

Koff v Maxwell-Kates Inc.
2017 NY Slip Op 31667(U)
August 7, 2017
Supreme Court, New York County
Docket Number: 652365/2016
Judge: Erika M. Edwards
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

HOWARD AND LISA KOFF,

Index No.: 652365/2016

Plaintiffs,

DECISION/ORDER

-against-

MAXWELL-KATES INC., EDGEWATER
APARTMENTS INC., JOSEPH LASPINA, JOEL
HAND, DENNIS ALEX, ARDIE BIALEK,
RICHARD COHEN, ADA CARCZMER, THOMAS
GREENBAUM, JAKE SILVERMAN, ANDREW
MARQUARDT, JOHN DOES 1-5, JOHN DOES 6-10,
JANE DOES 1-5, JANE DOES 6-10, ABC CORP.
1-5, and ABC CORP. 6-10,

Defendants.

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

Papers	Numbered
Notice of Motion and Affidavits/Affirmations/ Memos of Law annexed	<u>1</u>
Opposition Affidavits/Affirmations and Memos of Law annexed	<u>2</u>
Reply Affidavits/Affirmations/Memos of Law annexed	<u>3</u>

ERIKA M. EDWARDS, J.:

Plaintiffs Howard and Lisa Koff (“Plaintiffs”) brought this action against Defendants Maxwell-Kates Inc. (“Maxwell-Kates”), Edgewater Apartments Inc. (“Edgewater”), Joseph LaSpina (“LaSpina”), and the members of the Board of Directors, Joel Hand, Dennis Alex, Ardie Bialek, Richard Cohen, Ada Carczmer, Thomas Greenbaum, Jake Silverman and Andrew Marquardt (collectively “Directors”) (all collectively “Defendants”) for declaratory and monetary relief.

Plaintiffs own shares in a cooperative building owned by Edgewater, pursuant to a Proprietary Lease. Maxwell-Kates is the management company, LaSpina is an employee of Maxwell-Kates and manager of the building and the remaining defendants are members of the Board of Directors of the co-op. Plaintiffs' amended complaint alleges thirteen causes of action which are primarily based on fraud, breach of contract and breach of fiduciary duty because of Defendants' alleged improper assessment of \$163,074.85 for legal, engineering, contractor and other fees related to leaks and water damage in areas of the building that Defendants attributed to Plaintiffs' defective solarium located on Plaintiffs' terrace. Additionally, Plaintiffs allege that Defendants improperly rejected their bid package to purchase a maid's room in the building solely because of the unpaid improper charges and fraudulently threatened to terminate the lease and evict Plaintiffs if they did not pay the fees.

The Defendants move to dismiss Plaintiffs' amended complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action and argue Plaintiffs' amended complaint fails to set forth a prima facie case for any cause of action.

For the reasons set forth herein, the court grants Defendants' motion to dismiss in part and denies it in part as per the following:

(1) denies dismissal of subsection (a) of Count One (declaratory judgment) regarding a declaratory judgment to determine that Plaintiffs had no obligation to pay the disputed charges, but grants dismissal of subsection (b) of Count One as to a declaration of any other rights and obligations of the parties as to all Defendants;

(2) grants dismissal of Count Two (negligence) as to all Defendants;

(3) denies dismissal of Count Three (fraud in the inducement) as to Defendants

Edgewater, Maxwell-Kates and LaSpina, but grants dismissal as to the remaining Defendants;

- (4) grants dismissal of Count Four (fraud) as to all Defendants;
- (5) grants dismissal of Count Five (conspiracy to commit fraud) as to all Defendants;
- (6) grants dismissal of Count Six (unjust enrichment) as to all Defendants;
- (7) grants dismissal of Count Seven (prima facie tort-rejection of bid package for maid's room) as to all Defendants;
- (8) grants dismissal of Count Eight (prima facie tort-prevented use of the solarium and terrace) as to all Defendants;
- (9) grants dismissal of Count Nine (interference of contract) as to all Defendants;
- (10) grants dismissal of Count Ten (interference with prospective economic advantage) as to all Defendants;
- (11) denies dismissal of Count Eleven (breach of fiduciary duty-rejection of bid package for maid's room) as to Defendants Edgewater and the Directors, but grants dismissal as to Defendants Maxwell-Kates and LaSpina;
- (12) grants dismissal of Count Twelve (breach of fiduciary duty-failure to repair/improper charges) as to Defendants LaSpina and the individual Directors, but denies dismissal as to Defendants Edgewater and Maxwell-Kates; and
- (13) denies dismissal of Count Thirteen (breach of contract) as to Defendant Edgewater, but grants it as to the other Defendants.

