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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

Index Number : 601104/2010
BRITTON, JULIE
vs.
BOARD OF MANAGERS OF KEYSTONE
SEQUENCE NUMBER : 001
SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

FILED
MAY 08 2013
NEW YORK
COUNTY CLERK'S OFFICE

FILED
MAY 08 2013
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 5/3/13

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 : PART 2

JULIE BRITTON,

Plaintiff,

-against-

THE BOARD OF MANAGERS OF THE KEYSTONE BUILDING CONDOMINIUM and ANDREWS BUILDING CORPORATION,

Defendants.

INDEX NO. 601104/2010
Motion Sequence 001
DECISION & ORDER

LOUIS B. YORK, J.:

In this action for property damage and mold infestation, defendants the Board of Managers of the Keystone Building Condominium (the Board) and Andrews Building Corporation (Andrews) move for summary judgment, pursuant to CPLR 3212, dismissing the complaint. Plaintiff Julie Britton cross-moves for summary judgment dismissing the defendants' second counterclaim.

Background

Plaintiff is the owner of Units 6B and 6C, two of three units on the sixth floor, in the Keystone Building Condominium (the Keystone), located at 38-44 Warren Street, New York County. Andrews is the Keystone's property manager, engaged by the Board. Both units were originally purchased by plaintiff and her husband together, but he assigned all of his rights, title and interest in the units to plaintiff on or about April 18, 2009. Unit 6B consists of approximately 1,955 square feet of indoor space, and 790 square feet of outdoor space in two terraces. It was purchased on or about April 3, 2003, and was the couple's primary residence until October 2004, when they leased it to tenants. Plaintiff relocated to London, England, and

now lives in Moscow, Russia. Unit 6C consists of approximately 1,850 square feet of indoor space, and 736 square feet of outdoor space in two terraces.[1] Unit 6C was purchased on or about September 12, 2007, and was leased to tenants from the outset.

In 2005, the Board brought suit against the sponsor of the Keystone's conversion to condominium status for construction defects, including water infiltration on Keystone's western facade.[2] The action was discontinued in exchange for compensation to the Board, and a waterproof coating was applied to the western facade at the suggestion of non-party FSI Architecture (FSI), an engineering firm engaged by the Board.[3] FSI's recommendation that the building's other walls be tested and likely waterproofed was accepted by the Board, or at least its president, at first, but then withdrawn in light of a prospective cost of $850,000 to waterproof the entire building, and apprehension about the efficacy of applying waterproofing to the entire facade. Plaintiff's units are not on the western side of the building, and their exterior walls remain untreated.

The occupant of adjacent Unit 6A informed plaintiff of water infiltration and mold growth in his unit in April 2008,[4] which proved serious enough to cause him to relocate temporarily, at Keystone's expense. Plaintiff's units were tested in August 2008 by

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[1]The complaint refers collectively to all the outdoor space as the Terraces.

[2]*Board of Managers of Keystone v East Tribeca Associates, LLC*; the New York County index number is recorded inaccurately.

[3]FSI tested the Keystone's facade on October 4, 2005 after the Board received notice of water infiltration on the building's west side. Motion, exhibit I (FSI Report). FSI found that deficient window installations in several apartments allowed substantial amounts of water into the apartments. Unit 6B was part of the test, but its moisture readings were negative. Unlike tested apartments that allowed water infiltration, however, Unit 6B had no windows on the exposed wall.

[4]FSI examined the premises of Unit 6A and reported to defendants on April 3, 2008. Mclaughlin affirmation, exhibit 2.

Microecologies, Inc. (Microecologies[5]), a firm hired by defendants. The test results were released to plaintiff in October 2008, about two months after being given to defendants. The test found mold in Unit 6B and recommended remediation in that unit only. In November 2008, Microecologies conducted another test with the same results.

Tests conducted by other companies on behalf of plaintiff's and her tenants' insurers, in December 2008 and January 2009 respectively (the Chubb Report and the Insight Report), showed mold in Unit 6C, in addition to what Microecologies found in Unit 6B. The Insight Report attributed the mold growth in Unit 6C partly to cross-contamination from Microecologies's work in Unit 6A.

Defendants hired Microecologies to clean up Unit 6B only, whose occupants terminated their lease (at a monthly rent of $9,450) with plaintiff prematurely in November 2008. Plaintiff then reduced the $9,975 monthly rent for Unit 6C by $3,990 in an attempt to mollify her tenants. Nevertheless, the occupants of Unit 6C terminated their lease in June 2009. Plaintiff subsequently relet both units, but at a lower rent than before.

