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Short Form Order

SUPREME COURT - STATE OF NEW YORK
TRIAL TERM, PART 15 NASSAU COUNTY

PRESENT:

Honorable Karen V. Murphy
Justice of the Supreme Court

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FREDERIC HEYMAN,

Plaintiff(s),

Index No. 4902/06

Motion Submitted: N/A

-against-

LIDO BEACH TOWERS CONDOMINIUM,

Defendant(s).

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A trial was held on August 18, 2010, August 19, 2010, August 23, 2010, October 19, 2010 and October 20, 2010. Plaintiff, Frederic Heyman is a unit owner in a condominium known as Lido Beach Towers Condominium, the Defendant herein. The complex was built as a grand hotel in the 1920's and was something of a destination. Due to changing times and declining hotel business, in 1981, the once opulent oceanfront hotel was converted to condominium units. Plaintiff purchased his unit, 4W in 1987.

It is Plaintiff's position that Defendant breached a contractual duty to maintain the premises resulting in damage to his unit and causing him to sustain monetary damages. His second cause of action alleges a breach of Warranty of Habitability. Plaintiff also alleges that Defendant was unjustly enriched because of his payment of maintenance and assessments while the apartment was allegedly uninhabitable. Lastly, Plaintiff claims that he is entitled to compensatory as well as punitive or exemplary damages due to Defendant's continued failure to address the uninhabitable condition of the unit, which allegedly constitutes intentional tortuous conduct by Defendant.[1]

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[1]The summons and complaint, marked as Exhibit 5, does not contain the fourth cause of action, however, Defendant annexed a copy of the March 13, 2006 summons and verified

Defendant contends that it acted reasonably at all times and met its obligations to Plaintiff and that he brought about his own inability to rent or sell his unit due to his failure to maintain the unit and further that he failed to avail himself of the temporary repairs of water leaks offered to unit owners during the lengthy renovation project.

In support of his contentions Plaintiff offered his own testimony as well as that of a real estate broker, Pamela Walsh Boening; a licensed residential and commercial building inspector, John Scott Bray; a former tenant and general contractor, Nicholas Camarano; and a home improvement contractor, David Gliner. Documentary evidence was submitted and reviewed by the Court.

Defendant offered the testimony of Shari Morse, the General Manager of Lido Beach Towers Condominium; Michael Harris, Defendant's facilities manager; Robin Amato, a licensed real estate agent; Jordon Ruzz, a licensed professional engineer who was hired by Defendant to redesign and oversee the implementation and completion of the renovation as a design professional; Anthony Colao, president of Sato Construction Company, the company that ultimately performed the renovation of the roof, facade, cupolas and balconies. Defendant also submitted documentary evidence that was reviewed and considered by the Court.

After living in the unit for a period of years, Plaintiff relocated and began renting his unit in 1997. His second tenant made complaints regarding the apartment in the latter part of 2003 and Plaintiff went to the unit to inspect it. Harris accompanied him on that inspection and arranged for the repair of the oven and dishwasher as well as caulking the air-conditioner sleeve. Plaintiff testified that the windows were in bad condition and the sliding door to the terrace was almost inoperable in October of 2003[2] and that he took no action to repair them nor did Harris, apparently due to the planned renovation of the building, which was to address those concerns. Plaintiff's last tenant left in March of 2004 and the unit has been vacant ever since.

The aging building suffered from numerous and ongoing water leaks over a period of years that caused damage to many of the units and common areas. Some areas were more extensively damaged than others, including an emergency stairwell, which collapsed. At

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complaint as Appendix A to his Post-trial Memorandum of Law.

