

Grabel v Diamond On Duane Condominium
2015 NY Slip Op 30913(U)
June 2, 2015
Supreme Court, New York County
Docket Number: 153105/13
Judge: Joan M. Kenney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

-----X
JEFFRY N. GRABEL, as Trustee Under an
Instrument dated November 28, 1988 for
the benefit of ADAM TAKI and RH
GALLERY, LLC,

Plaintiffs,

DECISION & ORDER
Index No. 153105/13

-against-

DIAMOND ON DUANE CONDOMINIUM, BOARD OF
MANAGERS OF DIAMOND ON DUANE
CONDOMINIUM and ANDREWS BUILDING
CORPORATION,

Defendants.

-----X
JOAN M. KENNEY, J.:

Defendants Diamond on Duane Condominium (Condominium), Board of Managers of Diamond on Duane Condominium (Board), and Andrews Building Corporation (Andrews) move for an order: a) pursuant to CPLR 3212, dismissing the third cause of action against defendants; b) pursuant to CPLR 3212, dismissing the complaint against the Condominium; and c) pursuant to CPLR 2004, extending defendants' time to file supplemental proof in support of the motion. Plaintiff Jeffry N. Grabel (Grabel), as Trustee Under an Instrument dated November 28, 1988 for the benefit of Adam Taki (Taki) and RH Gallery, LLC (RH), cross-moves for an order: a) pursuant to CPLR 3212, granting summary judgment on liability under the first cause of action and setting the matter down for an assessment of damages; b) pursuant to CPLR 3212, directing defendants to specifically perform their obligations under the condominium declaration and bylaws to repair and/or replace and maintain the roof above Unit C-1, and replace the areas on the exterior walls of the premises at

137-141 Duane Street, New York, NY, adjacent to the roof above Unit C-1; c) permitting plaintiff to serve an amended complaint on defendants; d) for an order denying defendants' motion; and e) for an order setting a date for trial of the damage issues in the first, second and fourth causes of action.¹

The complaint alleges that Grabel, as Trustee for Taki and RH, is the owner of Unit C-1, one of the commercial units in the Condominium located at 137-141 Duane Street, New York, NY. Unit C-1 consists of 3,500 square feet over two floors, including a vault area below the sidewalk.

Grabel asserts that, beginning shortly after he purchased Unit C-1 in November 2009, there were problems with water leaking into the street level portion of the unit from the roof above and the exterior walls of the building adjacent to the roof, and into the basement portion of the unit through defects in the sidewalk and through the doors in the sidewalk which allowed ingress and egress to the cellar and vault area. Grabel aff, dated January 19, 2015, ¶ 4.

At the time the action was filed, RH, was the tenant in Unit C-1, operating a business which bought, exhibited and sold art at the premises. In mid-May of 2013, however, RH ceased operations of

¹ The court notes that plaintiff's motion does not seek summary judgment on liability pursuant to the second cause of action, and that the fourth cause of action appears only in the amended complaint which plaintiff seeks to file.

the gallery in Unit C-1 (Adam Taki dep at 17), and according to Grabel, the causes of action on behalf of RH have been discontinued. Grabel aff, ¶ 27. According to Grabel, due to the need to remediate mold conditions caused by the water leakage, he was unable to lease the premises until August 22, 2013. He further contends that, because defendants had not yet repaired the area under the roof, that area had to be excluded from the lease. He, therefore, had to reduce the rent by \$3,300 per month for the pilates studio which agreed to rent the space. Grabel aff, ¶ 18. Grabel further asserts that although he constantly receives calls from persons interested in purchasing the unit, "[t]he failure of the Defendants to repair the leaky roof areas, while it might be 'livable' for the Pilates studio, would be unacceptable to a purchaser who must build to suit and would risk the loss of improvements." Grabel aff, ¶ 20.

In the first cause of action, the complaint alleges that the Condominium had a duty to care for, maintain and repair the roofs above and sidewalks in front of the building, but that commencing on or about July 19, 2012, substantial amounts of water entered Unit C-1 through the rear roof and front sidewalk, causing damages to the premises and contents of Unit C-1. According to the complaint, prior to July 19, 2012, defendants had notice of "chronic leaks in the rear roof above Unit C-1 and the front sidewalk above Unit C-1" (verified complaint, ¶ 17), and they

failed to repair and/or negligently maintained the roof, causing water to leak into the unit. *Id.* ¶ 18. The first cause of action alleges that plaintiff sustained damages resulting from the leaks.

