[* 1]

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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Dorr

Plaintiff (s),

INDEX NO. 105451/06

MOTION DATE

MOTION SEQ. NO. ~~005~~ 007

- v -

London Terrace Defendant(s).

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, the court's decision on this (these) motion (s) is as follows:

motion (s) and cross-motion(s) decided in accordance with the annexed decision/order of even date.

FILED

MAY 11 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 5/10/11

Hon. Judith J. Gische, J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE ☐ SETTLE/SUBMIT ORDER

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Cheri Dorr and Dorr Design Associates, Inc.,

Plaintiffs,

-against-

London Terrace Towers Owners, Inc., The Board of Directors of London Terrace Towers, Inc., London Terrace Towers Condominium, The Board of Managers of London Terrace Towers Condominium, Douglas Elliman Property Management, Westfair Restoration Services, Inc., Nancy Frawley, Steven Engel and Kay Waterproofing Corp.,

Defendants.

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DECISION/ORDER
Action #1
Index No.: 105451/06
Seq. No.: 008

Present:
Hon. Judith J. Gische
J.S.C.

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Peter Kaufmann and Jenny Kaufman,

Plaintiffs,

-against-

London Terrace Towers Owners, Inc., The Board of Directors of London Terrace Towers, Inc., London Terrace Towers Condominium, The Board of Managers of London Terrace Towers Condominium, Douglas Elliman Property Management, Westfair Restoration Services, Inc., Nancy Frawley, Steven Engel and Kay Waterproofing Corp.,

Defendants.

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Action #2
Index No.: 102219/06

Recitation, as required by CPLR § 2219 [a], of the papers considered in the review of this/these motion(s):

Papers	**Numbered**
Def's n/m (partial SJ), CHR affirm, exhs	1
GKV affirm in opp, exh	2
3/17/11 Transcript	3

Upon the foregoing papers the decision and order of the court is as follows:

These two actions arise from property damage caused by flooding at the plaintiffs' residential cooperative units. Defendants London Terrace Towers Owners, Inc. (The "Co-op"), The Board of Directors of London Terrace Towers, Inc., London Terrace Towers Condominium, The Board of Managers of London Terrace Towers Condominium, Douglas Elliman Property Management, Nancy Frawley and Steven Engel (collectively herein referred to as the "LTDE Defendants") move for: [1] partial summary judgment dismissing the claims brought by Dorr Design Associates, Inc. ("DDA")' [2] partial summary judgment dismissing plaintiffs Cheri Dorr's claims for "consequential damages"; and [3] leave to amend their answer in the both actions to assert an affirmative defense. CPLR §§ 3212, 3025 [b]. Plaintiffs Dorr and DDA oppose the motion in its entirety. The plaintiffs in the second action have not taken a position on this motion.

In September 2004, the plaintiffs' apartments sustained water damage and associated mold growth as a result of several severe rain storms. The court will focus on the facts in Action #1, since the balance of this motion centers on Dorr's case.

Dorr has submitted an affidavit to the court. The LTDE Defendants "vehemently dispute[]" her characterization of the facts. Dorr states that in 1996, she purchased the small one-room studio, which is the property that was damaged in 2004. She claims that hundreds of gallons of water gushed through the walls and ceilings. She was told after the water damage occurred that it was caused by "a problem with a water trough above [the apartment], which damaged the waterproofing." She claims that "[t]he Co-op

did nothing at all, and mold began to form almost immediately after the first flood. The smell was putrid, and a good part of the ceiling collapsed and fell in, and the north wall was damaged." In November 2004, Dorr moved into a temporary apartment nearby, and her insurance company, Chubb, covered the costs of the move and the temporary rental.

She claims that a mold remediation was completed late December 2004 by the Co-op. The next month, another flood occurred. Dorr applied for a home equity loan, with intention of renovating the apartment "since a huge amount of demolition had been done during the Co-ops (sic) mold remediation." Dorr and the Co-op tried to execute an agreement to allocate responsibility between the parties for the various stages of the renovation work to be done on the apartment. Dorr claims that "[t]his agreement required [her] to release the co-op for all responsibility, and [her] assuming the responsibility for, any mold or asbestos contamination, in exchange for a rent abatement and their doing some repairs."

According to Dorr, there was still mold in the apartment. She reluctantly agreed to take on the work herself (whether this was ever memorialized or not is unclear to the court). During the course of trying to hire contractors to do the work, she discovered that in addition to the mold, there might be asbestos in the apartment. Since the Co-op agreed to pay for independent testing if any mold was found, Dorr hired Ed Olmstead, a Certified Industrial Hygienist, to perform mold testing. Olmstead reported that extensive toxic mold was present, as well as "friable asbestos."

The Co-op then "flatly disputed and dismissed the testing saying they would not

pay for it and they had never agreed to pay for it." Nancy Frawley communicated to Dorr that they were going to schedule a "plumber to remove the asbestos and there was nothing [Dorr] could do about it." Nor would the Co-op agree to any rent abatements or to work with Dorr regarding the renovation of the apartment. Dorr then filed this suit in March 2005.

