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SUPREME COURT OF THE STATE OF NEW YORK - NEW YORK COUNTY
PRESENT: Hon. Doris Ling-Cohan, Justice Part 36

CACTUS 4 LLC, et. al,

Plaintiffs,

-against-

MAYA SWISA, et. al,

Defendants.

INDEX NO. 111093/09

MOTION SEQ. NO. 002

The following papers, numbered 1 - 5 were considered on this motion to dismiss:

PAPERS	NUMBERED
Notice of Motion/Order to Show Cause, — Affidavits — Exhibits	1, 2
Answering Affidavits — Exhibits	3, 4
Replying Affidavits	5

Cross-Motion: [ ] Yes [X] No

Upon the foregoing papers, it is ordered that this motion is denied as set forth below.

In this action, plaintiffs – a building owner and its insurers – seek to recover damages for money paid as a result of a fire that occurred in the subject building. The complaint alleges that the fire emanated from a candle that was burning unattended in an apartment in that building. As to the movant, defendant Maya Swisa, the complaint further alleges that defendant Maya Swisa lived in that apartment and was a signatory to the lease for the apartment. Pursuant to insurance policies covering the subject building, plaintiffs-insurers allegedly issued payments to the building owner in the amount of $472,796.64, for property and business interruption damages.

Defendant Maya Swisa now moves to dismiss the fourth and fifth causes of action, pursuant to CPLR 3211(a)(3)[1] and (7). The fourth cause of action alleges a claim for gross negligence, in that defendant Maya Swisa "breached [her duty] to exercise reasonable care by, *inter alia*, failing to exercise

[1] In defendant's Notice of Motion, defendant seeks relief pursuant to CPLR 3211(a)(3) and (7). However, nowhere else in the motion papers is CPLR 3211(a)(3), a motion to dismiss based on plaintiff's incapacity to sue, ever discussed or argued. Thus, in light of this fact, and that it appears the insurers do have capacity to sue, as they are subrogated to the rights of their insured, the motion to dismiss pursuant to this subsection is denied. *See ELRAC, Inc. v Ward*, 96 NY2d 58, 75 (2001).

slight or scant care or diligence in connection with the monitoring of the subject candle(s)." Compl ¶ 75. The fifth cause of action alleges a breach of contract claim against defendant Maya Swisa based on the terms of her lease, by her "fail[ure] to reasonably maintain the subject apartment." Compl ¶ 83.

On a motion to dismiss, pursuant to CPLR 3211, the pleading is given a liberal construction and the facts alleged therein are accepted as true. *Leon v Martinez*, 84 NY2d 83, 87 (1994). The motion to dismiss will only be granted if, upon giving the non-moving party every favorable inference, the facts do not fit within any cognizable legal theory. *Id.* at 87-88.

Defendant Maya Swisa argues that both the fourth and fifth causes of action should be dismissed because plaintiffs have failed to state a cause of action, pursuant to CPLR 3211(a)(7). With regard to the fourth claim for gross negligence, defendant contends that plaintiffs essentially have made the same allegations to support such cause of action as they alleged in support of the negligence cause of action. Defendant argues that plaintiffs have not "alleg[ed] that Ms. Swisa evinced a reckless disregard for the rights of others or committed intentional wrongdoing." Jeremy D. Platek Affirmation in Support ¶ 14. Defendant argues that, thus, the allegations asserted in the fourth claim for gross negligence are insufficient and unsupported to state such cause of action. *See Mancuso v Rubin*, 52 AD3d 580 (2d Dep't 2008). Defendant further argues that the underlying facts of this case do not give rise to a gross negligence cause of action as a matter of law.

In opposition, plaintiffs contend that the complaint adequately alleges a cause of action for gross negligence by asserting that defendant breached her duty to exercise care by failing to exercise slight or scant care or diligence in monitoring the lit candle and that such breach proximately caused the subject property the damages sustained at the premises. Compl ¶¶ 75-76. Plaintiffs contend that their cause of action for gross negligence is not merely a repetition of their negligence claim, in that they allege the higher standard required for gross negligence in such claim.

As to defendant Maya Swisa's motion to dismiss the fourth cause of action, it is denied.

Plaintiffs have adequately pleaded a cause of action for gross negligence. Contrary to defendant's assertion, the fourth cause of action for gross negligence is not simply a restatement of plaintiffs' negligence claim. Plaintiffs have alleged two different standards in their negligence and gross negligence claims. While plaintiffs have alleged, in the negligence cause of action, that defendant failed to exercise "reasonable care" in connection with the lighting and monitoring of the candle in the apartment, their allegations in the gross negligence claim are heightened, in that they allege that defendant failed to "exercise slight or scant care or diligence." Compl ¶¶ 64, 75. Gross negligence is defined as "a failure to use even slight care, or conduct that is so careless as to show complete disregard for the rights and safety of others." PJI 2:10A, *citing*, *inter alia*, *Sommer v Federal Signal Corp.*, 79 NY2d 540 (1992); *Food Pageant, Inc. v Consolidated Edison Co.*, 54 NY2d 167 (1981).

