

**Estate of King v 870 Riverside Dr. Hous. Dev.
Fund Corp.**

2009 NY Slip Op 32049(U)

September 1, 2009

Supreme Court, New York County

Docket Number: 105298/2008

Judge: Paul G. Feinman

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

PRESENT: HON. PAUL G. FEINMAN
Justice

PART 12

Index Number : 105298/2008
ESTATE OF CAROL R. KING
vs.
870 RIVERSIDE DRIVE HOUSING
SEQUENCE NUMBER : 002
DISMISS

INDEX NO. 105298/2008
MOTION DATE _____
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

in this motion to/for _____

PAPERS NUMBERED

12
4,5
67
3,

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

Answering Affidavits — ~~Exhibits~~ *to Cross Motion*

Replying Affidavits *Choice of Cross Motion, Aff*

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

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

MOTION AND CROSS MOTION(S) ARE DECIDED IN ACCORDANCE WITH ANNEXED DECISION AND ORDER.

FILED
SEP 10 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/1/09

[Signature]
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

Refcc 10/28/09 2-15 pm

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
ESTATE OF CAROL R. KING, ESTATE OF
CHEVENE B. KING and MARGARET E. KING
N/K/A MARGARET KING JORDE,

Plaintiffs,

Index Number 105298/2008

Mot. Seq. No. 002

-against-

870 RIVERSIDE DRIVE HOUSING DEVELOPMENT
FUND CORP. a/k/a 870 RIVERSIDE DRIVE H.D.F.C.,
BOARD OF DIRECTORS OF 870 RIVERSIDE DRIVE
HOUSING DEVELOPMENT FUND CORP., SOLEDAD
HICIANO, MESCAL WILSON, EFFIE BYNUM, PETER
GREEN, CANDIDA PORTUGESE, LUIS BAEZ and
GLADYS HERNANDEZ,¹

DECISION AND ORDER

Defendants.

-----X
Appearances: **For Plaintiffs:**
 Marc E. Scollar, Esq.
 1031 Victory Boulevard
 Staten Island, NY 10301
 (718) 720-4505

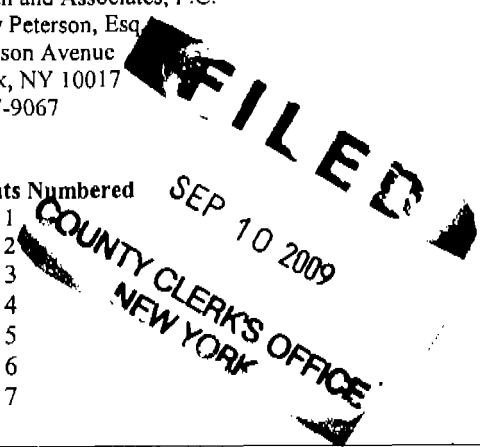
For Defendants:
Braverman and Associates, P.C.
By: Tracy Peterson, Esq.
331 Madison Avenue
New York, NY 10017
(917) 657-9067

Papers considered in review of this motion to dismiss:

- Papers**
- Defendants' Motion & Attachments
- Defendants' Memorandum of Law in Support
- Plaintiff's Cross-Motion and Attachments
- Defendants' Reply Memorandum
- Plaintiff's Reply Memorandum in Opposition
- Reply Affidavit
- Affidavit of Peter Green

Documents Numbered

- 1
- 2
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- 5
- 6
- 7



PAUL G. FEINMAN, J.:

In this action, plaintiff Margaret E. King (“Jorde”) seeks the transfer of stock in and

¹ This is the current caption according to the records of the County Clerk. As described in the body of this decision, after commencement of the action, the parties signed and the court so ordered, a stipulation allowing plaintiffs to amend the summons and complaint. As amended, the caption should have removed the estates of Carol King and Chevene King as parties. However, plaintiffs failed to properly serve a copy of the order on the County Clerk, thus the caption was never changed.

