Board of Mgrs. of the Residence on Madison Condominium v Aryeh
2013 NY Slip Op 31908(U)
August 7, 2013
Supreme Court, New York County
Docket Number: 104343/11
Judge: Manuel J. Mendez
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SCANNED ON 8/15/2013
[* 1]

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

PRESENT: HON. MANUEL J. MENDEZ, Justice — PART 13

BOARD OF MANAGERS OF THE RESIDENCE ON MADISON CONDOMINIUM, ON BEHALF OF ALL ITS UNIT OWNERS,

Plaintiff,

-against-

MICHAEL ARYEH AND SHIREEN ARYHEN, AS TRUSTEES OF THE MAHIN ARYEH TRUST F/B/O DANIELLA ARYEH DATED 8/1/97 AND AS TRUSTEES OF THE MAHIN ARYEH TRUST, F/B/O MORAD ARYEH, DATED 8/1/97,

Defendants.

INDEX NO. 104343/11
MOTION DATE 07-24-2013
MOTION SEQ. NO. 004
MOTION CAL. NO.

FILED
AUG 15 2013
COUNTY CLERK'S OFFICE
NEW YORK

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

The following papers, numbered 1 to 13 were read on plaintiff's motion for summary judgment dismissing the counterclaims and assessing costs for asserting frivolous counterclaims and the defendants cross-motion for summary judgment:

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1 - 3
Answering Affidavits — Exhibits ______ cross motion	4-7, 8-9
Replying Affidavits	10-11, 12-13

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is Ordered that plaintiffs' motion for summary judgment pursuant to CPLR §3212, to dismiss the counterclaims and pursuant to CPLR 8303-a for frivolous practice, is granted only as to the dismissal of the counterclaims and the eighth and ninth affirmative defense. The remainder of the relief sought in plaintiff's motion is denied. Defendants' cross-motion pursuant to CPLR §3212 for summary judgment is denied.

Plaintiffs' motion seeks an Order granting summary judgment pursuant to CPLR §3212, dismissing all of the counterclaims as meritless and assessing costs pursuant to CPLR 8303-a for frivolous practice.

Defendants oppose the plaintiffs' motion and cross-move pursuant to CPLR §3212 for summary judgment dismissing this action and for sanctions based on frivolous motion practice.

Pursuant to New York County Courthouse Procedures, Procedure II, Filing Fee on Motions and Cross-Motions: "A motion fee must be paid on motions made in writing by notice of motion, order to show cause or ex parte after the commencement of an action....The fee must be paid on written cross-motions filed in opposition to motions on which a fee is required ..."

[* 2]

Plaintiffs' submitted a document labeled as a "motion," pursuant to CPLR §3211[b], *seeking to dismiss the defendants' second and third affirmative defenses;* for partial summary judgment pursuant to CPLR §3212, and pursuant to CPLR §4317[b] for the appointment of a special referee. The "motion," prepared by different attorneys from those attorneys on the underlying motion, has the same return date, but was not filed as a separate motion with the clerk's office. There was no filing fee paid, or motion sequence number assigned to it. The plaintiffs' "motion" was merely submitted to the Court simultaneously with the underlying motion for summary judgment. Motion practice that avoids filing fees and proper Courthouse procedures for the submission of papers, shall not be condoned. This Court will not address the merits of the relief sought in plaintiffs' "motion."

This action stems from Labor Law 11 work done to a building located at 1080 Madison Avenue, New York, NY. Defendants own and reside in units 9A and 9B. The contractors and agents retained by plaintiffs used defendants' terrace as a staging area for the period from March of 2011 through October of 2011. Defendants claim that plaintiffs' contractors and agents substantially damaged items placed on the terrace; the terrace doors; and altered the terrace's pitch causing water damage to the units.

On April 11, 2011, plaintiffs brought this action seeking a judgment in the amount of $17,846.48 against defendants for damages based on failure to pay common charges; additional common charges; special assessments for condominium Units 9A and 9B; additional amounts as they become due and owing after April, 2011; reasonable rental value from October 1, 2010 to date of entry of a judgment; the appointment of a receiver and attorneys fees (Mot., Exh. A). On April 27, 2011, defendants interposed an answer which asserted affirmative defenses and included five counterclaims (Mot., Exh. B). On May 16, 2011, plaintiffs, by different counsel, replied to the counterclaims, with the affirmative defense of failure to state a cause of action (Mot., Exh. C).

