

**Asteriadis v Twelve Seventy Fifth Ave. Cooperative,  
Inc.**

2011 NY Slip Op 31530(U)

May 27, 2011

Sup Ct, NY County

Docket Number: 109199/08

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES  
*Justice*

PART 59

ATHANASIOS ASTERIADIS and DIMITRA  
TAMPAKOPOULOU,  
Plaintiffs,

Index No.: 109199/08

Motion Date: 10/15/10

Motion Seq. No.: 1

- v -

THE TWELVE SEVENTY FIFTH AVE. COOPERATIVE,  
INC., TED PHILLIPS, individually and as a  
Director of THE TWELVE SEVENTY FIFTH AVE.  
COOPERATIVE, INC. and CATHERINE CODY,  
individually and as a Director of THE  
TWELVE SEVENTY FIFTH AVE. COOPERATIVE,  
INC.,  
Defendants.

**FILED**

**JUN 09 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

The following papers, numbered 1 to 8 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits	No (s) .	1, 2
Answering Affidavits - Exhibits	No (s) .	3, 4
Replying Affidavits - Exhibits	No (s) .	5 - 8

Upon the foregoing papers, it is ordered that this motion is

Plaintiffs move for summary judgment against all defendants.  
Defendants cross-move for summary judgment dismissing all causes  
of action against defendants Ted Phillips (Phillips) and  
Catherine Cody (Cody); partial summary judgment dismissing the  
second, fourth, fifth and sixth causes of action against  
defendant The Twelve Seventy Fifth Ave. Cooperative  
(Cooperative); and partial summary judgment on Cooperative's  
counterclaim.

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

1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .. MOTION IS:  GRANTED  DENIED  GRANTED IN PART  OTHER
3. CHECK IF APPROPRIATE: .....  SETTLE ORDER  SUBMIT ORDER
- DO NOT POST  FIDUCIARY APPOINTMENT  REFERENCE

Plaintiffs bring this action against Cooperative for breach of contract, breach of fiduciary duty, and breach of implied warranty of habitability, seeking damages and attorneys' fees. They also sue Phillips and Cody, former directors of Cooperative, for inducement to breach fiduciary duties, prima facie tort, and aiding and abetting Cooperative in its alleged breach of the Occupancy Agreement ("Agreement").

The counterclaim alleges that plaintiffs breached the Agreement by withholding maintenance for two months.

Specifically, the complaint alleges that

- (1) plaintiffs, who occupy the premises owned by Cooperative of which they are tenant-shareholders, were renovating their apartment before occupying it;
- (2) upon nearing completion, plaintiffs discovered that their hardwood floors were seriously damaged by a flood;
- (3) plaintiffs reported the situation to the superintendent, who determined that water was leaking through defective air conditioner unit sleeves in the apartment;
- (4) the air conditioners could not be safely operated until the sleeves were repaired;
- (5) relying on the Occupancy Agreement (Agreement) which they claim requires Cooperative to repair the sleeves, plaintiffs proceeded to inform Cooperative of their situation. For nearly three years, between August 2006 and May 2009, Cooperative did not respond to plaintiffs' request for repair of the sleeves;
- (6) after plaintiffs retained an attorney, they were

able to compel Cooperative to allow plaintiffs to hire an outside contractor to make the repairs; (7) Cooperative has subsequently refused to fully reimburse plaintiffs for the costs of the repairs and other damages sustained as a result of the delay in repairing the sleeves.

Plaintiffs move for summary judgment on all of their causes of action, arguing that Cooperative violated the Agreement when for nearly three years it failed to repair the sleeves despite repeated representations that it would do so. They argue that Cooperative did inform them that it would make the appropriate repairs and, thus, covenanted to do the job. They assert that where the Agreement is silent as to the time within which the repairs are to be made, the repairs argue that the cause of the disrepair of the sleeves is not in dispute. They insist that there was deterioration to the sleeves due to the settling of the building. They deny that their remodeling of the apartment had any effect on the condition of the sleeves. They maintain that the fact that Cooperative claims that it has no contractual duty to provide air conditioning is not relevant to this case, because they are only claiming that under the circumstances, Cooperative had a duty to repair the sleeves. Plaintiffs claim that the implied warranty of habitability was breached because they were reasonable in their expectation that Cooperative would provide

them with workable sleeves within a reasonable time, avoiding the inconvenience of no air conditioning during the summers.