proprietary lease for a cooperative apartment situated in the residential cooperative building known as 870 Riverside Drive Housing Development Fund Corp. (the co-op). The defendants are the co-op, its board of directors and individual directors, who now move to dismiss the amended complaint pursuant to CPLR 3211 (a)(1), (7) and (10). Plaintiffs cross-move for summary judgment pursuant to CPLR 3212. For the reasons which follow, the branch of defendants' motion to dismiss the claims of breach of fiduciary duty as against the individual board member defendants (Soledad Hiciano, Mescal Wilson, Effie Bynum, Peter Green, Candida Portugese, Luis Baez and Gladys Hernandez), and breach of contract as against the individual board member defendants and the Board of Directors of 870 Riverside Drive Housing Development Fund Corp., is granted. The balance of defendants' motion is denied, as is plaintiff's cross-motion for summary judgment.

BACKGROUND

In January 1985, Jorde and her now deceased father, Chevene B. King, purchased shares of stock in the co-op, and executed a proprietary lease for apartment 7C. To finance the purchase, the co-op lent \$15,750.00 to plaintiff and her father who together executed a promissory note, agreeing to repay the loan over the course of one year (Mot. Ex. 7), and a mortgage agreement which conveyed to the co-op shares of stock appurtenant to the apartment. (Mot. Ex. 8).

Chevene King died in March 1988, and his wife, Carol R. King, was appointed executrix of his estate. (Am. Compl. ¶ 2; Cross-Mot. Ex. C). Prior to his death, Chevene King assigned his interest in the apartment to plaintiff Jorde. (Am. Compl. ¶ 12).² Jorde apparently sought transfer

²The copy of the Assignment of Lease submitted in plaintiff's cross-motion, includes a notarization in which the state, day, and month are scratched out, and the year changed (Cross-Mot. Ex. A).

of the stock and lease into her name. On April 2, 2007, the new managing agent for the cooperative wrote to plaintiff concerning her request to amend the apartment's "deed." (Mot. Ex. 1, Am. Complaint Ex. A). The managing agent indicated that "the Board of 870 fully agrees with this," and she was asked to contact the co-op's attorney, Edward Filmyer, Esq. The letter also indicated that the building's facade was going to be re-pointed, which "should eliminate any water seepage in [y]our apartment." Finally, the managing agent's letter indicated that after the re-pointing, "we will assess damage and repairs to your apartment."

On June 7, 2007, Carol King and plaintiff signed a Surrender Agreement in which it was agreed that the Executrix of the Estate of Chevene King and Jorde together surrendered the title and interest in the proprietary lease, and Jorde assumed all obligations under the proprietary lease. (Mot. Ex. 1, Am. Complaint Ex. B). This document was also to be signed and agreed to by the co-op, but it was not signed.³ Carol King died in September 2007. (Am. Compl. ¶ 2). *Plaintiff was then appointed Executrix of her mother's estate.* (Cross Mot p. 4 ¶ 9B, Emphasis Added).

After the Surrender Agreement was signed by plaintiff and her mother as Executrix, the co-op apparently raised the issue of maintenance arrears. By letter dated July 17, 2007, plaintiff's attorney indicated that according to the bookkeeping statement prepared by the co-op, in January 1996 there was a balance of \$381.91 which plaintiff thought had been paid. (Cross-Mot. Ex. E, Scollar letter to Filemyr, July 17, 2007). Plaintiff attaches a photocopy of a check made out to the co-op, dated November 20, 1996, in the amount of \$381.97, which was deposited November 27, 1996. (Cross-Mot. Ex. G). Jorde admits that she is currently in arrears in paying her maintenance, because defendants have not honored their obligations under the proprietary lease both in making

³At the time, defendant Soledad Hiciano was president of the Board of the co-op.

necessary repairs, and in re-issuing the stock and proprietary lease. (Cross-Mot. Jorde Aff. ¶ 11).

