

Gochberg v Sovereign Apts., Inc.

2013 NY Slip Op 33131(U)

April 8, 2013

Supreme Court, New York County

Docket Number: 652382/2012

Judge: Anil C. Singh

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

HON. ANIL C. SINGH
SUPREME COURT JUSTICE

PRESENT: _____
Justice

PART 61

Index Number : 652382/2012
GOCHBERG, JOHN R.
vs.
SOVEREIGN APARTMENTS, INC.
SEQUENCE NUMBER : 001
DISMISS ACTION

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 *decided in accordance with the merged order.*

**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER**

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

Dated: 4/8/13

Anil C. Singh
HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

- 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 61

-----X
JOHN R. GOCHBERG and KIMBERLY L. GOCHBERG,

Plaintiffs,

-against-

SOVEREIGN APARTMENTS, INC., ALAN KERSH,
in his capacity as a member of the board of directors of
Sovereign Apartments, Inc., and PAUL BLOOM, in his
capacity as a member of the board of directors of Sovereign
Apartments, Inc.,

Defendants.

-----X

DECISION AND
ORDER
Index No. 652382/2012

HON. ANIL C. SINGH, J.:

Defendants, Alan Kersh and Paul Bloom, move to dismiss the fifth cause of action,
breach of fiduciary duty, pursuant to CPLR § 3211(a)(7), for failure to state a cause of action.
Plaintiffs oppose the motion.

Background

Plaintiffs are shareholders of defendant Sovereign Apartments, Inc. (SAI), a cooperative
residential apartment building located at 425 East 58th Street in Manhattan (the building). Alan
Kersh and Paul Bloom are members of the board of directors of SAI. In February of 2003 the
plaintiffs entered into a proprietary lease with SAI for unit 20A (the apartment) of the building.
In the same month Plaintiffs purchased shares of stock in SAI.

Plaintiffs brought the underlying action against Sovereign Apartments, Inc. and against
Alan Kersh and Paul Bloom in their capacity as members of SAI's board of directors. Plaintiffs
allege that defendants supplied their apartment with discolored, foul-smelling, and sediment-

laden water with levels of bacteria in excess of legal limits.

Plaintiffs' complaint contains five causes of action. The causes of action against SAI include: violation of Real Property Law § 235-b, warranty of habitability; breach of the covenant of quiet enjoyment; breach of contract; and gross negligence. The only claim against Alan Kersh and Paul Bloom is for breach of fiduciary duty.

Immediately after moving into the apartment, in February of 2003, Plaintiffs noticed that the water in one of the bathrooms was brown and had a foul odor. Plaintiffs brought the issue to the attention of the building maintenance supervisor. He told Plaintiffs that the discoloration was due to old, rusty pipes in the building; that it had been previously investigated; and that it posed no health concerns.

In September 2009, the plaintiffs had a meeting with representatives of SAI to discuss the numerous problems they were having with water service in the apartment. Following the meeting, SAI made repairs to the pipes in the apartment, with construction being completed in April 2010. This construction failed to remedy the problems with the water in the apartment.

Beginning in October 2010, the quality of the water became significantly worse, with a smell similar to sewage or mold. In December 2010, black, chunky water began to run from the bathtub in the apartment. At this time Plaintiffs brought a sample of the water to Alan Kersh, who was president of the board of directors at the time. Between December 2010 and May 2011, the plaintiffs brought approximately five samples of the water to SAI's management. Plaintiffs were told that the water would be analyzed.

Plaintiffs requested the results of the analyses of the samples. The only analysis they received was for the December 2010 sample. SAI had water samples from December 2010,

January 2011, and February 2011 analyzed by Cascade Water Services, Inc. Written reports of these analyses were provided to SAI, Alan Kersh, and Paul Bloom. Plaintiffs allege that although the report on the December analysis was provided to Defendants on February 1, 2011, SAI, Mr. Kersh, and Mr. Bloom did not provide the report to the Plaintiffs until late April or early May of that year despite repeated requests. Plaintiffs allege that SAI, Kersh, and Bloom intentionally withheld the reports from Plaintiffs.

Cascade took additional water samples from the apartment in March 2011. Plaintiffs allege that reports on these samples were provided to SAI, Mr. Kersh, and Mr. Bloom at the end of March or beginning of April. Plaintiffs allege that SAI, Mr. Kersh, and Mr. Bloom intentionally withheld these reports until May 12, 2011.

On May 23, 2011, the plaintiffs moved out of their apartment and into a hotel.

SAI hired several companies to perform water testing in the building. Following this testing, the plaintiffs received a letter from Mr. Kersh, on behalf of the board of directors, stating that the corporation had been advised that the issues the plaintiffs had been experiencing had been eliminated and that it was appropriate to return to the apartment.

On July 23, 2011, Plaintiffs moved back into the apartment. Within an hour, the black, foul-smelling water was back. At this time, Mr. Gochberg delivered water samples to EMSL Analytical Inc. for analysis. He paid with his own credit card and used his address on the order form. After waiting for the results, he contacted EMSL and was informed that SAI had requested that they become the client on the analysis and that the analysis had been sent to SAI. On July 28, 2011, the plaintiffs moved out of the apartment again.

