

**Gotham Condominium v Firstservice Residential**

2015 NY Slip Op 30168(U)

February 2, 2015

Supreme Court, New York County

Docket Number: 652371/2014

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: Part 55

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THE GOTHAM CONDOMINIUM, INDIVIDUALLY  
AND AS ASSIGNEE OF BOTH SHARON E. GRUBIN  
AND DEBORAH E. LANS,

Plaintiff,

Index No.652371/2014

-against-

**DECISION/ORDER**

FIRSTSERVICE RESIDENTIAL, ET AL.,  
Defendants.

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**HON. CYNTHIA KERN, J.S.C.**

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : \_\_\_\_\_

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits and Cross Motion.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>      </u>

Plaintiff condominium has commenced the present action against the former management company and managing agent of the condominium. Defendants have brought the present motion for an order dismissing plaintiff's claims for negligence, indemnification, fraud and breach of fiduciary duty on the ground that they are duplicative of the breach of contract claim and are inadequately pled. They also move to dismiss the claims against the individual defendant Tomas A. Padilla. Although they originally moved to dismiss the breach of contract claim, they have since conceded that a valid breach of contract claim has been stated.

The relevant facts, as alleged in the complaint, are as follows. The plaintiff and

management company entered into a Condominium Management Agreement on March 2002. The management agreement required the management company to “[p]repare, obtain and process all necessary documents and instruments necessary or desirable for the Board or any Committee thereof to carry out its obligations” and “[g]enerally, do all things reasonably deemed necessary or desirable by the Board for the proper management of the Gotham.” Since 2002, the condominium had to carry out two major projects. Both of these projects involved the need to access the terrace that was owned by Sharon Grubin and Deborah Lans (the “Condominium Unit Owners”). The Board made a determination, after complaints by the Condominium Unit Owners, that it needed to replace the railings on the terraces adjacent to the Condominium Unit Owners’ unit. After agreeing to replace the railings, the Board requested that the property manager for defendant order replacement railings. On numerous occasions, the property manager represented to the Board that he had ordered the replacement railings for the unit, when in fact he never ordered them. In reliance on these representations, the plaintiff condominium informed the Condominium Unit Owners that the railings had been ordered. When the Board learned that the railings had never been ordered, they complained to defendant who then replaced the property manager with a new property manager, defendant Padilla. In connection with the projects in the building, the Condominium Unit Owners made numerous demands and threatened litigation in the event that the list of repairs, including the installation of the new railings, were not addressed. Defendants knew about such threats but never reported these threats to the proper insurance carriers, even though it was their responsibility to do so. The defendants also failed to disclose this information on the condominium’s application for directors and officers insurance. As a result of these actions, the insurance carriers declined coverage for litigation that was

subsequently commenced by the Condominium Unit Owners against the Condominium and the defendants. The lawsuit commenced by the Condominium Unit owners was subsequently settled by the plaintiff condominium without any contribution to the settlement being made by the defendants and the Condominium Unit Owners assigned their claims against defendants to the plaintiff condominium. Plaintiff then commenced this action against defendants on its own behalf and as assignee of the Unit Condominium Owners, seeking to recover the amount that it settled the previous lawsuit for and the attorneys fees and expenses it incurred in the previous litigation.

“It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated. This legal duty must spring from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract. *Clark-Fitzpatrick, Inc. v. Long Is. R. Co.*, 70 N.Y.2d 382, 389 (1987) (internal citations omitted). *See also Pacnet Network Ltd. v. KDDI Corp.*, 78 A.D.3d 478, 479 (1<sup>st</sup> Dept 2010). Moreover, a condominium owner’s “negligence claim should be dismissed as duplicative of his contract claim, since he does not posit any source of duty other than [the managing company’s] alleged management agreement with the Board.” *Regini v. Board of Mgrs. Of Loft Space Condominium*, 107 A.D.3d 496, 497 (1<sup>st</sup> Dept 2013).

