

Loss v 407-413 Owners Corp.

2009 NY Slip Op 30640(U)

March 29, 2009

Supreme Court, New York County

Docket Number: 105897/2007

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 35

Index Number : 105897/2007
LOSS, GREGORY M.
vs.
407-413 OWNERS CORP.
SEQUENCE NUMBER : 003
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...
Answering Affidavits — Exhibits _____
Replying Affidavits _____

FILED
PAPERS NUMBERED
MAR 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

It is hereby

ORDERED that motion sequence 003 is decided in accordance with the accompanying Memorandum Decision. It is hereby

ORDERED that defendants' motion to dismiss the complaint as against the individual defendants Harriet Kyrous and Frederick T. Horen is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants Harriet Kyrous and Frederick T. Horen dismissing the complaint as against them, with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants' motion to dismiss the first cause of action is granted only to the extent of dismissing that cause of action alleging physical injury to plaintiffs; and it is further

Dated: _____ J.S.C.

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

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

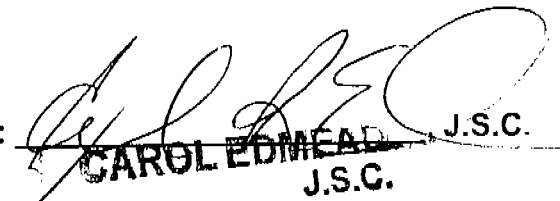
ORDERED that defendants' motion to dismiss the second, fifth and sixth causes of action is granted; and it is further

ORDERED that defendants' motion to dismiss the seventh cause of action is denied; and it is further

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

FILED
MAR 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated 3/24/09

ENTER:  J.S.C.
CAROL EDMEAD
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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-

DECISION

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

Defendants.

FILED

MAR 26 2009

COUNTY CLERK'S OFFICE
NEW YORK

-----x
EDMEAD, J.:

BACKGROUND

In motion sequence number 003, defendants move, pursuant to CPLR 3212, to dismiss the complaint against the individual defendants, based on the business judgment rule, and to dismiss the first, second, fifth, sixth and seventh causes of action against the corporate defendants.

The facts of the case have been detailed in the court's earlier decision with respect to motion sequence number 002, and need not be reiterated here. The causes of action against the corporate defendants subject to the instant motion are: first, negligence (with respect to the claims for personal injury to plaintiffs); second, gross negligence; fifth, negligent infliction of emotional distress; sixth, nuisance; and seventh, trespass.

DISCUSSION

The proponent of a motion to dismiss a complaint 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. *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st 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 (1st 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 must be denied. See *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978).

Defendants' motion with respect to dismissing the complaint against the individual defendants, Harriet Kyrour and Frederick T. Horen, is granted.

The individual members of 407-413 Owners Corp. (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 (1st Dept 2008); see also *Chambers Associates LLC v 105 Acquisition LLC*, 37 AD3d 365 (1st Dept 2003).

In their opposition, plaintiffs aver that they were treated differently from other unit owners, and therefore the business judgment rule should not shield Harriet or Horen. See *Allannic v Levin*, 57 AD3d 443 (1st Dept 2008). This differing treatment refers to the fact that other unit residents on the same floor as plaintiffs also had leaks which, allegedly, have been repaired. However, it is not disputed that, in the instant matter, the cause of plaintiffs' leaks has yet to be discovered. Plaintiffs have provided no evidence that the source of the other unit residents' problems is the same as theirs. Therefore, plaintiffs have not demonstrated that they were treated differently from other similarly situated tenants, and so the business judgment rule is applicable to the case at bar. *Simon v 160 West End Avenue Corp.*, 7 AD3d 318 (1st Dept 2004).

Defendants' motion with respect to dismissing the first cause of action with respect to the allegation that defendants' negligence caused physical injury to plaintiffs is granted.

"[L]iability in negligence arises when a defendant owes a plaintiff a duty of care and is negligent in taking reasonable measures to prevent injury arising from conduct that is reasonably foreseeable."

Colarusso v Dunne, 286 AD2d 37, 40 (2d Dept 2001).

It is not challenged that a landlord has a duty to maintain a building in a safe condition. *Park West Management Corp. v Mitchell*, 47 NY2d 316 (1979). However, to state a cause of action for negligence, the plaintiff must allege to have suffered some injury occasioned by the defendant's actions. In the instant matter, although evidence has been submitted that plaintiffs have suffered property damage, there is little to support their claim for physical injury.