[2]According to Plaintiff's Exhibit 9, Bray's report dated July 25, 2007, indicated that the sliding glass door appeared serviceable and was in need of minor adjustment and that the windows were older, of poor quality and in need of replacement and further that the ballast springs needed to be repaired.

some point in or about 2004, the Board sought expert advice from an architect, and based upon those recommendations, bids from contractors to waterproof the building were solicited. Unfortunately, upon commencement of the work, more serious defects became known, as the facade separated from the building and the work was stopped. A new engineer was hired and new proposals were sought. The more extensive renovation began in 2006. The roof and facade were replaced as originally planned and the scope of the project grew to include replacement of doors, windows, terraces, air-conditioner sleeves, the deteriorating and/or collapsed stairwells and replacement of damaged sheetrock, spackle and paint in individual units as well as in common areas. Additionally, the new contract called for replacement of drywells, landscaping and irrigation. Ultimately, in the summer of 2010, the project was completed at a cost of approximately 13.5 million dollars. Defendant arranged and paid for temporary repairs to the building and individual units throughout the duration of the renovation project at an additional cost of $345,750.00. Due to the nature of the leaks it was often necessary to make the same repairs repeatedly. This was no doubt a difficult, frustrating and expensive time for all concerned.

Plaintiff bases his first cause of action for breach of contract on the Declaration and Bylaws of the condominium and recites certain sections applicable to this matter. To establish the existence of a cause of action for breach of contract between the parties, Plaintiff must establish his performance and the Defendant's breach. (***Furia v. Furia,*** 116 A.D.2d 694, 498 N.Y.S.2d 12 [2d Dept., 1986]). The parties agree that the Bylaws and declaration of the condominium are controlling, however their interpretations of those documents are at odds. It is uncontroverted that common elements were damaged due to the myriad leaks throughout the building, however, Plaintiff claims that the interior portions of the exterior walls of his unit, which sustained water damage, the poorly operating sliding door to the shaky terrace, the air-conditioner sleeve and windows and their surrounds were the responsibility of the Defendant, as was the alleged damage to Plaintiff's carpeting and window treatments.

Paragraph 8 of the declaration (Ex. 3) defines the common elements. In pertinent part, common elements include:

> ...those portions of the exterior walls beyond the outside face of the sheet rock board... and those portions of the walls and partitions dividing Apartment Units located between the unexposed faces of both sheetrock boards enclosing the Apartment Units.

Paragraph 6 defines the unit as follows:

> "The apartment Units consist of the area enclosed horizontally by the unexposed face of the sheet rock wallboard at the exterior walls of the building and the unexposed face of the sheet rock wall board dividing the Apartment Units from corridors, public

rooms, elevator shafts, stairs, storage areas or other Apartment Units including the sheet rock wallboard. Vertically, each Apartment Unit consists of the space between the upper face of the reinforced concrete floor and the unexposed face of the sheet rock ceiling. Doors and windows which open from an Apartment Unit shall be deemed part of the unit.

Article II, Section 2 of the Bylaws sets for the powers and duties of the Board of Managers. Such powers and duties include, in pertinent part:

(a) operation, care, upkeep and maintenance of the Common Elements; (b) Determination of charges for maintenance of the common Elements ("Common Charges"), and the operating costs of the Property ("Common Expenses");(c) Collection of the common Charges and Common Expenses from the Unit Owners.

Article V of the Bylaws addresses the operation of the property. Section 10 pertains to maintenance and repair:

(a) All maintenance of and repairs to any Unit and any Limited Common Elements exclusive thereto[3], structural or nonstructural, ordinary or extraordinary (other than maintenance of and repairs to any Common Elements contained therein and not necessitated by the negligence, misuse or neglect of the owner of such Unit), shall be made by the Owner of such Unit. Every Unit Owner shall be responsible for all damages to any and all other Units and/or to the Common Elements, that his failure to do so may engender;

(B) All maintenance, repairs and replacements to the Common Elements (other than the limited Common Elements exclusive to particular Units), whether located inside or outside of the Units (unless necessitated by the negligence, misuse or neglect of a Unit owner, in which case such expense shall be charged to such Unit Owner), shall be made by the Board of Managers and be charged to all the Unit Owners as a Common Expense.

Section 11 of the Bylaws provides for Terraces and Balconies.

A terrace or balcony to which a Unit has sole access shall be for the exclusive use of the Owner of such Unit as a Limited Common Element. Any such terrace or balcony shall be kept free and clean of snow, ice and any accumulation of waster by the Owner of such Unit who shall also make all repairs thereto.

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[3]Terraces are defined as Limited Common Elements in paragraph 9 of the Declaration.

