Gray v Walton Condominium
2018 NY Slip Op 30537(U)
March 28, 2018
Supreme Court, New York County
Docket Number: 159750/16
Judge: Paul A. Goetz

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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ALLYSON GRAY,

Plaintiff,

Index No.: 159750/16
DECISION/ORDER

-against-

THE WALTON CONDOMINIUM, THE BOARD OF MANAGERS OF THE WALTON CONDOMINIUM and 264 H20 BORROWER, LLC,

Defendants.

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HON. PAUL A. GOETZ, J.S.C.:

In this residential landlord/tenant action, plaintiff Allyson Gray (Gray) moves for injunctive relief via order to show cause (motion sequence number 001), and defendant 264 H20 Borrower, LLC (the sponsor) moves separately to dismiss the complaint, pursuant to CPLR 3211 (motion sequence number 002). For the following reasons, the order to show cause is denied, and the motion is granted in part and denied in part.

BACKGROUND

Gray is the owner of apartment 6A in a residential condominium building (the building) located at 264 Water Street in the County, City and State of New York. *See* order to show cause, exhibit A (complaint), ¶ 1. The defendant Walton Condominium (the condominium) is the condominium corporation that owns the building, the codefendant Board of Managers of the Walton Condominium (the board) is the association of apartment unit owners that manages the building, and 264 H20 is the condominium's sponsor. *Id.*, ¶¶ 2-5.

Gray purchased apartment 6A via a contract that she closed with the sponsor on February 11, 2015 (the purchase agreement). *See* order to show cause, exhibit A (complaint), ¶ 6. The

relevant portions of the purchase agreement provide as follows:

> "1. The Plan - Purchaser [i.e., Gray] acknowledges having received and read a copy of the Offering Plan for the Walton and all amendments thereto . . . (the Plan) . . . . The Plan is incorporated herein by reference and made a part hereof with the same force ane effect as if set forth at length.
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> * * *
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> "17. Condition of Property - The signing of this Agreement by Purchaser signifies Purchaser's acceptance of the condition of the Property (as represented by Sponsor in the Plan), including the Building, the Common Elements, the Unit and all fixtures, machinery, equipment, furnishings, appliances, installations and other personal property contained therein . . ."

Id., exhibit B. The building's offering plan (the offering plan), referenced above, includes a copy of the condominium's declaration, and of its by-laws (the by-laws). The relevant portions of the by-laws provide as follows:

> "Article 2 - Condominium Board
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> "Section 2.4 - Powers and Duties of the Condominium Board
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> "(A) The Condominium Board shall have all of the powers and duties necessary for, or incidental to, the administration of the affairs of the Condominium, provided, however, that the Condominium Board shall not have such powers and duties that by Law, or pursuant to the terms of the Declaration and these By-Laws, may not be delegated to the Condominium Board by the Unit Owners. Without intention to limit the generality of the foregoing in any respect, the Condominium Board shall have the following specific powers and duties:
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> "(i) to operate, maintain, repair, restore, add to, improve, alter or replace the Common Elements, including, without limitation, as the Condominium Board shall deem necessary in connection therewith, (a) the purchase and leasing of supplies, equipment and material, and (b) the employment, compensation and dismissal of personnel.
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> * * *
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> "Article 5 - Operation of the Property

"Section 5.1 - Maintenance and Repairs

"(A) Except as otherwise provided in the Declaration or in these By-Laws, all painting, decorating, maintenance, repairs and replacements, whether structural or non-structural, ordinary or extraordinary:

"(i) in or to any Unit and all portions thereof (including, but not limited to, the interior walls, partitions, ceilings and floors of the Unit, kitchen and bathroom fixtures and appliances, windows and Terrace doors, the interior face of all entrance doors and their interior facing frames and saddles, exposed plumbing, gas and heating fixtures and equipment, heating and cooling systems [i.e., incremental units], lighting fixtures and electrical panels, outlets, switches, branch wiring and fixtures of any Common Elements incorporated therein pursuant to Paragraph [B] of Section 5.8 hereof, but excluding any other Common Elements contained therein) shall be performed by the owner of such Unit at such Unit Owner's sole cost and expense;