In the instant case, plaintiff’s negligence claim must be dismissed as it is duplicative of plaintiff’s contract claim for breach of the management agreement and does not articulate the breach of any duty other than the duties imposed by the management agreement between the condominium and the management company. Any obligation that defendants had to order

replacement railings or to notify the insurance carriers of any threatened litigation or properly fill out applications for insurance only arose from their obligations to perform under the management agreement. Plaintiff's argument that the claim is not duplicative because it is being brought by the condominium in its assignee capacity on behalf of the Condominium Unit Owners who are not parties to the management agreement is without merit based on the First Department's decision in *Regina*. As the First Department explicitly held there, the condominium owner does not have any greater ability to bring a negligence claim against the management company than the condominium does as there is no duty other than the duties which arise from the management agreement. *Id.*

Plaintiff's fraud claim and breach of fiduciary duty claim must also be dismissed on the ground that these claims are duplicative of plaintiff's contract claim. Claims for breach of fiduciary duty should be dismissed as duplicative of the breach of contract claim where they are based on the same allegations and seek the identical damages. *Chowaiki & Co. Fine Art Ltd. v. Lacher*, 115 A.D.3d 600 (1<sup>st</sup> Dept 2014). A fraud claim will be dismissed as duplicative of a cause of action for breach of contract where it "is based on the same facts as underlie the contract claim and is not collateral to the contract and no damages are alleged that would not be recoverable under a contract measure of damages." *J.E. Morgan Knitting Mills v. Reeves Bros.*, 243 A.D.2d 422, 423 (1<sup>st</sup> Dept 1997). In the present case, the claims for fraud and breach of fiduciary duty, whether asserted by the Condominium Unit Owners or the condominium are duplicative of the breach of contract claim as they are based on the same allegations as the breach of contract claim, that defendants failed to fulfill their contractual obligations to order the railings and to notify the insurance carriers of threatened litigation and properly fill out the insurance

application. The plaintiff is also seeking the identical damages in the fraud and breach of fiduciary duty claim as it is seeking in the breach of contract claim, an amount no less than \$700,000.

Plaintiff's argument that its fraud and fiduciary claims are not duplicative because they are based on defendants' alleged misrepresentations about whether they performed their contractual obligations as opposed to their failure to perform their contractual obligations is without merit. All of these claims arise from defendants' alleged failure to perform their obligations under the contract and there is no damages plaintiff incurred based on defendants' alleged misrepresentations about their performance that are different than the damages which were incurred based on their failure to perform their obligations in the first instance. Nor can plaintiff rely on the decision in the earlier action finding that Individual Condominium Unit Owners suffered damages from the alleged fraud, distinct from any contractual damages, by refraining from bringing their lawsuit against the condominium as the misrepresentations alleged in the prior lawsuit were much more extensive than the misrepresentations being alleged in this action and many of the misrepresentations alleged in the former action were solely misrepresentations of the condominium rather than misrepresentations of the management company.

Similarly, plaintiff's argument that it is seeking different damages in its fraud and fiduciary duty claim because it is asserting a claim for punitive damages is without basis. As the First Department has recently stated in holding that a fraud claim was duplicative of a breach of contract claim, "apart from an unelaborated request for punitive damages in connection with the fraud claim, the proposed amended complaint seeks the same damages as the breach of contract

claim....” *Mosaic Caribe Ltd. v. AllSettled Group, Inc.*, 117 A.D.3d 421, 422-423 (1<sup>st</sup> Dept 2014).

The fifth cause of action for indemnification is also duplicative of the breach of contract claim as any claim that plaintiff would have for indemnification would only arise from the contractual relationship between the parties. The only basis plaintiff could have for seeking common law indemnification from defendant is based on the management company’s alleged breach of its contractual obligation to order the railings and notify the insurance carriers of threatened litigation and to properly complete the insurance application. Moreover, the damages plaintiff is seeking in its indemnification claim are the same damages that it is seeking in its breach of contract claim.

Finally, the court finds that the individual defendant, Tomas A. Padilla, should be dismissed from the action. It is well settled that “a corporate officer is not normally liable in his or her personal capacity on contracts executed on behalf of the corporation unless the officer expresses some intention to be personally bound, for the officer is in effect an agent of the corporate principle.” *W. Joseph McPhillips, Inc. v. Ellis*, 278 A.D.2d 682, 683 (1<sup>st</sup> Dept 2000). “Personal liability will be imposed, however, upon corporate officers who commit or participate in the commission of a tort, even if the commission or participation is for the corporation’s benefit.” *Id.* As previously stated, the court finds that this action is for breach of contract, rather than for any tortious activity, as a result of which there is no basis for imposing liability upon the individual defendant.

Based on the foregoing, the causes of action for fraud, indemnification, breach of fiduciary duty and negligence are dismissed as well as the claim against the individual defendant.

The foregoing constitutes the decision and order of the court.

Dated: 2/2/15

Enter: CK

J.S.C.

**CYNTHIA S. KERN**  
J.S.C.