While section 11 establishes that it is the unit owner's responsibility to make all repairs to the terrace it is uncontroverted that the Board replaced the terrace, not Plaintiff. Likewise, replacement of the air-conditioning sleeve, windows, terrace door and water damaged sheet rock was arranged for by the board and paid for through assessments charged to all unit owners. Section 10(a) of the bylaws required Plaintiff to maintain his unit, including the windows, door, terrace and internal sheetrock. Defendant undertook a massive renovation to address the leaks in a comprehensive manner and charged all of the Unit owners as a Common Expense for those costs pursuant to Section 10(b). To the extent that leaks in the common elements caused damage to Plaintiff's unit the Defendant met its obligation pursuant to the bylaws by implementing the water proofing project. There was no evidence to suggest that the Defendant's process for determining the source of the leaks and how to most effectively resolve the problem was deficient or in violation of the Bylaws or Declaration.

Plaintiff was aware that the renovation project[4], to replace the entire exterior of the building, the roof, terraces, windows and air conditioner sleeves, was going to begin and testified that he was under the impression that work would commence "shortly". Indeed, work under the aborted first project began on or about February 1, 2005 and the second contract, executed on May 18, 2006 provided that work begin within four weeks. It was anticipated that the project would take twenty-one months to complete, however there was no evidence offered as to when the west elevation, let alone, Plaintiff's unit was scheduled to be repaired. The credible evidence established that when Plaintiff met with Morse and Boening in 2006, as well as with Harris and Camarano in 2006 the conversations were geared toward the need for the waterproofing project, possible renovations to the unit, and how to make the unit more marketable, rather than specific work orders to make immediate repairs to Plaintiff's unit.

While the evidence established that there was a policy to complete a work order to request repairs in a unit, the policy was not strictly adhered to. Plaintiff denied ever completing a work order, expressing his belief that management took care of such things. Management stated it was the owner's responsibility to fill in the multi-part form, but acknowledged that there were times when staff would complete the form as an accommodation to unit owners. Inasmuch as work was sometimes done without the formality of a work order, the existence or lack of a work order is not dispositive.

Moreover, Plaintiff failed to establish by a preponderance of the evidence that he requested and the Defendant failed to make repairs to his unit. To the contrary, the evidence established that Harris promptly made repairs at Plaintiff's request despite the lack of a work

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[4]See Exhibit O, the March 2006 Newsletter requesting that the House Committee be notified of any new leaks or the continuation of old ones so that they can be temporarily repaired, during the pendency of the "TOTAL JOB".

order. In 2004, when summoned to the unit, Harris met Plaintiff and at Plaintiff's request directed that his staff repair the peeling paint around a window frame and made sure that the air conditioner sleeve was caulked. Later, in 2006, Harris arranged to have window ballasts replaced in the bedroom window. Morse had a waterproofing membrane placed above all the windows and the door of Plaintiff's unit and also caulked around the air-conditioning unit shortly after being made aware of this suit in 2006. Ultimately, when the project reached Plaintiff's unit, the terrace, sliding door, windows and air-conditioner sleeve were replaced and interior work was done, including sheet rock replacement, spackle and painting inside his unit[5].

Not adverse to documenting the Defendant's perceived failure to address his delinquent maintenance payments[6], Plaintiff sent letters dated February 28, 2005 (Ex B), December 19, 2006 (Ex. C) and a letter (see Ex. A) sent by certified mail on January 23, 2007, wherein he failed to even mention the repairs he allegedly requested and which were not made by Defendant. On the other hand, the letters dated April 5, 2005, January 3, 2006 and March 9, 2006 (Ex. 11) Plaintiff claims to have sent to Defendant, mention not only his delinquent maintenance charges, but also unspecified repairs, including water and wind leaks. The Court credits Defendant's testimony that the letters comprising Exhibit 11 were not received by Defendant and thus, it did not have notice of Defendant's complaints.

Turning to Plaintiff's complaints that he was unable to rent or sell his unit due to the water damage and air infiltration allegedly caused by defects in the common elements, his proof does not sustain those allegations. Admittedly, the unit was in need of updating[7].