* * *

"(iv) in or to the Residential Limited Common Elements, specifically including Terraces and appurtenances thereto, except as set forth in paragraph (B) of section 5.8 hereof, shall be performed (a) by the Condominium Board as a Common Expense, if involving structural maintenance, repairs or replacements (including, but not limited to, the repair of any leaks that are not caused by the acts or omissions of the Unit Owner having direct and exclusive access thereto), or (b) by the Unit Owner having direct and exclusive access thereto as such Unit Owner's sole cost and expense, if involving ordinary maintenance of Terraces. Notwithstanding the above, the Unit Owner is responsible for ordinary maintenance of Terraces and for keeping Terraces free of snow, ice, debris and water accumulation and for replacing and/or repairing the lighting fixtures, bulbs, exposed water lines (i.e., spigots) and electrical outlets on the Terraces.

* * *

"Article 6 - Common Charges

"Section 6.2 - Payment of Common Charges.

> "(A) All Unit Owners (including Sponsor with respect to Unsold Units for so long as the same are owned thereby) shall be obligated to pay Common Charges, Residential Common Charges, if applicable, and Special Assessments assessed by the Condominium Board . . . . To the extent permitted by Law, the Condominium Board shall have a lien on each Unit, on behalf of all Unit Owners, for unpaid Common Charges and Special Assessments assessed against the Unit. Such lien, however, shall be subordinate, to the extent required by law, to any liens for real estate taxes assessed against such Unit and any sums unpaid on a Permitted Mortgage recorded against the Unit.
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> * * *
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> "Section 6.5 - Default in Payment of Common Charges, Residential Common Charges and Special Assessments
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> "(A) The Condominium Board shall take prompt action to collect any Common Charges, Residential Common Charges and Special Assessments due to the Condominium Board that remain unpaid for more than 10 days after the due date for the payment thereof, including, but not limited to, the imposition of late charges, notice fees and the institution of such actions for recovery of interest and expenses as provided in this Article 6. . . . In connection therewith, the Condominium Board shall have the right and obligation to cause liens for all sums due and owing to the Condominium Board to be filed in the Register's Office pursuant to the terms of Section 339-aa of the Condominium Act and/or to institute all other proceedings deemed necessary or desirable . . . ."

Id., exhibit C.

As was previously stated, Gray owns apartment 6A, which is located on the building's sixth floor. *See* order to show cause, exhibit A (complaint), ¶ 1. The apartment units that are located on the building's seventh floor are evidently the ones which include roof terraces. A portion of the living room of apartment 6A is located directly below one such roof terrace. On October 27, 2015, the portion of apartment 6A's ceiling that is situated below that roof terrace collapsed into Gray's unit. *Id.*, ¶ 13. Gray asserts that this collapse resulted from long-term, unremediated water intrusion into her ceiling from the above terrace. *Id.* Gray further asserts that defendants breached their duties, both as fiduciaries and under the condominium's governing

documents, by neglecting and/or failing to perform maintenance and repair work on the roof terrace of the seventh-floor unit above hers. *Id.*, ¶¶ 8-12. Gray states that her unit was rendered uninhabitable by the ceiling collapse, and that she has been forced to lease another apartment, unit 5-C at 20 Stuyvesant Oval (the Stuyvesant Town apartment), as alternative living quarters between October 28, 2015 and November 2, 2106. *Id.*, ¶ 19. Gray also states that she had the collapsed ceiling privately inspected at her own expense, and has determined: 1) that the ceiling had been rendered structurally unsound by the long-term water intrusion; 2) that the collapsed portion of the ceiling contained asbestos; and 3) that the collapsed portion of the ceiling contained toxic mold. *Id.*, ¶¶ 14-18. Gray has presented: 1) copies of the building's governing documents; 2) a copy of her lease for the Stuyvesant Town apartment; 3) a copy of a violations report issued against the building by the New York City Department of Housing Preservation and Development (the HPD report); 4) an expert's report prepared by engineer Paul Angelides about the cause of the ceiling collapse (the Angelides report); 5) a report prepared by Total Environment Restoration Solutions, Inc. concerning the toxic mold in 6A's ceiling (the TERS report); 6) a report prepared by GCI Environmental Advisory, Inc. concerning the asbestos in apartment 6A's ceiling (the GCI report); and 7) a report prepared by Merritt Engineering Consultants, PC (Merritt) concerning the structural deficiencies in apartment 6A's ceiling (the Merritt report). *Id.*, exhibits B, C, E, F, G, H, I, J.