Plaintiff apparently then sought to sell the apartment. In January 2008 her attorney notified the co-op's attorney that a closing date had been set, and that the transfer documents needed to be signed by the co-op before then, otherwise the co-op would be held in default and liable for damages. (Cross-Mot. Ex. E, Scollar letter to Filemyr, Jan. 3, 2008). The documents were not signed.

Jorde commenced this action on April 14, 2008, by filing a summons and verified complaint on behalf of herself and the estates of her two late parents. Defendants' motion to dismiss and plaintiffs' cross-motion to amend the complaint were subsequently filed and then withdrawn pursuant to a stipulation signed on July 10, 2008, and entered on July 18, 2008. The stipulation included an agreement that plaintiffs would file and serve an amended complaint, and that defendants would answer the amended complaint.

The amended verified complaint, dated July 18, 2008, among other things, leaves Jorde as the sole plaintiff. (Mot. Exhibit A). The amended complaint seeks, in the first cause of action, to compel defendants to execute all documents necessary to transfer the shares of stock in apartment 7C to Jorde. The second cause of action alleges negligent or intentional breach of fiduciary duty by defendants in their failure to transfer the stock certificate and proprietary lease, which has cost plaintiff damages in an amount of at least \$500,000, because she has been unable to sell the apartment, and for which she seeks sanctions, punitive damages, and costs. The third cause of action alleges breach of defendants' obligation under the proprietary lease not to unreasonably withhold consent to transfer and assignment of the lease pursuant to the proprietary lease. The fourth cause of action alleges violation of the proprietary lease by defendants' failure to repair the source of water leaks that have damaged and continue to damage her apartment, and which have

made the space uninhabitable. The fifth cause of action is constructive eviction. The sixth cause of action is personal property damage in the amount of \$50,000. Defendants move, pre-answer, to dismiss the amended complaint.

Defendants filed the instant pre-answer motion on September 16, 2008, seeking to dismiss the amended complaint as against all the defendants, and seeking sanctions. They maintain that plaintiff's first, fifth, and sixth causes of action should be dismissed as plaintiff failed to join necessary parties, namely the estates of plaintiff's parents; that the complaint fails to state a cause of action for breach of fiduciary duties against the individual board members and should therefore be dismissed; that the complaint fails to state a cause of action against the board and the board member defendants for breach of contract and should therefore be dismissed; that the cause of action for injunctive relief must be dismissed because plaintiff has an adequate remedy at law; that plaintiff's plea for the award of punitive damages should be stricken; that the fifth cause of action for constructive eviction must be dismissed because plaintiff voluntarily chose not to live in the apartment; and that plaintiff's sixth cause of action for property damage is time-barred.

Plaintiff Jorde filed a cross-motion on October 24, 2008, in which she seeks an order discharging the debt evidenced by a purchase money note and mortgage agreement dated January 25, 1985; for an order compelling the co-op to transfer stock and the proprietary lease from the Estate of Chevene King to plaintiff, as well as for sanctions, and attorney's fees. In opposition to the motion, she asserts that her parents' estates are not necessary parties; that defendants breached their fiduciary duties in both an individual and a corporate capacity; that various provisions in the proprietary lease warrant the finding of summary judgment in her favor, or, in the alternative, warrant a trial on the merits; that specific and unique damages are required in the form of the re-issuance of the stock certificate and proprietary lease, and that therefore monetary damages are

not appropriate; that rather than injunctive relief, plaintiff is in fact seeking a declaratory judgment; that the request for punitive damages is for the court to entertain; that the maintenance should be rightfully abated where substantial damage to the apartment has been shown, and her voluntarily leaving the apartment and/or living elsewhere should not be taken into account; that the water damage is current and ongoing and therefore there is no statute of limitations issue, and that certain assurances were made to plaintiff within the appropriate time frame for bringing a cause of action; and that the cross-motion for summary judgment is not premature as, among other things, defendants “opened the door” to plaintiff’s application. (Reply Mem in Opp to Mot to Dismiss and in Further Supp of Cross-Mot for Sum Judg).