The second cause of action, which is quite similar to the first, appears to focus primarily on leaks from the sidewalk. It alleges that because of a failure to maintain or repair the sidewalk, "commencing with plaintiffs' occupancy of the premises and at all times thereafter," whenever there was substantial precipitation water entered the lower level of Unit C-1, causing damage to the interior of the unit.² *Id.* ¶ 21.

In the third cause of action, plaintiff alleges that, pursuant to article 6 of the Condominium declaration and section 9 (b) of the bylaws of the Condominium, the Board is obligated to maintain and repair all common elements of the Condominium, including, but not limited to, the sidewalks adjacent to and the roof above Unit C-1. The third cause of action seeks specific performance of defendants' obligations under the Condominium Declaration and bylaws to maintain and repair common elements, including the roof and sidewalks adjacent to the building.

DEFENDANTS' MOTION

MOTION TO DISMISS THE THIRD CAUSE OF ACTION

² Paragraph 21 also attributes the water damage to failure to maintain and repair the rear roof, as well as the sidewalk. As a result, the intended distinction between the first and second causes of action is far from clear.

Citing *Cho v 401-403 57th St. Realty Corp.* (300 AD2d 174 [1st Dept 2002]), defendants first argue that specific performance is properly an equitable remedy, rather than a separate cause of action, and should be dismissed. Although the Court in *Cho* did indeed make that observation, it did not disturb the order of the Supreme Court refusing to dismiss the cause of action for declaratory judgment and specific performance

"The decision whether or not to award specific performance is one that rests in the sound discretion of the trial court." *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 415 (2001). Specific performance is generally held to be a proper remedy to enforce a contract for the sale of real property. "Generally, the equitable remedy of specific performance is routinely awarded in contract actions involving real property, on the premise that each parcel of real property is unique." *EMF Gen. Contr. Corp. v Bisbee*, 6 AD3d 45, 52 (1st Dept 2004). Specific performance may also be available in sales involving personal property where the uniqueness of personal property makes the calculation of money damages to difficult or uncertain. *Cho v 401-403 57th St. Realty Corp.*, 300 AD2d at 175 (upholding an order of the Supreme Court refusing to dismiss a cause of action for specific performance of an option to purchase shares in a closely held real estate corporation).

In contrast with their willingness to order specific

performance of contracts for the sale of real or personal property,

"courts have been reluctant to enforce '[c]ontracts which require the performance of varied and continuous acts, or the exercise of special skill, taste, and judgment' because 'the execution of the decree would require such constant superintendence as to make judicial control a matter of extreme difficulty.'"

Matter of Grayson-Robinson Stores (Iris Constr. Corp.), 8 NY2d 133, 137 (1960), quoting *Standard Fashion Co. v Siegel-Cooper Co.*, 157 NY 60, 66 (1898). Although the Court in *Grayson-Robinson* departed from that longstanding reluctance and directed the specific performance of a contract for the construction of a building, it did so only because the request to enforce the complex contract reached the Court when it was called upon to enforce an arbitration award where the parties had given the arbitrators the express power to award specific performance. *Id.* The longstanding tradition discussed in *Grayson-Robinson* is, however, reflected in the Restatement of Contracts which states,

"[a] promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial."

Rest 2d Contr § 366. Furthermore, "[s]pecific performance is not appropriate where the terms of the contract to be enforced are not 'certain enough to permit the Court to frame an order of specific performance ... and to determine whether resulting performance is in accord with what has been ordered.'" *Netherby Ltd. v Jones*

Apparel Group, Inc., 2007 WL 1041648, *20, 2007 US Dist LEXIS 25720, *58 (SD NY 2007, No. 04 Civ 7028 [LEG]), quoting Rest 2d Contr § 362; see also *Corti v Continental Copper & Steel Export Corp.*, 223 F Supp 503, 510 (SD NY 1963) ("A contract may be too indefinite to justify a decree for specific performance and yet definite enough to sustain an action for damages").

