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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUIS B. YORK J.S.C. Justice

PART 2

Bradley, et al.,

-v-

30 Orchard Assocs. et al.

INDEX NO. 107913/11

MOTION DATE

MOTION SEQ. NO. 01

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION

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

FILED

JUL 20 2012

NEW YORK COUNTY CLERK'S OFFICE

Dated: 7/11/12

LOUIS B. YORK, 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

----------X

JORDAN L.BRADLEY, TSUCHIKO MIYATA and BRADLEY TIRPAK,

Index #104913/11

Plaintiffs,

-against-

50 ORCHARD ASSOCIATES LLC, DOUGLAS ELLIMAN, MICHAEL MUROFF ARCHITECT LLC, MICHAEL MUROFF and THE BOARD OF MANAGERS OF 50 ORCHARD STREET CONDOMINIUM,

Defendants,

----------X

YORK, J.:

Defendant 50 Orchard Associates LLC ("50 Orchard" or "Sponsor") moved to dismiss the verified complaint against it pursuant to CPLR 3211(a)(1), (a)(3), a(5) and (a)(7). In its Interim Order dated April 9, 2012, this court converted the motion to dismiss into a motion for summary judgment pursuant to CPLR 3211 (c), directing parties to make additional submissions. Plaintiffs responded by opposing the motion, and defendant replied. Based on all papers in the record, the motion is granted.

BACKGROUND

In 2005 plaintiffs Tsuchico Miyata ("Miyata") and Bradley Tirpak ("Tirpak") entered into a Purchase Agreement ("Agreement") with 50 Orchard Associates LLC for the purchase of units at the 50 Orchard Street Condominium ("Condominium" or "Property"). The Sponsor converted the Property into a mixed use residential and commercial condominium in accordance with the Offering Plan filed by the Sponsor with the State of New York in September 2004. The Condominium consists of 25 residential and 3 commercial units. Myata acquired unit 4A for $700,000, and Tirpak unit 5A for $1,375,000, both in the building constructed in the Phase I of the conversion. The Offering Plan was incorporated into the Agreement. The Report of Physical Condition (the "Report") by the architects, integrated into the Offering Plan, made this statement concerning sound insulation:

> Sound insulation between apartments is provided by 6' sound insulation horizontally between the floor joists and 31/2' sound insulation between apartments horizontally and vertically. The floor construction will have approximately 6 ml. of cork underlayment providing resiliency. The estimated STC rating between floor/ceiling assembly is approximately 51. The estimated STC rating between wall assembly is approximately 48.

(Tirpak Aff., Exh. B, 178-179).

In their complaint Tirpak and Miyata alleged that the design of the floors in the condominium units and common areas, as set forth in the Offering Plan and Report, was defective in that it failed to adequately prevent noise, sound, vibrations and nuisances coming from one condominium unit into another. In addition they claimed the building's construction was not in compliance with applicable provisions of the New York City Building Code ("Code") concerning noise control in multiple dwelling unit buildings.

The New York City Department of Buildings received three complaints, in 2007, 2009 and 2010, concerning the quality of floor construction at 50 Orchard Street. The complaints stated that work at the Condominium was conducted contrary to approved plans, in particular that the approved floor plans had 5 layers while the floors were constructed with only 3 layers. On the two occasions that an inspector gained access to the building, the Department determined that the approved plans conformed to actual work done and did not issue a violation.

Tirpak retained Acoustilog, Inc. ("Acoustilog") to conduct independent testing of the soundproofing and insulation at the condominium. The Field Impact Insulation Class (FIIC) measurement of the floor and ceiling systems in one instance was 48, in another 44. Acoustilog concluded that "repair of this problem is expensive, usually requiring removal of the sheetrock ceiling, installing isolation hangers or clips, and then reinstalling 2 layers of sheetrock." (Tirpak Aff., Exh. H).

On October 10, 2007 Tirpak and another member of the Board, both claiming to act on behalf of most of the unit owners residing in the Phase I portion of the building, officially notified the Sponsor members of Board that there existed sound issues requiring remediation. Referring to the Acoustilog report, they stated that "[t]he Building passed the test conducted for airborne noise, but failed two separate sets of tests conducted for impact noise." They demanded, among other things, that a licensed, independent engineer conduct a complete building inspection, that the results of such inspection be examined by the board and the unit owners, and that all recommended remedial actions be taken at the expense of the sponsor. (Mester Reply Aff. Exh. P).

