

Stipe v Harbor House Owners Corp.

2011 NY Slip Op 32557(U)

September 28, 2011

Supreme Court, New York County

Docket Number: 114130/2008

Judge: Doris Ling-Cohan

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DORIS LING-COHAN
J.S.C.
Justice

PART 36

Stipe, Michael
-v-
Harbor House Owners

INDEX NO. 114 130 / 200
MOTION DATE 9/28
MOTION SEQ. NO. 010

The following papers, numbered 1 to _____, were read on this motion to/for Summary judgment
Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1, 2
Answering Affidavits — Exhibits _____ | No(s). 3
Replying Affidavits _____ | No(s). 4

Upon the foregoing papers, it is ordered that this motion is by defendant Harbor House Owners Corp. is consolidated for disposition with motions Seq. # 009 + 011 + decided in accordance with the attached memorandum decision.

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

FILED

SEP 30 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: 9/28/11

[Signature]
DORIS LING-COHAN, J.S.C.
J.S.C.

- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 36

-----X
MICHAEL STIPE,

Plaintiff,

-against-

Index №.: 114130/08
Motion Seq. Nos.:
009, 010, 011

HARBOR HOUSE OWNERS CORP., and David
K. SCHOENKIN,

Defendants.
-----X

DORIS LING-COHAN, J.S.C.:

DECISION AND ORDER

FILED

SEP 30 2011

NEW YORK
COUNTY CLERK'S OFFICE

In this action involving a fire started in defendant K. Schoenkin's (Schoenkin) apartment in a cooperative building owned by defendant Harbor House Owners Corp. (Harbor House), and an unrelated water leak from the same unit, plaintiff Michael Stipe moves, pursuant to CPLR 3212, for partial summary judgment against Schoenkin as to liability on his negligence and third-party beneficiary claims, as well as against Harbor House, for judgment as to liability on his negligence, breach of fiduciary duty, and attorneys' fees claims (Motion Seq. No. 009). Harbor House and Schoenkin each move for summary judgment dismissing all claims and cross claims as against them (Motion Seq. Nos. 010 and 011, respectively). Motion Seq. Nos. 009, 010, and 011 are consolidated for disposition.

BACKGROUND

On the evening of October 31, 2005, a fire ignited in the floor beams underneath a fire box in unit 5D of a building

located at 130 Jane Street in Manhattan (130 Jane Street). 130 Jane Street is owned by Harbor House and 5D is part of Schoenkin's duplex apartment. A friend of Schoenkin's ex-girlfriend was burning a single log in the fireplace at the time (Schoenkin Deposition, at 16-18).

At 10:15 PM, the New York City Fire Department (FDNY) dispatched units led by Battalion Chief Edward O'Donnell (O'Donnell), who testified that he believed that the fire in the boards beneath Schoenkin's fire box was caused by a process called pyrolysis (O'Donnell Deposition, at 11, 23). O'Donnell explained that pyrolysis "means the wood...over repeated exposures to heat becomes carbonized ... eventually what happens is it becomes almost like charcoal ... so it reaches a point where its ignition temperature gets lowered, and eventually it will catch fire" (*id.* at 23-24).

In addition to Schoenkin's apartment on the fifth floor, the FDNY entered plaintiff's apartment on the fourth floor, where "a light smoke condition," was present, as the fire had traveled to the ceiling beams above plaintiff's apartment (*id.* at 22, 25). The FDNY tore open part of the ceiling in plaintiff's apartment and used water to extinguish the fire, allegedly damaging plaintiff's apartment and making it temporarily uninhabitable (*id.* at 24-25, 27-28, 64).

Prior to the fire, in June 2004, plaintiff alleges that

damage was done to his apartment by a water leak from Schoenkin's air conditioner.