The instant action commenced on April 29, 2010, asserting causes of action for breach of fiduciary duty against the Board (first), negligence against both defendants (second), breach of duty to properly hire, screen and supervise an outside service provider against Andrews (third), loss of use of the Terraces against both defendants (fourth), and a permanent injunction to restore use of the Terraces against both defendants (fifth).

Discussion

Under Keystone's Declaration of Condominium, article 6 (b) (i), the Terraces, defined as

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[5]The name of this company sometimes appears as Microecology or Micro Ecologies.

"any portion of the sixth floor roof . . . to which there is direct and exclusive access from the interior of a Residential Unit," are limited common elements. According to the "Condominium By-Laws," article VI § 9 (b), the Board has the responsibility to maintain, repair and replace limited common elements, although the cost may be borne by one or all unit owners. New York State's Multiple Dwelling Law and New York City's Housing Maintenance Code (Administrative Code [NYC Code] § 27-2001 et seq.) place responsibility on the owner to maintain, repair and replace a building's roof and exterior.

The Complaint contains certain allegations which are central to plaintiff's action:

- "[T]he Board of Managers failed to conduct the comprehensive testing and investigation recommended by FSI, until several years later." Complaint, ¶ 20.
- Water infiltration was due to "deterioration of the terraces and/or leaks penetrating the building envelope . . . [,or] failure of some other Common Element as that term is defined in the Declaration and By-Laws . . . that are the responsibility of the Board of Managers to maintain, repair, and replace." *Id.*, ¶¶ 26-27.
- "[D]efendants caused FSI to prepare a written report, dated in or about April 2008, that reflected the adverse conditions in Unit 6A . . . [which was not provided to plaintiff], nor did they notify plaintiff of the existence of said report at the time." *Id.*, ¶ 33.
- Although "plaintiff repeatedly requested mold testing in her units" after she became aware of the conditions in Unit 6A, "the Board of Managers and Andrews declined and refused to conduct the mold testing requested by plaintiff until in or about late August 2008." *Id.*, ¶¶ 36, 39.
- "[T]he mold [then found in Unit 6B] was caused to spread due to the defendants' failure to act promptly to investigate the source of water infiltration, and due to improper containment of the conditions in Unit 6A by Microecologies, the remediation company engaged by the defendants." *Id.*, ¶ 38.
- "Plaintiff repeatedly requested the August 2008 test results, but those results were not furnished to the plaintiff until October 2008." *Id.*, ¶ 41.
- The Chubb Report and the Insight Report, which both "disclosed more extensive water damage and mold presence in both Units than had been disclosed in Microecologies' August and November 2008 Reports," were provided to defendants, who declined to

follow their recommendations. *Id.*, ¶¶ 43, 44-47.

- "Instead, the defendants again engaged Microecologies . . . to perform the remediation and subsequent clearance testing. On information and belief, this practice contradicted standard industry practice, which dictates that clearance testing be conducted by a company that is independent of the firm that performs remediation." *Id.*, ¶ 48.

- "[T]he Board of Managers declined and refused to relocate the tenants in Unit 6B, or to compensate plaintiff for their relocation during the course of such remediation [by Microecologies], despite the fact that the remediation presented a possible health hazard and render[ed] the Unit uninhabitable." *Id.*, ¶ 51.

- "[D]espite demand therefor, the Board of Managers declined and refused to relocate the tenants [of Unit 6C], or to compensate plaintiff for their relocation during the course of such remediation [by Microecologies], despite the fact that the mold and the remediation presented a health hazard and would displace the tenants from a significant portion of Unit 6C, rendering it uninhabitable." *Id.*, ¶ 54.

- "This work [needed to address waterproofing the Keystone's facade] would prevent plaintiff's use and access to the Terraces for a prolonged, unspecified period of time, resulting in additional damages hereinafter alleged." *Id.*, ¶ 56.

- "Andrews failed to properly screen and supervise Microecologies in its screening, testing and remediation work in Plaintiff's Units. Such negligence included but is not limited to the failure to take steps to protect against cross-contamination that affected plaintiffs units." *Id.*, ¶ 78.

- "[T]he failure to the Board to act reasonably and timely caused the mold condition and water damage to spread, thus rendering the Units uninhabitable by late winter/early spring 2009." *Id.*, ¶ 59.

Plaintiff was deposed on March 15, 2011 and March 16, 2011. When plaintiff learned that the Keystone's western facade had been waterproofed in 2007, she said that she asked her tenants in Unit 6B and the then owners of Unit 6C whether they experienced any water infiltration. First Britton Transcript at 81-83. Her tenants told her that there was no problem in Unit 6B;[6] Unit 6C though "had spotting from the wood floors inside the terrace door." *Id.* at 81.