The condominium and board oppose Gray's application on the grounds that: 1) Gray is not entitled to the requested relief; 2) the order to show cause is procedurally improper; 3) the board is not a contractual party to any of the building's governing documents; and 4) the condominium has already undertaken significant repair and renovation work to both apartment

6A and the roof terrace above it. *See* Johnson affirmation in opposition (motion sequence number 001), ¶¶ 1-23. In connection with the latter argument, the condominium and the board have presented a summary of invoices from Merritt that show a total expenditure of $447,241.00 between April 2016 and April 2017, purportedly for such work. Id., exhibit G. The condominium and the board also argue that the notice of lien that they filed against Gray on June 14, 2016 was proper, since she had failed to pay the carrying charges for apartment 6A through that date, and they further assert that they are now within their rights to foreclose on that lien and to sell apartment 6A. *Id.*, Johnson affirmation in opposition, ¶¶ 28-30. The sponsor joins in with the condominium's and the board's opposition. *See* Schreiber affirmation in opposition, ¶¶ 1-4.

In reply, Gray asserts that she has paid all of the carrying charges for apartment 6A into an escrow account during the time that she resided in the Stuyvesant Town apartment. *See* order to show cause, Gray aff, ¶¶ 13-14. Gray also asserts that she only returned to apartment 6A after November 2, 2016, despite repair work there not being complete, because simultaneously paying rent for the Stuyvesant Town apartment, carrying charges for apartment 6A, and her mortgage for apartment 6A, created an undue financial hardship for her. *Id.*, ¶¶ 10-12.

The sponsor, which has not yet filed an answer in this action, moves separately to dismiss Gray's complaint as against it, along with the cross claim asserted by the condominium and the board. The sponsor argues that Gray's claims against it are all barred, as a matter of law, either because they are contradicted by documentary evidence (i.e., the building's governing documents), or that they fail to state causes of action. *See* notice of motion (motion sequence number 002), Quaco affirmation, ¶¶ 1-13. The condominium and the board join in the sponsor's motion, except to the extent that it seeks dismissal of their cross claim against the sponsor. *See*

Johnson affirmation in opposition (motion sequence number 002), ¶ 2.

Gray commenced this action on November 8, 2016 by filing a summons and complaint that sets forth causes of action for: 1) negligence; 2) breach of contract (the portions of the offering plan and by-laws that obligated defendants to deliver an apartment unit that was "free and clear of all material defects"); 3) breach of contract (the portions of the offering plan and by-laws that obligated defendants to "timely and properly repair" the cause of the instant water damage); 4) breach of fiduciary duty; 5) breach of the covenant of quiet enjoyment; 6) a rent abatement; 7) constructive eviction; 8) money damages for breach of the warranty of habitability; 9) libel (by improperly corresponding with Gray's bank); 10) tortious interference with contract; 11) libel (by improperly filing a notice of lien); 12) intentional infliction of extreme emotional distress (by improperly filing a notice of lien); 13) an injunction (to withdraw the notice of lien); 14) an injunction (against foreclosing on the notice of lien); and 15) court costs and attorney's fees. *See* order to show cause, exhibit A (complaint). On March 24, 2017, the condominium and the board filed a joint answer with affirmative defenses that also includes a cross claim against the sponsor for "contributory negligence/breach of contract/breach of warranty/contractual indemnity." *See* Johnson affirmation in opposition, exhibit B. As was previously mentioned, the sponsor has not yet filed an answer, but has instead moved to dismiss the complaint. No note of issue has yet been filed in this action, nor has any discovery yet been taken.