Plaintiff's first cause of action alleges that Schoenkin is liable under a theory of negligence for damages arising from the fire, while his second cause of action alleges that Schoenkin is liable in negligence for damage caused by the air conditioner leak. In his eighth cause of action, plaintiff also alleges that Schoenkin is liable to plaintiff for breaching his proprietary lease with Harbor House, as, allegedly, plaintiff is a third-party beneficiary of that lease. As to Harbor House, plaintiff's third and fourth causes of action allege that it is liable to him under a theory of negligence for damages arising from the fire, while his fifth cause of action alleges that Harbor House is liable in negligence for damages arising from the air conditioner leak, and his sixth and seventh causes of action allege that it is liable to him for breaching a fiduciary duty by allowing Schoenkin to use a fireplace that it had not maintained in a safe condition. Finally, plaintiff's ninth cause of action alleges that Harbor House owes him attorneys' fees, pursuant to Real Property Law (RPL) § 234.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of

any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a prima facie showing, the court must deny the motion "'regardless of the sufficiency of the opposing papers'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

Initially, the court rejects plaintiff's argument that Harbor House and Schoenkin's motions should be denied based upon defendants' failure to comply with the court's order from August 27, 2010 (the August 2010 Order). The August 2010 Order, which extended the time the parties had to move for summary judgment to 120 days from the filing of the note of issue, provided that a copy of the order must be attached to any dispositive motion and referenced in the first paragraph of the accompanying affirmation. While all parties conformed to the 120-day deadline, and plaintiff and Schoenkin submitted copies of the August 2010 Order with their summary judgment motions, Harbor House failed to submit a copy of the order. Additionally, the affirmation supporting Schoenkin's motion did not reference the August 2010 Order until the sixth paragraph. Pursuant to CPLR 2001, the court disregards these defects, as the failure to submit the August 2010 Order, and the failure to reference it in the first paragraph of the accompanying affirmation, were "merely

[] technical procedural irregularit[ies] which did not prejudice the [plaintiff]" (*Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 82 AD3d 586, 587 [1st Dept 2011] [internal citation and quotation marks omitted]; compare *Goldenberg v Westchester County Health Care Corp.*, 16 NY3d 323, 328 [2011] [holding that CPLR 2001 does not allow a trial judge to disregard "a complete failure to file within the statute of limitations"] [internal citation and quotation marks omitted]).

I. Negligence Relating to the Fire

To have a duty giving rise to liability for a dangerous condition on property that it did not create, a party must own, occupy, control or make a special use of the property (*Gibbs v Port Auth. of N.Y.*, 17 AD3d 252, 254 [1st Dept 2005]), and have either actual or constructive notice of the condition (*Jackson v Board of Educ. of City of N.Y.*, 30 AD3d 57, 62 [1st Dept 2006]). "Constructive notice is generally found when the dangerous condition is visible and apparent, and exists for a sufficient period to afford a defendant an opportunity to discover and remedy the condition" (*Ross v Betty G. Reader Revocable Trust*, 86 AD3d 419, 2011 NY Slip Op 05857, *2 [1st Dept 2011]).

A. Harbor House

Plaintiff contends that Harbor House had actual and constructive notice of a dangerous condition involving the placement of wooden beams directly underneath Schoenkin's fire

box. In order to support this contention, plaintiff submits, among other things, the deposition testimony of Lloyd Kagin (Kagin), a former proprietary lessee of the subject cooperative building, as well as the president of Harbor House's board of directors (the Board) from 1984 until 2001. Kagin, who lived in the building from 1983 until 2005, testified that he was concerned about the building's fireplaces throughout his residency at 130 Jane Street:

Very very soon after I moved into the building, there were several smoke conditions within the building that were the result of fireplaces, and as a result of that it caused me to be very very concerned about whether these fireplaces in general were safe and should be allowed to be used. At our first Board meeting after the building was converted into a co-op [in 1984], I basically brought that point up to the Board. Unfortunately, I was shot down ...

(Kagin Deposition, at 17-18).

Kagin also testified that while he lived in the building, "[t]here were several fireplace fires that caused smoke conditions within the common areas of the building that resulted in phone calls to the FDNY and responses by the FDNY" (*id.* at 13). Kagin referred specifically to an incident involving a deceased former resident, Mark Mandel (Mandel), that occurred, Kagin estimated, "some time in the late nineties" (*id.* at 14). Both Kagin and Mandel were members of the Board at the time (*id.* at 15):

A: There was a fire in the building, the Fire Department was called and the fire was

subsequently extinguished. When I went to visit Mr. Mandel after the fire, I saw that the fire took place within his fireplace, causing the Fire Department to pull the fireplace apart, pull the floor apart, exposing a beam in the floor that was charred, and also I believe exposing the apartment below 5F.

Q: Where was the beam that you say you saw was charred?

A: It ran underneath the fireplace.

Q: Underneath the hearth?

A: Underneath the substrate, the stone substrate where the firebox was.