ANALYSIS

Dismissal under CPLR 3211 is narrowly defined, as the court must “accept the facts alleged as true and determine simply whether the facts alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court is required to accord plaintiff the benefit of every possible favorable inference in the context of a motion to dismiss. (*Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]).

The first contention is that the amended complaint should be dismissed because it fails to join necessary parties, namely the estates of Jorde’s parents (CPLR 3211[a][10]). Under the statute, “in determining whether to allow the action to proceed [despite the absence of a party], the court shall consider: whether the plaintiff has another effective remedy in case the action is dismissed on account of the nonjoinder; the prejudice which may accrue from the nonjoinder to the defendant or to the person not joined; whether and by whom prejudice might have been avoided or may in the future be avoided; the feasibility of a protective provision by order of the court or in the judgment; and whether an effective judgment may be rendered in the absence of

the person who is not joined.” (CPLR 1001 [b]). CPLR 1001 (b) further states that “[i]f jurisdiction over the parties can be obtained only by his [sic] consent or appearance, the court, when justice requires, may allow the action to proceed without his [his] being made a party.” The determination as to whether the action may proceed without a party being joined rests within the court’s sound discretion, but should be guided by the principle that dismissal is a “last resort” (*L-3 Communications Corp. v SafeNet, Inc.*, 45 AD3d 1, 11 [1st Dept. 2007], citing *Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d 801, 821 [2003]). There are two reasons where dismissal may be required for the failure to join an indispensable party. “First, mandatory joinder prevents multiple, inconsistent judgments relating to the same controversy. Second, joinder protects the otherwise absent parties who would be ‘embarrassed by judgments purporting to bind their rights or interests where they have had no opportunity to be heard.’” (*Saratoga County Chamber of Commerce, Inc. v Pataki*, 100 NY2d at 820, quoting *First Natl. Bank v Shuler*, 153 NY 163 [1897]). In the case at bar, neither of these arguments is applicable as there is no risk of multiple, inconsistent judgments relating to the same controversy, given that the entities at issue are the estates of Jorde’s deceased family members, and that Jorde is herself the executrix of her mother’s estate. Additionally, based on the contents of the proprietary lease signed by Mr. King, and the papers executed by Mrs. King shortly before her death, there can be nothing that Jorde would do which would contravene the clearly expressed intent of the deceased parents. (Mot Exhibit 5 and Cross-Mot Exhibit A, D). Therefore the branch of the motion to dismiss the first, fifth and sixth causes of action based on failure to join necessary parties, is denied.

The branch of the motion seeking to dismiss the second cause of action, sounding in breach of fiduciary duties as against the individual board members, is granted without prejudice to plaintiff seeking to re-plead. On a motion to dismiss pursuant to CPLR 3211(a) (7), the complaint

must be liberally construed in the light most favorable to the plaintiff and all allegations must be accepted as true. (see *Leon v Martinez*, 84 NY2d 83 at 87; *LoPinto v J.W. Mays, Inc.*, 170 AD2d 582 [2nd Dept. 1991]). “Initially, the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail.” (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). “When considering a 3211(a) (7) motion to dismiss, the court must read the pleading to determine if the pleader has a cause of action and not whether the cause of action has been properly pled.” (*United Air Conditioning, Corp. v Wu/Lighthouse 100 William Street LLC*, 12 Misc 3d 1168A, *2 [Sup Ct, Nassau County 2006] , citing *Guggenheimer v Ginzburg*, 43 NY2d at 275]). Here, the complaint alleges that the individual board member defendants breached their duties in an individual as well as in a corporate capacity. However, defendants correctly assert that plaintiff must assign claims of individual tortious conduct to the individual members in order to bring such a claim for breach of fiduciary duties. (See, *Hoppe v Board of Directors of 51-78 Owners Corp.*, 49 AD3d 477, 477 [1st Dept 2008]; *Messner v 112 E. 83rd St. Tenants Corp.*, 42 AD3d 356, 357 [1st Dept], *lv dismissed* 9 NY3d 976 [2007]). Additionally, breach of fiduciary duty must be pled in detail pursuant to CPLR 3016 (b) (see *Perl v Smith Barney Inc.* 230 AD2d 664, 666 [1st Dept 1996]). Although the threshold for stating a claim on a motion to dismiss is not high, as the complaint currently stand, no cause of action exists against the individual defendants for breach of fiduciary duties, as only the barest allegations are set forth as to them. Accordingly, defendants’ motion is granted to the extent that the second cause of action as against the individual board members is dismissed.

