Onetti v The Gatsby Condominium
2012 NY Slip Op 33584(U)
March 8, 2012
Sup Ct, NY County
Docket Number: 591143/06
Judge: Carol R. Edmead

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice

PART 35

Onetti

INDEX NO. 59143/2006

-v-

MOTION DATE 10/7/2011

MOTION SEQ. NO. 004

Gatsby Condominium

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 sequence 002, 003 and 004 are decided in accordance with the Memorandum Decision attached to motion sequence 002. It is hereby

ORDERED that defendants Intell 65 East 96, LLC, Intell 96 Managers, LLC, and Gary Barnett's joint motion for summary judgment dismissing all claims and cross claims as against them (motion seq. no. 002) is granted with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of defendants The Gatsby Condominium and Halstead Management, LLC's joint motion for summary judgment (motion seq. no. 003) which seeks dismissal of all claims and cross claims as against Halstead Management, LLC is granted with costs and disbursements to said defendant as taxed by the Clerk upon the submission of an appropriate bill of costs; and it further

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

Dated: ____ ____, 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

[* 2]

ORDERED that the branch of defendants The Gatsby Condominium and Halstead Management, LLC's joint motion for summary judgment which seeks dismissal of all claims and cross claims as against The Gatsby Condominium is granted only to the extent that the third cause of action, for breach of fiduciary duty, is dismissed; and it is further

ORDERED that defendants Omer Realty, LLC, Albert Attias, and Ofer Kalina's motion for summary judgment dismissing all claims and cross claims as against them (motion seq. no. 004) is granted with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

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

ORDERED that counsel for defendant Intell shall serve a copy of this order with notice of entry within twenty (20) days of entry, on all counsel.

Dated 3.8.2012 ENTER: J.S.C.

HON. CAROL EDMEAD

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

----------X

FABIAN A. ONETTI and MARIA P. ONETTI,

Plaintiffs,

-against-

THE GATSBY CONDOMINIUM, INTELL EAST 65 EAST 96, LLC, INTELL 96 MANAGERS, LLC, OMER REALTY, LLC, ALBERT ATTIAS, GARY BARNETT, OFER KALINA, E.S. BARREKETTE, P.E., P.H.D. and HALSTEAD MANAGEMENT, LLC,

Defendants.

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Index №.: 591143/06
Motion Seq. Nos. 002, 003, and 004

DECISION AND ORDER

CAROL R. EDMEAD, J.S.C.:

In a case involving a fire that damaged property in an apartment building on 96th Street in Manhattan, defendants Intell 65 East 96, LLC (Intell), Intell 96 Managers, LLC (Intell Managers), and Gary Barnett (Barnett) (collectively, the Intell defendants) move, pursuant to CPLR 3212, for summary judgment dismissing plaintiffs' complaint as against them, and for leave, pursuant to CPLR 3025, to amend their answer to add the affirmative defense of untimeliness for plaintiff's fourth, sixth, and seventh causes of action (motion seq. no. 002). Defendants The Gatsby Condominium (the Condominium) and Halstead Management, LLC (Halstead) also move for summary judgment dismissing plaintiffs' complaint as against them; additionally, the Condominium and Halstead move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint for failure to state a cause of action (motion seq. 003). Finally, defendants Omer Realty, LLC (Omer

Realty), Albert Attias (Attias), and Ofer Kalina (Kalina) (collectively, Omer defendants) move for summary judgment dismissing the complaint, or, alternatively, for dismissal of the complaint on CPLR 3211 grounds (motion seq. no. 004).

BACKGROUND

On November 1, 2005, a fire in plaintiffs Fabian Onetti and Maria Onetti's apartment, 9-B of a building located at 65 East 96th Street, caused property damage to the apartment. The Fire Department of New York's (FDNY) incident report on the fire stated that it started

> in the living room along the west wall approximately five feet from the south wall, and approximately eight inches from floor levels in a combustible material (electrical wiring). Fire extended throughout combustible material and further extended to all four walls, ceiling, and the entire contents of the room. Fire was confined thereto and extinguished

(FDNY Incident Report, Face Sheet).