Here, unlike a straightforward contract for the sale of real or personal property, the order for specific performance requested by plaintiff would involve the court in overseeing not merely the indefinite obligations involved in the supervision of a construction project, but the determination of both the cause of the leaks in the roof above Unit C-1 and choice of alternative remedial measures to end those leaks and repair the damages.

Defendants submit the affidavit of Nancy Diamond-Fraze, an employee of Andrews, the Condominium property manager, stating that the Board retained nonparty CTA Architects P.C. (CTA) to assess the situation and prepare construction documents to replace the roof over Unit C-1 and another unit as well, and to perform construction administrative services. Diamond-Fraze lists 13 detailed items for work to be done on two setback roofs, one of which is over Unit C-1, outlined by CTA which she approved on July 24, 2014.³

³ Among the 13 items are "[i]nstallation of new oversized roof metal drain baskets" and "[r]emoval of existing roof membrane down to roof decking and install new resin based and insulated roof system." Diamond-Fraze aff, ¶ 4.

Diamond-Frazee aff, ¶ 4.

Defendants also submit the affidavit of Michael Hyun, president of the Board, who states that as of November 2014, the permitting process with government agencies had begun and the proposed scope of work had been submitted to contractors for bidding. Hyun aff, ¶ 3.

Grabel asserts, however, that

"absent this Court's direction and redress, I question whether the Defendants and their contractors would perform and insure a proper repair. ... A view of the sidewalk and repair work in front of the building clearly indicates the repairs which the Defendants accepted, were shoddy, incomplete, and cosmetically unacceptable. This board is not above accepting a superficial ineffective job."

Grabel aff, dated Jan. 19, 2015, ¶ 17. Rather, Grabel insists that the proposals for roof repair made by his contractor, Meszaros Engineering in its report dated June 10, 2014 (Meszaros Report, Grabel aff, exhibit 4) should be specifically enforced by this court. However, he presents no evidence of Meszaros's expertise, the report itself is unsworn, it contains no explicit statement of the cause of the leaks into Unit C-1, and plaintiff has presented no basis for the court to conclude that the Meszaros proposals are any more likely to correct the problems causing the leaks than the measures proposed by defendants' contractor, CTA.

Grabel also asserts that specific performance is necessary because of "a five (5) year history of almost begging the managing agent and the BOARD OF MANAGERS to correct these conditions leaves

me with little or no confidence that it will, in fact, be done expeditiously and/or correctly." Grabel aff, ¶ 26.

Diamond-Fraze, however, states that defendants have replaced the sidewalk vault area in front of Unit C-1 and are planning to complete repairs to the remaining sidewalk and vault areas and to replace the roof over Unit C-1. According to Diamond-Fraze, sidewalk vault work in front of Unit C-1 was completed by November 2014, and though a portion of the sidewalk adjacent to the area in front of plaintiff's property has not been completed, she is not aware of any complaints by plaintiff about water leaks to Unit C-1 coming from that adjacent area. Diamond-Fraze aff, ¶¶ 2 & 7.⁴ Nor has Grabel asserted that there have been water leaks in the cellar or vault since the repairs were made to the sidewalk in front of Unit C-1.

Finally, "specific performance will not be ordered where money damages 'would be adequate to protect the expectation interest of the injured party.'" *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d at 415, quoting Restatement (Second) of Contracts § 359 (1).

"The point at which breach of a contract will be redressable by specific performance thus must lie not in any inherent physical uniqueness of the property but

⁴ With respect to the sidewalk vault work in front of those other areas of the building, Diamond-Fraze states that the New York City Department of Transportation does not permit such work during the holiday season and it is generally too cold to perform such work during the months of January through March. She further states that it was expected that the work would be completed in early to mid-2015. *Id.* at ¶ 5.

instead in the uncertainty of valuing it: What matters, in measuring money damages, is the volume, refinement, and reliability of the available information about substitutes for the subject matter of the breached contract. When the relevant information is thin and unreliable, there is a substantial risk that an award of money damages will either exceed or fall short of the promisee's actual loss. Of course this risk can always be reduced — but only at great cost when reliable information is difficult to obtain. Conversely, when there is a great deal of consumer behavior generating abundant and highly dependable information about substitutes, the risk of error in measuring the promisee's loss may be reduced at much smaller cost. In asserting that the subject matter of a particular contract is unique and has no established market value, a court is really saying that it cannot obtain, at reasonable cost, enough information about substitutes to permit it to calculate an award of money damages without imposing an unacceptably high risk of undercompensation on the injured promisee. Conceived in this way, the uniqueness test seems economically sound."