[6]There had been water damage in Unit 6B earlier, caused by a problem in the bathroom of the master bedroom. This occurred after she had moved out, but before 2007.

The owners of Unit 6C, who were in the process of selling it to plaintiff and her husband, "had it repaired and fixed," and were going to notify defendants "about the situation so they could keep it in mind when they needed testing." When plaintiff viewed Unit 6C before the closing, "[i]t was in very good condition . . . . No signs of water damage." *Id.* at 84. Other than her visual inspection, she did not have an independent examination made concerning water infiltration of Unit 6C before taking ownership.

An e-mail message from the owner of Unit 6A, dated April 28, 2008, was plaintiff's first notice of water damage to that unit. She testified that she checked again with her tenants, now in Unit 6C as well as Unit 6B, and was advised that there were no such problems. *Id.* at 101. "They didn't report any damage." *Id.* at 105. Plaintiff could not recall whether she informed her tenants of the character or extent of the damage to Unit 6A then. When a pipe burst higher in the building's "C" line of apartments in June 2008, plaintiff's tenants in Unit 6C assured her that "[t]here is no damage in our apartment." *Id.* at 110.

The parties agree that Microecologies conducted its first test of plaintiff's units in August 2008. According to Microecologies's report, they found mold growth only behind the baseboards in the living room of Unit 6B, and no mold growth in Unit 6C, in spite of a "slight . . . mold-like odor [in] the northeast corner of the living room." Motion, exhibit N. The parties also agree that plaintiff was not notified of the result of this test until October 2008. Other than questioning her tenants, plaintiff took no independent steps regarding conditions in her units in the almost six months between learning of the problems in Unit 6A and receiving the Microecologies's test report. First Britton Transcript at 106-108. Although plaintiff and her tenants were displeased with the delay in receiving the report, which identified mold in Unit 6B, she still did not take any independent action because "Micro Ecologies was authorized to go in

very quickly to do the follow-up testing that they were suggesting." *Id.* at 120.

Plaintiff was told in advance of the erection of the scaffolds to work on the outside of the building to deal with water infiltration. *Id.* at 130-131. Because she knew of the thorough approach taken to remediate the condition of Unit 6A, it was her "assumption that I would be treated the same way." *Id.* at 142. She was shown a letter from the Board which offered to compensate her tenants in Unit 6B for temporary relocation costs, which contradicts an allegation in her complaint. She testified, however, that she did not convey the offer to her tenants, because they had given notice of vacating. The letter, dated December 12, 2008, offered to pay half the cost of a temporary three-to-five day relocation for Unit 6B's occupants, up to $1,000.

Plaintiff seems to have denied the Board access to Unit 6C for repairs in the period January through April 2009, according to her somewhat confusing testimony, made more so by interruptions by various attorneys. First Britton Transcript at 157-167. The Board's December 12, 2008 letter also asserted that access to Unit 6B, known to have mold growth, has continued to be denied, apparently by the tenants. Robert Moses, who was the Board's president in 2008, and secretary in 2009, testified that access to plaintiff's unit (presumably Unit 6C) "was conditioned upon her receiving some overall compensation," which the Board was unwilling to promise in advance. Plaintiff testified that work in Unit 6B began "immediately after the tenants moved out," in December 2008. She recalled that Microecologies's work in Unit 6B was completed "toward the end of the summer of 2009." Britton Transcript II at 55. Plaintiff testified that Insight Environmental, Inc. (Insight), a company brought in originally to report to one of the insurance carriers, "did the clearance testing," that is, an independent review of the remediation process. *Id.* She said that the work on Unit 6C was completed in or about December 2009. *Id.* at 96. Plaintiff made no effort to enforce the lease against the occupants of either unit. Both

units were allegedly relet to new tenants in January 2010.

Plaintiff testified that the scaffolding was removed from the Terraces sometime in 2010, but that the Terraces were not "accessible" until August 2010. She said that she gave her tenants a $1,000 monthly rent concession between January and August 2010. Although it is not clear whether this pertained to one or both units.

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York Univ. Med. Center*, 64 NY2d 851, 853 (1985). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact.'" *People v Grasso*, 50 AD3d 535, 545 (1st Dept 2008), quoting *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied. *Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 (1978); *Grossman v Amalgamated Hous. Corp.*, 298 AD2d 224, 226 (1st Dept 2002).