Plaintiffs, by pre-discovery motions, sought essentially the same relief currently being sought under motion sequence 004. Defendants cross-moved to amend the answer. The Decision and Order of this Court dated November 28, 2011, denied both of plaintiffs' motions. Defendants' cross-motion was granted only to the extent that the Answer was amended as to the first, second and sixth counterclaims and the second, third, eighth and ninth affirmative defenses. The remainder of the proposed amended answer was severed and dismissed (Cross-Mot., Exh. A).

The second and third affirmative defenses assert that the defendants do not owe the money to plaintiff, that any money owed to plaintiff has been paid, and the amounts alleged in the complaint are not accurate. The eight affirmative defense and first *counterclaim allege nuisance; the ninth affirmative defense and second counterclaim* allege breach of contract; and the sixth counterclaim alleges property damage (Cross-Mot., Exh. E). Discovery was conducted and on January 23, 2012, plaintiffs filed the note of issue.

It is well established that once a motion for summary judgment is denied, subsequent motions seeking the same relief must also be denied. The use of "successive fragmentary motions" is improper, there cannot be any reservation of issues

for subsequent summary judgment motions (Phoenix Four Inc. v. Albertini , 245 A.D. 2d 166, 665 N.Y.S. 2d 893 [N.Y.A.D. 1st Dept.,1997] and Turner Construction Co. v. H.E.L.P. Social Service Corp., 43 A.D. 3d 731, 841 N.Y.S. 2d 448 [N.Y.A.D. 1st Dept., 2007]). The exception to the rule prohibiting successive summary judgment motions, is when there is newly discovered evidence or sufficient cause shown (NYP Holdings v. McClier Corp., 83 A.D. 3d 426, 921 N.Y.S. 2d 35 [N.Y.A.D. 1st Dept., 2011]). Newly discovered evidence requires a showing of due diligence in attempting to find the evidence and its unavailability before the submission and adjudication of the prior motion (Jones v. 636 Holding Corp., 73 A.D .3d 409, 899 N.Y.S. 2d 605 [N.Y.A.D. 1st Dept., 2010]). Sufficient cause shown applies when the record demonstrates that the matter can be disposed of without burdening the resources of the court. A subsequent clarifying decision, is a basis to find good cause shown (Varsity Transit, Inc. v. Board of Educ., 300 A.D. 2d 38, 752 N.Y.S. 2d 603 [N.Y.A.D. 1st Dept., 2002]).

In order to prevail on a motion for summary judgment pursuant to CPLR §3212, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (Klein v. City of New York, 89 N.Y. 2d 833, 675 N.E. 2d 548, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence in admissible form, sufficient to require a trial of material factual issues (Amatulli v. Delhi Constr. Corp., 77 N.Y. 2d 525, 571 N.E. 2d 645; 569 N.Y.S. 2d 337 [1999]).

An expert's affidavit must be based on sufficient evidentiary proof of its allegations and foundational facts as to the asserted claims, it must not be conclusory. The claims presented in an expert's affidavit must be more than mere speculation to prevail on a motion for summary judgment (Romano v. Stanley, 90 N.Y. 2d 444, 684 N.E. 2d 19, 661 N.Y.S. 2d 723 [1997]).

An individual unit owner may not withhold common charges in derogation of the condominium units by-laws, however, that does not preclude the unit owner from interposing defenses or counterclaims to the action (Residential Bd. of Mgrs. of Century Condominium v. Berman, 213 A.D. 2d 206, 633 N.Y.S. 2d 478 [N.YA.D. 1st Dept. 1995]). A defendant's counterclaims can remain pending, without affecting the obligation to pay common charges (Matter of Abbady (Mailman), 216 A.D. 2d 115, 629 N.Y.S. 2d 6 [N.Y.A.D. 1st Dept., 1995]). A condominiums' by-laws are a contract with the unit owner. The board of managers decisions concerning a residential condominium are judged based on the "business judgment rule," which requires deference to its decisions made in good faith (Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y. 2d 530, 553 N.E. 2d 1317, 554 N.Y.S. 2d 807 [1990]). The business judgment rule is subject to judicial scrutiny upon a showing that the board acted, "...(1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith."(Lorne v. 50 Madison Avenue, LLC, 65 A.D. 3d 879, 886 N.Y.S. 2d 1 [N.Y.A.D. 1st Dept. 2009] citing to Pelton v. 77 Park Ave. Condominium, 38 A.D. 3d 1, 825 N.Y.S. 2d 28 [N.Y.A.D. 1st Dept., 2006]). The board of managers of a condominium building is entitled to summary judgment on claims of breach of contract related to the by-laws, upon a demonstration that its actions were undertaken pursuant to legitimate corporate purposes and that it acted in good faith in fulfilling its obligations. Conclusory affidavits concerning the condition of the unit are insufficient to raise an issue of fact

