

McMahon v Cobblestone Lofts Condominium

2016 NY Slip Op 31466(U)

July 27, 2016

Supreme Court, New York County

Docket Number: 151136/14

Judge: Geoffrey D. Wright

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 47

-----X
SHANE McMAHON and MARISSA McMAHON
Individually And As Parents And Natural Guardians
Of Their Minor Children, AM, BM and CM,
Plaintiff-Respondent(s),

Index #151136/14
Motion Cal #

Motion Seq. #13
DECISION/ORDER
Pursuant To Present
Hon. Geoffrey Wright
Judge, Supreme Court

-against-
COBBLESTONE LOFTS CONDOMINIUM,
THE ANDREWS ORGANIZATION, f/k/a
Andrews Building Corporation, NOVA RESTORATION
OF NY, INC., NOVA RESTORATION LLC,
WALTER B. MELVIN, ARCHITECTS, LLC
and JOHN DOES 1 and 2
Defendant-Respondent(s)

-----X
THE COBBLESTONE LOFTS CONDOMINIUM,
THE ANDREWS ORGANIZATION, f/k/a
Andrews Building Corporation,
Third-Party Plaintiffs,

-against-
NOVA RESTORATION OF NY INC.,
NOVA RESTORATION LLC and
WALTER B. MELVIN ARCHITECTS, LLC,
Third-Party Defendants.

-----X
THE COBBLESTONE LOFTS CONDOMINIUM and
THE ANDREWS CORPORATION f/k/a Andrews
Building Corporation,
Second Third-Party Plaintiffs,

-against-
OLMSTEAD ENVIRONMENTAL SERVICES, INC.
and TOTAL ENVIRONMENTAL RESTORATION
SOLUTIONS, INC.,
Second Third-Party Defendants.
-----X

Recitation, as required by CPLR 2219(a), of the papers considered in the review of
this Motion to: amend the answer of Cobblestone to the second amended complaint; cross-
motion by the Plaintiffs to condition the amended answer

PAPERS	NUMBERED
Notice of Petition/Motion, Affidavits & Exhibits Annexed	1

Order to Show Cause, Affidavits & Exhibits	
Answering Affidavits & Exhibits Annex	
Replying Affidavits & Exhibits Annexed	2
Cross-motion & Exhibits Annexed	
Supporting Affidavits	
Memoranda	3,4,5

Upon the foregoing cited papers, the Decision/Order on this Motion is as follows:

The primary Defendants here, Cobblestone Condominium and The Andrews Organization, move to dismiss the first, second, fourth, seventh, eighth and ninth causes of action. As repeated over the course of numerous motions, the Plaintiffs, two parents and three children, were occupants of a penthouse apartment within the defendant condominium. Because of leaks leading to an unremedied mold condition, the family moved out of their apartment in or about May 2012, and remains away from the building.

The motion to dismiss is aimed at the first, second, fourth, seventh, eighth and ninth causes of action in the second amended complaint. The claims are:

- (1) negligence in the performance of the legal duty of all building owners to maintain premises;
- (2) negligence in the care, maintenance of the building;
- (4) breach of contract
- (7) negligent infliction of emotional harm
- (8) an injunction directing the condominium and its managing agent to cure the mold condition in the Plaintiffs' home;
- (9) a declaratory judgment that the condominium and its management company are required to effect the remediation of the mold condition and attendant leaks.

As to the Andrews Organization, the management for the condominium, the motion is granted. The Andrews Organization is a known agent of a known principal, the condominium. The complaint, and the opposing papers do not allege any independent actions taken by Andrews that would remove it from its agency position.

As to the condominium, the motion is granted as to the seventh claim, alleging the negligent infliction of emotional harm. A claim for the negligent infliction of emotional harm "must generally be premised upon a breach of a duty owed directly to the plaintiff which either endangered the plaintiff's physical safety or caused the plaintiff fear for his or her own physical safety" (*Lancellotti v. Howard*, 155 A.D.2d 588, 589–590, 547 N.Y.S.2d 654 [1989]). Courts had found their index of reliability in requiring that the alleged conduct "unreasonably endanger" a plaintiff's physical safety (See, *De Rosa v. Michelman*, 184 A.D.2d 490, 584 N.Y.S.2d 202 [2d Dept. 1992]; *Losquadro v. Winthrop Univ. Hosp.*, 216 A.D.2d 533, 628 N.Y.S.2d 770 [2d Dept. 1995]; *Glendora v. Gallicano*, 206 A.D.2d 456, 615 N.Y.S.2d 45 [2d Dept. 1994]). [*GERSON V. GIORGIO SANT'ANGELO COLLECTIBLES, INC.*,