...

Q: Did you discuss with Mr. Mandel anything about that fire?

...

A: Yes. Mr. Mandel told me that the fire started because the beam underneath the fire box super heated and combusted as a result of its heating, and the fire started in the floor

(*id.* at 15-16, 19).

Mr. Kagin discussed fireplace safety at Board meetings following the Mandel fire (*id.* at 20-21, 25, 56-57), and he testified that the Board issued fliers directing residents not to use their fireplaces until the board had an opportunity to determine what the problems were and how to remediate them (*id.* at 22). He also testified that there were two distinct problems with 130 Jane Street's fireplaces:

One problem was the reoccurring smoke condition or back up of smoke into the apartment and into the common areas as a result of problems with the flues and fireplaces in general. The second problem was the problem that occurred in Mr. Mandel's apartment regarding fire boxes super heating the beams underneath the fireplaces. Each time, I shouldn't say each time, but several times that these conditions happened, the building did retain a fireplace expert to come in and opine upon the situation. I believe after Mr. Mandel's

fire, the Board came to the determination that each individual that owned an apartment had to remediate their fireplaces based upon the expert's recommendations and be able to prove to the Board that the remediation took place in order for the fireplaces to be used in the future

(*id.* at 23).

Plaintiff also submits the deposition testimony of Joseph Attard (Attard), the superintendent at 130 Jane Street from 1980 until 2000 (Attard Deposition, at 12), and an affidavit from Juliet Panebianco (Panebianco), a resident of 130 Jane Street since approximately 1990 (Panebianco Affidavit, ¶ 1). While Attard recalled three or four incidents where the FDNY was called in to deal with fires or smoke incidents caused by the fireplaces at 130 Jane Street, he did not know whether any of the incidents were caused by overheated beams beneath a fire box, and he did not recall the board of directors instructing residents not to use their fireplaces (Attard Deposition, at 22-24). Panebianco stated that, approximately one month before the subject fire, she received a note under her door from Harbor House instructing residents not to use their fireplaces unless they had been inspected within the past year, and that she had received similar notes prior to that (Panebianco Affidavit, ¶ 5, 6, 11).

In opposition, and in support of its own motion, Harbor House submits the deposition testimony of Bruce Ebnother, who has been a member of the Board since approximately "2001, 2003," or "long enough that it's a blur" (Ebnother Deposition, at 15).

Ebnother testified that while the Board was aware of problems regarding smoke conditions caused by cracks in the flues and chimneys of 130 Jane Street's fireplaces (Ebnother Deposition, at 9), it was not aware of the condition that caused the subject fire until after October 31, 2005:

The issue that we tried to address after the October 31st fire with a chimney specialist and fireplace specialist was a structural issue which we had never looked at before. And were not aware of. And it was to do - the issue, as we understood it, was the proximity of wooden timbers to the bottom of the fire box

(*id.* at 51).

Here, plaintiff has made a prima facie showing that Harbor House had actual notice of a dangerous condition regarding the proximity of the fire boxes and the wood beams beneath the fireplaces in 130 Jane Street, the condition that led to pyrolysis and the subject fire. While the testimony of Attard and Panebianco is not specific to the condition regarding the firebox and its supporting beams, and thus cannot alone support a showing of notice, Kagin's testimony shows that the Board received actual notice of this defect through the Mandel fire and investigations following other smoke and fire incidents.

Ebnother's testimony, that the Board had no knowledge of the dangerous condition involving the proximity of the fire box and the wooden beams beneath it, does not, by itself, rebut plaintiff's prima facie showing, as Ebnother became a member of

the Board several years after the Mandel fire. However, Harbor House also submits Kagin's deposition testimony. In addition to the statements on which plaintiff based his prima facie showing, Kagin also stated that a fireplace expert was hired, and, based on his recommendations, "the people that put a fan on the top of their flues at the roof were allowed to use their fireplaces ..."
(Kagin Deposition, at 52).

Giving all favorable inferences to Harbor House, Kagin's statement regarding the fireplace expert's recommendations shows a conflict within Kagin's testimony as to whether the Board had notice of the specific dangerous condition that caused the subject fire. As this creates a material issue of fact on the question of notice, neither plaintiff, nor Harbor House is entitled to summary judgment as to liability on the issue of negligence relating to the October 31, 2005 fire.