Eventually, the Co-op agreed to perform the mold and asbestos remediation. Dorr continued living in the rental apartment, which Chubb paid for until September 2006. Thereafter, Dorr paid the monthly payments herself, along with the maintenance and mortgage on her co-op apartment. In October 2007, Dorr gave up her office space and started working out of the business apartment. She paid for the costs of the move. She continued working and living in the rental apartment until April 2008, when she finally moved out of the city and to a small house in Barryville, New York "in an effort to survive financially (and otherwise)."

In November 2008, the Co-op communicated to Dorr that the apartment had been "fixed." After inspecting the apartment, Dorr characterizes the work done as a "horrible job." She states that "[a]ll the custom and detail work [she] had done was turned into an ugly tenement apartment." Thereafter, Chubb provided additional money in July 2009, and she maintains that the apartment was " 'fixed' to a certain point" and she was able to rent it out by October 2009.

Dorr describes these events as a "devastating experience" that effective made her "homeless." She claims that she suffered "substantial financial losses, separate and apart from her business." She maintains that she spent "thousands and thousands of

dollars on such things as environmental testing, moving costs, alternate housing, property repairs, damaged property, increased living costs, and other things." Dorr states that she sought counseling during this ordeal.

As for her business, DDA, she claims that these events hurt her business in a number of ways. Dorr, a graphic designer, states that she is her business, and that she works both at home and in her office. She claims that up until the flood, she would often bring work home and would normally work at her desk from 5am - 9am. Then, she would "polish up the work she had done that morning on the big computer" in her office. After the flood, her work desk in the apartment was covered in plastic, located almost directly beneath the hole in the ceiling. She says that she often slept at the office from September to November 2004, because "as the mold grew, the apartment became increasingly uninhabitable."

Dorr claims that in 2004-2005, her work business suffered terribly because of the issues she was dealing with regarding the apartment, such as meeting with Co-op representatives, their insurance company, her insurance company, taking pictures, obtaining estimates, packing up the apartment, and moving. Then when she moved from her office in 2007 that she had been occupying since 1999, this disruption also caused her business to suffer. She claims that now that she lives and works in Barryville, New York, she doesn't get most of the projects she used to work on before September 2004. She claims that she is no longer active with any professional NYC organizations "given the fact that [she] live[s] so far away." She states that "[i]t's hard to say exactly how much work [she has] lost because of my inability to network and to

socialize/wine and dine clients, but it is substantial and can be estimated." Because of all this, she maintains that her business has lost "a great deal of money." She states that she can't just move back the NYC now because the companies she used to work with have found other people to do the work, and the additional expense might not be worth it.

Discussion

The court will first address the motion for summary judgment. The LTDE Defendants maintain that Dorr is entitled to such damage remedies as a rent abatement for the period where the apartment was uninhabitable, the actual property damage Dorr sustained including incidental costs such as moving expenses and alternate housing costs, offset by any money Dorr received from Chubb covering same expenses, and any attorneys fees to which Dorr is entitled to under RPL § 234, "to the extent the law is applicable." So in this motion, the LTDE Defendants seek dismissal of Dorr's claim for "consequential damages", because they argue that it is improper, and further maintain that DDA is an improper party, and its claims should be dismissed.

The plaintiffs maintain that DDA is a proper party because under the Lease, home occupations "are permitted under the applicable zoning laws." They also ague that the defendant's breach of the Lease provision setting forth remedies in the event the apartment is damaged by fire or other cause does not foreclose other applicable remedies for the LTDE Defendant's breach of their fiduciary duty to Dorr. Plaintiffs also argue that consequential (and punitive) damages are available "for the defendants' tortious conduct and breaches of the warranties of habitability and quiet enjoyment."

On a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a *prima facie* case that would entitle it to judgment in its favor, without the need for a trial (CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 [1985]; Zuckerman v. City of New York, 49 NY2d 557, 562 [1980]). Only if it meets this burden, will it then shift to the party opposing summary judgment who must then establish the existence of material issues of fact, through evidentiary proof in admissible form, that would require a trial of this action (Zuckerman v. City of New York, *supra*). If the proponent fails to make out its *prima facie* case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (Alvarez v. Prospect Hospital, 68 NY2d 320 [1986]; Ayotte v. Gervasio, 81 NY2d 1062 [1993]).

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (Rotuba Extruders v. Ceppos, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (Sillman v. Twentieth Century Fox Film , 3 NY2d 395 [1957]). When only issues of law are raised in connection with a motion for summary judgment, the court may and should resolve them without the need for a testimonial hearing (Hindes v. Weisz, 303 AD2d 459 [2d Dept 2003]).

The court does find that DDA's claims should be dismissed, because none of the defendants owed it a legal duty. While the Lease expressly permitted Dorr to operate a home business in the apartment, this was still a residential property, and DDA was not

a party to the Lease. DDA's office was not in the apartment and DDA did not suffer any property damage as a result of the alleged water intrusions. Any obligations that the LTDE Defendants owed to Dorr stemming from the Lease do not necessarily flow to DDA. As for plaintiffs' breach of fiduciary claim, this claim suffers the same problem. The LTDE Defendants did not have a fiduciary relationship with DDA in the context of this residential leasehold. Accordingly, the LTDE Defendants have established entitlement to summary judgment dismissing DDA's claims, and those claims are hereby severed and dismissed.