176 Misc.2d 388671 N.Y.S.2d 9581998 N.Y. Slip Op. 98213]. Claims for the infliction of emotional harm are typically dismissed in building maintenance cases [*WORTH V. 281 ST. NICHOLAS PARTNERS, LLC*, 2014 WL 3728496 (N.Y.Sup.), 2014 N.Y. Slip Op. 31981(U) (Trial Order “ claims for pain and suffering, and intentional and negligent infliction of emotional harm must also be dismissed. These are based on the alleged failure to maintain services in the building. Pain and suffering are recognized damages for the failure to maintain an apartment [*Elkman v. Southgate Owners Corp.*, 233 A.D.2d 104, 649 N.Y.S.2d 138, “pain and suffering are not recoverable under Real Property Law § 235-b” (citing *Court v. Westchester Country Club*, 186 A.D.2d 712, 589 N.Y.S.2d 491. lv. dismissed in part, lv. denied in part, 81 N.Y.2d 912, 597 N.Y.S.2d 931, 613 N.E.2d 963)]” That is not to say, that compensation is not available to the Plaintiffs [“the question of compensatory damages is inextricably tied to the question of feasibility of abatement of the nuisance.” *HOHENBERG V. 77 W. 55TH STREET ASSOC.*, 118 A.D.2d 418, 499 N.Y.S.2d 83 [1st Dept. 1986] 118 A.D.2d 418499 N.Y.S.2d 83].

In a condominium, abatement of common charges is not a recognized claim as there is no landlord-tenant relation, and pain and suffering are not available as compensation for a breach of the warranty of habitability [*REAL PROPERTY LAW § 235-b*; *Court v. Westchester Country Club*, 186 A.D.2d 712, 589 N.Y.S.2d 491. lv. dismissed in part, lv. denied in part, 81 N.Y.2d 912, 597 N.Y.S.2d 931, 613 N.E.2d 963, “pain and suffering are not recoverable under Real Property Law § 235-b”].

I decline to dismiss the first cause of action, based on Real Property Law 78, which covers a building owners obligation to maintain premises. The claim under 27-345, relating to fire safety is stricken as unrelated to the current dispute. Although entitled a negligence action, it is actually a claim for breach of a statutory duty.

The second cause of action is also dismissed. In terms of the breach of a duty, it is a duplicate of the third claim, sounding in contract. Typically, contract and negligence are antithetical, and the tort claim must fail. [*DREZIN V. NEW YANKEE STADIUM COMMUNITY BENEFITS FUND, INC.*, First Department, New York. April 12, 201294 A.D.3d 542944 N.Y.S.2d 172012 N.Y. Slip Op. 02782; “plaintiff's claims based on negligent or grossly negligent performance of a contract are not cognizable.” *PACNET NETWORK LTD. V. KDDI CORP.*, First Department, New York. November 16, 201078 A.D.3d 478912 N.Y.S.2d 1782010 N.Y. Slip Op. 08353].

The ninth claim must be dismissed as it is based on a breach of the warranty of habitability (RPL 235-b). This law does not apply to condominiums. [*FRISCH V. BELLMARC MGMT., INC.*, 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dept. 1993)].


The motion is denied as to the ninth claim, seeking a declaratory judgment. [“CPLR 3001 states that “[t]he supreme court may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed”. A declaratory judgment

action “ requires an actual controversy between genuine disputants with a stake in the outcome” *WATSON V. AETNA CAS. & SUR. CO.*, 246 A.D.2d 57, 64, 675 N.Y.S.2d 367, 371 (2d Dep't 1998]. The foregoing applies to the dispute here. A finding in favor of the Plaintiffs would inevitably lead to a direction to correct the condition, as would be required under Real Property Law 78, therefore, the eighth cause of action survives this motion. I have previously issued an order in favor the condominium allowing it to amend its answer to add 7 Vestry LLC, Pact Realty, LLC, Paul Jacobson, Avra Jain, Christopher Smith, CMS Architecture and Design, Robert Shapiro, Ostreicher Laight Partners LLC, and Ostreicher Construction Corporation as Defendants.

To summarize, the first cause of action is dismissed as against The Andrews Organization, the second cause of action, alleging negligence is dismissed as subsumed in the breach of contract claims, the fourth cause of action survives, the seventh cause of action is dismissed, the eighth and ninth causes of action survive.

The foregoing constitutes the decision and order of the court.

Dated: July 27, 2016



GEOFFREY D. WRIGHT

A JUDGE