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[5]See Exhibit 21-A indicating re-wiring of electrical outlets and light fixtures on the terrace was to begin starting March 12, 2008 and Exhibit 21-H, to 4W indicating the work was to be done on June 20, 2008; Exhibit 21-G indicating the new windows were being installed around May 1, 2008 and that the owner should remove all window treatments; Exhibit 20, memo to 4W that the air conditioner sleeve was to be installed on May 7, 2008; Exhibit 21-B, dated August 20, 2008 indicating the windows would be covered with plastic in preparation for the EIFS system; Exhibit S, an invoice dated December 12, 2008 for the taping spackling, sanding and primer coat, 20 linear feet of cracked corner beads and "3 windows, 1 door, 2 A/C units, 2 electrical patches and floor molding at door" of unit 4W and Exhibit 21-J indicating window and door screens and door hardware and electrical GFI outlet and exterior light installation was commencing on the west elevations on June 30, 2009 and that the terrace was not to be used .

[6]A judgment was entered in 2010 against Plaintiff, in favor of Defendant for $78,000.00 due to unpaid maintenance assessments.

[7]Plaintiff's proof included the testimony of Plaintiff, Boening, Bray, Gliner and Camarano describing the need for and extent of the proposed renovations to the kitchen, bathrooms, and living room and bedroom; including removal of a wall, new cabinets, appliances,

Granted, with the ongoing water infiltration there was a possibility of future water damage to the exterior wall of the interior of the unit, but there was no credible evidence that temporary repairs would have been unsuccessful or that the Defendant would not have continued to make such repairs, as needed, during the renovation project. While it may be advantageous to wait until the repairs were complete before undertaking a major overhaul of the unit, as was testified to by Plaintiff and his witnesses, under the circumstances herein i.e.; the extensive nature and lack of a finite date for completion of the project and the availability of temporary repairs, Plaintiff's decision to forego routine maintenance since at least 2004 is unreasonable and unjustified.

Plaintiff failed to establish that simply cleaning the apartment, removing debris, painting, and performing minor repairs in the kitchen and bathrooms, which were undeniably his responsibility, would not have improved his prospects of renting or selling the unit.[8] No doubt the Plaintiff's failure to address these minor repairs would have some impact on the desirability of the premises, despite his alleged assurances that those items would be addressed prior to renting or selling[9]. (See ***Park West Management Corp v. Mitchell,*** 47 N.Y.2d 316, 317, 391 N. E. 2d 1288, 418 N.Y.S.2d 310 [1979]). Furthermore, it is not clear how much of an impact Plaintiff's failure to provide electricity in the unit had on its marketability.

The memos sent by the Defendant to unit owners advised owners that window treatments as well as protecting their interior and personal property from dust and damage during the renovation was the owner's responsibility (Ex. 21G, 21H and 21L). Plaintiff simply failed to protect or care for his property. Plaintiff inexplicably failed to remove a broken screen door from the floor, nor did he proffer any evidence to demonstrate that he even attempted to clean the worn carpeting or paint or repair those areas of the apartment that were not impacted by the leaks. With regard to the alleged vandalism, other than making a police report, Plaintiff failed to replace the missing toilet, sink, stove and electric parts or to take any action to safeguard his unoccupied unit from further vandalism.

Furthermore, the evidence was inconclusive as to whether the unit has continuously

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new electric and plumbing, fixtures, lighting, painting and flooring, as well as a description of the poor condition of the vacant and out dated unit.

[8]Despite the completion in 2008 of the window, door, terrace, air conditioner sleeve and sheetrock replacement and painting in Plaintiff's unit by the Defendant, the Plaintiff has still not rented or sold the unit, nor has he completed the aforementioned renovations.

[9]Boening testified that some prospective tenants or purchasers may have vision, whereas others could not imagine how the unit would look if the renovations were completed.

been listed for sale and rent since it was vacated in March of 2004. Nonetheless, Plaintiff did receive at least three offers to purchase the unit, but there was no proof to establish that the failure to consummate those deals was a result of Defendant's alleged breach. To assume the failure to rent or sell was due to leaks in the common areas and resulting damage to his unit or to any cause attributable to Defendant would call for speculation and is not supported by any credible evidence[10]. Indeed, the fact that people were willing to buy the unit undercuts Plaintiff's claims that the unit was uninhabitable.