At a Board meeting on December 12, 2007 attended by Tirpak, the Sponsor and the architect it was decided that the Sponsor would arrange for its own independent acoustical

testing. The firm of Robert A. Hansen ("Hansen") performed the impact sound transmission testing on March 20, 2008 for three sets of apartments. FIIC for one set was 47, for the other two 44. The expert found that the result of 47 was in compliance with the Code, since field ratings may deviate by up to 5 points from the laboratory rating of 51. As to the measurement of FIIC 44 the expert commented that the floor-ceiling assembly installation was in marginal non-compliance with the Code by an "acoustically insignificant amount of 2 decibels." (Mester Reply Aff., Exh. Q). A supplemental report by Hansen issued on July 10, 2008 recommended the placement of pads under vibration producing appliances, a 80% carpet rule in the condominium units and carpeting on the hallways. According to Hansen, the padded rugs could easily reduce the noise level by 10 or more decibels.

Acoustilog subsequently conducted further inspections in June 2010 and issued a report concerning the measures taken by the Sponsor to remediate the sound insulation deficiencies. It determined that the soundproofing of impact noise through a floor/ceiling partition in the hallway was significantly improved by the installation of thin resilient material. However the soundproofing between two apartments decreased by 2 points (from FIIC 48 to 46) despite blowing insulation into the cavity. Hansen endorsed these findings.

On September 23, 2010 the Condominium held a Board meeting which discussed the noise issue. The Sponsor members of the Board proposed to amend the condominium's bylaws to require that at least 80% of the floor area of each unit be covered with rugs instead of the existing norm of 50%. The vote did not pass, Tirpak voting against it. The current suit followed.

In their first cause of action plaintiffs sued the Sponsor for breach of the Purchase Agreement. According to plaintiffs, the units contained substantial material defects, were constructed with substandard and deficient materials and in violation of the Code. As a result,

plaintiffs incurred substantial damages, which they evaluate at five million ($5,000,000.00) dollars. This cause of action is now before the court on the motion for summary judgment.

DISCUSSION

The Offering Plan describes the rights and obligations of the Sponsor as follows:

> Sponsor will diligently, expeditiously and at its sole cost and expense, perform or cause to be performed such work, and will supply or cause to be supplied all materials necessary to complete construction of the Building substantially in accordance with the "Description of Property and Specifications" more fully set forth in Part II of this Plan. Sponsor shall not be obligated to correct and will not be liable to any Purchaser as a result of any insubstantial variations from the "Description of Property and Specifications" or the description of the Building or a Unit set forth in the Plan."

The parties disagree whether the Sponsor has constructed the condominium substantially in accordance with the Offering Plan. The reports of experts on acoustics hired by the parties provide similar measurements for the soundproofing systems between the ceiling and the floor of adjoining apartments. However, experts come to different conclusions as to the degree the measurements deviate from the Code and the best ways to improve sound insulation in the building. The New York City Building Code was amended in 2008. The impact insulation norm was reduced from 51 to 50 decibels, and the field measurement could deviate up to 5 points from the laboratory test results, while in the previous version of the Code such deviation was permitted only by 2 points (*See* Section 1207 of the 2008 New York City Building Code). When the first measurements were taken by experts in 2007 and 2008, some field results departed from the norm by 5 points, in 2010 in the worst case by 1 point only. Acoustilog adhered to the previous version of the Code even in 2010, while Hansen applied what it called a customary standard of precision in field testing prior to its adoption by the 2008 Code. Accordingly,

Acoustilog found that there were substantial deviations from the Code, while Hansen contends that such deviations are insignificant. Hansen proposed a less expensive mode of remediation of alleged sound defects than Acoustilog. If the matters in dispute were "conflicting findings, conclusions and recommendations in the reports of the respective parties' engineers", as plaintiffs assert (Tirpak Aff. Para.33), there would be a triable issue of fact warranting the denial of summary judgment for defendant Sponsor.