Plaintiff also argues that the doctrine of *res ipsa loquitur* is applicable to his negligence claims against Harbor House arising out of the fire. A plaintiff may rely on this doctrine to draw an inference of negligence against a defendant if it can establish the following elements:

- (1) the event must be of a kind which ordinarily does not occur in the absence of someone's negligence;
- (2) it must be caused by an agency or instrumentality within the exclusive control of the defendant;
- (3) it must not have been due to any voluntary action or contribution on the part of the plaintiff

(*Morejon v Rais Constr. Co.*, 7 NY3d 203, 209 [2006] [internal

quotation marks and citations omitted]).

Here, while Harbor House maintained a right to reenter Schoenkin's apartment, it did not have exclusive control over Schoenkin's fire box and the wooden beams beneath it, as Schoenkin had control over his unit such that he could initiate structural changes (see Schoenkin Deposition at 7-8).

Plaintiff also argues that Harbor House has admitted its negligence by providing plaintiff with a partial rent abatement subsequent to the fire, invoking a provision of plaintiff's proprietary lease with Harbor House that provides, in relevant part:

No abatement of rent ... shall be made or allowed because of the making or failure to make or delay in making any repairs, alterations or decorations to the building ... or for interruption or curtailment of any service agreed to be furnished by the Lessor, due to accidents ... unless due to lessor's negligence

(Plaintiff's Lease, ¶ 29 [a]).

Plaintiff cites no authority suggesting that a rent abatement may constitute an admission of negligence. Moreover, the abatement stipulates that "it shall not constitute an admission." While Harbor House may not have been required under the lease to provide a rent abatement absent negligence, the fact that it did so does not amount to an admission. Additionally, post-fire statements by Harbor House's insurance adjustor that "the involved firebox and fireplace was not built to code" (Charles Reilly January 3, 2006 letter, ¶ 3) does not go to the

issue of notice and, thus, does not alter the determination that neither plaintiff nor Harbor House is entitled to summary judgment on plaintiff's negligence claim relating to the October 31, 2005 fire.

B. Schoenkin

Schoenkin has been living in the building since approximately 1993 or 1994 (Schoenkin Deposition, at 5). He contends that he was not negligent with respect to the subject fire, as he did not receive any notice of the dangerous condition involving his fire box's proximity to the floor beams. Schoenkin makes a prima facie showing of entitlement to judgment on this issue by submitting his own deposition testimony, in which he states that he was never instructed not to use his fireplace because of the existence of a dangerous condition (*id.* at 15-16, 108-109).

Plaintiff claims that Schoenkin had notice of the dangerous condition through Kagin's testimony that he discussed fireplace safety regularly at meetings of the Board throughout his tenure as the president of the Board. Plaintiff also contends that Schoenkin had notice, as proprietary lessees of 130 Jane Street were discouraged from using their fireplaces. However, the record indicates that any discouragement from the Board as to fireplace usage related to chimney and flue conditions that did not play a role in the October 31, 2005 fire, and that lessees

were allowed to use their fireplaces as long as they remediated these conditions. Kagin, plaintiff's principal notice witness, testified that following the Mandel fire, a fireplace expert was hired, and, based on his recommendations, "the people that put a fan on the top of their flues at the roof were allowed to use their fireplaces ... " (Kagin Deposition, at 52).

Plaintiff fails to submit any evidence showing that Schoenkin received actual notice of the dangerous condition involving the fire box and the floor beams. Moreover, since the condition was obscured from sight, and Schoenkin did not have an opportunity to discover and remedy the condition, he cannot be charged with constructive notice. Thus, plaintiff fails to rebut Schoenkin's prima facie showing, and Schoenkin is entitled to dismissal of the negligence claims relating to the October 31, 2005 fire.

II. Third-Party Beneficiary

Plaintiff contends that Schoenkin breached section 18 (b) of his proprietary lease with Harbor House. The provision states, in relevant part, that Schoenkin "shall not permit or suffer any unreasonable noises or anything which will interfere with the rights of other lessees or unreasonably annoy them or obstruct the public halls or stairways." The provision also prohibits unreasonable smells that interfere with the rights of other lessees.