There was water damage in the apartment below Plaintiffs' apartment which resulted in prior litigation between the parties in Housing and Civil Courts. After an investigation, including multiple inspections and water tests, Edgewater determined that the water damage was caused by leaks from defects in Plaintiffs' solarium. Edgewater required Plaintiffs to remove the solarium so Edgewater could repair the terrace floor underneath it. Plaintiffs disagree and argue

in substance that there was no definitive determination that defects in their solarium caused the water damage; the engineer reports were inconclusive as to the cause of the water infiltration; the terrace and other areas of the building caused or contributed to the leaks; and such maintenance and repairs were not Plaintiffs' responsibility. Plaintiffs allege that Defendants improperly assessed them fees and costs for engineering, contractor and legal fees in connection with the inspections, repairs and maintenance of the solarium, terrace and water infiltration in other areas of the building. Plaintiffs paid the disputed fees under protest and reserved their right to challenge payment of the fees.

Plaintiffs, Edgewater, Maxwell-Kates (and Plaintiffs argue LaSpina) stipulated in a previous action that Plaintiffs would remove the solarium so Edgewater could make necessary repairs to the terrace membrane and Edgewater agreed not to unreasonably withhold its consent for Plaintiffs to rebuild the solarium. Plaintiffs further allege that Defendants never intended to permit Plaintiffs to rebuild the solarium so they refused to approve the reconstruction plans and imposed unreasonable conditions on Plaintiffs, which were not imposed on other shareholders, to prevent them from rebuilding.

When considering Defendants' motion to dismiss Plaintiffs' amended complaint for failure to state a cause of action, pursuant to CPLR 3211(a)(7), the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the Plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). A court may freely consider affidavits submitted by a plaintiff to remedy any defects in the complaint, but the court should not consider whether the plaintiff has simply stated a cause of action, but should consider whether the plaintiff actually has one (*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept

2009]). Normally, a court should not be concerned with the ultimate merits of the case (*Anguita v Koch*, 179 AD2d 454, 457, 579 NYS2d 335 [1st Dept 1992]). However, these considerations do not apply to allegations consisting of bare legal conclusions as well as factual claims which are flatly contradicted by documentary evidence (*Simkin v Blank*, 19 NY3d 46, 52, 945 NYS2d 222, [2012]).

1) Declaratory Judgment

Defendants move to dismiss Plaintiffs' First Cause of Action for a declaratory judgment (a) determining that Plaintiffs had no obligation to pay Edgewater \$163,074.85 for the disputed charges and (b) for "a declaration as to any other rights and obligations of the parties as may be required to affect comprehensive resolution of the controversy between and among the parties" (Plaintiffs' amended complaint at p. 5).

Declaratory relief is unnecessary and inappropriate when Plaintiffs have an adequate, alternative remedy in breach of contract (*Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988] [internal citations omitted]).

The court determines that a justiciable controversy exists, even though Plaintiffs paid the fees, because Plaintiffs repeatedly disputed the charges, paid them under protest when Defendants attempted to cancel their Proprietary Lease and evict Plaintiffs and Plaintiffs reserved their right to challenge the validity of the fees. Additionally, Plaintiffs seek a declaratory determination of whether Plaintiffs were required to pay the disputed charges pursuant to the terms of the Proprietary Lease and Alteration Agreement, which includes a determination of whether Plaintiffs are responsible for the water damage. To make this determination, the court must consider the engineering reports, amount billed for each service or repair and other evidence in the case. Even though a portion of the consideration may be the

basis of Plaintiffs' breach of contract claim, such determination is not dispositive. Additionally, not all Defendants were a party to the applicable contracts. Therefore, Plaintiffs do not solely have an adequate remedy at law against all Defendants based on their breach of contract claim.

Here, Plaintiffs set forth a cognizable cause of action for declaratory relief as to whether Plaintiffs were obligated to pay the disputed charges, even though many of the rights and obligations of the parties are governed by the terms of the Proprietary Lease and Alteration Agreement and the parties disagree on the interpretation of the agreements. However, the court dismisses Plaintiffs second request for a declaration as to "any other rights and obligations of the parties," as this request is vague and fails to put the Defendants on notice of what rights and obligations Plaintiffs are asking the court to address (Plaintiffs' amended complaint at p. 5).

Therefore, the court denies Defendants' motion to dismiss subsection (a) of Plaintiffs' First Cause of Action for a declaratory judgment as against all Defendants, but grants it as to subsection (b) as against all Defendants.