Plaintiffs rented the apartment before they bought it in December 2000, as the building was being converted into a condominium. Intell filed the offering plan for the Condominium (the Plan) on May 17, 2000. The Plan identified Intell's members as Intell Managers and Omer Realty, and its principals as Barnett, Attias, and Kalina.

Plaintiff's first, second, and third causes of action allege, respectively, breach of contract, negligence, and breach of fiduciary duty against the Condominium. The fourth cause of

action alleges fraud and misrepresentation against Intell, Intell Managers, Omer Realty, Barnett, Attias and Kalina. The fifth, sixth, and seventh causes of action allege, respectively, breach of contract, breach of warranty, and negligence against Intell. The court dismissed the eighth and ninth causes of action, both against defendant E.S. Barrekete, by order dated July 31, 2007. The tenth cause of action alleges breach of contract against Halstead.

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).

I. The Intell Defendants

Plaintiffs allege that Intell is liable to them under theories of fraudulent misrepresentation, breach of contract, breach of warranty, and negligence, and that Intell, Intell Managers, and Barnett are liable for fraudulent

misrepresentation. The Intell defendants are entitled to dismissal of all of these claims.

A. Fraudulent Misrepresentation and Breach of Warranty

Plaintiffs concede that they cannot maintain causes of action against all defendants for fraudulent misrepresentation and breach of warranty in the wake of *Kerusa Co. LLC v W10Z/515 Real Estate Ltd. Partnership* (12 NY3d 236 [2009]), which held that "a purchaser of a condominium apartment may not bring a claim for common-law fraud against the building's sponsor when the fraud is predicated solely on alleged material omissions from the offering plan amendments mandated by the Martin Act" (*id.* at 239; *see also Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011] [holding that while a plaintiff "may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act," a plaintiff "may bring a common-law claim ... that is not entirely dependant on the Martin Act for its viability"]).

Thus, plaintiffs indicate an intention to abandon these bases of liability (*Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]). As such, plaintiffs' fourth and sixth causes of action, for fraudulent misrepresentation and breach of warranty, respectively, are dismissed. As fraudulent representation was the only claim against Intell Managers, Barnett, and the Omer defendants, plaintiffs' complaint is

dismissed as against them. This effectively disposes of the Omer defendants' motion.

B. Breach of Contract

Plaintiffs argue that, prior to closing on their apartment in December 2000, Intell had an obligation to maintain the building. They submit the following provision from the Plan:

> Sponsor will maintain the Building and the Common Elements until the First Closing, subject to ordinary wear and tear. Sponsor's obligation to make repairs in any Unit shall cease upon the Closing of Title of such Unit, except for repairs which Sponsor was obligated to make prior to the closing of title

(the Plan, at 80).

Thus, plaintiffs argue, Intell breached the Plan by failing to upgrade the electrical system in Apartment 9-B prior to December 2000. Intell argues that there is no evidence that it breached its duty to "maintain the Building and the Common Elements." Plaintiffs are unable to submit any evidence that suggests that the electrical wiring in Apartment 9-B was combustible prior to December 2000. As such, there is no evidence that Intell breached its contractual duty to maintain the common areas prior to December 2000.

After December 2000, plaintiffs claim that Intell is responsible for the failure of the Condominium's Board of Managers (the Board) to repair the electrical wiring in plaintiffs' apartment, since it controlled the Board. Specifically, plaintiffs refer, among other sections, to the

following obligation Intell had under the Plan:

> Sponsor will cause the Condominium Board to maintain the Property in substantially the same condition and manner as on the date of presentation until [Intell] no longer controls the Condominium Board.
>
> All representations under the Plan, all obligations pursuant to the GBL and such additional obligations under the Plan which are to be performed subsequent to the closing of each Unit will survive delivery of the deed

(*id.* at 80).

Intell submits another provision of the plan, however, that states that the residential units, such as 9-B, are sold "as-is" under the Plan:

> The Residential Units, the Professional Units and their appurtenant Common Elements are being sold "as-is" in the condition in which they exist on the Filing Date of this Plan, subject to the ordinary wear and tear and further subject to Sponsor's obligation to maintain the Building until the First Closing and further subject to Sponsor's obligation to make repairs, improvements or decorations as may be otherwise set forth in this Plan.

