

Konami v Galleria Condominium Assoc., Inc.

2013 NY Slip Op 31378(U)

June 20, 2013

Supreme Court, New York County

Docket Number: 112412/10

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JOAN A. MADDEN
Justice

PART 11

Kazuko Konami

INDEX NO. 112412/10

- v -

MOTION DATE _____

Galleria Condominium
Brown

MOTION SEQ. NO. 001

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum Decision and Order.

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

FILED

JUN 28 2013

COUNTY CLERK'S OFFICE
NEW YORK

Dated: June 29, 2013

JOAN A. MADDEN J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. MOTION IS: GRANTED DENIED GRANTED IN PART OTHER (CHECK AS APPROPRIATE)
- 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: IAS PART 11

-----X
KAZUKO KONAMI,

Plaintiff,

-against-

GALLERIA CONDOMINIUM
ASSOCIATION, INC., BROWN HARRIS
STEVENS, SKY 4 LLC., AMSTERDAM
HOSPITALITY GROUP and STREAMLINE
WINDOWS, INC.,

Defendant.

JOAN MADDEN, J.:

In this action for property damage allegedly attributable to defendants' negligence, defendants Galleria Condominium Association, Inc. ("Galleria") and Brown Harris Stevens (together with Galleria, the "Moving Defendants") move to dismiss the complaint against them, pursuant to CPLR 3211(a)(7) or, alternatively, seek summary judgment. Plaintiff Kazuko Konami ("Konami"), opposes the motion, and defendants Sky 4 LLC. ("Sky 4") and Amsterdam Hospitality Group ("Amsterdam") partially oppose the motion. For the reasons set forth below, the motion is denied.

Background

This action seeks to recover for property damage sustained on June 6, 2010, when windows and part of the Building's exterior wall allegedly fell onto the terrace of Konami's condominium apartment known as Unit 19B ("Konami's Apartment") in a building located at 117 E. 57th Street, New York, New York (the "Building"). Sky 4 and Amsterdam also owned condominium apartments in the Building known as Units 52 and 53A ("Apartments 52 and 53A"). The Building is owned, operated, and maintained by Galleria, and Brown Harris Steven is the Building's managing agent.

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NEW YORK

Before the incident, defendant Streamline Windows, Inc. ("Streamline") manufactured and installed windows for Sky 4 and Amsterdam in Apartments 52 and 53A. The complaint alleges that prior to June 6, 2010, one or more windows fell from Apartments 52 and 53A and struck an enclosed balcony, known as a "winter garden," which was part of Konami's apartment. Konami alleges in her complaint and verified bill of particulars that this occurrence was attributable solely to the negligence of the defendants in failing to properly install and/or maintain the Building's windows and/or exterior and that the fallen windows caused property damage of approximately \$100,000, including the cost of repairing the balcony (\$52,150.00) and damages to personal property (\$48,000.00).

The Moving Defendants seek dismissal of the claims against them on the grounds that Section 6.3 of the condominium's by-laws precludes recovery with respect to personal property damages as it provides in relevant part that "[i]n the event that the Building or any part thereof is damaged... by fire or other casualty... the Residential Board... will arrange for the prompt repair or restoration thereof (including each Unit, but excluding... personal property...)...." The Moving Defendants also seek to dismiss Konami's complaint insofar as it seeks recovery for the costs of repairing the balcony, which they allege were paid for by condominium association and not Konami; however, the Moving Defendants alternatively argue that if Konami incurred \$52,150.00 of repair costs, Section 6.3 of the Building's by-laws precludes recovery for such costs since losses which do not affect "General Common Elements" must be borne by the individual unit owner. Alternatively, the moving defendants seek summary judgment based on the undisputed facts.

In opposition, Konami argues that her claims are based on negligence, rather than breach of contract or breach of warranty. In particular, Konami alleges that the condominium's

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negligence in maintaining the windows and the building's exterior caused the property damage at issue. She also argues that no clause in the Building's by-laws exempts the Moving Defendants from negligence liability, nor could any clause effectively provide such an exemption, as it would be void and unenforceable pursuant to General Obligations Law, Section 5-322.1.

In their affirmation in partial opposition, Sky 4 and Amsterdam assert that the Building's by-laws are not admissible, since no proof has been submitted to establish their authenticity. They further argue that the by-laws are ambiguous and do not clearly exempt the Moving Defendants from liability for negligence. Additionally, Sky 4 and Amsterdam argue that Konami's complaint alleges sufficient facts to state a cause of action, that summary judgment is premature as discovery is not complete, and that the Moving Defendants have failed to address the cross-claims asserted against them by Sky 4 and Amsterdam. However, Sky 4 and Amsterdam do not oppose the motion to the extent it seeks to dismiss Konami's claims for costs incurred in repairing the balcony, asserting that these costs were paid by the condominium association.

Discussion

On a motion pursuant to CPLR §3211(a)(7), the court is limited to ascertaining whether a pleading states any cause of action and not whether there is any evidentiary support for the complaint. Guggenheimer v. Ginzburg, 43 N.Y.2d 268, 275 (1977). The complaint must be liberally construed in a light most favorable to the plaintiff, and all factual allegations must be accepted as true. Id. At the same time, "[i]n those circumstances where the legal conclusions and factual allegations are flatly contradicted by documentary evidence, they are not presumed to be true or accorded every favorable inference," and dismissal is appropriate pursuant to

CPLR §3211(a)(1). Ark Bryant Park Corp. v Bryant Park Restoration Corp., 285 A.D.2d 143, 150 (1st Dep't 2001)(internal citations omitted). In such cases, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he has stated one." Id., quoting, Guggenheimer v. Ginzburg, 43 N.Y.2d at 275. However, dismissal based on documentary evidence may only result when the documentary evidence "utterly refutes [a] plaintiff's allegations, conclusively establishing a defense as a matter of law." Goshen v. Mutual Life Ins. Co. of New York, 98 N.Y.2d 314, 326 (2002).