(Katz v. Board of Managers, 83 A.D. 3d 501, 921 N.Y.S. 2d 228 [N.Y.A.D. 1st Dept., 2011]).

To establish liability for a claim of private nuisance a party is required to demonstrate, "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (Copart Indus., Inc. v. Consolidated Edison Co. Of N.Y. 41 N.Y. 2d 564, 362 N.E. 2d 968, 394 N.Y.S. 2d 169 [1977]). In determining whether a private nuisance exists the court must weigh the gravity of the harm against utility and necessity (Copart Indus., Inc. v. Consolidated Edison Co. of N.Y. 41 N.Y. 2d 564, supra). Not every intrusion constitutes a nuisance, it varies based on the circumstances, "Persons living in organized communities must suffer some damage, annoyance and inconvenience from each other..." (Nussbaum v. Lacopo, 27 N.Y. 2d 311, 265 N.E. 2d 762, 317 N.Y.S. 2d 347 [1970]). Money damages sought under a claim of nuisance require a showing of diminution of the value of the property, or for a temporary condition, reduction of the usable value of the property (Board of Managers of Waterford Association v. Samii, 73 A.D . 3d 617, 900 N.Y.S .2d 860 [N.Y.A.D 1st Dept., 2010] citing to Guzzardi v. Perry's Boats, 92 A.D. 2d 250, 460 N.Y.S. 2d 78 [N.Y.A. D. 2nd Dept., 1983]).

A negligence claim requires proof of, "..the existence of a duty, breach (of duty) and proximate cause.." (Kenney v. City of New York, 30 A.D. 3d 261, 817 N.Y.S. 2d 264 [N.Y.A.D. 1st Dept., 2006] citing to, Palsgraf v. Long Is. R.R. Co., 248 N.Y. 339 162 N.E. 99 [1928]). A property damage claim based on negligence, measures damages based on,"...the lesser of decline in market value and the cost of restoration" (Jenkins v. Etlinger, 55 N.Y. 2d 35, 432 N.E. 2d 589, 447 N.Y.S. 2d 696 [1982]). Claimant need only introduce evidence concerning either; the reasonable costs of repairs, less the diminution of market value; or that the cost of restoring the property is more than the dimunition of value (Fisher v. Qualico Contracting Corp., 98 N.Y. 2d 534, 779 N.E. 2d 178, 749 N.Y.S. 2d 467 [2002]). Testimony from an expert concerning the value of damaged property that is uncontroverted will provide a basis for the extent of damage to property (Wool v. Ayres, 283 A.D. 2d 299, 724 N.Y.S. 2d 612 [N.Y.A.D. 1st Dept., 2001]).

Plaintiffs contend that they are entitled to summary judgment on the counterclaims. Defendants in their discovery responses make no assertion that the Board of Managers failed to act beyond its legal authority in undertaking general maintenance and entering into a contract for repair of the building (Mot. Exhs. F & G). The Labor Law 11 work was commenced before the deadline to save the building money, based on a potential substantial increase in prices by contractors for the work performed as the deadline approached. Defendants do not specifically allege the elements of fraud, overreaching or breach of fiduciary duty, to trigger further judicial scrutiny on the claim for breach of contract. Plaintiffs rely on the affidavit of Burton Wallak, President of Wallack Management, Inc., the management company for the condominium (Mot. Exh. N). Mr. Wallak refers to documents produced during discovery and attests that the defendants, specifically, George Aryeh, were invited to, and did attend job meetings. Defendants were made aware of the necessity of the scaffolding placement prior to the work (Mot. Exh. O).