However, Dorr's claims for consequential damages survives. While it is true that typically, under a breach of contract theory, consequential damages are not available, Dorr has alleged sufficient facts to raise a triable issue as to whether such damages are available to her. In order to recover consequential damages, or damages that result from an injurious act, she must show that her damages were: [1] foreseeable; and [2] within the contemplation of the parties at the time the Lease was entered into (see i.e. American List Corp v. U.S. News and World Report, Inc., 75 NY2d 38 [1989]). On the first issue, a reasonable juror could conclude that it was foreseeable that Dorr would lose income, profits or wages or suffer damages flowing from the disruption of her daily living as a result of the LTDE Defendants' failure to timely repair the apartment.

On the second issue, it was certainly within the contemplation of the parties at the time the Lease was executed that Dorr live, work and conduct business in the apartment (see i.e. Carolina v. Dinicu, 258 AD2d 218 [1st Dept 1999]). It is of no moment that the Lease specifically provides for a rent abatement in the event that the

apartment is rendered uninhabitable, it is undisputed that Dorr did not receive a rent abatement, and this fact is part of the basis for her claims against the LTDE Defendants. Moreover, the rent abatement provision does not expressly foreclose special damages, or otherwise expressly indicate that it is the only remedy for plaintiff i.e. a liquidated damages provision. Absent such language, the LTDE Defendants cannot show, at this juncture, entitlement to judgment as a matter of law, dismissing plaintiff's consequential damages claims.

The parties argue at length about the viability of Dorr's breach of fiduciary duty claims. However, since the LTDE Defendants have not specifically moved to dismiss those claims, the court need not address them at this time, having found that consequential damages are available under her breach of contract claim.

Accordingly, the LTDE Defendants' motion to dismiss Dorr's claims for consequential damages is denied.

The motion to amend

The LTDE Defendants seek to amend their answer to assert a defense that the plaintiffs in both actions failed to mitigate their damages. The LTDE Defendants claim that during the course of discovery, they learned that: [1] Dorr did not use the money she received from her homeowner's insurance policy to repair the apartment; and [2] the Kaufmans did not repair or attempt to stop on-going water infiltration in their apartment.

In the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025 (b) (Fahey v. County of

Ontario, 44 NY2d 934 [1978]). Moreover, leave should be granted when the denial of the motion would create a greater prejudice than granting it (Murray v. City of New York, 43 NY2d 400 [1977]; Adams Drug Co. v. Knobel, 129 AD2d 401 [1st Dept 1987]). However, an order allowing the amendment should not be granted without considering the validity of the claim sought to be asserted. Thus, "the sufficiency or meritoriousness of a proposed pleading or matter" should be resolved at the outset "to obviate the possibility of needless time consuming litigation." Sharapata v. Town of Islip, 82 AD2d 350, 362 *aff'd* 56 NY2d 332 (1982).

The party seeking leave to amend is required to show that the new claims have a colorable basis (NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 [1st Dept 1990]). In addition, where there has been an extended delay in moving to amend, the moving party must establish a reasonable excuse for the delay (Oil Heat Institute of Long Island Ins. Trust v. RMTS Associates, LLC, 4 AD3d 290 [1st Dept 2004] citing Heller v Louis Provenzano, Inc., 303 AD2d 20 [1st Dept. 2003]).

The Kaufmanns do not oppose the LTDE Defendants' motion to amend. Only Dorr does, and she argues that it would have been impossible for her to repair the apartment, and that any repairs she could have made would have been damaged by the necessary remediation work. Dorr's arguments highlight that these are issues of facts for a jury to decide. Further, the LTDE Defendants have demonstrated a reasonable excuse for their delay in seeking to amend insofar as they learned about Chubbs' pay-outs to Dorr under the policy during the course of discovery. Accordingly, the motion to amend to add a new affirmative defense of failure to mitigate damages is

added. The LTDE Defendants' are direct to serve their Answer in the form annexed to their moving papers as Exhibit "T" with respect to Dorr's Amended Complaint and Exhibit "U" with respect to Kaufmann's Complaint.

Conclusion

In accordance herewith, it is hereby:

ORDERED that the motion for summary judgment is granted only to the extent that Dorr Design Associates's claims are hereby severed and dismissed; and it is further

ORDERED that the motion to amend is granted and: [1] the LTDE Defendants are directed to serve their Answer to Dorr's Amended Complaint in the form annexed to their moving papers as Exhibit "T" within 10 days; and [2] the LTDE Defendants are directed to serve their Answer to Kaufmanns' Complaint in the form annexed to their moving papers as Exhibit "U"; and it is further

ORDERED that the motion is otherwise denied.

Any requested relief not expressly addressed herein has nonetheless been considered by the court and is denied.

This shall constitute the decision and order of the court.

Dated: New York, New York
May 10, 2011

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.