

Kidd v Friedman

2016 NY Slip Op 30848(U)

May 5, 2016

Supreme Court, New York County

Docket Number: 653600/14

Judge: Gerald Lebovits

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY: PART 7**

JOHN KIDD and JIN CHUNG KIDD,

Plaintiffs,

-against-

JASON FRIEDMAN, STEVEN FAUTH, BEEKMAN
LANDING CONDOMINIUM, BEEKMAN LANDING
CONDOMINIUM BOARD, SIREN MANAGEMENT
CORPORATION, NORFOLK BUILDERS INC., GRANT
MCLELLAN, and JOHN DOE DEFENDANTS 1-5, individually
jointly and severally,

Defendants.

Index No.: 653600/14
DECISION/ORDER
Motion Seq. No. 001

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing defendants' motion for summary judgment.

Papers	Numbered
Defendants' Notice of Motion	1
Memorandum of Law in Support	2
Defendants' Affidavit of Jason Friedman in Support	3
Defendants' Affidavit of Steven Fauth in Support	4
Defendants' Affidavit of Dirk Kaufman in Support	5
Plaintiffs' Affirmation in Opposition.....	6
Plaintiffs' Memorandum of Law in Opposition.....	7
Plaintiff John Kidd's Affidavit in Opposition	8
Plaintiff Jin Kidd's Affidavit in Opposition	9
Plaintiffs' Affidavit of Steven Kratchman in Opposition.....	10
Defendants' Reply Affirmation in Support.....	11
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Defendants' Letters dated March 28, 2016.....	13-14
Plaintiffs' Letter dated March 18, 2016.....	15
Plaintiffs' Letter dated April 4, 2016.....	16

Schwartz Law PC, Garden City (*Evan S. Schwartz* of counsel), for plaintiffs.
Miranda Sambursky Slone Sklarin Verveniotis LLP, Mineola (*Ondine Sloan* of counsel), for defendants Jason Friedman, Steven Fauth, Beekman Landing Condominium, Beekman Landing Condominium Board, and Siren Management Corporation.
Codispoti & Associates PC, New York City (*Connie Gibilaro* of counsel), for defendants Norfolk Builders Inc. and Grant McLellan.

Gerald Lebovits, J.

Plaintiff, Jin Chung Kidd, is the owner of a first-floor unit in Beekman Landing Condominium (Beekman) at 130 Beekman Street, New York, New York (Building). She and her husband, plaintiff John Kidd, resided in the condominium unit when, on October 29, 2012, Hurricane Sandy caused three to five feet of flooding on the first floor. Plaintiffs filed a complaint asserting 15 causes of action against defendants, who were involved with the clean-up and reconstruction of the Building after the hurricane.

Defendants move for summary judgment under CPLR 3212. After oral argument on March 3, 2016, the court, in an oral opinion on the record, dismissed plaintiffs' first, second, seventh, thirteenth, and fourteenth causes of action.¹ The court reserved decision on the third, fourth, and fifth causes of action as to whether these causes of action could be pleaded in the alternative. The third cause of action is for breach of contract against Beekman, the Beekman Landing Condominium Board (Board), and Siren Management Corporation (Siren)²; the fourth cause of action is for breach of fiduciary duty against the Board and board members Jason Friedman and Steven Fauth; the fifth cause of action is for breach of good faith and fair dealing against the Board, Friedman, and Fauth. The court later also requested further argument on the punitive-damages claim.

Plaintiffs' third cause of action alleging breach of contract is dismissed only against Siren. To state a claim for a breach of contract, a plaintiff must show that a contract exists, plaintiff's performance under the contract, defendant's breach of the contract, and plaintiff's damages. (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007].) A plaintiff must allege the contract provisions that defendant breached. (*Atkinson v Mobil Oil Corp.*, 205 AD2d 719, 720 [2d Dept 1994].) Plaintiffs do not have a contract with Siren. Siren had a contract only with Beekman. Even if plaintiffs were third-party beneficiaries of the Beekman's contract with Siren, plaintiffs do not allege any provision in the contract that required Siren to secure or guard plaintiffs' property. Therefore, plaintiffs' breach-of-contract claim is dismissed only against Siren.

Plaintiffs' third cause of action alleging breach of contract against the remaining defendants is not dismissed; plaintiffs' fourth cause of action alleging breach of fiduciary duty is

¹ The first cause of action was for specific performance against Beekman, the Beekman Landing Condominium Board, and Norfolk Builders Inc. (Norfolk) to cease, desist, and vacate plaintiffs' condominium unit; the second cause of action was for declaratory judgment on plaintiffs' right to rebuild; the seventh cause of action was for warranty of habitability against all defendants; the thirteenth cause of action was for conversion of electricity against the Board and Norfolk; the fourteenth cause of action was for negligent misrepresentation against the Board for flood-insurance coverage.