2) Negligence

Defendants move to dismiss Plaintiffs' Second Cause of Action for negligence based on Defendants' alleged failure to inspect, maintain and repair the common areas of the building, which included Plaintiffs' terrace and other areas, and Defendants' improper assessment of the disputed charges. Plaintiffs entered into contracts with Defendant Edgewater and Plaintiffs failed to sufficiently allege a violation of a legal duty independent of the obligation imposed by the contracts (*Clark-Fitzpatrick, Inc. v Long Island R. Co.*, 70 NY2d 382, 389-390 [1987] [internal citations omitted]). "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" (*id.* at 389 [internal citation omitted]).

The other Defendants were not parties to the agreements. Plaintiffs' failed to allege that these Defendants owed a duty to Plaintiffs and they failed to provide facts alleging the relationship and source of duties owed by any of the Defendants. Plaintiffs simply rely on conclusory allegations that all Defendants had the same duties and breached those duties. Additionally, Plaintiffs failed to allege any reason why the individual Defendants could be held liable for a company's alleged negligence.

Thus, the court grants dismissal of Plaintiffs Second Cause of Action for negligence as to all Defendants.

3) Fraud in the Inducement

The court denies Defendants' motion to dismiss Plaintiffs' Third Cause of Action for fraud in the inducement against Edgewater, Maxwell-Kates and LaSpina, but grants it as to the Directors. Plaintiffs allege that Defendants fraudulently induced Plaintiffs to enter into a stipulation in the previous litigation where Plaintiffs agreed to remove the solarium to allow Edgewater to make necessary repairs to Plaintiffs' terrace. Plaintiffs allege that Defendants misrepresented that they would not unreasonably withhold their consent to permit Plaintiffs to rebuild the solarium when Defendants never intended to grant permission and Defendants imposed unreasonable conditions to prevent the reconstruction.

The stipulation was signed by Plaintiffs, the representative of Defendants Edgewater and Maxwell-Kates and the plaintiff in the prior action. Plaintiffs allege that LaSpina was involved in making the fraudulent misrepresentations and he was bound by the terms of the stipulation because he was a party to the prior action and represented by the same attorney who appeared in the action for Edgewater and Maxwell-Kates and drafted papers. Defendants disagree.

To prove fraudulent inducement, Plaintiffs must demonstrate that Defendants intentionally misrepresented a material fact to defraud or mislead Plaintiffs, and that Plaintiffs reasonably relied on the misrepresentation and suffered damages as a result (*Connaughton v Chipotle Mexican Grill, Inc.*, 135 AD3d 535, 650 [1st Dept 2016]). Fraudulent inducement claims require specificity, including the circumstances of the alleged fraud (CPLR 3016[b]). Where a cause of action or defense is based upon fraud the circumstances constituting the wrong shall be stated in detail (*Pludeman v Northern Leasing Sys., Inc.*, 10 NY3d 486, 491 [2008] [internal quotations and citations omitted]).

General allegations that Defendants entered into a contract with no intent to perform are insufficient to support Plaintiffs' fraudulent inducement claim. However, it is sufficient if Plaintiffs pled that they were induced to enter into a contract based on Defendants' promise to perform and that Defendants, at the time they made the promise, had a preconceived and undisclosed intention of not performing the contract, then such a promise would constitute a representation of present fact collateral to the terms of the contract (*Manas v VMS Assoc., LLC*, 53 AD3d 451, 453 [1st Dept 2008]).

Here, it is clear that Defendants Edgewater and Maxwell-Kates were parties to the stipulation and, accepting the allegations in the amended complaint as true, the court includes Defendant LaSpina as being bound by the stipulation. Plaintiffs failed to set forth sufficient facts to allege that they were fraudulently induced by any Defendant who was not a party to the Stipulation. However, as to Edgewater, Maxwell-Kates and LaSpina, the court determines that Plaintiffs sufficiently state a cause of action for fraudulent inducement against these three Defendants with the required specificity as Plaintiffs sufficiently alleged that Defendants Edgewater, Maxwell-Kates and LaSpina misrepresented a fact which they knew to be false, with

the intent to induce Plaintiffs' reliance on it, and which caused harm to Plaintiffs for their justifiable reliance upon it (*see New York City Housing Auth. v Morris J. Eisen, P.C.*, 276 AD2d 78, 85 [1st Dept 2000]; *Tierney v Capricorn, L.P.*, 189 AD2d 629, 631 [1st Dept 1993]).

Therefore, the court denies dismissal of Plaintiffs' Third Cause of Action for fraud in the inducement as to Defendants Edgewater, Maxwell-Kates and LaSpina, but grants it as to the Directors.