Defendant 50 Orchard moves for summary judgment on a different ground. It argues that individual unit owners have no standing to enforce Sponsor's obligations related to a common element of the building. The relevant provision of the offering plan is in paragraph 22.

> Obligations of the Sponsor under this Section with respect to the Condominium and the Common Elements shall be enforceable only by the Condominium Board on behalf of all Unit Owners. In no event shall any obligations of the Sponsor be enforceable by individual unit Owners unless the Condominium Board fails to take reasonable action to enforce such obligations within ninety (90) days following the giving of written notice of such claims by a Unit Owner to the Condominium Board.

The provisions of the condominium's declaration and by-laws establish what are common elements. Royal York Owners Corp. v Royal York Assoc., L.P., 43 AD3d 357, 358-59; 842 N.Y.S.2d 384 [1st Dept 2007]. Article 6(b) of the Condominium Declaration defines a unit as "measured vertically from the top of the floor to the underside of the plaster ceiling at its highest level" making it clear that insulation between the floor of an apartment and the ceiling of an apartment below is not part of an individual unit, but rather a common element. Article 7(a) further specifies that the common elements consist of

> ii) all foundations, columns, beams, supports, girders, exterior walls, partitions, window frames, concrete floor slabs, roofs and ceilings in, on, or under the Building, to the extent that the same are not expressly included as a part of a Unit pursuant to the terms of Article 6 hereof.
>
> ...

> v) all other parts of the Property, and all apparatus and installations now existing or hereafter constructed in the Building or on the property, either existing for the common use of the Unit or the Unit owners or necessary for, or convenient to, the existence, maintenance, or safety of the Property.

Plaintiffs have not contested that the partition between the floor and the ceiling of the adjoining apartments is a common element, choosing to focus on the effect of allegedly defective insulation on their individual units. It is well settled that the condominium board has an exclusive authority to enforce the rights related to common elements. Board of Mgrs. of the Chelsea 19 Condominium v Chelsea 19 Assoc. 73 AD3d 581, 581; 905 N.Y.S.2d 8 [1st Dept 2010]; Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership, 50 AD3d 503; 858 N.Y.S.2d 109 [1st Dept 2008]; Devlin v 645 First Ave. Manhattan Co., 229 AD2d 343; 645 N.Y.S.2d 476 [1st Dept 1996]). The owners of individual condominium units can have standing to pursue claims arising from the defect in the common elements, if the extended liability provision in a contract with the sponsor explicitly reserves such right. Devlin, at 343-344.

Reading paragraph 22 of the Offering Plan in the light most favorable to plaintiffs, it allows individual unit owners to pursue claims against the Sponsor even in relation to common elements, if the Board fails to take reasonable action within 90 days of written notice. Plaintiffs allege that they made numerous complaints to the Board seeking to remedy the defective conditions, but the Board failed and/or refused to take any measures to repair the conditions or to hold the Sponsor and/or the architects responsible.

The evidence in the record contradicts these allegations. The Board convened for the meeting within 90 days of a written request from two unit owners and decided that the Sponsor would hire an independent acoustic expert. Remedial action on sound insulation in hallways was successful, and the Sponsor was prepared to act on the recommendation of its expert to increase the carpeted surface in individual units. Two members of the Board representing the Sponsor

voted in favor of this recommendation, while plaintiff Tirpak opposed it. As a result, neither Hansen's proposal, nor a more expensive one by Acoustilog was acted upon. As the Board started to pursue the matter in a reasonable way, it assumed the responsibility for ultimate success in correcting alleged soundproofing defects. Under the terms of the Offering Plan, plaintiffs thus do not have standing to sue the Sponsor for damages to common elements of the condominium.

CONCLUSION

For the foregoing reasons, it is

ORDERED that the motion of defendant 50 Orchard Associates LLC for summary judgment to dismiss the complaint against it is granted; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint as against defendant 50 Orchard Associates LLC; and it is further

ORDERED that the action is severed and continued as to the Board of Managers of 50 Orchard Street Condominium.

Dated: 7/16/12

FILED

JUL 20 2012

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE

J.S.C.