According to plaintiffs, defendants breached their fiduciary duties as a matter of law, and their claim is not duplicative of the breach of contract claim, because defendants owed duties that were independent of the Agreement. Plaintiffs contend that they have provided sufficient proof that defendants acted in bad faith towards them. They hold that defendants' actions made in bad faith preclude any attempt to invoke the business judgment rule. They oppose defendants' motion on the counterclaim, arguing that upon advising Cooperative, they withheld maintenance for the months of August and September 2008 to protest its failure to repair, but continued to pay maintenance beginning in October 2008, because of a house rule that allegedly provides that a shareholder will not be in arrears on maintenance unless he or she has failed to pay maintenance for more than two months. The two months of maintenance is currently being held in escrow by plaintiffs' counsel pending this court's determination of their claims.

Plaintiffs also argue that Cooperative breached the implied warranty of habitability by its failure to repair that rendered the apartment uninhabitable during the summer periods when plaintiffs were unable to occupy their apartment. Plaintiffs seek the recovery of the costs for the repairs as well as an

abatement of maintenance for the period when no repairs had been performed.

As to the individual defendants, plaintiffs contend that they breached their fiduciary duties to plaintiffs, when Phillips intentionally neglected to take necessary steps to repair the sleeves, and Cody persuaded the Board of Directors to vote against the repairs.

Plaintiffs argue that Phillips and Cody committed a prima facie tort when they intentionally inflicted harm on plaintiffs by causing them to live without air conditioning for nearly three years without justification, and by refusing to repair or to cover the cost of repairing for a legitimate reason.

Plaintiffs also contend that they are entitled attorneys' fees as special damages due to the alleged malice of the individual defendants and pursuant to Real Property Law Section 234.

They aver that Phillips failed to take the necessary measures to ensure the repairs due to his prejudice towards the Greek ancestry of plaintiffs and that Cody had an irrational personal dislike of plaintiff Asteriadis, which effected her decisions while she was a member of the Board of Directors. Plaintiffs state that such malevolence on defendants' part would justify the granting of punitive damages.

Defendants oppose the motion and cross-move for summary judgment dismissing all claims against the individual defendants, and most claims against Cooperative. They argue that there is a question as to who was responsible for the damage to the sleeves. If said damage was an artifact of plaintiffs' renovations, they assert that plaintiffs, and not Cooperative, would be contractually responsible for repairing the damage.

Defendants argue that Cooperative did not breach its fiduciary duty to plaintiffs when it failed to repair the sleeves because it did not owe them a duty to provide air conditioning in the first place. Defendants contend that the claim is simply a restatement of a breach of contract claim and is insufficiently pled. Defendants also seek dismissal of the inducement of breach of fiduciary duties claim brought against the individual defendants. They argue that there is an insufficient showing of malfeasance in the conduct of such defendants in their capacity as Board directors. According to defendants, their decisions as directors are protected by the business judgment rule. By affidavits, Phillips and Cody contend that the alleged purpose of delaying plaintiffs' repairs was to conserve funds and complete repairs on all damaged sleeves found in the apartment complex rather than do repairs piecemeal at a presumably higher cost.

Defendants aver that the prima facie tort claim against the individual defendants be dismissed because the individual

defendants did not intend to inflict harm on plaintiffs, and that the personal and racist basis for such conduct as alleged by plaintiffs is non-existent.

As for the balance of the complaint, defendants argue that Cooperative's failure to provide air conditioning does not constitute a breach of the warranty of habitability; that the reciprocal provisions of the Real Property Act do not apply with respect to plaintiffs' claim for attorneys' fees; and that plaintiffs' request for punitive damages is unwarranted in the absence of extreme egregious conduct.