Although defendant cites to a different standard, i.e. that gross negligence is "conduct that evinces a reckless disregard for the rights of others or 'smacks' of intentional wrongdoing," the Court of Appeals has specifically noted that such standard is used in the context where a party is attempting to escape liability through a contractual clause, for damages occasioned by "grossly negligent conduct." *Colnaghi, U.S.A., Ltd. v Jewelers Protection Svcs., Ltd.*, 81 NY2d 821, 823–24 (1993), *quoting Sommer*, 79 NY2d at 554. *See also Mancuso v Rubin*, 52 AD3d 580, 583 (2d Dep't 2008). While differing standards have been used by the courts, it is undisputed that there is a difference between ordinary negligence and gross negligence and that gross negligence "differs in kind, not only degree, from claims of ordinary negligence." *Colnaghi, U.S.A., Ltd.*, 81 NY2d at 823–24. In any event, although differing standards have been used by the courts, at this juncture, plaintiff has sufficiently pleaded a cause of action for gross negligence.

Further, although defendant has argued that, as a matter of law, the facts of this case do not amount to a gross negligence claim, it has been held that: "Where the inquiry is to the existence or nonexistence of gross negligence, the ultimate standard of care is different [than negligence], but the

question nevertheless remains a matter for jury determination." *Food Pageant, Inc.*, 54 NY29 at 173. In light of defendant's argument in support of her motion and based on the above, the motion to dismiss this cause of action is denied.

With regard to the fifth cause of action for breach of contract, defendant argues that this claim fails as it is duplicative of the negligence claim. Defendant cites to case law, which states that: "It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated." *Clark-Fitzpartrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 389 (1987). Defendant argues that there are no allegations in the breach of contract cause of action that arise from a separate and independent duty than the allegations in the negligence claim, since plaintiff has alleged a negligence claim for defendant's failure to "exercise reasonable care" in connection with the lighting of a candle in the apartment and plaintiff has also alleged a breach of contract claim for defendant's failure to "reasonably maintain the subject apartment." Compl ¶¶ 64, 83.

In opposition, plaintiffs argue that since the negligence claim arises out of duties separate and apart from those required pursuant to the lease, the breach of contract claim is not duplicative and should not be dismissed. Plaintiffs contend that "defendant Maya breached her contractual duties to maintain the subject apartment in good condition but also, as is clearly alleged in the Complaint, breached her separate and independent duty to reasonably care for the subject apartment." Aaron M. Schlossberg Affirmation in Opp ¶ 27.

The motion to dismiss the fifth cause of action is also denied. Viewing the alleged facts in the light most favorable to plaintiffs, defendant Maya Swisa has not shown that the breach of contract cause of action should be dismissed as duplicative of the tort claim of negligence. While plaintiffs rely on well-established case law that states that a breach of contract claim cannot be transformed into a tort claim unless there is a separate and distinct legal duty that arises apart from the duty set forth in the contract, such is not the case presented here.

Defendant is not attempting to dismiss the tort claim as merely duplicative of a clear breach of contract claim, as in the cases cited by plaintiffs. *See, e.g.*, *Sommer*, 79 NY2d at 551; *Clark-Fitzpatrick, Inc. v Long Island R.R. Co.*, 70 NY2d 382, 390 (1987); *Clemens Realty, LLC v New York City Dep't of Educ.*, 47 AD3d 666, 666–67 (2d Dep't 2008). Instead, defendant is attempting to do the reverse – dismiss a breach of contract claim as duplicative of a tort claim. However, as plaintiffs allege that there is language applicable to this case in the contract, i.e. that plaintiff was required to reasonably maintain the apartment pursuant to the lease, it would be inappropriate to dismiss a claim that is clearly based on a contract, at this stage. The First Department has held that "a *tort* cause of action that is based upon the same facts underlying a contract claim will be dismissed as a mere duplication of the *contract* cause of action." *Duane Reade v SL Green Operating Partnership, LP*, 30 AD3d 189, 190 (1st Dep't 2006) (emphasis added); *see also Sommer*, 79 NY2d at 551. However, the case law does not provide for the same result if a defendant seeks to dismiss a contract claim instead of a tort claim. As such, the motion to dismiss the breach of contract claim is denied.

Accordingly, it is

ORDERED that defendant Maya Swisa's motion to dismiss the fourth and fifth causes of action is denied; and it is further

ORDERED that within 30 days of entry of this order, plaintiffs shall serve a copy of this order with notice of entry, upon all parties.

Dated: 8/20/10

DORIS LING-COHAN, J.S.C.

Check one: [ ] FINAL DISPOSITION [ ] NON-FINAL DISPOSITION
Check if Appropriate: [ ] DO NOT POST [ ] REFERENCE
[ ] SUBMIT ORDER/JUDG. [ ] SETTLE ORDER/JUDG.

J:\Dismiss\Cactus 4.Swisa, dismiss breach of k & gross neglig - denied.wpd