4) Fraud

Plaintiffs' Fourth Cause of Action for fraud alleges in substance that Defendants fraudulently charged Plaintiffs the disputed additional fees and used such unpaid fees to threaten to terminate the Proprietary Lease to evict Plaintiffs, retained such fees, denied Plaintiffs' bid package to purchase the maid's room and took other unlawful action when they knew Plaintiffs were not responsible for the fees.

To establish fraud, Plaintiffs must show a material misrepresentation of an existing fact, made with knowledge of its falsity, an intent to induce reliance thereon, justifiable reliance upon the misrepresentation, and damages (*MBIA Ins. Corp. v Countrywide Home Loans, Inc.*, 87 AD3d 287, 293 [1st Dept 2011] [internal citation omitted]). General allegations that a defendant entered into a contract with no intent to perform are insufficient to support a fraud claim (*id.* [internal citation omitted]). A defendant's actual knowledge of the fraud "need only be pleaded generally, cognizant, particularly at the pre-discovery stage, that a plaintiff lacks access to the very discovery materials which would illuminate a defendant's state of mind" (*Oster v Kirschner*, 77 AD3d 51, 55 [1st Dept 2010]).

Notwithstanding that discovery has not yet been completed, the court grants Defendants' motion to dismiss Plaintiffs' Fourth Cause of Action for fraud. Plaintiffs failed to sufficiently

allege the elements of fraud with the requisite particularity, failed to sufficiently plead a fraud independent of the breach of contract claim as to Edgewater, or that Defendants intentionally misrepresented a present material fact. Instead, Plaintiffs' allegations pertain to Defendants' misrepresentation of their future intent and comprise of conclusory, general statements about the intent, actions and roles of all Defendants taken together as a whole, when it appears that not every Defendant was responsible for assessing the charges.

Therefore, the court grants Defendants' motion to dismiss Plaintiffs' Fourth Cause of Action for fraud as to all Defendants.

5) Conspiracy to Commit Fraud

Plaintiffs allege that Defendants agreed to unlawfully and fraudulently submit false bills for the disputed charges to Plaintiffs when Defendants knew Plaintiffs were not liable for paying such charges in whole, or in part, and Defendants retained the fees, threatened to terminate the Proprietary Lease to evict Plaintiffs, denied Plaintiffs' bid package to purchase the maid's room and took other unlawful action.

New York does not recognize an independent cause of action in tort for conspiracy (*Salerno v Pandick, Inc.*, 144 AD2d 307, 308 [1st Dept 1988]; *Brackett v Griswold*, 112 NY 454, 467 [1889] [a mere conspiracy to commit a fraud is never of itself a cause of action]). Although a cause of action sounding in civil conspiracy cannot stand alone, it stands or falls with the underlying tort (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472, 474 [1st Dept 2010] [internal citation and quotation omitted]). To establish a claim of civil conspiracy, Plaintiffs must demonstrate the primary tort, plus (1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury (*id.* [internal citation omitted]).

Here, Plaintiffs failed to sufficiently plead this cause of action and, as set forth above, Plaintiffs' underlying fraud claim fails. Therefore, the court grants Defendants' motion to dismiss Plaintiffs Fifth Cause of Action for conspiracy to commit fraud against all Defendants.

6) Unjust Enrichment

Plaintiffs' Sixth Cause of Action for unjust enrichment is based on the stipulation regarding removal of the solarium and alleges that Defendants misrepresented to Plaintiffs that Defendants would permit Plaintiffs to reconstruct the solarium when Defendants knew that they would never do so and Defendants imposed additional conditions on Plaintiffs to prevent them from rebuilding. Plaintiffs further allege that Defendants were unjustly enriched because Defendants prevented Plaintiffs from using their solarium and terrace for an extended period while continuing to receive Plaintiffs' regular monthly maintenance fees for use of the entire apartment, including the terrace and solarium. This area added approximately 100 square feet and Plaintiffs argue that their agreement requires their maintenance fees to be reduced in consideration for the unused portion. Plaintiffs also allege they were damaged because Defendants required them to pay the additional fees associated with the solarium repairs and inspection, plus the costs in preparation of the reconstruction. Defendants argue that Plaintiffs did not pay any additional maintenance fees for use of the solarium or terrace.

Unjust enrichment requires the receipt by one party of money or a benefit to which it is not entitled, at another's expense (*Abacus Fed. Sav. Bank v Lim*, 75 AD3d 472 [1st Dept 2010] [citation omitted]). It is a "quasi-contract claim" that contemplates "an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties concerned" (*IDT Corp. v Morgan Stanley Dean Witter & Co.*, 12 NY3d 132, 142 [2009] [internal quotation marks and citation omitted]). It requires a party to hold property "under such circumstances that

in equity and good conscience he ought not to retain” (*Sharp*, 40 NY2d at 123). Such equitable consideration is “essentially a legal inference drawn from the circumstances surrounding a transfer of property and the relationship of the parties” (*id.*).