Now before the court are Gray's order to show cause for preliminary injunctive relief (motion sequence number 001) and the sponsor's motion to dismiss the complaint (motion sequence number 002).

DISCUSSION

Order to Show Cause (motion sequence number 001)

As was previously mentioned, Gray's order to show cause seeks a preliminary injunction. Pursuant to CPLR 6301:

> A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff's rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff. A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

CPLR 6301. In most cases, "[t]he party seeking a preliminary injunction must demonstrate a probability of success on the merits, danger of irreparable injury in the absence of an injunction and a balance of equities in its favor." *Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 (2005), *citing* CPLR 6301. Gray's request is atypical, however. Her application seeks seven items of relief in a proposed order:

> "A) Directing defendants . . . to immediately correct all violations cited by [HPD] . . .;
>
> "B) [Directing defendants to] immediately correct any and all conditions . . . caused by water leaks emanating from the roof and/or facade of the subject premises . . .;
>
> "C) [Directing defendants to] immediately conduct environmental testing of [apartment 6A] . . . for the presence of toxic mold, asbestos and lead . . .;
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> "D) Directing defendants to reimburse plaintiff for all out of pocket expenses . . . including expenses incurred in seeking alternate housing as well as expenses incurred in performing repairs to [apartment 6A] . . .;

> "E) Directing defendants to abate and return all common charges and assessments paid by plaintiff . . .;
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> "F) Directing defendants to withdraw the Notice of Lien . . .;
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> "G) Enjoining [sponsor] from selling or otherwise transferring title to [apartment 6A] . . . or in the alternative requiring [sponsor] to post a bond sufficient to cover any verdict, judgment or settlement as may be recovered by plaintiff herein . . .;
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> "H) Directing defendants to pay the reasonable attorney's fees, costs and disbursements incurred by plaintiff . . .; and
>
> "I) Awarding . . . such other and further relief as this court may deem just and proper . . .."

See order to show cause, Silberman affirmation, ¶ 2. Counsel for Gray observes that "much of the relief sought herein is in the nature of a declaratory judgment." This statement is a legal non sequitur, however, since neither the complaint nor the order to show cause pleads any claim for declaratory relief. *See* order to show cause, Silberman affirmation, ¶ 26; exhibit A.

Instead, it appears that Gray's application is one for "a mandatory preliminary injunction (one mandating specific conduct), by which the movant would receive some form of the ultimate relief sought as a final judgment, [that] is granted only in 'unusual' situations, 'where the granting of the relief is essential to maintain the status quo pending trial of the action.'" *Second on Second Café, Inc. v Hing Sing Trading, Inc.*, 66 AD3d 255, 264 (1st Dept 2009). "While courts are generally 'reluctant' to grant mandatory preliminary injunctions, and such relief will be granted only where 'the right [thereto] is clearly established,' cases do arise where a provisional remedy of this nature is appropriate. As the Court of Appeals observed more than a century ago:

> "[W]here the complainant presents a case showing or tending to show that affirmative action by the defendant, of a temporary character, is necessary to preserve the status of the parties, then a mandatory injunction may be granted."

Second on Second Café, Inc., 66 AD3d at 265 (internal citations omitted).

Here, Gray does not discuss a "mandatory preliminary injunction" in her moving papers, but rather merely argues that she has demonstrated the right to a preliminary injunction. *See* order to show cause, Silberman affirmation, ¶¶ 26-30. The condominium and the board respond that she has not. *See* Johnson affirmation in opposition, ¶¶ 28-51. The sponsor joins in their opposition. *See* Schieber affirmation in opposition, ¶¶ 2-3.