Generally, properly-situated defendants rely upon the business judgment rule to insulate them from plaintiff's charges of mismanagement. "The business judgment rule is applicable to the board of directors of cooperative and condominium corporations." *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 989 (1st Dept 2009).

> "[W]here a challenge is made by an individual owner to an action of a condominium board of managers, whether incorporated or not, absent claims of fraud, self-dealing, unconscionability or other misconduct, the court should apply the business judgment rule and should limit its inquiry to whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the condominium."

Schoninger v Yardarm Beach Homeowners' Assn., 134 AD2d 1, 10 (2d Dept 1987).

Examining the record, primarily consisting of plaintiff's descriptions and recollections, there are no material issues of fact that warrant continuing this action. Almost all of defendants' conduct complained of by plaintiff falls under the protection of the business judgment rule. Whether deciding not to waterproof the entire building, choosing Microecologies to clean up the damaged units, requiring exclusive temporary use of the Terraces to work on the building's exterior, or offering partial compensation for relocation of the occupants of Unit 6B (an offer plaintiff did not pass on to her tenants), there is not a hint of misconduct, no less fraud, self-dealing, or unconscionability, by defendants. Some choices by defendants may have been imperfect, even unwise, notably the two-month delay in informing plaintiff of Microecologies' August 2008 report, but management groups are allowed that leeway by law, under the business judgment rule.

What also weighs against plaintiff is her lack of candor regarding cooperation with defendants in curing the problem. She accused them of failing "to act reasonably and timely" while she delayed giving them access to her premises in the hope of arriving at a large settlement in advance, according to Moses, the Board's president. *Katz v Board of Mgrs., One Union Sq. E. Condominium, N.Y., N.Y.*, 83 AD3d 501, 502 (1st Dept 2011) ("The record demonstrates further that, while defendant worked diligently and professionally to effect the restoration, plaintiff was uncooperative and indecisive and otherwise engaged in delay-causing conduct that prolonged the restoration process. . . . Thus, the record demonstrates that there was no breach of contract and no breach of the implied covenant of good faith and fair dealing").

Additionally, while the complaint charges that, contrary to standard industry practice, Microecologies was employed to conduct clearance testing after performing remediation,

plaintiff testified that Insight, a company brought in by one of the insurers of her premises, actually conducted clearance testing. Britton Transcript II at 55. Unfortunately, plaintiff's affidavit, sworn to on October 3, 2012, more than 18 months later, repeats the erroneous charge. Britton aff, ¶ 32.

Finally, use of the Terraces has been fully restored to the occupants of Units 6B and 6C. *Id.* at 126. Nothing in the record suggests that the amount of time that the Terraces were inaccessible was governed by anything but the exigencies of the repair work to the building's facade. The only evidence of conscious delay in the life of this dispute was on the part of plaintiff and her tenants when remediation was set to begin late in 2008.

Defendants' motion for summary judgment dismissing the complaint is granted. Defendants' second counterclaim asks for damages in excess of $150,000, because plaintiff allegedly "failed and refused and breached her promise to pay and reimburse the Condominium for the value of these repairs, renovations, and work to her units and limited common elements." Motion, Bull affirmation, exhibit B, ¶ 104. While defendants do not request summary judgment in their favor on this counterclaim, plaintiff cross-moves for its dismissal. She maintains that defendants have failed to produce "a shred of evidence or testimony that supports this claim." Britton aff, ¶ 69. She contends that nothing has resulted from a compliance conference order, dated April 15, 2012, for production of "[a]ll documents, if any, supporting counterclaim." *Id.*, exhibit 6. Defendants oppose the cross motion on several procedural grounds, but, in conclusion, "agree to stipulate to discontinuing the claims without prejudice to renew if summary judgment is granted." Therefore, defendants' second counterclaim is dismissed, and, since the first counterclaim requested contribution and/or indemnification from plaintiff in case defendants were found liable, the entire action is terminated.

Accordingly, it is

ORDERED that defendants the Board of Managers of the Keystone Building Condominium and Andrews Building Corporation's motion for summary judgment, pursuant to CPLR 3212, dismissing the complaint is granted, and the complaint is dismissed with costs and disbursements to said defendants as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further

ORDERED that plaintiff Julie Britton's cross motion for summary judgment dismissing the defendants' second counterclaim is granted on consent, and the entire action is terminated; and it is further

ORDERED that the Clerk shall enter judgment accordingly.

DATED: May 3, 2013

ENTER:

J.S.C.

LOUIS B. YORK J.S.C.

FILED
MAY 08 2013
COUNTY CLERK'S OFFICE
NEW YORK