The court grants dismissal of Plaintiffs’ Sixth Cause of Action for unjust enrichment against all Defendants. It appears that Plaintiffs paid the monthly maintenance fees for Edgewater’s use in the building. The other Defendants did not directly receive the benefit of the money. The court dismisses this claim against Edgewater because Plaintiffs failed to sufficiently plead this claim and because an express contract exists between Plaintiffs and Edgewater which Edgewater relied upon to charge Plaintiffs the disputed fees. Therefore, the alleged conduct is duplicative of Plaintiffs’ breach of contract claim as to Edgewater (*see Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 388 [1987]). Additionally, this claim is dismissed against the other Defendants because Plaintiffs failed to set forth the benefit received by the remaining Defendants and, to the extent that the allegations set forth the alleged conduct of each Defendant, such conduct does not rise to the level of such an injustice to require this equitable remedy.

Therefore, the court dismisses Plaintiffs’ unjust enrichment claim against all Defendants.

7) Prima Facie Tort-Rejection of Bid Package to Purchase Maid’s Room

Plaintiffs’ Seventh Cause of Action for prima facie tort alleges that, “[w]ithout justification and solely to harm Plaintiffs and to coerce Plaintiffs into paying the disputed charges” Defendants’ rejected Plaintiffs’ bid package to purchase a maid’s room in the building which caused Plaintiffs to suffer financial losses including the loss of the maid’s room, loss of investment opportunities when they had to liquidate \$200,000 for the purchase price, required payments to the owner of the maid’s room during the approval process and Defendants billed

Plaintiffs for legal fees in connection with the review and rejection of the bid package. Plaintiffs seek damages, costs, attorney's fees, and other relief.

To state a claim for prima facie tort, Plaintiffs must plead "(1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]). A critical element is that Plaintiffs suffered specific and measurable loss, which requires an allegation of special damages (*id.* [internal citation and quotation omitted]; *Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Allegations of special damages must be fully and accurately stated and even round figures, with no attempt at itemization, do not sufficiently state special damages (*Franklin v Daily Holdings, Inc.*, 135 AD3d 87, 93 [1st Dept 2015] [internal citation and quotation omitted]). To recover, malevolence must be the sole motive of Defendants' otherwise lawful act, unless Defendants act in disinterested malevolence (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983] [internal citation and quotation omitted]).

Here, even after affording the pleading a liberal construction and accepting all facts as alleged in the amended complaint as true, Plaintiffs failed to sufficiently plead malevolence as the sole motivating factor and special damages. Plaintiffs alleged in substance that Defendants' intent included a desire to coerce Plaintiffs into paying the disputed charges, which is inadequate. Additionally, Plaintiffs failed to demonstrate that such coercion rose to the level of being unlawful, such as extortion, which would be improper. Also, Plaintiffs are required to plead special damages and it is not enough for Plaintiffs to simply mention general categories of damages.

Therefore, the court dismisses Plaintiffs' Seventh Cause of Action for prima facie tort for the rejection of Plaintiffs' bid package to purchase the maid's room.

8) Prima Facie Tort-Prevented Use of the Solarium and Terrace

Plaintiffs' Eighth Cause of Action is for prima facie tort pertaining to Defendants' prevention of Plaintiffs use of their solarium and terrace without justification and solely to harm Plaintiffs and coerce Plaintiffs into paying the disputed fees. Plaintiffs allege that they suffered financial harm because they did not have use of their solarium or terrace and they incurred costs to repair and remove it from the terrace and were assessed additional fees.

As discussed above regarding Plaintiffs' other prima facie tort claim, the court dismisses this prima facie tort claim as against all Defendants because Plaintiffs failed to allege that malevolence was Defendants' sole motivating factor and they failed to allege special damages.

9) Interference of Contract

Plaintiffs' Ninth Cause of Action is for interference of contract is based on Defendants' alleged refusal to approve Plaintiffs' contract to purchase the maid's room from a third-party seller because of Plaintiffs' refusal to pay the disputed charges. Plaintiffs alleged that they were unable to perform the contract and that they suffered financial losses because they could not use the maid's room or the \$200,000 in liquidated funds and they had to pay other costs and expenses related to the bid package.