As an initial observation, the nine items of relief that Gray identifies in her order to show cause may be grouped into four categories of requests: 1) that the board and the condominium perform full and adequate repair work in apartment 6A (items A, B and C); 2) that the board and the condominium fully reimburse Gray for all of the various expenditures that she made in connection with the damage to apartment 6A (items D, E, F and H); 3) that the board and the condominium withdraw their notice of lien (item F); and 4) that the sponsor not be permitted to sell any more apartment units in the building (item G). Except for the third request in the order to show cause (item F), which seeks the same relief as Gray's thirteenth cause of action for injunctive relief, none of the requests in Gray's order to show cause relate specifically to the other causes of action in her complaint. Instead, it appears that Gray's "repair injunction" requests (items A, B and C) seeks similar relief to that which she seeks in her first, second, third, fourth and fifth causes of action (negligence, breach of contract, breach of fiduciary duty and breach of covenant), and that her "reimbursement injunction" requests (items D, E, F and H) relate to her sixth, seventh, eighth and fifteenth causes of action (rent abatement, constructive eviction, breach of warranty and legal fees). As was previously mentioned, Gray's "apartment sale injunction" request is unrelated to any of the causes of action in her complaint. It must now

be determined whether any of Grays' requests merit the imposition of a mandatory injunction.

> Item F in Gray's order to show cause requests an injunction:
>
> "Directing the defendants to withdraw the Notice off Lien filed with the Clerk of the County of New York for the State of New York against the plaintiff on or about June 14, 2016 and immediately take any and all appropriate steps to expunge the public record of such lien, or in the alternative, enjoining the defendants from enforcing and/or otherwise foreclosing upon said lien during the pendency of the proceedings herein;"

See order to show cause, Gray aff, ¶ 2 (F). Gray's thirteenth cause of action seeks:

> ". . . an immediate Order of this Honorable Court directing the Condominium and/or the Board to immediately withdraw the aforementioned Notice of Lien and to take all necessary and proper steps to ensure that the record of its filing be expunged from the records of the Clerk of the County of New York."

Id., exhibit A (complaint), ¶¶ 95-103. The June 14, 2016 notice of lien was filed by the board against Gray, and recites that "the amount due is $8037.71 and consists of common charges and late fees" for unit 6A that accrued between December 2015 and June 2016 (and thereafter). *Id.*, exhibit H. Gray argues that defendants' act of filing the notice of lien while the apartment was uninhabitable was "outrageous," that it "threatens her ownership of the unit" and that it "harms her credit and her reputation in the community," however, she raises no specific argument as to why she is likely to prevail on the merits of this claim. *See* order to show cause, Silberman affirmation, ¶ 28. The condominium and the board, on the other hand, assert that section 6.5 of the by-laws specifically authorizes them to file a lien for unpaid apartment common charges. *See* Johnson affirmation in opposition, ¶ 28; exhibit H. Gray herself does not deny withholding the apartment's carrying charges, but merely disputes the amount due and asserts that she has instead been depositing her monthly payments into an escrow account. *See* order to show cause, Gray aff, ¶ 31. Real Property Law ("RPL") § 339-z provides in pertinent part that "[t]he board of

managers, on behalf of the unit owners, shall have a lien on each unit for the unpaid common charges thereof, together with interest thereon . . ." Therefore, under RPL § 339-z and section 6.5 of the by-laws, the condominium and the board are authorized to file a lien for Gray's unpaid common charges. *Heywood Condominium v Wozencraft*, 148 AD3d 38 (1st Dept 2017) (holding no basis to dismiss condo board's cause of action for lien foreclosure). Consequently, Gray has not demonstrated a likelihood of success on the merits of her thirteenth cause of action, a/k/a injunction request item F. Accordingly, the court denies so much of the order to show cause as pertains to item F in her application for injunctive relief.

Item G in Gray's order to show cause requests an order:

> "Enjoining [the sponsor] from selling or otherwise transferring title to any unit presently owned by [the sponsor] located in [the building]. During the pendency of the proceedings herein, or in the alternative directing [the sponsor] to post bond in an amount sufficient to cover any verdict, judgment or settlement as may be recovered by the plaintiff herein, in an amount to be determined by this Honorable Court;"

