

**Board of Mgrs. of the Hudson Tower Condominium
v Thyssenkrupp EI. Corp.**

2017 NY Slip Op 30126(U)

January 20, 2017

Supreme Court, New York County

Docket Number: 162498/15

Judge: Barbara Jaffe

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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THE BOARD OF MANAGERS OF THE HUDSON TOWER Index No. 162498/15
CONDOMINIUM,

Plaintiff, Mot. seq. no. 001

-against- **DECISION AND ORDER**

THYSSENKRUPP ELEVATOR CORPORATION,

Defendant.

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BARBARA JAFFE, J.:

For plaintiff:
Philip P. Foote, Esq.
770 Lexington Ave., 6th Fl.
New York, NY 10065
212-755-2800

For defendant:
Karen L. Wagner, Esq.
Babchik & Young, LLP
245 Main St.
White Plains, NY 10601
914-470-0001

By notice of motion, defendant moves pursuant to CPLR 3211(a)(5) and (7) for an order dismissing all claims related to the parties' modernization contract as contained in the second, third, and fourth causes of action in the amended complaint based on the expiration of the applicable statute of limitations, pursuant to CPLR 3211(a)(1) dismissing all claims related to the modernization and maintenance contracts as contained in the second, third and fourth causes of action of the amended complaint as barred by documentary evidence, pursuant to CPLR 3211(a)(7) dismissing the complaint for failure to state a cause of action, pursuant to CPLR 3016 dismissing the third cause of action as inadequately pled and duplicative, dismissing the claim for attorney fees on the ground that it is not a cognizable cause of action, and dismissing the first cause of action as to all non-actionable maintenance. Plaintiff opposes, although at oral argument it agreed to dismissal of the claims related to the modernization contract.

I. PERTINENT BACKGROUND

This action arises from the parties' agreement related to the maintenance of elevators within the subject condominium. The maintenance contract at issue is dated May 23, 2005, and provides that the services required thereunder will be furnished for a five-year period, with the building owner having the right to renew the contract year-to-year following the initial five years of services. It also permits attorney fees, costs, and expenses in the event of litigation between the parties. (NYSCEF 14).

By letter dated June 8, 2015, defendant advised plaintiff's managing agent that it "will not be renewing the current elevator maintenance service agreement under the existing terms and conditions," and that its notice of cancellation would take effect on July 8, 2015. (NYSCEF 29).

As set forth in plaintiff's amended complaint, dated January 14, 2016, plaintiff alleges in the first cause of action for breach of contract that from and after October 2007, defendant breached the maintenance contract by failing to service and maintain the elevators adequately, that in October 2007 and February 2009 notices of violations were issued, that between 2008 and 2015, plaintiff retained the services of an elevator consultant to advise it of the deficiencies in defendant's maintenance obligations, that from 2008 to 2015 plaintiff continually complained to defendant concerning its deficiencies, and that in July 2015 defendant resigned from the contract. (NYSCEF 12).

As its second cause of action for negligence, plaintiff alleges that defendant failed to perform its duties under the contract to maintain the elevators and thereby caused the elevators to be inadequately maintained. In the third cause of action for a declaratory judgment, plaintiff asserts that the maintenance contract constituted a scheme to deceive and defraud plaintiff by

false and fraudulent misrepresentations as to the proper and adequate maintenance of the elevators, that defendant's conduct defeated the parties' intent in making the contract, and that a judicial declaration is warranted that defendant breached the contract. In its fourth cause of action for gross negligence, plaintiff alleges that defendant acted with egregious indifference to plaintiff's rights, failed to exercise appropriate diligence, demonstrated a reckless disregard for the true conditions of the elevators, thus seeking damages including punitive damages. Plaintiff also seeks attorney fees and costs of litigation as its fifth cause of action. (*Id.*).

II. ANALYSIS

Even if the maintenance contract expired in 2010, having commenced this action within six years thereof, plaintiff has sufficiently stated a cause of action for breach of contract.

Defendant's 2015 letter, by which it apparently cancelled the maintenance contract as of July 2015 does not conclusively establish that plaintiff's negligence and gross negligence claims are time-barred. However, its cause of action for negligence fails to state a cause of action as the negligent performance of a contract is not a cognizable claim (*Wildenstein v 5H & Co., Inc.*, 97 AD3d 488 [1st Dept 2012] [breach of contract not considered tort unless legal duty independent of contract has been violated]; *Bd. of Mgrs. of Chelsea 19 Condominium v Chelsea 19 Assoc.*, 73 AD3d 581 [1st Dept 2010] [claim for negligent performance of contract not cognizable]; *Saint Patrick's Home for the Aged and Infirm v Laticrete Intl., Inc.*, 267 AD2d 166 [1st Dept 1999] [alleging that breach of contract duty arose from lack of due care will not transform breach of contract into tort]), and, in any event, is duplicative of a breach of contract claim (*Bd. of Mgrs. of Soho N. 267 W. 124th St. Condominium v NW 124 LLC*, 116 AD3d 506 [1st Dept 2014] [allegations of negligence based on defects in construction of condominium sound in breach of

contract, not tort]; *Hamlet on Olde Oyster Bay Home Owners Assn., Inc. v Holiday Org., Inc.*, 65 AD3d 1284 [2d Dept 2009], *lv denied* 15 NY3d 742 [2010] [negligence claim based on construction defects dismissed as duplicative of breach of contract claim]).

Plaintiff's allegations related to its cause of action for gross negligence fail to allege, other than conclusorily, or establish the essential elements of, intentional wrongdoing or a reckless indifference to the rights of others (*see Sommer v Fed. Signal Corp.*, 79 NY2d 540 [1992] [gross negligence depends on intentional wrongdoing and conduct evincing a reckless indifference to rights of others]), and it is duplicative of the breach of contract claim (*see Abacus Fed. Savings Bank v ADT Sec. Servs., Inc.*, 18 NY3d 675 [2012] [allegations that breach of contract occurred due to gross negligence does not give rise to duty independent of contractual relationship]; *OFSI Fund II, LLC v Canadian Imperial Bank of Commerce*, 82 AD3d 537 [1st Dept 2011], *lv denied* 17 NY3d 702 [claim for gross negligence dismissed as it sounded in contract rather than tort, as there was only contractual duty between parties and plaintiff essentially seeking enforcement of bargain]).

Plaintiff's claim for a declaratory judgment is unnecessary and inappropriate as its claim for breach of contract remains viable. (*See Ithilien Realty Corp. v 180 Ludlow Dev. LLC*, 140 AD3d 621 [1st Dept 2016] [declaratory judgment claims sounding in breach of contract dismissed as plaintiff had adequate, alternative remedy in breach of contract claim]).

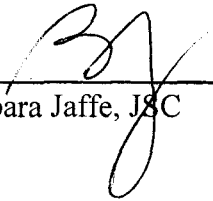
Even if plaintiff is entitled to seek attorney fees, costs, and expenses, a claim for attorney fees may not be maintained as separate cause of action. (*See La Porta v Alacra, Inc.*, 142 AD3d 851 [1st Dept 2016] [cause of action for attorney fees dismissed, but request for fees in prayer for relief remains]).

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendant's motion to dismiss is granted to the extent of dismissing plaintiff's claims for (1) negligence, (2) gross negligence, (3) a declaratory judgment, and (4) attorney fees, and any claims related to the modernization contract, and is otherwise denied.

ENTER:



Barbara Jaffe, JSC

DATED: January 20, 2017
 New York, New York