² The Board hired Siren as a managing agent to hire, pay, and supervise the Building's employees; to clean and maintain the Building; to address Building violations or code issues; to contract for utilities and work performed for the Building and to buy equipment; and to perform related tasks.

dismissed in its entirety. Plaintiffs may not argue in the alternative their breach-of-contract and breach-of-fiduciary duty claims. A plaintiff may not allege a breach of fiduciary duty that is duplicative of a plaintiff's breach-of-contract claim. (*Hylan Elec. Contracting, Inc. v MasTec N. Am., Inc.*, 74 AD3d 1148, 1150 [2d Dept 2010].) The same conduct that constitutes a breach of a contractual obligation may also constitute the breach of a fiduciary duty arising out of the contract relationship when the fiduciary duty is independent of the contract itself. (*Davis v Dime Sav. Bank of New York, FSB*, 158 AD2d 50, 52 [3d Dept 1990].)

Plaintiffs allege the same conduct against defendants for the breach-of-fiduciary duty claims as for the breach-of-contract claim: Defendants allegedly willfully disregarded plaintiffs' instruction not to touch plaintiffs' personal property after the hurricane, failed to secure plaintiffs' unit, and directed or allowed the removal, conversion, and disposal of plaintiffs' personal property. For both claims, plaintiffs allege that the contract is the Beekman bylaws, which establishes the Board as plaintiffs' agent. Plaintiffs do not allege that defendants had any fiduciary duty independent of the contract. Therefore, plaintiffs' breach-of-fiduciary-duty claim against defendants is dismissed as duplicative of plaintiffs' breach-of-contract claim.

Plaintiffs' fifth cause of action alleging breach of good faith and fair dealing against the Board may not be dismissed. The covenant of good faith and fair dealing in the course of performance is implied in every contract. (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002].) The contract is Beekman's bylaws. However, the conduct at issue is defendants' alleged bad faith in delaying plaintiffs' reconstruction attempts. Because this claim is based on conduct different from plaintiffs' breach-of-contract claim, there is no duplicative cause of action issue. Therefore, plaintiffs may plead their breach of the duty of good faith and fair dealing claim in the alternative to their breach-of-contract claim.

The fifth cause of action is dismissed as against Board members Jason Friedman and Steven Fauth. A court may dismiss claims against individual members of a condominium board when a plaintiff does not allege against the board members wrongdoing that is "separate and apart from their collective actions taken on behalf of the condominium." (*Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735-736 [1st Dept 2013].) Board members are self-interested in a challenged transaction when they receive a direct benefit different from a general benefit to condominium owners. (*Marx v Akers*, 88 NY2d 189, 202 [1996].)

Plaintiffs' complaint alleges that Friedman and Fauth acted "as members of the Board," "under the direction of the Board," "in the name of the Board," and as an "extension of the Board." (Plaintiffs' Opposition, Exhibit A ¶¶ 150, 151, 155 & 163.) Plaintiffs do not substantiate their claim that Fauth's actions were taken for Fauth's own behalf. Plaintiffs allege that Friedman acted in bad faith because Friedman stated to plaintiffs that he wanted to move back into the Building as early as November 5, 2012, six days after the hurricane. Plaintiff does not demonstrate that Friedman received a benefit different from any other condominium owner. Friedman's statement alone does not demonstrate that he was self-interested. Therefore, plaintiffs' fifth cause of action is dismissed as against Board members Friedman and Fauth.

The court dismisses plaintiffs' punitive-damages claim. To obtain punitive damages, a plaintiff must show that (1) defendant's conduct is actionable as an independent tort; (2) the

tortious conduct is of such an egregious nature, with a high degree of moral turpitude, and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations;³ (3) the egregious conduct must be directed to the plaintiff; and (4) the egregious behavior must be part of a pattern directed at the public generally. (*NYU v Cont. Ins. Co.*, 87 NY2d 308, 316 [1995].)


Even if plaintiffs established the first three elements — which they do not — the claim fails on the last element. Plaintiffs argue that the defendants' conduct was directed toward only them. The record does not show that defendants' conduct was directed toward the public.

Beyond what this court ordered on March 3, 2016, it is ORDERED that defendants' motion for summary judgment is granted to the extent that plaintiffs' third causes of action is dismissed only as to Siren; plaintiffs' fourth cause of action is dismissed; plaintiffs' fifth cause of action is dismissed only as to Board members Friedman and Fauth; and plaintiffs' punitive-damages claim is dismissed.

ORDERED that counsel for defendants is directed to serve a copy of this order with notice of entry upon the plaintiffs and the Clerk of the Court, who is directed to enter judgment accordingly.

This opinion is the court's decision and order.

Dated: May 5, 2016


J.S.C.
HON. GERALD LEBOVITS
J.S.C.

³ See *Walker v Sheldon*, 10 NY2d 401, 404-405 (1961).