Defendants seek summary judgment on the counterclaim brought by Cooperative. They contend that Cooperative did not breach the warranty of habitability which is alleged to be a basis for the withholding of maintenance, and that plaintiffs lack any justification for withholding the money.

DECISION

The court shall deny summary judgment on the first cause of action for breach of contract against the Cooperative, as to both sides.

Article 11 of the Agreement provides, in pertinent part:  
(a) By Member (plaintiff): The member agrees to repair and maintain his dwelling unit at his own expense as follows

(1) Any repairs or maintenance necessitated by his own negligence or misuse.  
\* \* \*

(b) By Corporation: The Corporation shall provide and pay for all necessary repairs, maintenance and replacements

of project property ... Except as specified in clause (a) of this ARTICLE. . .

Plaintiffs have not come forward with prima facie proof that the deterioration in the sleeves was due to the settling of the building as opposed to their renovation work. Therefore, there remains an issue of fact as to breach of contract, including but not limited to which party or parties bear responsibility for the repair work under the foregoing terms of the Agreement.

Furthermore, Article 20 of the Agreement states that "No representations other than those contained in this Agreement, the Charter and the By-Laws of the Corporation shall be binding upon the Corporation". Plaintiffs' contention that defendants repeatedly advised them that they would make such repairs constitutes inadmissible parol evidence that may not alter the terms of the Agreement.

That in early 2008 the Board authorized a building survey to determine which apartments had sleeves in need of repair and that twenty two apartments claimed defects in the sleeves does not establish the cause of the deterioration in plaintiffs' sleeves as a matter of law. Nor does the Board's offer to reimburse plaintiffs for the repairs up to the building-wide cost for repairing sleeves establish that plaintiffs were free of misuse or neglect with respect to the sleeves. The Board's cancellation of its plan to permit the simultaneous performance of repairs on all damaged sleeves in the apartment building in an effort to

contain costs neither establishes that it was responsible for repair of the sleeves nor constitutes an admission by the Board that it was responsible.

The court shall also deny plaintiffs' motion for summary judgment on their third cause of action for breach of the warranty of habitability. The plaintiffs clearly establish a prima facie case for liability on this claim, particularly by the affidavit of Cooperative's superintendent, that states that the defective air conditioning sleeves resulted in flooding and serious water damage to plaintiffs' living and bedrooms. However, Cooperative's property manager, by affidavit, raises issues of fact, including but not limited to, whether the renovation carried out or other acts by the plaintiffs resulted in damage to the air conditioning sleeves. She cites circumstantial evidence that Cooperative did not receive any complaints about leaks until after plaintiffs commenced their renovation. She points out that the Cooperative had no obligation under the Agreement to provide air conditioning to any apartment, which is what plaintiffs claim made the apartment uninhabitable during hot weather. She also states that the it was the plaintiffs' rejection of the recommendation of Cooperative to place a shallow pans below the air conditioner sleeves to collect condensation, a "simple remedial measure" successfully used by other tenants during lags in building wide

facade work, which left plaintiffs without air conditioning during the period in question.

The court shall deny plaintiffs' motion for summary judgment as to the second cause of action for breach of fiduciary duty against the Corporation and grant defendants' motion for summary judgment to dismiss such cause of action.

The standard of review for challenges to the decisions of board of directors of residential cooperative corporation is analogous to the business judgment rule, i.e., as long as the board acted for purposes of the cooperative, within the scope of its authority, and in good faith, the courts will not substitute their judgment for that of the board. Levandusky v One Fifth Avenue Apartment Corp., 75 NY2d 530 (1990). Plaintiffs have failed to meet their prima facie burden to demonstrate that the board's decision to decline to authorize the repairs of their air conditioning sleeves at the Cooperative's full expense had no legitimate relationship to the welfare of the cooperative, deliberately singled them out for harmful treatment, was taken without notice or consideration of the relevant facts, or was beyond the board's authority, the standard enunciated in Levandusky.