Van Wagner Adv. Corp. v S & M Enters., 67 NY2d 186, 193 (1986) (internal quotation marks and citation omitted) (specific performance of a contract to lease allegedly unique billboard space was properly denied because the plaintiff could adequately be compensated by damages).

Grabel asserts that the value of Unit C-1 cannot be "realized" until the water risk is eliminated, and that, therefore, the diminution of value is difficult to prove "with reasonable certainty." *Van Wagner Adv. Corp.*, 67 NY2d at 193 quoting (Restatement [Second] of Contracts § 360 [a]). However, he provides no basis whatever for that assertion. To the contrary, he indicates that because of the leaks in the roof above the first floor portion of his unit, he had to decrease the rent charged to

the pilates studio, which certainly belies his contention that it is not possible to calculate damages resulting from the leaks.

Given all of these considerations, defendants' motion for an order dismissing the third cause of action for specific performance is granted.

MOTION TO DISMISS THE CONDOMINIUM AS A DEFENDANT

Defendants move to dismiss the Condominium as a party defendant. Condominiums, which are "generally regarded [to be] unincorporated associations," (*Brasseur v Speranza*, 21 AD3d 297, 297 [1st Dept 2005]), are governed by the Real Property Law. *Board of Mgrs. of Lenox Grand Condominium v DSW Lenox LLC*, 111 AD3d 467, 468 (1st Dept 2013).

Defendants cite Real Property Law § 339-u which states that the operation of a condominium shall be governed by its bylaws. Pursuant to the Condominium's bylaws, "[t]he affairs of the Condominium are to be governed by the Board of Managers" which has "[t]he powers and duties necessary for the administration of the affairs of the Condominium" including "(a) Operation, care, upkeep and maintenance of the Common Elements, including purchase and leasing of material, supplies and equipment." Bylaws of Diamond On Duane Condominium, article II, §§ 1 & 2 (a). In addition, the Board represents the unit owners "in any proceedings, negotiations, settlements or agreements relating to ... making of repairs." *Id.* at § 2 (m).

As defendants note in their affirmation in opposition to plaintiff's cross motion, plaintiff does not specifically oppose the dismissal of the Condominium as a defendant. Defendants' motion to dismiss the Condominium as a defendant is, therefore, granted.

REQUEST TO EXTEND DEFENDANTS' TIME TO FILE SUPPLEMENTAL PROOF.

Finally, pursuant to CPLR 2004, defendants request permission to submit supplemental papers to update the court on the progress of the proposed work. Given the rulings of the court on the motion and cross motion, the court concludes it would be more appropriate to present any such evidence at trial.

Therefore, defendants' request is denied.

PLAINTIFF'S CROSS MOTION

CROSS MOTION FOR SUMMARY JUDGMENT ON THE FIRST CAUSE OF ACTION

Plaintiff cross-moves for an order granting summary judgment on liability on the first cause of action and setting the matter down for a trial on the issue of damages.⁵

Defendants have characterized plaintiff's first cause of action as one for negligence. Because plaintiff has failed to set forth the basic elements of the cause of action, it is not clear whether

⁵ In August 2013, plaintiff previously moved for summary judgment on the second and third causes of action, but that motion was denied by this court on October 10, 2013 as premature, as discovery was still outstanding. In April 2014, plaintiff again moved for summary judgment on the third cause of action. On August 13, 2014, this court denied that motion for failure to set forth entitlement to an injunction and to rebut the factual assertions made by defendants in opposition to the request for injunctive relief.

plaintiff contends that it is based upon negligence or breach of contract pursuant to the Condominium declaration and bylaws. Needless to say, the court should not be required to guess the basis for plaintiff's claim of liability.