Similarly, the third cause of action, breach of contract, fails to state a cause of action against the individual board member defendants, as “the complaint does not allege any individual

wrongdoing by the individual defendants, who are members of the cooperative's board of directors, separate and apart from their collective actions taken on behalf of the cooperative.”(*Granirer v Bakery, Inc.*, 54 AD3d 269, 272 [1st Dept., 2008], citing *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 10 [1st Dept 2006]). The claim of breach of contract against the board itself is also insufficient, as the co-op board was not a party to the proprietary lease, and therefore not subject to the agreement. Any remedy plaintiff may seek for such a breach is fully available through the cause of action against the co-op itself, a party to the proprietary lease, and the entity for which the board operates. Accordingly, defendants’ motion is granted to the extent that the third cause of action is dismissed as against the co-op board members in their individual capacity and the co-op board qua co-op board

Defendants seek dismissal of the first cause of action which claims willful refusal by defendants to re-issue the stock certificate and proprietary lease in Jorde’s name and for an order and judgment compelling defendants to execute the documents. Defendants characterize this request as “injunctive relief,” and argue that such relief is inappropriate where, as here, Jorde also seeks monetary damages in other causes of action. (Memo in Supp. p. 11). Plaintiff asserts the claim essentially seeks a declaratory judgment, and cites *Brief v 120 Owners Corp.*, 157 AD2d 515, (1st Dept 1990), in which the defendant sought a declaratory judgment in order to protect it from other claims. (Reply Memo in Opp p. 4). “If the remedies sought are mutually exclusive, the plaintiff will have to elect from among them at some point in the case. If the plaintiff does not voluntarily elect, the trial judge will determine what that point is.” (Siegel NY Prac ¶ 219 [4th ed], citing *Baratta v Kozlowski*, 94 AD2d 454 [2d Dept 1983]). At this stage in the litigation, the alternative damages theories are acceptable and shall remain. The branch of defendants’ motion seeking dismissal of the first cause of action as against the board and the board members is denied.

Defendants seek to dismiss the fifth cause of action sounding in constructive eviction. Constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises. (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 83 [1970], citing *City of New York v Pike Realty Corp.*, 247 NY 245 [1928]). Where the tenant remains in possession of the demised premises there can be no constructive eviction. (*Barash, supra*, 26 NY2d at 83, citing *Edgerton v Page*, 20 NY 281, 284 [1859]). It has been said that it is inequitable for the tenant to claim substantial interference with the beneficial enjoyment of his or her property and remain in possession without payment of rent. (*Barash, supra*, 26 NY 2d at 83, citing *City of New York v Pike Realty Corporation*, 247 NY 245 at 247; *Edgerton v Page*, 20 NY at 284). Here, defendants argue that Jorde has been voluntarily living in New Jersey for many years, and that she cannot thus claim to have been constructively evicted. However, the claim is adequately pled, and the branch of the motion which seeks dismissal of the fifth cause of action is denied.

Defendants' further contention that the sixth cause of action, sounding in loss of personal property due to the damages to her apartment, is time-barred is inapposite, as it is asserted that the damage is continuous and ongoing. "[B]eing recurring wrongs *they are not subject to any Statute of Limitations*, because they constantly accrue, thus giving rise to successive causes of action." (*Jensen v General Elec. Co.*, 182 AD2d 903, 904 [3d Dept 1999] [emphasis added; analysis based on continuing trespass and nuisance causes of action.]). Accordingly, the branch of the motion to dismiss the sixth cause of action is denied.