Here, Plaintiffs failed to state whether their claim is for intentional interference with contract or tortious interference with contract, which require slightly different elements. Tortious interference with contract requires (1) the existence of a valid contract between the Plaintiffs and a third-party, (2) Defendants' knowledge of that contract, (3) Defendants' intentional procurement of the third-party's breach of the contract without justification, (4) actual

breach of the contract and (5) damages resulting therefrom (*Lama Holding Co. v Smith Barney Inc.*, 88 NY2d 413, 424 [1996] [internal citations omitted]). Intentional interference with contract requires (1) the existence of a contract, enforceable by Plaintiffs, (2) Defendants' knowledge of the existence of that contract, (3) Defendants' intentional procurement of the breach of the contract and (4) resultant damages to Plaintiffs (*Bogoni v Friedlander*, 197 AD2d 281, 286 [1st Dept 1994]; *Israel v Wood Dolson Co.*, 1 NY2d 116, 120 [1956]). However, based on the arguments, Plaintiffs appear to have based this cause of action on tortious interference with contract, as Plaintiffs set forth the required elements of this claim in their opposition papers.

Although the court is required to construe liberally the allegations in the pleadings on a motion to dismiss, Plaintiffs must support their claim with "more than mere speculation" (*Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006]).

Here, Plaintiffs failed to allege that Defendants intentionally procured the third-party to breach the contract without justification, which is a necessary element to recover under tortious interference with contract. Plaintiffs simply stated in substance that Defendants refused to approve Plaintiffs' proposed contract of sale because of Plaintiffs' refusal to pay the false charges. Plaintiffs failed to state any facts to support a claim that Defendants did anything to procure a breach by a third-party.

Additionally, it appears that the performance of the contract of sale of the maid's room was contingent on the approval of the contract by Edgewater's Board. Plaintiffs failed to sufficiently allege that any of the other non-Director Defendants or Edgewater had any involvement in the decision whether to approve Plaintiffs' bid package. Therefore, this claim is dismissed against Defendants Maxwell-Kates and LaSpina for this reason as well.

As such, the court grants dismissal of Plaintiffs' Ninth Cause of Action for interference of contract against all Defendants.

10) Interference with Prospective Economic Advantage

Plaintiffs' Tenth Cause of Action for interference with prospective economic advantage is based on Defendants' alleged improper rejection of Plaintiffs' bid package which prevented Plaintiffs from purchasing the maid's room and Defendants' alleged intentional interference with the contract. Plaintiffs include the same financial harm related to the rejection of their bid package as set forth above.

Tortious interference with prospective economic relations requires Plaintiffs to allege that they would have entered into an economic relationship but for the Defendants' wrongful conduct which resulted in damages (*Vigoda v DCA Prods. Plus Inc.*, 293 AD2d 265, 266 [1st Dept 2002]).

Here, Plaintiff failed to demonstrate that Defendants' alleged actions were the sort of egregious wrongdoing that might have supported this claim or that such actions were independently unlawful, that they constituted an independent tort, that they had an evil motive, or that Defendants' conduct was for the sole purpose of inflicting intentional harm on Plaintiffs (*Carvel Corp. v Noonan*, 3 NY3d 182, 189-190 [2004]). Even if Plaintiffs has sufficiently pled that Defendants' sole motive was to intentionally harm Plaintiffs, then Plaintiffs would still have to allege that such conduct was directed against the third-party seller and not Plaintiffs (*id.* at p. 192 [internal citations omitted]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614, 621 [1996]; *Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 193-194 [1980]). Plaintiffs failed to allege that any conduct was directed towards the seller or any third-party.

Therefore, Plaintiffs failed to allege the necessary elements of this claim against any Defendant and the court dismisses Plaintiffs' Tenth Cause of Action.

11) Breach of Fiduciary Duty-Rejection of Bid Package to Purchase Maid's Room

Plaintiffs' Eleventh Cause of Action for breach of fiduciary duty alleges that Defendants had a duty to act in good faith and to treat Plaintiffs as equitably and fairly as other shareholders of the Edgewater and that Defendants breached their duty to Plaintiffs by improperly, arbitrarily and maliciously failing to approve Plaintiffs' bid package to purchase the maid's room.

Plaintiffs alleged the same damages related to rejection of their bid package as set forth above.

The elements of breach of a fiduciary duty are (1) the existence of a fiduciary duty; (2) breach of that duty; and (3) a showing that the breach was a substantial factor in causing an identifiable loss (*People v Grasso*, 50 AD3d 535, 545 [1st Dept 2008]). To establish a fiduciary relationship, Plaintiffs must show that Defendants were under a duty to act for or to give advice for the benefit of Plaintiffs upon matters within the scope of the relation (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005] [internal quotation and citation omitted]).

