature]*  
**CAROL EDMEAD**  
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 CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 35

-----x  
GREGORY M. LOSS and EILEEN M. MULRENIN,

Plaintiffs,

Index No.: 105897/07

-against-

407-413 OWNERS CORP., KYROUS REALTY  
GROUP, INC., FREDERICK T. HOREN, HARRIET  
KYROUS and JOHN/JANE DOES I-VIII,

Defendants.

-----x

EDMEAD, J.:

**BACKGROUND**

In motion sequence 002, plaintiffs, resident-shareholders of defendant 407-413 Owners Corp. (Co-op), move, pursuant to CPLR 3212 (e), for partial summary judgment on the issue of liability on the third, fourth, sixth, seventh and eighth causes of action.

Plaintiffs purchased their shares in the Co-op in February, 2004. A prior owner, not the immediate seller, added a Board-approved additional room/extension to the unit. The unit in question is on the top floor of the building.

During the summer of 2004, plaintiffs began experiencing leaks in the kitchen and living room of the unit. Plaintiffs assert that they immediately reported the leaks to defendant Harriet Kyrous (Harriet), who is an officer of defendant Kyrous Realty Group, Inc. (Kyrous), the Co-op's managing agent. Harriet had the building superintendent inspect the unit, and,

DECISION

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MAR 24 2009  
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NEW YORK

eventually, after several leaks, made a hole in the ceiling to alleviate the pressure. Plaintiffs state that the leaks did not abate.

In early 2005, plaintiffs began writing letters to Kyrous, complaining about the leaks. Between February and May, 2005, the building's architect, ARC, PC (ARC), was sent to investigate the problem four times. Allegedly, ARC made four reports recommending certain repair work, but the Co-op did no work to remedy the situation. Plaintiffs aver that, by October, 2005, the leaks became so severe that they had to use industrial-size trash cans to catch the falling water.

According to the ARC reports submitted with the instant motion, the architects could not definitively determine the source of the leaks, but surmised that they might be caused by the skylight in plaintiffs' bathroom, or by the decking on the penthouse level outside plaintiffs' unit. The skylight and the decking were both installed by previous owners of the unit. Also, the report indicated no signs of leakage on plaintiffs' kitchen ceiling, but noted water stains on the wood joists indicating that some leaking had occurred.

In October, 2005, defendant Frederick T. Horen (Horen) the then Board president, came to view the problem. Horen indicated that he would remedy the situation.

In December, 2005, the leaks continued, and plaintiffs wrote

to the Board, expressing concerns about the presence of mold in the unit, caused by the leaks. Plaintiffs have small children residing in the unit, and the husband allegedly suffers from asthma and sinusitis. In early 2006, the Board indicated that it would have mold testing done, and placed a tarp over the bathroom skylight to see if that was the source of the leak.

In March of 2006, the mold inspection report was completed for the unit (Exhibit 22), which indicated borderline levels of fungal contamination, but also indicated that fungi are present in most, if not all, indoor and outdoor environments. The report stated that there was an indication of a leak in the unit, but the source was not apparent, and recommended that the ceiling plenum be sealed off until the source of the leak could be determined. Plaintiffs contacted a contractor to obtain an estimate for ridding the unit of mold, which they forwarded to the Board.

Plaintiffs say that the Board indicated that it would do no further work until it was determined who was responsible for paying for the repairs.

Eventually, plaintiffs paid for the removal of the decking, and, allegedly, the Board agreed to pay for the majority of the repairs. The repair work began in June, 2006.

Plaintiffs' position is that the cause of the leaks emanates from the building's exterior, and, therefore, is the

responsibility of the Co-op. Defendants assert that the cause of the leaks, still unknown at this time, is plaintiffs' bathroom skylight or the windows and doors leading to the deck which were put in by the earlier owner, as noted above, and therefore is plaintiffs' obligation to remedy.

Plaintiffs maintain that the leaks are continuing, and that the Co-op has failed to make any additional repairs since the instant suit was filed in 2007. Plaintiffs argue that the leaks have caused severe damage to their unit, have created health issues for the family, and have made the unit uninhabitable. It is noted that plaintiffs have continued to make all their maintenance payments.

Defendants state that, between 2005, when plaintiffs made their first written complaint, until June, 2006, they made localized repairs in an attempt to locate the source of the leaks. In June, 2006, defendants authorized the repairs recommended by the contractor located by plaintiffs, which included masonry work, copper wall-through flashing, and stucco work, which appeared, temporarily, to resolve the problem. Defendants further aver that plaintiffs refused to vacate the unit so that any mold remediation could be effectuated. It is noted that the unit has to be vacated in order to perform the mold work safely.

According to Harriet and Kyrour (Exhibit E of the motion

papers), repairs were done to the walls and roof of the unit in question in 2005, additional repairs were performed in 2006, and inspections and water tests were performed. There still is no definitive answer as to the cause of the leaks.

The instant motion seeks summary judgment with respect to liability for the following causes of action: third, breach of contract against Co-op; fourth, breach of fiduciary duty against all defendants; sixth, nuisance against the corporate defendants; seventh, trespass against the corporate defendants; and eighth, breach of the warranty of habitability against Co-op.

#### DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1<sup>st</sup> Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1<sup>st</sup> Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Plaintiffs' motion with respect to the third cause of action for breach of contract is denied.

The contract in question is the Proprietary Lease, which, among other things, requires Co-op to care for and repair the exterior of the building. Plaintiffs' argument rests on the allegation that, because the leaks still exist, Co-op has failed to meet its contractual obligation.

In *34-35th Corp. v 1-10 Industry Associates, LLC* (16 AD3d 579 [2d Dept 2005]), the court held that the tenants were not entitled to summary judgment against the landlord on the issue of liability for breach of contract because the landlord failed to prevent water leaks and excessive moisture in the premises. The court stated that "[t]here is evidence in the record that the defendant made repairs in an attempt to cure the problems. Whether its efforts were sufficient constitutes a triable issue of fact for the jury to determine." *Id.* at 580.

Plaintiffs indicate, correctly, that the court in *34-35th Corp.* found that summary judgment was inappropriate for the breach of contract claim under a theory of a breach of the covenant of quiet enjoyment. Plaintiffs maintain that, because they have not alleged a breach of the warranty of quiet enjoyment, this case is distinguishable from the case at bar. However, the court believes that it is a distinction without significant difference.

Since the source of the leaks is still undetermined, and some evidence has been presented that the source could be plaintiffs' skylight or the doors and windows to the deck that the previous owner installed, questions of fact exist as to who is responsible for remedying the problem. Further, the repair work performed by Co-op may, under the circumstances in which the source of the leak is unknown, be considered, by reasonable persons, to be sufficient to meet its contractual obligations. Such factual issues preclude granting summary judgment.

Plaintiffs' motion with respect to the fourth cause of action for breach of fiduciary duty is denied.

The individual members of Co-op's board of directors are protected from the court's review of their actions under the business judgment rule. Under business judgment rule, "[s]o long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, ... judicial review is not available." *Levandusky v One Fifth Avenue Apartment Corp.*, 75 NY2d 530, 538 (1990).

"Plaintiffs disagree with the board's decisions as to the costs, means, allocation and methods employed in making repairs to the building, but fail to adduce evidence of self-dealing, fraud, or other acts constituting a breach of fiduciary duty sufficient to overcome the business judgment rule [citations omitted]."

*Parker v Marglin*, 56 AD3d 374, 374 (1<sup>st</sup> Dept 2008); see also *Chambers Associates LLC v 105 Acquisition LLC*, 37 AD3d 365 (1<sup>st</sup> Dept 2003).

Plaintiffs motion with respect to the sixth cause of action for nuisance is denied.

"The elements of a private nuisance cause of action are '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failing to act' [citations omitted]."

*JP Morgan Chase Bank v Whitmore*, 41 AD3d 433, 434 (2d Dept 2007).

In the instant matter, there is no evidence that defendants intentionally caused the leaks, or that they have totally failed to act to remedy the situation, thereby rendering this cause of action untenable. *Donnelly v Nicotra*, 55 AD3d 868 (2d Dept 2008); *Kaniklidis v 235 Lincoln Place Housing Corp.*, 305 AD2d 546 (2d Dept 2003).

The case cited by plaintiffs to support their claim, *Gellman v Seawane Golf & Country Club, Inc.*, (24 AD3d 415 [2d Dept 2005]), is totally distinguishable from the facts of the case at bar. In *Gellman*, a country club operated its golf course in a manner that allowed golf balls continually to escape the golf course and enter the plaintiff's property. The defendant in *Gellman* never attempted to remedy the situation, and it was the defendant who unquestionably created the situation that caused the golf balls to trespass onto the plaintiff's property. In the instant matter, there exists a question of fact as to the cause and origin of the leaks, and defendants have attempted to remedy

the situation. For these reasons, *Gellman*, is unavailing to support plaintiffs' cause of action for nuisance.

Plaintiffs' motion with respect to the seventh cause of action for trespass is denied.

As discussed above, the source and cause of the leaks remain undetermined at the present time, and so it would be premature to find defendants' liable for a trespass when these issues still remain a question of fact.

Lastly, plaintiffs' motion with respect to the eighth cause of action for breach of the warranty of habitability is likewise denied.

A warranty of habitability mandates

"first, that the premises are fit for human habitation; second; that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety."

*Park West Management Corp. v Mitchell*, 47 NY2d 316, 325 (1979).

Further, the warranty of habitability applies to co-operative shareholder-tenants. *Frisch v Bellmarc Management, Inc.*, 190 AD2d 383 (1<sup>st</sup> Dept 1993).

Contrary to defendants' averments, this warranty may be breached even if the residents remain on the premises.

*Kipsborough Realty Corp. v Goldbetter*, 81 Misc 2d 1054 (Civ Ct, NY County 1975). However, it remains a question of fact as to whether the conditions in the unit were so severe that a

reasonable person would find that the warranty of habitability had been breached. *Park West Management Corp. v Mitchell*, supra at 329; see also *Birch v Ryan*, 281 AD2d 786 (3d Dept 2001); *Molloy v Li*, 235 Ad2d 342 (1<sup>st</sup> Dept 1997).

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiffs' motion for partial summary judgment is denied; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry within twenty days of entry on counsel for defendants.

Dated: March 24, 2009

ENTER:



Carol R. Edmead, J.S.C.

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