Plaintiffs claim that defendants cannot establish the elements of the nuisance. The work performed was necessary and not unreasonable or intentionally calculated to create a nuisance. Plaintiffs annex the affidavit of Thomas M. Capobianco, P.E., to establish that the work performed on the building was an essential undertaking, necessary to comply with Local Law 11 mandates, and properly performed (Mot. Exh. K). Mr. Capobianco states in his affidavit that the facade work complied with all regulations concerning site safety and was necessary to comply with Local Law 11, concerning the maintenance and repair of the buildings facade (Mot. Exh. K). Regardless of where the scaffolds were hung, defendants by regulation would be unable to use the terrace while work was performed. Mr. Capobianco states that based on his own inspection of the premises, standard calculations and accepted formulas, nothing used or placed on the defendants terrace changed its pitch (Mot. Exh. K).

Plaintiffs contend that there is no basis for the counterclaim related to property damage. Defendants cannot establish that there was a duty owed, that there was a breach of duty or that plaintiffs' contractors proximately caused the alleged damage. Mr. Wallack states in his affidavit that George Aryeh was advised prior to the work being performed, to remove his property from the terrace (Mot. Exhs. N & O). Mr. Capobianco states that efforts were made to protect those items left on the terrace and describes those efforts made by the contractors (Mot. Exh. K). Defendants have not provided proof of actual damages, or that damages were proximately caused by the placement of the scaffold on the terrace. Mr. Aryeh testified at his deposition that there was water seepage from the terrace into the unit from before the scaffold was placed there (Mot. Exh. J, pgs. 51-58). Defendants have not provided an engineer's affidavit or other proof of attempts to mitigate the damages. The defendants expert's report concerning damages, is conclusory.

Defendants oppose the motion and cross-move for summary judgment pursuant to CPLR §3212 and sanctions for frivolous motion practice. Defendants claim that the prior denial of plaintiffs pre-discovery motions are law of the case. Plaintiffs are not asserting any new claims or basis for the relief post-discovery. Plaintiffs failed comply with Section 15 of the By-laws which states in relevant part, "...such right (to entry) shall be exercised in such a manner as will not unreasonably interfere with the use of the units..."(Mot. Exh. P). Defendants claim that the business judgment rule does not apply because the Board of Managers failed to exercise their fiduciary duty when permitting the Condominium to utilize a substantial portion of the terrace for a lengthy period of time.

Defendants claim that the elements of nuisance are proven. The terrace was intentionally and willfully taken by the plaintiffs. The terrance was taken over for use as a construction site at least a year prior to the date it was mandated under Labor Law 11. The plaintiffs had no statutory basis for the use of the terrace for the extended period of time, it was actually taken. The penthouse apartment was not inconvenienced because defendants terrace was used as the staging area.

Defendants contend that they have stated a claim for property damage. The property damage, including the change in the pitch of the terrace, was caused by the storage of heavy materials on the terrace by the contractors. Defendants claim that plaintiffs were responsible for the storage of equipment on the terrace, which was

performed negligently and resulted in tilting of the terrace and damage to personal property. There is no need to establish that insurance or tax claims were filed for property damages to the terrace and personal property during the March of 2011 through September of 2011 repair work, because it is manifestly clear that property damage occurred. The property was taken by plaintiffs without compensation for the loss. Defendants claim they were entitled to compensation at the fair market value of the premises which is at least $25,000.00 per month. In support of their claim as to the value of the premises they rely on the affidavit of Oded Hecht, a licensed real estate broker. Mr. Hecht conducted an inspection of Units 9A and 9B. He states that based on comparable listings and the condition of the premises the fair market value in 2011 was at least $25,000.00 per month. The value of the damaged property can be determined based on rental amount for the unit, as established by Mr. Hecht.

Upon review of all the papers submitted this Court finds that plaintiffs have stated a basis to re-make their motion for summary judgment post-discovery. The prior cross-motion by defendants sought to amend the answer to assert potential claims, which required discovery prior to a determination for summary judgment. Plaintiffs have met their initial burden of proof in their motion for summary judgment on the counterclaims.

The eighth affirmative defense and first counterclaim allege nuisance, plaintiffs have provided proof that the use of the terrace was not unreasonable based on the structure of the building and the need to perform work on common elements. Defendants by statute, would not be able to use the terrace even if the scaffold was placed elsewhere on the building. Defendants claims that the penthouse terrace remained usable and only their terrace and unit was imposed on, are conclusory.