The Bylaws provide that repairs to the terrace and inside the unit, including doors, windows, painting and flooring were the responsibility of Plaintiff, unless it could be established that the damage stemmed from issues in the common areas. It is not contested that deteriorating common elements such as the facade and roof caused leaks, but the extent of that damage, as opposed to the damage due to Plaintiff's failure to maintain his unit was not proven by Plaintiff. Plaintiff also failed to establish that his loss of rental income or other economic damages was attributable to the Defendant. Lacking credible proof that Plaintiff notified Defendant of ongoing issues and that Defendant failed to address any complaint made by Plaintiff, Plaintiff failed to prove that Defendant had an obligation to repair the Plaintiff's unit and that it breached that duty. For the foregoing reasons, the first cause of action has not been established.

Plaintiff's second cause of action alleges a breach of Warranty of Habitability. The warranty of habitability (***Real Property Law* §235-b**) does not apply to an individual unit within a condominium (***Matter of Abbady,*** 216 A.D.2d 115, 629 N.Y.S.2d 6 (1st Dept., 1995); ***Edge Management Consulting v. Blank***, 25 A.D.3d 364, 807 N.Y.S.2d 353 [1st Dept., 2006]). Absent expert testimony, the allegations that there was and/or is a mold condition in the unit are purely speculative. Assuming *arguendo* that there was, or is, a mold condition, there was no evidence that it was a type of mold that would render the unit unsafe or uninhabitable.

Clearly, Plaintiff's unit was not as desirable as a renovated and/or leak free unit, but Defendant established that other units suffering from water infiltration were inhabited and their owners availed themselves of the services of the leak team, which provided temporary repairs to make the living more comfortable during the renovation project. Indeed, Plaintiff's realtor established that other units in the complex sold during the renovation project. Furthermore, both Boening and Amato testified that the unit was rentable, though they disagreed on the value. While it is clear that Plaintiff chose not to invest in a renovation of the unit, the mere fact that the unit was not occupied or that there was some thought that a

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[10]Again, Defendant completed repairs in and about Plaintiff's unit in 2008, but that has had no effect on the marketability of the unit, lending credence to the Defendant's argument that the condition of the apartment itself, rather than water and air infiltration was the reason it did not rent.

dangerous mold condition may have existed, does not establish that the unit was uninhabitable. Furthermore, Plaintiff failed to prove that the Defendant caused the unit to be uninhabitable.

Plaintiff's third cause of action alleged that Defendant was unjustly enriched as a result of his payment of maintenance and assessments. To prevail on a claim of unjust enrichment, Plaintiff must demonstrate that Defendant was enriched at Plaintiff's expense and that it is against equity and good conscience to permit Defendant to retain what is sought to be recovered. (***Marini v. Lombardo,*** 79 A.D.3d 932, 912 N.Y.S.2d 693 [2d Dept., 2010]). The payment of maintenance and assessments is Plaintiff's obligation and he failed to establish unjust enrichment, as such expenses paid for the normal operating expenses of the condominium and the renovation project, which was desperately needed to stop the water infiltration that gave rise to this matter and which ultimately inured to Plaintiff's benefit. Equity and good conscience requires Plaintiff to meet his financial obligations to Defendant in accordance with the bylaws.

Plaintiff's fourth cause of action alleged that Defendant's deliberate conduct, including its alleged refusal to address the uninhabitable condition of the unit constitutes tortuous conduct by Defendant, entitling him to compensatory, punitive or exemplary damages. It is well settled that a contracting party may be charged with a separate tort liability arising from a breach of a duty distinct from, or in addition to the breach of contract (***East End Laboratories, Inc. v Sawaya,*** 79 A.D.3d 1095, 914 N.Y.S.2d. 250 [2d Dept., 2010]). Inasmuch as Plaintiff has failed to establish that the unit was uninhabitable and further neither alleged nor proved any actions, which would constitute a wrong separate and apart from the alleged breach of contract (***id)***, this cause of action also fails and is dismissed.

For the foregoing reasons, Plaintiff has failed to meet his burden of proof and thus the complaint is dismissed in its entirety.

The foregoing constitutes the Order of this Court.

Dated: March 31, 2011
Mineola, N.Y.

Karen V. Murphy
J. S. C.
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NASSAU COUNTY
COUNTY CLERK'S OFFICE