Here, as Intell conveyed Apartment 9-B and its appurtenant Common Elements "as-is" to plaintiffs and the Condominium, it did not have an obligation under the Plan to discover and remedy the combustible wiring after it sold the unit to plaintiffs. Plaintiffs fail to submit any specific obligation under the Plan to maintain, inspect, or repair the electrical wiring within individual units that would override the "as-is" clause. Thus, as Intell has shown that it did not breach the Plan before or after plaintiffs bought their apartment, plaintiffs' breach of

contract claims against Intell are dismissed. As such, plaintiffs' claim for breach of contract against Intell, the fifth cause of action, is dismissed.

C. Negligence

"In order to establish negligence, plaintiff is required to prove the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] [interior citations omitted]).

Intell argues that it has no duty of care, outside of the Plan, to plaintiffs. A tort claim may arise where two parties have a contractual relationship, but "merely alleging that the breach of a contract duty arose from a lack of due care will not transform a simple breach of contract into a tort" (*Saint Patrick's Home for Aged & Infirm v Laticrete Intl.*, 267 AD2d 166, 168 [1st Dept 1999] [internal quotation marks and citation omitted]). Similarly, courts decline to allow plaintiffs to bring negligence claims where the injury did not involve personal injury or property damage, and there "was not an abrupt, cataclysmic occurrence" (*Bellevue S. Assoc. v HRH Constr. Corp.*, 78 NY2d 282, 294 [1991]). However, where a plaintiff seeks not the benefit of its contract, but property damages caused by a fire, the Court of Appeals has held that plaintiff's claims were

not limited to breach of contract, but could also sound in tort (*Sommer v Federal Signal Corp.*, 79 NY2d 540, 552-553 [1992]).

While it is possible, in these circumstances, for plaintiffs' claims to sound in negligence, plaintiffs' inability to show that the wires were combustible while Intell owned the building is fatal to their negligence claims against it. Thus, even if Intell failed to inspect the condition of the wires, plaintiffs cannot prove that this failure was a substantial cause of the fire. As such, the negligence claim against Intell, the seventh cause of action, is dismissed.

Plaintiffs argue that Intell's motion for summary judgment is premature because they have not had an opportunity to depose Intell regarding complaints about the electrical wiring in other units. However, plaintiffs have failed to make a showing that further depositions will unearth relevant information. As such, all claims and cross claims as against Intell are dismissed.

The branch of the Intell defendants' motion that seeks leave to amend its answer to add a statute of limitations defense is denied as moot.

II. The Condominium and Halstead

Plaintiffs bring claims for breach of contract, negligence, and breach of fiduciary duty against the Condominium, and breach of contract claims against Halstead. The Condominium is entitled to dismissal of the breach of fiduciary duty claim, and Halstead

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is entitled to dismissal of all claims and cross claims as against it.

The Condominium and Halstead argue, initially, that all causes of action against them should be dismissed because plaintiffs breached the by-laws by failing to buy homeowner's insurance in the amount required by the Condominium's by-laws. Section 6.2.6 of the by-laws provides, in relevant part:

> The Condominium Board is not required to obtain or maintain any insurance with respect to any personal property contained in a Unit. A Unit Owner shall, at the Unit Owner's own cost and expense, obtain and keep in full force and effect (a) comprehensive personal liability insurance against any and all claims for personal injury, death or property damage (including, but not limited to, loss due to water damage) occurring in, upon, or from the Unit or any part thereof, with minimum combined single limits of liability of $300,000 for each bodily injury or death arising out of any one occurrence including $300,000 for damage to property ... To the extent either party is insured for loss or damage to property, each party will look to their own insurance policies for recovery.

Fabian Onetti testified at his deposition as follows regarding homeowner's insurance:

Q: At the time of the fire, did you have an insurance policy with Chubb Insurance?
A: Yes.
Q: Was the primary insured location on that policy [another house owned by plaintiffs]?
A: Yes.
Q: Are you aware that Chubb only paid 10 percent of your adjusted claim?
A: Yes.
Q: Was the 96th Street apartment listed on the Chubb policy?
A: I don't remember. I don't know.
Q: Did you have a separate policy for the 96th apartment listed on the Chubb policy?