Defendants argue in substance that Plaintiffs failed to comply with the heightened pleading requirement of CPLR 3016(b) to support this claim as Plaintiffs' allegations are conclusory and fail to include detailed facts to support their claim that Defendants owed a fiduciary duty to Plaintiffs and the specific misconduct that allegedly breached this duty. Additionally, Defendants argue that Edgewater does not owe Plaintiffs a fiduciary duty because a corporation does not owe a fiduciary duty to its members or shareholders, Maxwell-Kates and LaSpina do not owe a fiduciary duty to Plaintiffs because a managing agent and its employee of a co-op do not owe a fiduciary duty to the shareholders, but only to the corporation, and the individual Directors are protected by the business judgment rule.

Under the business judgment rule, it is presumed that the actions of a residential cooperative's directors are taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes (*Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Absent a showing of a breach of fiduciary duty, the exercise of the co-op board's powers for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient (*40 W. 67th St. v Pullman*, 296 AD2d 120, 126 [1st Dept 2002] [internal citations and quotations omitted]).

When considering a motion to dismiss for failure to state a cause of action, the court cannot consider Defendants' substantive arguments regarding the merits of the case or the applicability of the business judgment rule. However, when affording the pleading a liberal construction, according Plaintiffs the benefit of every possible inference, including additional allegations incorporated by reference, the court determines that Plaintiffs have adequately pled this cause of action against Edgewater and the Directors only, but they failed to set forth sufficient facts to allege that Defendants Maxwell-Kates and LaSpina owed Plaintiffs a fiduciary duty related to this cause of action, nor how they breached this duty based on their involvement in the alleged improper decision to reject Plaintiffs' bid package.

Therefore, the court denies Defendants' motion to dismiss this claim against Defendants Edgewater and the Directors, but grants it as to Defendants Maxwell-Kates and LaSpina.

12) Breach of Fiduciary Duty-Failure to Repair/Improper Charges

Plaintiffs' Twelfth Cause of Action for breach of fiduciary duty is based on Defendants' alleged breach of their duty to act in good faith and to treat Plaintiffs as equitably and fairly as other shareholders by failing to timely inspect, repair, and/or maintain certain common areas of the building and portions of Plaintiffs' terrace, attempting to cancel Plaintiffs' Proprietary Lease,

billing Plaintiffs for the disputed charges and delaying the reconstruction of Plaintiffs' solarium which caused Plaintiffs to sustain property damage and other financial losses.

Here, as discussed with Plaintiffs' breach of fiduciary duty claim pertaining to the rejection of the bid package, Plaintiffs failed to set forth sufficient facts to allege that each Defendant owed Plaintiffs a fiduciary duty or how they were involved in breaching said duty. However, when affording the pleading a liberal construction, according Plaintiffs the benefit of every possible inference, including additional allegations incorporated by reference, the court determines that Plaintiffs have adequately pled this cause of action against Defendants Edgewater and Maxwell-Kates, but they failed to set forth sufficient facts to allege that any of the individual Defendants owed Plaintiffs a fiduciary duty related to this cause of action, nor how they breached this duty based on their involvement with the alleged conduct.

Therefore, the court dismisses this cause of action against Defendants LaSpina and the individual Directors, but denies dismissal against Defendants Edgewater and Maxwell-Kates.

13) Breach of Contract

Plaintiffs' Thirteenth Cause of Action for breach of contract alleges in substance that Defendants materially breached the terms of Plaintiffs' Proprietary Lease by failing to repair and maintain portions of the building and Plaintiffs' terrace to prevent the water infiltration and resultant damage, preventing Plaintiffs' quiet enjoyment of their apartment and failing to permit Plaintiffs or their representatives from inspecting certain records at Maxwell-Kates' office. As a result of Defendants' conduct, Plaintiffs claim property damage financial losses related to their defense of the law suits and payment of the disputed fees, rejection of their bid package, loss of quiet enjoyment of their apartment and other damages.

The elements of breach of contract are (1) the existence of a valid contract, (2) plaintiff's performance of its obligations under the contract, (3) defendant's breach, and (4) resulting damages (*see Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478, 479 [1st Dept 2007]; *Stonehill Capital Mgt., LLC v Bank of the West*, 28 NY3d 439, 448 [2016]).

Here, the Proprietary Lease was between Plaintiffs and Edgewater only. Therefore, none of the other Defendants were parties to the Lease and Plaintiffs failed to allege any contractual obligation owed to them by the other Defendants.