In this action, the complaint is sufficient to state a cause of action for negligence, pursuant to CPLR 3211(a)(7), and the Moving Defendants offer no arguments as to why the pleadings are deficient. Furthermore, to the extent that the Moving Defendants seek dismissal based on the documentary evidence, such relief may not be granted since, as indicated below, the Building's by-laws do not refute Konami's allegations nor establish a defense as a matter of law.

Once a condominium is created, "the administration of the condominium's affairs is governed principally by its bylaws, which are, in essence, an agreement among all of the individual unit owners as to the manner in which the condominium will operate, and which set forth the respective rights and obligations of unit owners, both with respect to their own units and the condominium's common elements" Glenridge Mews Condominium v. Kavi, 90 AD3d 604, 605 (2d Dept 2011)(internal citation and quotation omitted). Like any other agreement, the bylaws "must be read as a whole to determine the parties' purpose and intent, giving a practical interpretation to the language employed so that the parties' reasonable expectations are realized." Snug Harbor Square Venture v. Never Home Laundry, 252 A.D.2d 520, 521 (2nd Dept 1998); see also Zodiac Enterprises, Inc. v. American Broadcasting Companies, Inc., 81 A.D.2d 337, 339 (1st Dep't 1981), aff'd, 56 N.Y.2d 738 (1982).

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“[W]hen parties set down their agreement in a clear, complete document, their writing should...enforced according to its terms.” W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d 157, 162 (1990). It is also fundamental to contract interpretation that agreements are construed in accord with the parties’ intent. See Slatt v. Slatt, 64 N.Y.2d 966, 967 (1985); see also Hartford Acc. & Indem. Co. v. Wesolowski, 33 N.Y.2d 169, 171 (1973). “Extrinsic evidence of the parties’ intent may be considered only if the agreement is ambiguous, which is an issue of law for the courts to decide.” Greenfield v. Philles Records, Inc., 98 N.Y.2d 562, 569 (2002) citing W.W.W. Assocs., Inc. v. Giancontieri, 77 N.Y.2d at 162; see also Matter of Wallace v. 600 Partners Co., 86 N.Y.2d 543, 548 (1995).

In determining whether an agreement is ambiguous, the court “should examine the entire contract and consider the relation of the parties and the circumstances under which it was executed.” Kass v. Kass, 91 N.Y.2d 554, 566 (1998). “If the court concludes that the agreement is ambiguous, extrinsic evidence may be used to discern its meaning.” Nappy v. Nappy, 40 AD3d 825, 826 (2d Dep’t 2007)(internal citation omitted).. “Resolution of the ambiguity is for the trier of fact.” Id. (internal citation omitted)

Under these principles, section 6.3 of the bylaws cannot be construed, as a matter of law, to mean that the condominium cannot be held liable for damaging a unit owners personal property through its own acts of negligence. Section 6.3 generally addresses the condominium’s responsibility for repairing the building when there is a fire or “other casualty” which destroys or damages the condominium, and the allocation of insurance proceeds to cover the costs of such repair. Under this section, while the condominium agrees to the “repair and restoration” of the “General Common Elements” and “the Units” it excludes “fixtures, furniture, furnishings, or other personal property not constituting part of the unit.” However, contrary to the position of

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the Moving Defendants, this exclusion is not clearly applicable under the circumstances here, where the condominium's own negligence is allegedly responsible for the damage to plaintiff's property.¹ Accordingly, the by-laws do not provide a basis for dismissal based on documentary evidence.

Furthermore, the Moving Defendants' argument that Konami should not be permitted to recover \$52,150, representing the costs attributable to repairs to the balcony, must be rejected as the Moving Defendants have not provided conclusive documentary evidence to substantiate their assertion that Konami did not pay the costs of these repairs.

The court next considers the Moving Defendants' request for summary judgment. On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case...." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

For the same reasons discussed above with respect to the Moving Defendants' arguments in support of dismissal based on documentary evidence, the Building's by-laws do not unambiguously establish that the Moving Defendants are not responsible for damage to plaintiff's personal property caused by their own negligence. Moreover, in the absence of discovery, it cannot be determined whether any negligence by Moving Defendants caused the property damage

¹That being said, however, to the extent that plaintiff argues that such an interpretation of the by-laws would render them inconsistent with General Obligations Law Section 5-322.1, such argument is without merit as that section of the General Obligations Law applies to agreements to indemnify a negligent party for its own negligence (see generally, Brooks v. Judlau Contracting, Inc., 11 N.Y.3d 204 (2008)), and the by-laws do not constitute an indemnification agreement.

at issue here. Next, the Moving Defendants fail to provide evidence sufficient to establish that Konami did not pay the costs of repairs to the balcony. Accordingly, the Moving Defendants' motion for summary judgment must be denied.

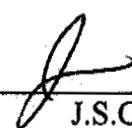
Conclusion

In view of the above, it is

ORDERED that the motion for to dismiss and for summary judgment by defendants Galleria Condominium Association, Inc. and Brown Harris Stevens is denied; and it is further

ORDERED that the parties shall appear on ~~January 2013~~ ^{July 25, 2013} at 9:30 am for a status conference in Part 11, room 351, 60 Centre Street, New York, NY.

DATED ~~May 1, 2013~~ ^{June 20, 2013}



J.S.C.

FILED
JUN 28 2013
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