A: I don't know. I don't remember.
Q: Did you have a separate policy for the 96th Street apartment?
A: I don't think so

(Fabian Onetti Deposition, at 210-211).

The Condominium and Halstead submit a verified bill of particulars, dated April 10, 2008, in which plaintiffs state that their insurer paid them $50,000 under their homeowners' policy. Thus, the Condominium and Halstead claim that, as plaintiffs breached the by-laws by failing to purchase the requisite amount of homeowner's insurance, they should not be allowed to recover damages. The Condominium and Halstead rely on Real Property Law § 339-j, which states that a failure by a unit owner to strictly comply with condominium by-laws "shall be ground for an action to recover sums due, for damages or injunctive relief or both maintainable by the board of managers on behalf of the unit owners ... "

However, while Real Property Law § 339-j may give rise to damages against plaintiffs for their failure to procure the required amount of homeowner's insurance, it does not foreclose plaintiffs' claims against the Condominium and Halstead. The two cases relied on by the Condominium and Halstead do not suggest otherwise (*Canela v TLH 140 Perry St., LLC*, 47 AD3d 743, 744 [2d Dept 2008] [enforcing indemnification clause for alteration work in applicable by-laws]; *Board of Directors of Hill & Dale*

Homeowners Assoc., Inc. v Cappello, 18 Misc 3d 38, 42 [App Term, 2d Dept 2007] [holding that, under the applicable by-laws, unit owner was responsible for unpaid common charges, as well as late charges, and attorneys' fees]). As such, plaintiffs' failure to purchase adequate homeowner's insurance is irrelevant to their claims against the Condominium and Halstead.

A. Negligence

Next, the Condominium argues that there was no notice of a dangerous condition in plaintiffs' apartment. Further, it argues that it had no duty to inspect the wiring within the walls of the building, contending that, while the electrical system may have been outdated, the Condominium had no reason to believe that it was dangerous. Plaintiffs contend, among other things, that the Condominium had the duty to periodically inspect the electrical systems at the building.

Where "an object capable of deteriorating is concealed from view, a property owner's duty of reasonable care entails periodic inspection of the area of potential defect. If no such program of inspection is in place, constructive notice is imputed" (*Hayes v Riverbend Hous. Co., Inc.*, 40 AD3d 500, 501 [1st Dept 2007] [internal quotation marks and citation omitted]; *see also Perez v 2305 Univ. Ave., LLC*, 78 AD3d 462 [1st Dept 2010]).

The Condominium argues that it is not the landowner with respect to plaintiffs' electrical wiring, as the wiring is not

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part of the common areas of the building. Article 6 of the Condominium's Declaration (the Declaration), entitled "The Units," outlines what purchasers buy when they close on a unit:

> Each Unit includes, and each Unit Owner shall be responsible for, the front entrance door and any other entrance doors to such Unit, interior walls and partitions installed by the Unit Owner, wall coverings, floorings, doors, hardware, smoke detectors, all plumbing, gas and heating fixtures and equipment such as refrigerators, dishwashers, heating, ventilation and air conditioning (HVAC) units (including the fans inside the units), heating equipment, ranges and other appliances, as may be affixed, attached or appurtenant to such Unit and serving such Unit exclusively. Plumbing, gas and heating fixtures and equipment as used in the preceding sentence shall include exposed gas and water pipes from branch or fixture shut-off valves attached to fixtures, appliances and equipment and the fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which a Unit Owner may install within a wall or ceiling, or under the floor, but shall not include gas, water or other pipes, conduits, wiring or ductwork within the walls, ceilings or floors. Each unit shall also include (i) all lighting and electrical fixtures and appliances within the Unit, and (ii) any special equipment, fixtures or Facilities (as hereinafter defined) affixed, attached or appurtenant to the Unit, to the extent located within a Unit from the panel and serving or benefitting only that Unit. Notwithstanding anything contained in this Article 6 to the contrary, each Unit Owner will have the right, excercisable at any time, to install, at such Unit Owner's sole cost and expense, decorations, fixtures and coverings (including, without limitation, painting, finishing, wall to wall carpeting, pictures, mirrors, shelving and lighting fixtures) on the surfaces of the walls, ceilings and floors that face the interior of such Unit Owner's Unit and to a depth of one inch behind such surfaces for the purposes of installing nails, screws, bolts and the like, provided that no such installation shall impair the structural integrity and mechanical and electrical systems of such Unit or of the Building

(Condominium Declaration, § 6.2).