Therefore, the court denies dismissal of this claim against Defendant Edgewater, but grants it as to the other Defendants.

CONCLUSION

As set forth herein, the court grants Defendants' motion to dismiss the following claims: Count One, subsection (b) (declaratory judgment as to any other rights and obligations of the parties); Count Two (negligence), Count Three (fraud in the inducement) as to the individual Director Defendants; Count Four (fraud), Count Five (conspiracy to commit fraud), Count Six (unjust enrichment), Count Seven (prima facie tort-rejection of bid package for maid's room), Count Eight (prima facie tort-prevented use of the solarium and terrace), Count Nine (interference of contract); Count Ten (interference with prospective economic advantage); Count Eleven (breach of fiduciary duty-rejection of bid package for maid's room) as to Defendants Maxwell-Kates and LaSpina; Count Twelve (breach of fiduciary duty-failure to repair/improper charges) as to Defendants LaSpina and the individual Directors; Count Thirteen (breach of contract) as to Defendants Maxwell-Kates, LaSpina and the individual Directors.

The court denies dismissal of the following claims which remain: Count One, subsection (a) (declaratory judgment as to a determination that Plaintiffs had no obligation to pay the

disputed charges) as to all Defendants; Count Three (fraud in the inducement) as to Defendants Edgewater, Maxwell-Kates and LaSpina; Count Eleven (breach of fiduciary duty-rejection of bid package for maid's room) as to Defendants Edgewater and the Directors; Count Twelve (breach of fiduciary duty-failure to repair/improper charges) as to Defendants Edgewater and Maxwell-Kates; and Count Thirteen (breach of contract) as to Defendant Edgewater.

Accordingly, it is hereby

ORDERED that the motion to dismiss by Defendants Maxwell-Kates Inc., Edgewater Apartments Inc., Joseph LaSpina, Joel Hand, Dennis Alex, Ardie Bialek, Richard Cohen, Ada Carczmer, Thomas Greenbaum, Jake Silverman and Andrew Marquardt is granted in part and denied in part as per the following without prejudice and without costs and the court hereby:

(1) denies dismissal of subsection (a) of Count One (declaratory judgment) regarding a declaratory judgment to determine that Plaintiffs had no obligation to pay the disputed charges as to all Defendants, but grants dismissal of subsection (b) regarding a declaration as to any other rights and obligations of the parties as to all Defendants;

(2) grants dismissal as to all Defendants of Count Two (negligence), Count Four (fraud), Count Five (conspiracy to commit fraud), Count Six (unjust enrichment), Count Seven (prima facie tort-rejection of bid package for maid's room), Count Eight (prima facie tort-prevented use of the solarium and terrace), Count Nine (interference of contract); and Count Ten (interference with prospective economic advantage);

(3) denies dismissal of Count Three (fraud in the inducement) as to Defendants Edgewater Apartments Inc., Maxwell-Kates Inc. and Joseph LaSpina, but grants dismissal as to Defendants Joel Hand, Dennis Alex, Ardie Bialek, Richard Cohen, Ada Carczmer, Thomas Greenbaum, Jake Silverman and Andrew Marquardt.;

(4) denies dismissal of Count Eleven (breach of fiduciary duty-rejection of bid package for maid's room) as to Defendants Edgewater Apartments Inc., Joel Hand, Dennis Alex, Ardie Bialek, Richard Cohen, Ada Carczmer, Thomas Greenbaum, Jake Silverman and Andrew Marquardt, but grants dismissal as to Defendants Maxwell-Kates Inc. and Joseph LaSpina;

(5) grants dismissal of Plaintiffs' Twelfth Cause of Action (breach of fiduciary duty-failure to repair/improper charges) against Defendants Joseph LaSpina, Joel Hand, Dennis Alex, Ardie Bialek, Richard Cohen, Ada Carczmer, Thomas Greenbaum, Jake Silverman and Andrew Marquardt, but denies dismissal against Defendants Edgewater Apartments Inc. and Maxwell-Kates Inc.; and

(6) denies dismissal of Plaintiffs' Thirteenth Cause of Action for breach of contract against Defendant Edgewater Apartments Inc., but grants it as to Defendants Maxwell-Kates Inc., Joseph LaSpina, Joel Hand, Dennis Alex, Ardie Bialek, Richard Cohen, Ada Carczmer, Thomas Greenbaum, Jake Silverman and Andrew Marquardt; and it is further

ORDERED that the parties must appear for a status conference on October 12, 2017, at 9:30 a.m., in Part 47, Room 320, 80 Centre Street, New York, New York.

Date: August 4, 2017



HON. ERIKA M. EDWARDS