Since there "is no clear indication that the parties to the lease intended to confer upon plaintiff the right to enforce the relied upon lease provision," plaintiff is merely an incidental beneficiary of the lease and does not have standing to sue as a third-party beneficiary (*Girlshop, Inc. v Abner Props. Co.*, 5 AD3d 141, 142 [1st Dept 2004]). Thus, the branch of Schoenkin's motion that seeks dismissal of plaintiff's third-party beneficiary claim must be granted.

III. Breach of Fiduciary Duties

When the action of a co-op or condominium board is challenged by an individual owner, courts apply the business judgment rule, under which a court will not substitute its own judgment for that of the board, as long as the board was acting, in good faith and within the scope of its authority, for the purpose of the condominium (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]). As the Court of Appeals held in *Levandusky*, "unless a resident challenging the board's action is able to demonstrate a breach of this duty [to act for the condominium in good faith and within the scope of its authority], judicial review is not available" (*id.*; see also *40 W. 67th St. v Pullman*, 100 NY2d 147, 155 [2003]).

Here, the record shows that the Board was acting in good faith, and within the scope of its powers, when it allowed Schoenkin to use his fireplace. Thus, it did not breach any

fiduciary duty owed to plaintiff and the branch of Harbor House's motion that seeks dismissal of plaintiff's breach of fiduciary duty claims must be granted.

IV. Negligence Relating to Schoenkin's Air Conditioner

A. Harbor House

Harbor House contends that plaintiff's negligence claim relating to water damage from a leak in Schoenkin's air conditioner in June 2004 is barred by the statute of limitations, pursuant to CPLR 214, as plaintiff did not file his summons with notice until October 21, 2008, more than three years after the alleged water damage. However, plaintiff is correct that Harbor House waived its statute of limitations defense by failing to plead the defense in its answer or by pre-answer motion (see *Matter of Augenblick v Town of Cortlandt*, 66 NY2d 775, 777 [1985]; *Orix Fin. Servs., Inc. v Haynes*, 56 AD3d 377 [1st Dept 2008]).

Harbor House also argues that plaintiff's negligence claim relating to water damage from a leak in Schoenkin's air conditioner is barred by a waiver of subrogation clause in plaintiff's proprietary lease. The waiver provides, in relevant part:

In the event that the Lessee suffers loss or damage for which Lessor would be liable, and Lessee carries insurance which covers such loss or damage and such insurance policy or policies contain a waiver of subrogation against the Landlord, then in such event Lessee releases Lessor from any liability with respect

to such loss or damage
(Stipe/Harbor House Lease, ¶ 4 [d]).

In order to show that this provision is applicable, Harbor House submits a homeowner's insurance policy that plaintiff took out on his home in Athens, Georgia. (M. Mitkoff Aff., Exh. L, at 1, 20). Since this policy does not relate to 130 Jane Street, Harbor House fails to make a prima facie showing of entitlement to judgment dismissing plaintiff's claim of negligence arising from a leak in Schoenkin's air conditioner.¹

B. Schoenkin

Schoenkin submits his deposition testimony, in which he stated that he did not know of any leak prior to receiving plaintiff's complaint (Schoenkin Deposition, at 71-72), as well as plaintiff's deposition testimony, in which plaintiff stated that he did not know whether the water damage was caused by an air conditioner or something else (Plaintiff's Deposition, at 209-210).

Finally, Schoenkin submits the deposition testimony of Carlos Martinez (Martinez), the building superintendent at the time of the leak. Martinez stated that he received a complaint sometime in 2004 regarding a leak into plaintiff's unit, that he observed a bubble of water on the ceiling and water on the floor

¹Harbor House also makes this subrogation argument in the context of plaintiff's negligence claims relating to the fire.

in the unit (Martinez Deposition, at 87-88). Martinez also testified that he contacted Schoenkin, who was away, about the leak, and Schoenkin gave him permission to enter his apartment in order to address the problem (*id.* at 86-86). According to Martinez, the air conditioner in Schoenkin's apartment had a clogged drip pan; he turned the air conditioner off and "[c]alled the air conditioning guys so we could remove the unit and unclog it" (*id.* at 88). Martinez returned to plaintiff's apartment, where he punctured the bubble on the ceiling and observed water fall onto the floor:

Q: Do you remember how much water came out?

A: ... Maybe a quarter of a 5-gallon bucket.

Q: Do you remember whether or not any of Mr. Stipe's personal property got wet when -- before you punched the hole in the bubble?

...

A: No; I don't think anything got damaged, except the ceiling and that water stain on the floor.

...