Legal Standard

In ruling upon a motion to dismiss, the court must “determine whether plaintiffs’ pleadings state a cause of action. The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law. In furtherance of this task, we liberally construe the complaint, and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion. We also accord plaintiffs the benefit of every possible favorable inference.” *511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 N.Y. 2d 144 [2002], (internal quotations and citations omitted.)

“The business judgment rule protects individual board members from being held liable for decisions, such as those concerning the manner and extent of repairs, that were within the scope of their authority.” *Berenger v 261 W. LLC*, 93 A.D. 3d 175, 184 (1st Dep’t 2012)(internal citations omitted). “Absent any allegation of independent tortious conduct, the individual defendants cannot be held liable for breach of fiduciary duty.” *Berenger* at 185 (internal citations omitted). Although “participation in a breach of contract will typically not give rise to individual director liability, the participation of an individual director in a corporation’s tort is sufficient to give rise to individual liability.” *Fletcher v Dakota, Inc.*, 99 A.D.3d 43, 47 (1st Dep’t 2012).

“A director of a corporation is not personally liable to one who has contracted with the corporation on the theory of inducing a breach of contract, merely due to the fact that, while acting for the corporation, he has made decisions and taken steps that resulted in the corporation’s promise being broken.” *Murtha v. Yonkers Child Care Ass’n*, 45 N.Y.2d 913, 915 (1978)(internal citations and quotation marks omitted).

In *Fletcher*, *Supra*, the breach of fiduciary duty claim was dismissed against the individual directors for failure to adequately plead violations of the individual director’s breach

of duty. However, several causes of action against the individual directors were allowed to proceed for their individual tortious conduct in discrimination and violation of the Civil Rights Law.

Where there is no allegation that a director “breached a duty other than, and independent of, those contractually imposed upon the board,” there is no cause of action against individual board members. *See Brasseur v. Speranza*, 21 A.D.3d 297, 298 (1st Dep't 2005)(internal citations omitted)(There was no breach of fiduciary duty where the board selectively required “plaintiffs, but not other unit owners, to enter into an alteration agreement prior to renovations of apartments in the building”).

Discussion

In the present case, Plaintiffs contend that Mr. Kersh and Mr. Bloom intentionally misled the plaintiffs and withheld the reports as to the water quality. Plaintiffs assert that because these actions were not taken as part of a collective decision of the SAI board that they subject the defendants to individual liability.

In this, the plaintiffs are mistaken. Plaintiffs have failed to allege any facts indicating that the actions of Mr. Kersh and Mr. Bloom were taken in their individual capacity, rather than as part of their responsibilities as members of the board. Plaintiffs contend that SAI withheld the reports on water quality analysis from them, and that it was the building maintenance person who told them that the discoloration was due to old, rusty pipes and that it was safe. Plaintiffs also said that the maintenance person did not provide the reports and told them that he did not understand the reports. The letter from Mr. Kersh stating that the issues with the water had been eliminated specifically stated that it was written on behalf of the Board of Directors.

Furthermore, Plaintiffs have failed to allege that Mr. Kersh or Mr. Bloom received or held the water reports as individuals, rather than in their capacity as members of the Board of Directors. Therefore, Plaintiffs have failed to allege a cause of action for breach of fiduciary duty, against Mr. Kersh or Mr. Bloom as individuals, for their actions in withholding the reports and in their representation of the water quality.

Plaintiffs further allege that Mr. Kersh and Mr. Bloom breached their fiduciary duty by doing nothing to remedy the quality of the water when initially informed of the problem and that they caused the plaintiffs' apartment to be furnished with a lower quality water supply than other shareholders in the building, thereby violating their duty to treat the plaintiffs equally to other shareholders.

As stated in *Berenger*, “[t]he business judgment rule protects individual board members from being held liable for decisions, such as those concerning the manner and extent of repairs, that were within the scope of their authority.” *Berenger v 261 W. LLC*, 93 A.D.3d at 184. Furthermore, even though the plaintiffs may have received water of a lower quality than other shareholders, this does not create individual liability for the board members. *See Brasseur v. Speranza*, 21 AD3d at 298. Therefore, the plaintiffs have failed to state a cause of action for breach of fiduciary duty against Mr. Kersh and Mr. Bloom for their failure to remedy the water quality problem or for providing plaintiffs with lower quality water than other shareholders.

Conclusion

Upon review of the summons and complaint, all papers attendant thereto, and all papers submitted in support of and opposition to the motion to dismiss, it is hereby

ORDERED that the motion of defendants Alan Kersh and Paul Bloom to dismiss the

complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further .

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein.

The foregoing constitutes the decision and order of the court.

Date: 4/8/13
New York, New York


Anil C. Singh

**HON. ANIL C. SINGH
SUPREME COURT JUSTICE**