Though in his affirmation in support of the cross motion, counsel for plaintiff refers to correspondence and emails between and among members of the Board and members of the management company, the significance of those documents is not explained, nor is much of the deposition testimony referred to by counsel, beyond the recognition by defendants that leaks into the first floor space of Unit C-1 exist.

Although plaintiff's frustration with the seeming inability of defendants' contractors to identify the cause of and repair the leak into the first floor space of Unit C-1, it is not clear whether plaintiff contends that the failure constitutes negligence or a breach of contract.

The burden of establishing entitlement to summary judgment is on the movant. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Plaintiff has failed to satisfy that burden. His cross motion for summary judgment on the first cause of action is, therefore, denied.

CROSS MOTION FOR SUMMARY JUDGMENT FOR SPECIFIC PERFORMANCE

Plaintiff cross-moves for summary judgment granting specific performance of defendants' obligations to maintain and repair common

elements of the Condominium, and specifically, to repair and/or replace and maintain the roof above Unit C-1, and replace the areas on the exterior walls of the premises 137-141 Duane Street, New York, NY, adjacent to the roof above Unit C-1.

In light of the ruling of the court on defendants' motion for summary judgment dismissing the third cause of action, plaintiff's cross motion for an order granting specific performance is denied.

CROSS MOTION TO AMEND THE COMPLAINT

Plaintiff cross-moves for permission to file an amended complaint adding a fourth cause of action for punitive damages. The proposed amended complaint alleges that, notwithstanding years of complaints by plaintiff concerning the leaks into Unit C-1, defendants have refused and failed to address those leaks. The amended complaint also alleges, on information and belief, that the Board has failed to address the problem because, since the majority of the Board is made up of residential owners, they would be personally financially responsible for repairs. For those reasons, the proposed amended complaint alleges that plaintiff is entitled to punitive damages.

Although "leave to amend pleadings is ordinarily freely given," it is within the discretion of the court to deny leave where the pleadings are plainly lacking in merit. *Garcia v New York-Presbyt. Hosp.*, 114 AD3d 615, 615 (1st Dept 2014).

"Punitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy

private wrongs but to vindicate public rights. However, where the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanton dishonesty as to imply a criminal indifference to civil obligations, punitive damages are recoverable if the conduct was aimed at the public generally."

Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603, 613 (1994) (internal quotation marks and citations omitted); see also *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 23 (1st Dept 2003) ("Unlike a claim for negligence, to establish a claim for punitive damages, plaintiff must demonstrate that the wrong to him rose to the level of such wanton dishonesty as to imply a criminal indifference to civil obligations" [internal quotation marks and citation omitted]); *National Broadcasting Co. v Fire Craft Servs.*, 287 AD2d 408, 408-409 (1st Dept 2001) ("an award of punitive damages must be premised on conduct particularly egregious in nature directed both at the plaintiff and the general public"). This court concludes, as did the Court in *National Broadcasting Co.*, that the conduct alleged in the proposed amended complaint "falls well short of this standard." *Id.* at 409.

For this reason, the motion for leave to file an amended complaint adding a punitive damage claim is denied.

Accordingly, it is hereby

ORDERED that the motion of defendants Diamond on Duane Condominium, Board of Managers of Diamond on Duane Condominium and Andrews Building Corporation is disposed of as follows:

a) the motion for summary judgment dismissing the third cause of action is granted and that cause of action is dismissed;

b) summary judgment dismissing the complaint against Diamond on Duane Condominium is granted, and the complaint is dismissed as against that defendant in its entirety with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the court is directed to enter judgment accordingly in favor of said defendant; 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 of defendant Diamond on Duane Condominium 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; and it is further

ORDERED that defendants' motion is otherwise denied; and it is further

ORDERED that the cross motion of plaintiff Jeffrey N. Grabel, as Trustee Under the Instrument dated November 28, 1988 for the benefit of Adam Taki and RH Gallery LLC is denied in its entirety.

Dated: 6/2/15

ENTER:



JOAN M. KENNEY
J.S.C.