The ninth affirmative defense and second counterclaim allege breach of contract. The condominiums' by-laws are the contract with the defendants. Plaintiffs actions were undertaken in good faith pursuant to legitimate corporate purposes of saving money and complying with the Labor Law 11 mandate. Defendants were provided with notification of the use of the terrace in advance of the work. Documentation provided by plaintiffs establish that the basis for the request to use the terrace was reasonable and does not violate Section 15 of the by-laws (Mot. Exhs. F, I & O). Defendants did not demonstrate that any other provision of the by-laws were violated. Defendants have failed to raised an issue of fact sufficient for judicial scrutiny of the board's actions under the business judgment rule.

The sixth counterclaim alleges property damage. Defendants have failed to establish plaintiffs' contractors proximately caused the alleged property damage or the extent of the damages to the terrace. Plaintiffs established that the contractors did not proximately cause alteration of the pitch of the terrace (Mot. Exh. K). There had been problems with water damage seepage from the terrace into the apartment prior to the placement of the scaffolding (Mot. Exh. J, pgs. 51-58). Defendants claims that other experts had determined the pitch was altered, are not substantiated and are conclusory (Mot. Exh. J, pgs. 34-43). Plaintiffs provided notice to the defendants that items left on the terrace would be left at their own risk (Mot. Exh. O, Meeting Notes, 3-7-11). Plaintiffs' contractors made efforts to protect those items remaining on the terrace (Capobianco Aff., Mot. Exh. K). There is no proof of defendants' claims that the items remaining on the terrace were damaged by plaintiffs' contractors. Defendants did not

provide sufficient evidence to refute plaintiffs' claims and raise an issue of fact. Defendants' expert provided a conclusory report that does not establish all the elements for a property damage claim. The report omits reasonable cost of repairs and does not state the diminution of market value. Defendants provide no other documentary proof of repairs and they rely only on conclusory assertions of damaged property.

Frivolity as defined by 22 NYCRR 130-1.1, requires conduct which is continued when its lack of legal or factual basis should have been apparent to counsel or the party. CPLR §8106 permits the Court in its discretion to award costs to a party, the imposition of sanctions requires a pattern (Sarkar v. Pathak, 67 A.D. 3d 606, 889 N.Y.S. 2d 184 [N.Y.A.D. 1st Dept. 2009]). Sanctions pursuant to CPLR §8303-a for frivolous counterclaims are only available in personal injury, property damage and wrongful death actions (Browning Ave. Realty Corp. v. Rubin, 207 A.D. 2d 263, 615 N.Y.S. 2d 360 [N.Y.A.D. 1st Dept., 1994]). The party seeking sanctions pursuant to CPLR §8303-a, must establish that the counterclaims were frivolous and brought in bad faith without any basis in law or fact, or that the counterclaims were not withdrawn after it was apparent the claims were frivolous (Ansonia Associates, Ltd. v. Ansonia Tenants' Coalition, Inc., 253 A.D. 2d 706, 677 N.Y.S. 2d 575 [N.Y.A.D. 1st Dept., 1998]).

Plaintiffs have not established that they are entitled to sanctions pursuant to CPLR §8303-a. Only one of defendants' counterclaims was based on property damage, the claims for breach of contract and nuisance are not covered by CPLR §8303-a. Defendants legitimately asserted counterclaims that were potentially meritorious and stated a basis for those claims. Although defendants were unable to present a basis to obtain or avoid summary judgment, their actions were not frivolous or sanctionable.

Accordingly, it is ORDERED that, plaintiffs motion pursuant to CPLR §3212, to dismiss the counterclaims and pursuant to CPLR 8303-a for frivolous practice, is granted only as to the dismissal of the counterclaims and the eighth and ninth affirmative defenses, and it is further,

ORDERED that the defendants counterclaims and the eighth and ninth affirmative defenses asserted in the amended answer are severed and dismissed, and the clerk shall enter judgment accordingly, and it is further,

ORDERED that the remainder of the relief sought in plaintiffs motion, is denied, and it is further,

ORDERED that, defendants' cross-motion pursuant to CPLR §3212 for summary judgment and sanctions, is denied.

FILED

AUG 15 2013

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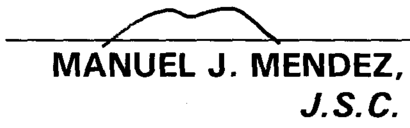

MANUEL J. MENDEZ,
J.S.C.

MANUEL J. MENDEZ
J.S.C.

Dated: August 7, 2013

Check one: ☐ FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE