| **Baker v 40 E. 80 Apt. Corp.** |
| --- |
| 2013 NY Slip Op 33413(U) |
| November 26, 2013 |
| Supreme Court, New York County |
| Docket Number: 603683/03 |
| Judge: Paul Wooten |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office. |
| This opinion is uncorrected and not selected for official publication. |

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

PRESENT: HON. PAUL WOOTEN *Justice* PART 7

JANET GREENBERG BAKER and NORMAN BAKER,

Plaintiffs,

-against-

40 EAST 80 APARTMENT CORPORATION, PENMARK REALTY CORPORATION, SELVIN R. SILVER, BARBARA NAFISSIAN, JAY B. FISCHOFF, BENJAMIN S. KLAPER, MIRIUM H. WEINGARTEN, STEPHEN A. MARSHALL and BRAD BUTLER,

Defendants.

INDEX NO. 603683/03

MOTION SEQ. NO. 026

PENMARK REALTY CORPORATION,

Third-Party Plaintiff,

-against-

S. KRAUSS RESTORATION and YATES RESTORATION GROUP LTD.,

Third-Party Defendants.

3RD PARTY INDEX NO. 590339/06



YATES RESTORATION GROUP, LTD.,

Second Third-Party Plaintiff,

-against-

ETNA CONSULTING, ETNA CONSULTING STRUCTURAL ENGINEERING, ETNA CONSULTING SERVICES, INC. and EDY ZINGHER,

Second Third-Party Defendants.

SECOND 3RD PARTY INDEX NO. 590664/07

The following papers were read on this motion by plaintiffs to reargue, pursuant to CPLR 2221.

| | PAPERS NUMBERED |
|---|---|
| Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ... | |
| Answering Affidavits — Exhibits (Memo) | |
| Replying Affidavits (Reply Memo) | |

**Cross-Motion:** ☐ Yes ■ No

Motion sequence numbers 026, 027, and 028 are hereby consolidated for purposes of disposition.

Janet Greenberg Baker and Norman Baker (plaintiffs or the Bakers), tenant-shareholders in a residential cooperative building located at 40 East 80th Street, New York, New York, bring this action against the cooperative corporation and managing agent, alleging that water infiltration into their apartment has caused a mold condition, rendered the apartment virtually uninhabitable, and resulted in damage to their real and personal property.

In motion sequence number 026, plaintiffs move, pursuant to CPLR 2221(d), for leave to reargue that portion of the Court's October 10, 2012 decision and order (the October 2012 decision), which dismissed their request for punitive damages. In motion sequence number 027, plaintiffs move: (1) pursuant to CPLR 2221(e), for leave to renew the Court's September 22, 2008 decision and order (the September 2008 decision), which dismissed defendants Selwin R. Silver, Barbara Nafissian, Jay B. Fischoff, Benjamin S. Klapper, Miriam H. Weingarten, Stephen A. Marshall, and Brad Butler (collectively, the individual defendants) from the action; and (2) pursuant to CPLR 3025(b), for leave to amend the third amended complaint. In motion sequence number 028, plaintiffs again move, pursuant to CPLR 2221(d), for leave to reargue that portion of the Court's October 2012 decision, which dismissed the fifth cause of action for gross negligence against defendant 40 East 80 Apartment Corporation (40 East 80) and defendant/third-party plaintiff Penmark Realty Corporation (Penmark).

BACKGROUND

The facts are set forth in detail in the Court's October 2012 and September 2008 decisions, and will only be repeated here to the extent necessary to this decision. The Bakers allege that, beginning in 2003, their penthouse apartment was subjected to chronic and severe water leaks, causing a mold condition and electrical hazards. According to the Bakers, the

apartment was rendered nearly uninhabitable, forcing them to vacate the apartment, and that 40 East 80 Apartment Corporation (40 East 80) and Penmark Realty Corporation (Penmark) willfully failed and refused to undertake necessary repairs and ignored the recommendations of several experts. 40 East 80 is the cooperative corporation that owns the building. The individual defendants are members of 40 East 80's board during the relevant period. Penmark was the managing agent of the building until 2010.

As relevant here, the second verified amended complaint asserted five causes of action against the individual defendants for: (1) injunctive relief, (2) negligence, (3) gross negligence, (4) breach of fiduciary duty, and (5) declaratory relief. The individual defendants moved for summary judgment dismissing the second amended complaint as asserted against them. The Bakers argued that the board's alleged indifference was so egregious that the board members should be subject to individual liability. In the September 2008 decision, the Court (Stallman, J.), among other things, granted the individual defendants' motion to the extent of dismissing the motion claims of negligence, gross negligence, and breach of fiduciary duty, and denied the Bakers' request for leave to amend the complaint noting that "plaintiffs did not come forward with evidence to raise a triable issue of fact as to whether the individual co-op board members had engaged in specific acts of tortious conduct on this motion. Plaintiffs' case against the individual board members is not only a matter of pleading, but one of proof" (Dorkey affirmation, exhibit E).

Subsequently, the Court permitted the Bakers to serve and file a third amended complaint. The third verified amended complaint alleges the following 10 causes of action:

(1) breach of the proprietary lease against 40 East 80;
(2) injunctive relief against 40 East 80 and Penmark;
(3) negligence against 40 East 80;
(4) negligence against Penmark;
(5) gross negligence against 40 East 80 and Penmark;
(6) breach of fiduciary duty against 40 East 80;
(7) breach of the covenant of good faith and fair dealing against 40 East 80;
(8) breach of the warranty of habitability against 40 East 80;

(9) constructive eviction against 40 East 80;
(10) declaratory relief against 40 East 80 and Penmark.

The Bakers seek punitive damages on their gross negligence, breach of fiduciary duty, breach of warranty of habitability, constructive eviction, and breach of the implied covenant of good faith and fair dealing claims.

Penmark subsequently moved for partial summary judgment dismissing the causes of action for gross negligence, injunctive relief, declaratory relief, and the request for punitive damages as against it. 40 East 80 also moved for summary judgment: (1) dismissing the causes of action for negligence, gross negligence, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and constructive eviction asserted against it; (2) dismissing the causes of action for injunctive and declaratory relief as against it; and (3) dismissing the request for punitive damages as against it.

In the October 2012 decision, the Court, in pertinent part, granted Penmark's motion for partial summary judgment and dismissed the cause of action for gross negligence as against it. The Court noted that:

> "there is no evidence that Penmark's actions 'smack[ed] of intentional wrongdoing' or 'evince[d] a reckless indifference' to the Bakers' rights. Between 2004 and 2008, Penmark hired five engineering experts and weather proofing contractors who performed work on the exterior of the Bakers' apartment. In addition, Penmark approved the retention of four contractors for testing, remediation, and renovation of the interior of the apartment. Thus, it cannot be said that Penmark failed to exercise even slight care or slight diligence"(*Baker v 40 E. 80 Apt. Corp.*, 2012 WL 5363542, 2012 NY Misc LEXIS 4952, 2012 NY Slip Op 32634[U] [Sup Ct, NY County 2012]).

In addition, the Court dismissed the Bakers' request for punitive damages as against Penmark, explaining that:

> "Plaintiffs seek punitive damage on their gross negligence claim as against Penmark. Although the Bakers argue that defendants ignored their own consultant's recommendations, there is no evidence that Penmark intentionally or willfully disregarded the Bakers' rights. As previously noted, Penmark hired waterproofing contractors Yates, Kraus, and AM Maintenance, and also retained the services of structural engineers Edy Zingher of Etna Consulting and Goldreich Engineering, P.C. to oversee the investigative work and repair of the exterior walls"

(*id.*).

The Court also granted 40 East 80's motion for summary judgment to the extent of dismissing plaintiffs' gross negligence, breach of fiduciary duty, implied covenant of good faith and fair dealing, and constructive eviction claims, and denied the motion as to the Bakers' claims for negligence and declaratory and injunctive relief (*id.*). With respect to the gross negligence claim, the Court stated that:

> "the Bakers have failed to plead or establish in their opposition papers the existence of a duty independent of 40 East 80's obligations pursuant to the proprietary lease. . . In any event, the Court finds that there is no evidence that 40 East 80's conduct' 'smack[s] of intentional wrongdoing' or 'evinces a reckless indifference' to the Bakers' rights" (*id.*).

Noting that punitive damages may be awarded in breach of habitability cases[1] where the landlord's actions or inactions were intentional or malicious, the Court also dismissed the request for punitive damages as against 40 East 80, finding "no evidence that 40 East 80's actions were intentional or malicious, or rose to the level of high moral culpability or indifference to civil obligations" (*id.*).

DISCUSSION

A motion for leave to reargue, addressed to the sound discretion of the court, may be granted upon a showing that the court overlooked or misapprehended the relevant facts or misapplied any controlling principle of law (CPLR 2221[d][2]; *Frenchman v Lynch*, 97 AD3d 632, 633 [2d Dept 2012]; *William P. Pahl Equip. Corp. v Kassis*, 182 AD2d 22, 27 [1st Dept], *lv dismissed in part and denied in part* 80 NY2d 1005 [1992], *rearg denied* 81 NY2d 782 [1993]; *Foley v Roche*, 68 AD2d 558, 567 [1st Dept 1979]). Reargument is "not designed to provide an unsuccessful party with successive opportunities to reargue issues previously decided, or to present arguments different from those originally presented" (*McGill v Goldman*, 261 AD2d 593,

---

[1] This was the only remaining cause of action on which the Bakers sought punitive damages.

594 [2d Dept 1999]; *see also Levi v Utica First Ins. Co.*, 12 AD3d 256, 258 [1st Dept 2004]).

A motion for leave to renew a prior motion must be based upon "new facts not offered on the prior motion that would change the prior determination" or must show that "there has been a change in the law that would change the prior determination" (CPLR 2221[e][2]; *see also Melcher v Apollo Med. Fund Mgt. L.L.C.*, 105 AD3d 15, 23 [1st Dept 2013]; *Matter of Katz*, 63 AD3d 836, 837-838 [2d Dept 2009]). Furthermore, the papers must "contain [a] reasonable justification for the failure to present such facts on the prior motion" (CPLR 2221[e][3]).

CPLR 2221(f) states that "[a] combined motion for leave to reargue and leave to renew shall identify separately and support separately each item of relief sought. The court, in determining a combined motion for leave to reargue and leave to renew, shall decide each part of the motion as if it were separately made."

**A. Gross Negligence (Motion Sequence Number 028)**

The Bakers move to reargue that portion of the Court's October 2012 decision which dismissed the fifth cause of action for gross negligence. The Bakers argue that the Court misapprehended the law and the facts in dismissing the gross negligence claim. According to the Bakers, "the failures of the [d]efendants to act and their repeated incompetent handling of what in hindsight even they must acknowledge was a simple problem to fix goes well beyond mere negligence" and "[d]efendants' bad acts caused the Bakers to repeatedly suffer inundations of biblical proportion" (Plaintiffs' memorandum of law at 2). In support of their argument, the Bakers point out the following:

(1) As early as 2001, defendants were aware of the deficiencies that led to the major water infiltration and mold in the Bakers' apartment, starting two years later in 2003, as indicated by a June 12, 2001 report from Etna Consulting to Penmark (Dorkey affirmation, exhibit A);

(2) After a major outbreak of mold in the Bakers' master bedroom in July 2003, defendants took no steps to remediate the apartment or investigate the cause of the mold, forcing the Bakers to hire their own environmental consultants and mold remediation company (third verified amended complaint, ¶¶ 21, 22);

(3) From 2004 through 2008, the Bakers suffered repeated and severe leaks in their apartment, which required the Fire Department to turn off the electricity on several occasions because water was dangerously infiltrating the electrical panel (*id.*, ¶¶ 46, 47);

(4) Defendants ignored the recommendations of their own experts regarding how to repair the structural deficiencies in the wall drainage system that was causing the water leaks. For example, in December 2003, Frank Pannone, a structural engineer, reported that "[t]he brick veneer is in dire need of a complete repointing project due to the extreme exposure of the upper walls to the prevailing winds that help to erode the mortar joints causing a driving rain to penetrate the brick joints and caused the mold, mildew and in extreme cases growth of moss," "[t]he weep holes were very actively draining which indicates there is water penetrating during a storm that will leave water within the cavity, which will seek relief of any sort, and I believe it has found cracks in the slab that is causing the mold within the Bakers' apartment," "[t]he cracking at the corner can be an indication that the seepage into the wall is reaching the structural steel that has started rusting which will crack and split the brick creating a greater source of water penetration," and "[t]his is a general overview of the difficulties that have developed that have achieved a status of a major repair to solve this [sic] serious problems that have developed due to neglect" (Dorkey affirmation, exhibit B);

(5) In May 2005, when the apartment suffered another mold outbreak in all rooms of the apartment, the Bakers were forced to vacate their home and could not return until three years later, in 2008; and

(6) The Bakers are still suffering water infiltration into their apartment, or over nine years after they commenced this action.

In addition, the Bakers submit photographs and a DVD which purportedly contains excerpts from a video taken in September 2004 and February 2008 documenting water leaks that occurred in the Bakers' apartment (Dorkey affirmation, exhibit F).

In opposition, 40 East 80 contends that the Bakers impermissibly present new evidence in the form of photographs and a DVD in support of reargument. 40 East 80 further argues that, to the extent that the motion is for renewal, it must be denied because the Bakers have made no showing that they were unable to present this evidence on the underlying motions. In addition, 40 East 80 contends that the Bakers have already separately moved to reargue the October 2012 decision, and therefore, this motion is a successive motion for summary judgment. In sum, 40 East 80 contends that the Court did not misapprehend the facts or misapply the law.

Penmark also contends, in opposing the motion, that: (1) the motion is defective because it fails to annex all of the papers on the underlying motions; (2) the Bakers have submitted new evidence and have failed to show that such evidence should be considered in the interests of justice; and (3) there is no basis to reinstate the gross negligence claim because defendants hired engineers, environmental experts, and remediation specialists to investigate, repair, and test the apartment's exterior walls, windows, doors, and terraces, and to remediate the mold and renovate the interior of the apartment.

In reply, the Bakers argue that the Court has discretion to consider the DVD and photographs. The Bakers also assert that the gross negligence claim is not duplicative of their breach of contract claim since it arises from 40 East 80's statutory duty to keep the premises in "good repair."

Contrary to Penmark's contention, the Bakers submitted all of the papers on the underlying motions for summary judgment (*see* CPLR 2214[c]). The Court also rejects 40 East 80's contention that the instant motion is a successive motion for summary judgment. First, the Bakers are not seeking summary judgment in their favor. Second, CPLR 2221 does not expressly prohibit successive motions to reargue (*see People v Oceanside Institutional Indus., Inc.*, 15 Misc 3d 22, 25 [App Term, 2d Dept 2007], *lv denied* 8 NY3d 989 [2007]). The Bakers' motions for reargument do not address the same issues, and, in any case, the Court has consolidated the motions for joint decision.

1. Renewal

The Bakers submit certain photographs and a DVD which purportedly contains excerpts from a video which were undisputedly not part of the record on the summary judgment motions (Dorkey affirmation, exhibit F). CPLR 2221(d)(2) states that a motion for leave to reargue "shall be based upon matter of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, *but shall not include any matters of fact not offered on the prior*

*motion*" (emphasis added). To the extent that the Bakers seek renewal based upon this new evidence (CPLR 2221[e][2]), they do not offer any justification for their failure to present such evidence on the prior motions. Even if the Court could consider this evidence in the interests of justice (*see Mejia v Nanni*, 307 AD2d 870, 871 [1st Dept 2003]), the Bakers have not offered any evidence to authenticate the photographs or DVD. Therefore, the Court declines to consider this evidence (*see National Ctr. for Crisis Mgt., Inc. v Lerner*, 91 AD3d 920, 921 [2d Dept 2012] [trial court properly declined to consider DVD video, absent showing that it "truly and accurately represented what . . . it purported to show"]; *Young v Ai Guo Chen*, 294 AD2d 430, 431 [2d Dept 2002] [unauthenticated photographs were inadmissible]).

2. Reargument

Leave to reargue the October 2012 decision is granted, but upon reargument, the Court adheres to its prior determination.

The Bakers have failed to show that the Court misapprehended the facts or misapplied the law. First, in the October 2012 decision, the Court held that the gross negligence claim was deficient because "the Bakers have failed to plead or establish in their opposition papers the existence of a duty independent of 40 East 80's obligations pursuant to the proprietary lease" (*Baker*, 2012 NY Slip Op 32634[U]). The Bakers do not take issue with this ruling in their moving papers on the present motion. Although the Bakers argue in reply that the gross negligence claim is not duplicative of their breach of contract claim, "[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion" (*Valenti v Camins*, 95 AD3d 519 [1st Dept 2012], quoting *Dannasch v Bifulco*, 184 AD2d 415, 417 [1st Dept 1992]).

Second, as noted by the Court in the October 2012 decision, "'gross negligence' differs in kind, not only degree, from claims of ordinary negligence. It is conduct that evinces a

reckless disregard for the rights of others or 'smacks' of intentional wrongdoing" (*Colnaghi, U.S.A. v Jewelers Protection Servs.*, 81 NY2d 821, 823-824 [1993], quoting *Sommer v Federal Signal Corp.*, 79 NY2d 540, 554 [1992]). In other words, "a party is grossly negligent when it fails to exercise even slight care . . . or slight diligence" (*Ryan v IM Kapco, Inc.*, 88 AD3d 682, 683 [2d Dept 2011] [internal quotation marks and citation omitted]). "[T]he act or omission must be of an aggravated character as distinguished from the failure to exercise ordinary care" (*Dalton v Hamilton Hotel Operating Co.*, 242 NY 481, 488 [1926] [internal quotation marks and citation omitted]).

"[O]rdinarily the question of gross negligence is a matter to be determined by the trier of fact . . . . [However], where plaintiff's allegations amount, at most, to ordinary negligence, they do not meet the foregoing standard, and defendant is entitled to summary judgment dismissing plaintiff's claims for gross negligence" (*Lubell v Samson Moving & Stor.*, 307 AD2d 215, 216, 217 [1st Dept 2003]).

As the Court determined in the October 2012 decision, there is no evidence that defendants' conduct "smacks of intentional wrongdoing" or "evinces reckless disregard for the [Bakers'] rights" (*Colnaghi*, 81 NY2d at 823-824). On the motions for summary judgment, Penmark submitted substantial documentation indicating that, between 2004 and 2008, Penmark hired five engineering experts and weather proofing contractors who performed work on the exterior of the Bakers' apartment, which resulted in $333,269.00 in charges to 40 East 80 (Dorkey affirmation, exhibit L [McGivney affirmation, exhibits T, U, W, Z, BB, FF, PP, QQ]). Penmark also approved the retention of contractors to test, remediate, and renovate the interior of the apartment, which resulted in $183,061.00 in charges to 40 East 80 (*id.*, exhibits X, II, KK, TT). While the Bakers urge that the water leaks were a "simple problem to fix," they do not submit any evidence to support this assertion. Therefore, there is no evidence that defendants' conduct went beyond the standard for ordinary negligence and satisfied the gross negligence

standard.

**B. Punitive Damages (Motion Sequence Number 026)**

The Bakers also move to reargue the portion of the October 2012 decision which dismissed their request for punitive damages. The Bakers argue, citing *Minjak Co. v Randlolph* (140 AD2d 245 [1st Dept 1988]), a case cited by the Court, that the Court misapprehended the law and facts in dismissing their request for punitive damages. The Bakers point out that "[a]lthough the Court sustained the Bakers' negligence and breach of warranty of habitability claims, both of which could easily support an award of punitive damages, it dismissed the Bakers' claim for punitive damages" (Plaintiffs' memorandum of law at 1). Relying on the same evidence to support their gross negligence claim, the Bakers contend that punitive damages are warranted under the circumstances. According to the Bakers, defendants' indifference and lack of response to their complaints and pleas to remedy the water leaks must be viewed as rising to the level of high moral culpability.

In response, 40 East 80 contends that: (1) the Bakers have failed to provide the Court with the underlying motion papers; (2) the Bakers impermissibly present new evidence to support their motion to reargue; (3) to the extent that the Bakers seek renewal, they have not shown that they were unable to present this evidence before; and (4) the Court did not misapprehend any relevant facts or misapply any controlling law.

Penmark similarly argues that the Bakers' motion is defective because they failed to provide the underlying papers, and submit new evidence which may not be considered on a motion to reargue. Penmark notes that the third amended complaint only sought punitive damages as against it on the gross negligence claim, and that there is no basis for punitive damages on a claim of ordinary negligence.

In reply, the Bakers provide copies of the original motion papers, and argue that there is no statutory ground to deny the motion on the basis that they did not initially submit these

papers. Additionally, the Bakers make clear that they are seeking punitive damages only on their breach of warranty of habitability claim (Plaintiffs' reply memorandum of law at 1), asserting that punitive damages are justified because their home was plagued with repeated and significant water infiltration which caused significant damage to their home and personal property for four years, and the water infiltration has still not been completely remedied. Finally, the Bakers maintain that the Court has discretion to consider the photographs and DVD.

While defendants argue that the Bakers' motion is procedurally defective because they did not submit all of the underlying papers, the First Department has determined that a motion for reargument is not defective if the movant fails to provide all of the originally submitted motion papers (*see Rostant v Swersky*, 79 AD3d 456 [1st Dept 2010] ["Nor did plaintiff's failure to submit all the original motion papers on her reargument motion render the latter procedurally defective. CPLR 2221 does not specify the papers that must be submitted on a motion for reargument, and the decision whether to entertain reargument is committed to the sound discretion of the court"]). Even if the instant motion is procedurally defective, the Court overlooks any defect because it has a full record (*see* CPLR 2001).

1. Renewal

To the extent that the Bakers seek renewal of the October 2012 decision based upon the new photographs and DVD (Dorkey affirmation, exhibit F), the Court does not consider this evidence because it is not authenticated (*see National Ctr. for Crisis Mgt., Inc.*, 91 AD3d at 921; *Young*, 294 AD2d at 431).

2. Reargument

The Court again grants leave to reargue the October 2012 decision, but upon reargument, adheres to its prior determination.

"A demand or request for punitive damages is parasitic and possesses no viability absent its attachment to a substantive cause of action" (*Rocanova v Equitable Life Assur. Socy.*

*of U.S.*, 83 NY2d 603, 616 [1994]). In the third verified amended complaint, the Bakers sought punitive damages on their gross negligence, breach of fiduciary duty, breach of warranty of habitability, constructive eviction, and breach of the implied covenant of good faith and fair dealing claims. In the October 2012 decision, the Court dismissed the gross negligence, breach of fiduciary duty, constructive eviction, and breach of the implied covenant of good faith and fair dealing claims.[2] On these motions, the Bakers only seek to reargue the dismissal of the gross negligence claim. As indicated above, the Court has found no basis to reinstate the Bakers' gross negligence claim.

As clarified by the Bakers' reply, the Bakers seek punitive damages on their breach of warranty of habitability claim, which is asserted only against 40 East 80 (third verified amended complaint, ¶¶ 139-144, wherefore clause [viii]).

Punitive damages are available for particularly egregious breaches of the implied warranty of habitability "to deter morally culpable conduct" when it is found that the landlord's actions were intentional or malicious, or imply a "criminal indifference to civil obligations" (*Minjak Co.*, 144 AD2d at 249, 250 [internal quotation marks and citation omitted]; *see also Morris v Flaig*, 511 F Supp 2d 282, 297 [ED NY 2007]).

In *Minjak Co., supra*, the First Department awarded tenants punitive damages based upon a breach of the warranty of habitability when the landlord failed to remedy excessive water leaks from the upstair tenant's health spa equipment business, and the tenants' complaints to the landlord went unheeded (*Minjak Co.*, 144 AD2d at 246, 250). In addition, renovations to the building caused excessive dust and sand to seep into the apartment (*id.* at 246-247). Other hazardous conditions such as falling bricks and demolished stairs also existed (*id.* at 247). The First Department explained that:

---

[2] 40 East 80 did not move for summary judgment dismissing the breach of warranty of habitability claim.

> "With respect to this State's strict housing code standards and statutes, made enforceable through civil and criminal sanctions and other statutory remedies, it is within the public interest to deter conduct which undermines those standards when that conduct rises to the level of high moral culpability or indifference to a landlord's civil obligations. Therefore, it has been recognized that punitive damages may be awarded in breach of warranty of habitability cases where the landlord's actions or inactions were intentional or malicious.
>
> "Accordingly, the issue of punitive damages was properly submitted to the jury, and we are satisfied that the this record supports the jury's finding of morally culpable conduct in light of the dangerous and offensive manner in which the landlord permitted the construction work to be performed, the landlord's indifference to the health and safety of others, and its disregard for the safety of others, so as to imply even a criminal indifference to the civil obligations. One particularly egregious example of the landlord's wanton disregard for the rights of others was the way in which the stair demolition was performed: steps were removed and no warning sign even posted. The landlord's indifference and lack of response to the tenants' repeated complaints of dust, sand and water leak problems demonstrated a complete indifference to their health and safety and a lack of concern for the damage these conditions could cause to the tenants' valuable personal property. Such indifference must be viewed as rising to the level of high moral culpability" (*id.* at 249-250 [citations omitted]).

The Bakers have failed to show that the Court misapprehended the facts or misapplied the law. Unlike *Minjak Co.*, there is no evidence that 40 East 80's actions were intentional or malicious, or rose to the level of criminal indifference to civil obligations. As indicated above, Penmark submitted substantial documentation indicating that, between 2004 and 2008, Penmark hired engineering experts and weather proofing contractors who performed work on the exterior of the Bakers' apartment, resulting in charges to 40 East 80 (Dorkey supplemental affirmation, exhibit M [McGivney affirmation, exhibits T, U, W, Z, BB, FF, PP, QQ]). Penmark also retained contractors to test, remediate, and renovate the interior of the apartment (*id.*, exhibits X, II, KK, TT). It cannot be said that 40 East 80 demonstrated a "complete indifference" to the Bakers' health and safety or potential property damage to the Bakers' possessions. Therefore, there is no basis for the award of punitive damages on the breach of warranty of habitability claim, even if it was breached (*see Smith v Perriello*, 85 AD3d 895, 896 [2d Dept 2011] [trial court properly determined that plaintiff was not entitled to punitive

damages, even if the landlord breached the warranty of habitability in failing to supply adequate heat to apartment]; *Ghadamian v Channing*, 295 AD2d 127, 130 [1st Dept 2002] [counterclaim for retaliatory eviction alleged "no more than a private wrong, for which an exemplary award [was] unavailable"]; *Jacobs v 200 E. 36th Owners Corp.*, 281 AD2d 281, 282 [1st Dept 2001] ["(p)laintiff's cause of action for breach of the implied warranty of habitability, alleging defendants' refusal to enforce House Rules and to remedy noise, low water pressure and other unpleasant living conditions" were not "so 'morally reprehensible' as to warrant an award of punitive damages"]; *cf. Pleasant East Assoc. v Cabrera*, 125 Misc 2d 877, 884 [Civ Ct, NY County 1984] [punitive damages awarded when landlord intentionally and maliciously failed to correct hazardous conditions for the purpose of forcing an interracial couple to vacate]).

**C. Individual Defendants (Motion Sequence Number 027)**

The Bakers move for leave to renew the September 2008 decision, arguing that the First Department's decision in *Fletcher v Dakota, Inc.* (99 AD3d 43 [1st Dept 2012]) is a sufficient change in the law that would change that determination. According to the Bakers, Justice Stallman's decision is based upon a pleading rule that has been overruled by the First Department. The Bakers maintain that the second amended complaint sufficiently alleges that the individual defendants participated in the torts committed by 40 East 80. Specifically, the Bakers argue, the second amended complaint alleges that throughout 2003 and 2004, they notified the individual defendants, 40 East 80, and Penmark of the need for repairs to the apartment and building and to address the substantial water infiltration into the apartment; however, the individual defendants negligently, carelessly, and unreasonably ignored the recommendations of their experts, failed to undertake any repairs, and failed to monitor and control the actions of Penmark. In light of *Fletcher*, the Bakers also move, pursuant to CPLR 3025(b), to serve and file a fourth amended complaint to reinstate their allegations as against the individual defendants.

40 East 80 argues that the Bakers' motion should be denied because they have failed to provide the underlying motion papers. In addition, 40 East 80 contends that the motion should be denied based upon the doctrine of laches. Finally, 40 East 80 maintains that *Fletcher* does not require a different determination.

Assuming arguendo that the Bakers' motion for leave to renew is procedurally defective because they failed to provide the original papers, the Court overlooks any such defect because they provided them in reply (*see* CPLR 2001).

Contrary to 40 East 80's contention, the Bakers' motion is not barred by the doctrine of laches (*see Ferguson v Shu Ham Lam*, 59 AD3d 388, 389 [2d Dept 2009]). Laches is defined "as such neglect or omission to assert a right as, taken in conjunction with the lapse of time . . . and other circumstances causing prejudice to an adverse party, operates as a bar in a court of equity" (*Matter of Schulz v State of New York*, 81 NY2d 336, 348 [1993] [internal quotation marks and citation omitted]). The essential element of the equitable defense of laches is that the delay is prejudicial to the defendant (*see Resk v City of New York*, 293 AD2d 661, 662 [2d Dept 2002], *lv denied* 99 NY2d 507 [2003]; *Martin v Briggs*, 235 AD2d 192, 199 [1st Dept 1997]). Prejudice may be demonstrated "by a showing of injury, change of position, loss of evidence, or some other disadvantage resulting from the delay" (*Matter of Linker*, 23 AD3d 186, 189 [1st Dept 2005] [internal quotation marks and citation omitted]). Although 40 East 80 contends that the individual defendants would have practically no time to conduct discovery or prepare for trial, the Court would give the individual defendants sufficient time if it found merit to the Bakers' position. Moreover, unlike a motion to reargue, the Bakers' motion for leave to renew is "not subject to any particular time constraints" (*Ramos v City of New York*, 61 AD3d 51, 54 [1st Dept 2009], *appeal withdrawn* 12 NY3d 922 [2009]; *see also* CPLR 2221[e][2]).

The business judgment rule bar "judicial inquiry into [the] actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate

furtherance of corporate purposes" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990] [internal quotation marks and citation omitted]).

In *Fletcher, supra*, the plaintiff, a resident of a cooperative, alleged race discrimination and retaliation in violation of the State and City Human Rights Laws (*Fletcher*, 99 AD3d 47). The cooperative corporation and the individual directors moved to dismiss the complaint (*id.*). The First Department held that two directors of the cooperative corporation were not entitled to dismissal on the ground that the complaint failed to allege acts separate and distinct from the actions they took as board members (*id.* at 50). The *Fletcher* Court cited to *Peguero v 601 Realty Corp.* (58 AD3d 556, 558 [1st Dept 2009]) for the proposition that "a corporate officer who participates in the commission of a tort may be held individually liable, . . . regardless of whether the officer acted on behalf of the corporation in the course of official duties and regardless of whether the corporate veil is pierced" (*id.* at 49). The Court overruled the pleading rule of *Pelton v 77 Park Ave. Condominium* (38 AD3d 1 [1st Dept 2006]), requiring that a discrimination plaintiff allege independent tortious conduct by individual members of a cooperate or board in order to hold them individually liable, stating that:

> "First, . . . the *Levandusky* rule will not protect a board member where he engages in discriminatory conduct. Second, *Pelton* takes a rule that applies where a cooperative or condominium board is alleged to have breached a contractual obligation, and incorrectly applies it where a board allegedly engaged in the intentional tort of discrimination. That is, *Pelton* failed to disentangle the principles of individual corporate director liability in the breach of contract context (understood to provide a shield against liability) from the principles applicable to tort cases (where there is no such shield). As authority for our holding in *Pelton*, we cited *Murtha v Yonkers Child Care Assn.* (45 NY2d 913 [1978]). We now find, however, that our reliance on *Murtha* was misplaced, and we therefore decline to follow the pleading rule articulated in *Pelton*" (*id.* at 50).

"The 'commission of a tort' doctrine permits personal liability to be imposed on a corporate officer for misfeasance or malfeasance, i.e, an affirmative tortious act; personal liability cannot be imposed on a corporate officer for nonfeasance, i.e., a failure to act" (*Peguero*, 58 AD3d at 559; *see also Palomo v 175th St. Realty Corp.*, 101 AD3d 579, 580 [1st

Dept 2012]). Thus, in *Palomo, supra*, which was decided after *Fletcher*, the First Department held that the individual defendants could not be liable to an injured plaintiff where "there [was] no evidence that [they] personally participated in any malfeasance or misfeasance constituting an affirmative tortious act" (*Palomo*, 101 AD3d at 580). In *Robles v Palazzolo Realty Corp.* (66 AD3d 417, 418 [1st Dept 2009]), an apartment building tenant brought an action against the landlord and landlord's president, alleging negligence in the maintenance of the apartment building. The First Department held that the conduct the plaintiff attributed to the landlord's president "amounts to nothing more than nonfeasance, for which he bears no liability as a corporate officer" (*id.*). Similarly, in *MLM LLC v Karamouzis* (2 AD3d 161, 162 [1st Dept 2003]), the First Department held that "[w]e reject plaintiff's claim that defendant, a principal of the restaurant corporation, engaged in allegedly tortious conduct, for which he should be held individually responsible. Such conduct amounts, at most, to nonfeasance, for which defendant is not liable." In *Michaels v Lispenard Holding Corp.* (11 AD2d 12, 14 [1st Dept 1960]), officers of a corporate owner were not individually liable for water damage to property of occupants of the building. The Court held that "[i]t is clear from the pleadings, the bill of particulars and exhibits that the corporate owner was not divorced from all control, and equally clear that the [officers] did not personally make the repairs . . . . Something more than the mere status of corporate officer must exist before individual liability can attach. . . ." (*id.*).

Here, the Bakers have failed to show that *Fletcher* is a sufficient "change in the law that would change the prior determination" (CPLR 2221[e][2]). Although the *Fletcher* Court overruled the *Pelton* pleading rule that a discrimination plaintiff must *allege* independent tortious conduct by individual board members of a cooperative or condominium board, it did not change the law with respect to an individual board member's liability for participation in malfeasance or nonfeasance. Furthermore, as noted by Justice Stallman in the September 2008 decision, there was no "triable issue of fact as to whether the individual co-op board members had

engaged in specific acts of tortious conduct," and the Bakers' failings against the individual board members was "not only a matter of pleading, but one of proof" (Dorke affirmation, exhibit E). Therefore, since the Bakers have failed to show a basis to change the September 2008 decision, their request to amend the third verified amended complaint is denied as "palpably insufficient or clearly devoid of merit" (*Nineteen Eighty-Nine, LLC v Icahn Enters. L.P.*, 99 AD3d 546, 548 [1st Dept 2012], *appeal dismissed* 20 NY3d 1005 [2013], *lv denied* 20 NY3d 863 [2013] [internal quotation marks and citation omitted]).

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion (sequence number 026) of plaintiffs Janet Greenberg Baker and Norman Baker for leave to reargue the Court's October 10, 2012 decision and order is granted, and upon reargument, the Court adheres to its original determination; and it is further,

ORDERED that the motion (sequence number 027) of plaintiffs Janet Greenberg Baker and Norman Baker for leave to renew the Court's September 22, 2008 decision and order and for leave to amend the third amended complaint is denied; and it is further,

ORDERED that the motion (sequence number 028) of plaintiffs Janet Greenberg Baker and Norman Baker for leave to reargue the Court's October 10, 2012 decision and order is granted, and upon reargument, the Court adheres to its original determination; and it is further,

ORDERED that counsel for 40 East 80 is directed to serve a copy of this Order with Notice of Entry upon all parties.

This constitutes the Decision and Order of the Court.

**Dated:** 11/26/13

**PAUL WOOTEN J.S.C.**

**Check one:** ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**

**Check if appropriate:** ☐ **DO NOT POST** ☐ **REFERENCE**