See order to show cause, Gray aff, ¶ 2 (G). Gray's complaint does not include any cause of action against the sponsor for such injunctive relief. *Id.*, exhibit A. It is clear that Gray cannot argue that she is "likely to prevail on the merits" of a non-existent claim. As will be more fully discussed in the second portion of this decision, Gray's complaint does name the sponsor as a defendant in her claims for: negligence (1), breach of contract (2 and 3), breach of fiduciary duty (4), breach of the covenant of quiet enjoyment (5), rent abatement (6), constructive eviction (7), breach of the warranty of habitability (8), injunction (14) and court costs and attorney's fees (15). *Id.* However, her order to show cause does not address the merits of any of these claims. Instead, Gray appears to presume that she will prevail on one or more of them, and asserts that, if

she does, there exists "the possibility . . . that [the sponsor] will have divested themselves of their only assets," and that, as a result, "there would be no assets to levy upon in order to satisfy any judgment or settlement" that Gray might win against the sponsor. *Id.*, Silberman affirmation, ¶ 29. This argument clearly "puts the cart before the horse," since it ignores Gray's obligation to establish that she is likely to prevail on the merits of her claims, and jumps ahead to calculating her damages. Gray's request for an injunction against the sponsor is both meritless and unsupported. Accordingly, the court denies so much of the order to show cause as pertains to item G in her application for injunctive relief.

Grey's "repair injunction" requests include applications for orders to: correct violations (item A); complete repairs (item B); and conduct environmental testing (item C). *See* order to show cause, Gray aff, ¶¶ 2 (A), (B) and (C). Such orders would plainly provide Gray with some of the relief that she seeks in her causes of action for: negligence (1); breaches of those portions of the offering plan and by-laws that obligate defendants to deliver an apartment "free and clear of all material defects," and to "timely and properly repair" any conditions for which they are responsible (2 and 3); breach of fiduciary duty (4); and breach of the covenant of quiet enjoyment (5). This is because the orders (if granted) would remedy defendants' alleged breaches of their legal and/or contractual duties to provide Gray with an apartment in a habitable condition, by requiring them to do so immediately. Therefore, two issues to be resolved now are: 1) whether the requested "repair injunction" orders are "essential to maintain the status quo pending trial of the action;" and 2) whether Gray has established that she is entitled to preliminary injunctive relief on the causes of action to which those proposed "repair injunction" orders are related. The court does not reach the second question, however, both because it is compelled to find against

Gray on the first, and because Gray raised no specific arguments relating to her causes of action.

With respect to "maintaining the status quo," Gray plainly alleges that "[a]ll necessary repairs to the unit have not been completed," and that "[t]hose that have been completed were paid for by ourselves." *See* order to show cause, Gray aff, ¶ 11. Gray also presents the DOB violation report, and the Angelides, TERS, Merritt and GCI reports to support her argument. *Id.*, exhibits E, G, H, I, J. In response, the condominium and the board have presented an affidavit from the board's president, Vilma Gabbay (Gabbay), who states that the "board has undertaken substantial efforts to repair the condominium common elements," specifically including the roof-related issues, for which the board retained both Merritt and non-party Xinos Construction (Xinos). *See* Johnson affirmation in opposition, exhibit C, ¶¶ 19-28. The condominium and the board have also presented a record of the work invoices that Merritt submitted through July 2017, which totals $97,000.00. *Id.*, exhibit G. Some of those invoices state that they are for roof repair work. *Id.* As a result of this competing evidence, there is a disputed issue of fact as to whether or not structural repairs are currently needed in apartment 6A. Because Gray has, thus, not convincingly established that such repairs are now clearly necessary in order to maintain the "status quo" between the parties, the court is compelled to conclude that she has failed to establish "unusual circumstances" entitling her to a "mandatory preliminary injunction" including items A, B, and C in her order to show cause. Accordingly, the court must deny so much of Gray's order to show cause as seeks those "repair injunction" requests.