Plainly, the provision excludes the defective electrical wiring from the Unit, as wiring within the walls is specifically excluded.

Article 8 of the Declaration, entitled "Common Elements," provides that the Condominium's common elements include "[e]lectric meters and panels, electric closets, feeders, risers and Facilities ... " (Condominium Declaration, § 8.4.4). "Facilities," under the Declaration, "includes, but is not limited to ... electric distribution facility, wiring, wireway, switch, switchboard, circuit breaker, transformer, fitting ... " (Condominium Declaration, § 8.2). Thus, through the term "Facilities," electrical wiring is defined as a common area of the Condominium under section 8.4.4 of the Declaration. As such, the Condominium's attempt to eschew liability by characterizing the defective electrical wiring as a part of plaintiffs' apartment, rather than as a common element of the building, is ineffectual.

Moreover, as the Condominium has failed to show that it had a program of inspection in place to inspect whether the electrical wiring in the walls of plaintiffs' apartment was deteriorating, it has failed to make a prima facie showing of entitlement to judgment on the issue of its negligence. As such, the portion of the Condominium and Halstead's motion that seeks

dismissal of the second cause of action, for negligence against the Condominium, is denied.

B. Breach of Contract

The parties agree that the Condominium had the responsibility under the Plan to repair and maintain the building's common elements. However, the Condominium and plaintiffs disagree as to whether the Condominium discharged this obligation. Here, the question of whether the Condominium breached its obligation to repair and maintain the building by failing to inspect the wiring is a question of fact for the jury. As such, the portion of the Condominium and Halstead's motion that seeks dismissal of the first cause of action, for breach of contract against the Condominium, is denied.

As to Halstead, plaintiffs' breach of contract claim against it, the tenth cause of action, should be dismissed, as plaintiffs were not signatories to the contract between the Condominium and Halstead (*see Randall's Island Aquatic Leisure, LLC v City of New York*, ---AD3d---, 2012 NY Slip Op 00843, *1 [1st Dept 2012]).

C. Breach of Fiduciary Duty

The Condominium argues that plaintiffs failed to plead their breach of fiduciary claim against the Condominium with particularity.

The elements of a claim for breach of fiduciary duty are: "(1) defendant owed [plaintiffs] a fiduciary duty, (2) defendant

committed misconduct, and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2011]).

A cause of action for breach of fiduciary duty must be pled with sufficient detail pursuant to CPLR 3016 (b) (*see Chiu v Man Choi Chiu*, 71 AD3d 621 [2d Dept 2010]). Here, plaintiffs' claim for breach of fiduciary duty against the Condominium must be dismissed, as the claim is duplicative of the contract claims (*see Ellington v Sony/ATV Music Publ. LLC*, 85 AD3d 438, 439 [1st Dept 2011]). As such, the third cause of action, for breach of fiduciary duty as against the Condominium, is dismissed.

CONCLUSION

Based on the foregoing, it is

ORDERED that defendants Intell 65 East 96, LLC, Intell 96 Managers, LLC, and Gary Barnett's joint motion for summary judgment dismissing all claims and cross claims as against them (motion seq. no. 002) is granted with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the branch of defendants The Gatsby Condominium and Halstead Management, LLC's joint motion for summary judgment (motion seq. no. 003) which seeks dismissal of all claims and cross claims as against Halstead Management, LLC is granted with costs and disbursements to said defendant as taxed by the Clerk

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ORDERED that defendants Omer Realty, LLC, Albert Attias, and Ofer Kalina's motion for summary judgment dismissing all claims and cross claims as against them (motion seq. no. 004) is granted with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

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

ORDERED that counsel for defendant Intell shall serve a copy of this order with notice of entry within twenty (20) days of entry, on all counsel.

Dated: March 8, 2012

ENTER:

Hon. CAROL R. EDMEAD, J.S.C.

HON. CAROL EDMEAD