Q: Did you ever discuss it again with Mr. Stipe?

A: No. I think they called the management office and dealt with it with them. Then he got his own contractor to come back, 'cause there was a special paint, and they had to sand the ceiling, like 10, 15 times, and add another coat of paint and sand it again. It was like this mirror finish paint that's only sold in -- it's a Dutch paint. A special paint

(*id.* at 88-90).

Martinez also testified that Harbor House has a maintenance contract with an outside provider that services the air conditioning units at 130 Jane Street, and that the outside provider checks the filters and drip pans within the units (*id.*

at 142).

Schoenkin makes a prima facie showing of entitlement to judgment as to plaintiff's negligence claims relating to the air conditioner leak by showing, through Schoenkin's own testimony, that he had no notice that his air-conditioner was leaking. (Schoenkin Deposition, at 71-72). While plaintiff's offers his own testimony on the issue of notice, he fails to show the existence of a material issue of fact:

Q: To your knowledge, did anyone talk to Mr. Schoenkin about his air-conditioners or the water damage to your apartment?

A: My memory is that Carlos Martinez, the super, spoke with my upstairs neighbor, spoke with Mr. Schoenkin

(Plaintiff's Deposition, at 317).

While this testimony is arguably consistent with that of Martinez, who testified that he called Schoenkin during the subject leak in June 2004 (Martinez Deposition, at 84-86), it does not show that Schoenkin had actual or constructive notice of a leaky air conditioner prior to June 2004. As such, the branch of Schoenkin's motion that seeks dismissal, as against him, of plaintiff's claim of negligence related to a leak in Schoenkin's air conditioner must be granted.

IV. Plaintiff's Claim for Attorneys' Fees Against Harbor House

"Under the general rule in New York, attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the

parties" (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379 [2010]). Plaintiff, however, contends that he is entitled to attorneys' fees pursuant to RPL § 234 and the proprietary lease between himself and Harbor House.

RPL § 234 provides:

Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. Any waiver of this section shall be void as against public policy.

Attorneys' fees granted pursuant to RPL § 234 "are appropriate only to the extent a party prevails" (*Murphy v Vivian Realty Co.*, 199 AD2d 192, 194 [1st Dept 1993]). Here, the reciprocal protections of RPL § 234 are applicable if plaintiff can prove a breach of the lease by Harbor House, as the lease contains a provision that requires plaintiff to pay legal fees incurred by Harbor House due to a breach by plaintiff.² However,

² Paragraph 28 of plaintiff's lease with Harbor provides:

since plaintiff has not obtained judgment against Harbor House, its application for attorneys' fees is premature and must be denied.

Harbor House argues that plaintiff's claim for attorneys' fees must be dismissed, as plaintiff cannot prove that Harbor House has breached the proprietary lease. Plaintiff argues that Harbor House has breached the proprietary lease by failing to keep 130 Jane Street in "good repair," and failing to maintain it as a "first-class apartment building" (Stipe/Harbor House Lease, ¶¶ 2-3). While it may be difficult to determine whether a latent defect, such as the one alleged by plaintiff, prevents a building from being considered a first-class building, plaintiff has submitted enough evidence to show the existence of a material issue of fact as to whether Harbor House breached its duty under the lease to keep the building in good repair. As such, the branch of Harbor House's motion that seeks dismissal of plaintiff's claim for attorneys' fees must be denied at this juncture.

If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending, or asserting a counter-claim in, any action or proceeding brought by Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent.

CONCLUSION

Accordingly, it is

ORDERED that plaintiff's motion for partial summary judgment (Motion Seq. No. 009) is denied; it is further

ORDERED that defendant Harbor House Owners Corp.'s motion for summary judgment (Motion Seq. No. 010) is granted only to the extent that plaintiff's sixth and seventh causes of action, for breach of a fiduciary duty are dismissed; and it is further

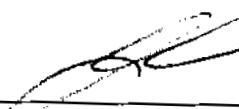
ORDERED that defendant David K. Schoenkin's motion for summary judgment (Motion Seq. No. 011) is granted, and all claims and cross claims as against him are severed and dismissed with costs and disbursements to said defendant, as taxed by the Clerk, upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

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

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

Dated: 9/28/11


Hon. Doris Ling-Cohan, J. NEW YORK
COUNTY CLERK'S OFFICE

FILED

SEP 30 2011