As for the claims against the individual Board members, defendants assert, and it is not denied by plaintiffs, that there were nine members of the Board in all at that time, making

Phillips and Cody a minority and limiting their influence on the matters at bar. As plaintiffs come forward with no evidence of bad faith or tortious conduct by the board members independent of the Board's delay and failure to authorize the repairs of the air conditioning sleeves at Cooperative's expense, the breach of fiduciary duty claims against the individual members must be dismissed. Pelton v 77 Park Avenue Condominium, 38 AD3d 1 (1<sup>st</sup> Dept 2006).

To the extent that plaintiffs' allege animus based on national animus, to make a prima facie case of housing discrimination under Executive Law § 296(5), plaintiff must demonstrate (1) that they are members of the class protected by the statute; (2) that they sought services in connection therewith that they were entitled to under the Agreement or other applicable law; (3) that such services were denied; and (4) that Cooperative's denial of such services occurred under circumstances giving rise to an inference of discrimination. Sayeh v 66 Madison Avenue Apt. Corp., 73 AD3d 459 (1<sup>st</sup> Dept 2010). Plaintiffs' provide no evidence that demonstrate animus and anti Greek bias by the defendants as a reason for their conduct as Board directors, as there is no evidence that the Board treated non-Greeks differently in regard to repair of their air conditioning sleeves. In fact, the only evidence in the

record before the court is that Cooperative never repaired the air conditioner sleeves of any of the tenants.

As for the prima facie tort claim, plaintiffs are required to allege and prove that the individual defendants (i) intentionally inflicted harm (ii) without excuse or justification (iii) by an act or series of acts that would be otherwise by lawful, (iv) resulting in special damages. See Kaisman v Hernandez, 61 AD3d 565, 566 (1<sup>st</sup> Dept 2009). As with their prima facie tort claims, plaintiffs have failed to come forward with any evidence that individual defendants intentionally inflicted harm on them, since each of the board members only took actions as part of the collective acts of the board.

Plaintiffs' claim for punitive damages shall also be dismissed because the allegations that the individual defendants engaged in malicious conduct have not been substantiated. Punitive damages, in contrast to compensatory damages, are awarded to punish a defendant for "wanton and reckless or malicious acts and to protect society against similar acts." Rivera v City of New York, 40 AD3d 334, 344 (1<sup>st</sup> Dept 2007). The failure to repair air conditioning sleeves does not constitute such an act.

The court must deny defendant's cross motion for summary judgment on plaintiffs' claim for attorneys' fees. Article III, Section 6 of the Bylaws, which are incorporated by reference in

the Agreement, provides that upon the termination of the Agreement, the landlord may recover attorneys' fees and other expenses incurred in connection with the default of the Member and the resale of his stock. Therefore, pursuant to Real Property Law Section 234, plaintiffs are afforded a reciprocal right as tenants for the recovery of legal fees based upon a landlord's failure to perform a covenant under the lease.

Finally, the court denies defendants' motion for summary judgment in their favor on their counterclaim for common charge arrears. Plaintiffs are not required to pay the full amount of the common charges prior to the adjudication of plaintiffs' breach of warranty of habitability claim and how much, if any, of a common charge abatement they are entitled. 664 West 161 Street Tenants Association v Leal, 154 AD2d 238 (1<sup>st</sup> Dept 1989).

Accordingly, it is

ORDERED that plaintiffs' motion for summary judgment in their favor as to the first, fifth and sixth causes of action is denied; and it is further

ORDERED that defendants' cross-motion for summary judgment is granted to the extent that the second, third, and fourth causes of action as well as any claim for punitive damages are dismissed, and is otherwise denied; and it is further

ORDERED that the parties shall appear in IAS Part 59, Room 103, 71 Thomas Street, New York, New York 10013 on June 28, 2011 at 2:30 PM. for a Preliminary Conference.

This is the decision and order of the court.

Dated: May 27, 2011

ENTER:

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**DEBRA A. JAMES** J.S.C.

**FILED**

JUN 09 2011

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