The evidence submitted demonstrates that plaintiff Gregory M. Loss (Loss) suffered from sinusitis for several years prior to moving in to the subject unit, and the physical examination of Loss by Jack J. Adler, M.D. (Ex. H), indicates that Loss has had chronic asthma going back to at least 1998, and that the major contributing factor to his ongoing sinusitis is the presence of cats in plaintiffs' home. Loss' chest was clear, and it was also noted that the levels of mold in the unit are relatively low. There is no evidence that the mold has significantly contributed to his sinusitis. Loss has not provided any expert evidence to rebut the findings of Dr. Adler. Plaintiff rests his opposition on the mold reports, discussed in the court's decision with respect to motion sequence number 002, which supported the contention that the levels of mold in the unit are relatively low.

Since there is no evidence that the water leaks or mold in the unit caused Loss' sinusitis, this cause of action is dismissed to the extent that plaintiffs allege physical injury. *Krasnow v JRBG Management Corp.*, 25 AD3d 479 (1st Dept 2006). The cause of action alleging that defendants' negligence caused property damage continues, although the court notes that the cause of the water leaks has yet to be definitively determined.

The complaint has not alleged any physical harm either to plaintiff Eileen M. Mulrenin or plaintiffs' children, and plaintiffs concede, in their opposition, that they are not asserting any claim for negligence causing physical injury to those persons.

Defendants' motion with respect dismissing the second cause of action for gross negligence is granted.

"Ordinarily the question of gross negligence is a matter to be determined by the trier of fact. ... Nevertheless, when used in this context, 'gross negligence' differs in kind, not only degree from claims of ordinary negligence. It is conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing.

Accordingly, where plaintiff's allegations amount, at most, to ordinary negligence, they do not meet the foregoing standard, and defendant is entitled to summary judgment dismissing plaintiff's claims for gross negligence [internal citations omitted]."

Lubell v Samson Moving & Storage, Inc., 307 AD2d 215, 216-217 (1st Dept 2003).

In the instant matter there is no indication that defendants' conduct was reckless or smacked of wrongdoing.

Plaintiffs' conclusory statements regarding defendants' conduct are insufficient to defeat defendants' motion. See generally *Schirmer v Penkert*, 41 AD3d 688 (2s Dept 2007).

Defendants' motion with respect to dismissing the fifth cause of action for negligent infliction of emotional distress is granted.

"A cause of action for negligent infliction of emotional distress must be based on allegations of conduct so extreme in degree and outrageous in character as to go beyond all possible bounds of decency and utterly intolerable in a civilized community. Whether the alleged conduct is outrageous is, in the first instance, a matter for the court to decide. Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action [internal quotation marks and citations omitted]."

Wolkstein v Morgenstern, 275 AD2d 635, 636-637 (1st Dept 2000).

In the case at bar, the actions alleged do not rise to such outrageous a character as to warrant a cause of action for negligent infliction of emotional distress, especially since the complaint includes causes of action in tort and breach of contract.

Defendants' motion with respect to dismissing the sixth cause of action for nuisance is granted, based on this court's decision with respect to motion sequence number 002.

Defendants' motion with respect to dismissing the seventh cause of action for trespass is denied, because the source and cause of the leaks remain undetermined at the present time, and

so it would be premature to find that defendants had no liability for trespass when these issues still remain a question of fact.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that defendants' motion to dismiss the complaint as against the individual defendants Harriet Kyrous and Frederick T. Horen is granted; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants Harriet Kyrous and Frederick T. Horen dismissing the complaint as against them, with costs and disbursements to said defendants as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that defendants' motion to dismiss the first cause of action is granted only to the extent of dismissing that cause of action alleging physical injury to plaintiffs; and it is further

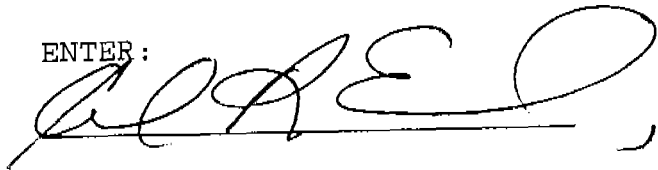
ORDERED that defendants' motion to dismiss the second, fifth and sixth causes of action is granted; and it is further

ORDERED that defendants' motion to dismiss the seventh cause of action is denied; and it is further

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

Dated: March 24, 2009

ENTER:



Carol R. Edmead, J.S.C.

FILED

MAR 26 2009

COUNTY CLERK'S OFFICE
NEW YORK