Defendants also seek to dismiss the claim for punitive damages with regards to the second and third causes of action, sounding respectively in breach of fiduciary duty and breach of

contract. “Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs, but to vindicate public rights.”(*International Plaza Associates, L.P. v Lacher*, 63 AD3d 527 [1st Dept 2009], citing *Fulton v Allstate Ins. Co.*, 14 AD3d 380, 381 [1st Dept 2005], quoting *Rocanova v Equitable Life Assur. Socy. of U.S.*, 83 NY2d 603, 613 [1994]). Here, as the wrongs alleged are private, the claims for punitive damages shall be stricken from the complaint.

Turning to the cross-motion, plaintiff Jorde first seeks an order discharging the alleged debt, arguing that her cancelled check for the outstanding balance, along with affidavits and documents from two former board members, are proof that the mortgage has been repaid in its entirety. She also argues that defendants must have originally approved the stock transfer, as indicated by the managing agent’s letter dated April 2, 2007, and would not have authorized its attorney to prepare the documentation to transfer the assets, or would have provided a bill and demanded payment for any alleged arrears. (Cross-Mot, Jorde Aff. ¶ 9). She further asserts that both her father, and her father’s estate via her mother as executrix, ratified Mr. King’s intentions to transfer his interest to her. (*Id.*) Plaintiff claims that neither she, nor her attorney, was ever notified after executing the surrender agreement that the co-op had any problem with the transfer of stock. (*Id.* at ¶ 10).

Defendants argue in opposition first the copy of the check has not yet been produced to them. (Def. Reply Memo at 11-12), and that one of the board members relied upon by plaintiff was not on the board at the relevant time period, and that the document produced by the other former board member appears not to be in the board’s possession. (Aff. of Peter Green ¶¶ 3, 5). Given the early stages of this litigation, and the questions raised by defendants, it is inappropriate to declare that plaintiff’s debt is discharged. For the same reasons, the branch of plaintiff’s cross-motion that

seeks an order compelling the co-op to transfer the stock and proprietary lease into Jorde's name must also be denied. The branch of her cross-motion seeking sanctions and attorney's fees is denied as premature. Accordingly it is,

ORDERED that defendants' motion to dismiss the complaint is granted to the extent that the second cause of action is dismissed without prejudice as against the individual board members, and the third cause of action is dismissed without prejudice as against the individual board members and the co-op board without prejudice, and the claims for punitive damages contained in the second and third causes of action are dismissed in their entirety, and is otherwise denied; and it is further

ORDERED that the remainder of the action is severed and shall continue; and it is further

ORDERED that the cross-motion is denied in its entirety; and it is further

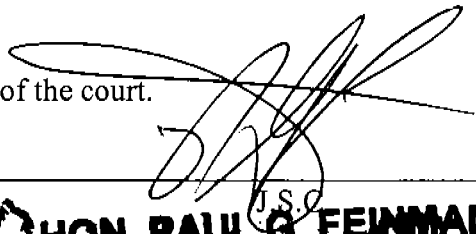
ORDERED that defendants are directed to serve an answer to the amended complaint within 30 days of entry of this order; and it is further

ORDERED that the plaintiff shall serve a copy of this order on the Trial Support Office (60 Centre, Rm. 158) and the Clerk of the Court (60 Centre, Basement) who shall enter judgment in accordance with this decision and amend the caption to reflect the names of parties as it stands after this decision and order; and it is further

ORDERED that all parties remaining shall appear by counsel fully authorized to enter into a preliminary conference order on October 28, 2009 at 2:15 p.m. in Part 12, Room 212, 60 Centre Street, New York, NY 10007 .

This constitutes the decision and order of the court.

Dated: Sept. 1, 2009



FILED
SEP 10 2009

HON. PAUL G. FEINMAN

COUNTY CLERK'S OFFICE
NEW YORK