The final category of requests, set forth in items D, E and H in Gray's order to show cause, are her "reimbursement injunction" requests for orders requiring defendants to: 1) pay for all of the expenses that she incurred as a result of their failure to effect timely repairs to the

structural problems in apartment 6A (including rent for the Stuyvesant Town apartment); 2) abate apartment 6A's common charges through the time that said repairs were finally completed; and 3) pay her attorney's fees and court costs. *See* order to show cause, Gray aff, ¶¶ 2 (D), (E) and (H). These proposed orders appear to concern Gray's causes of action for: rent abatement (6); constructive eviction (7); breach of the warranty of habitability (8); and legal fees (15). This is because, if granted, they would afford her similar monetary compensation as that which those causes of action request. As above, the two question to be answered now are: 1) whether the proposed "reimbursement injunction" orders are "essential to maintain the status quo pending trial of the action;" and 2) whether Gray has established that she is entitled to preliminary injunctive relief on the causes of action to which those proposed "reimbursement injunction" orders are related. Again, the court does not reach the second question, since it must find against Gray on the first.

Gray's moving papers do not explain how a court order that directs the defendants to make the three payments detailed in her "reimbursement injunction" requests will serve the goal of "maintaining the status quo" between the parties. Her supporting affidavit makes the request, but does not provide a reason. *See* order to show cause, Gray aff, ¶ 30. Indeed, Gray specifically states that she is no longer out of possession of apartment 6A. *Id.*, ¶ 11. Gray further states that, during the time that she was out of possession, she was able to make all of the common charge, mortgage, insurance and utility payments for apartment 6A. *Id.*, ¶ 13. Gray avers that she only returned to apartment 6A in November 2016 because she could not continue to make those payments as well as pay rent for the Stuyvesant Town apartment. *Id.*, ¶ 12. However, because Gray is no longer paying rent for the Stuyvesant Town apartment, it is clear that the financial

burden that she previously bore has been removed. Thus, there is nothing disabling her from making her usual monthly payments in connection with apartment 6A. Gray's affidavit certainly does not allege any such present financial disability. This, then, would appear to be the "status quo" between the parties: that Gray will continue to make her ususal monthly payments during the pendency of this action; and that the issue of whether or not she is entitled to be reimbursed for her previous payments will be resolved later in this action. Gray has failed to establish any "unusual circumstances" that would justify a "mandatory preliminary injunction" ordering the defendants to make such reimbursement payments right now. That would be an anomalous situation in any case, since well settled New York law provides that "monetary harm which can be compensated by damages . . . does not constitute irreparable injury for which injunctive relief will be granted." *Dupree v Scottsdale Ins. Co.*, 100 AD3d 467, 468 (1st Dept 2012). Because Gray has failed to make the aforementioned showing, the court is compelled to conclude that she is not entitled to a "mandatory preliminary injunction" for the reimbursement payments set forth in items D, E, and H of her order to show cause.[1] Therefore, the court must deny so much of Gray's order to show cause as seeks those "reimbursement injunction" requests. Accordingly, the court denies Gray's order to show cause in full.

Motion to Dismiss (motion sequence number 002)

The second motion to be disposed of in this decision is the sponsor's motion to dismiss

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[1] It would also be anomalous to grant Gray's current request that defendants pay her legal fees, since such fees are customarily awarded to the "prevailing party" in any litigation, and Gray has not yet "prevailed" on any of her claims herein. *See e.g. Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 (1st Dept 2007).

the complaint (motion sequence number 002).[2] When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a) (7), the court "must give the pleadings a liberal construction, accept the allegations as true and accord the plaintiffs every possible favorable inference." *See Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 52 (2106), citing *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 (2002). It has been held, however, that where the documentary evidence submitted flatly contradicts the plaintiff's factual claims, the entitlement to the presumption of truth and the favorable inferences are both rebutted. *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 (1st Dept 2001), *affd as mod Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314 (2002), citing *Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 (1st Dept 1994).

At the outset, the court notes that the sponsor is either named or implicated as a defendant in ten of Gray's causes of action; specifically, those which assert: negligence (1), breach of contract (2 and 3), breach of fiduciary duty (4), breach of the covenant of quiet enjoyment (5), a rent abatement (6), constructive eviction (7), breach of the warranty of habitability (8), an injunction (14) and court costs and attorney's fees (15). The sponsor raises various arguments why these causes of action should be dismissed as against it.

First, the sponsor argues that all of plaintiff's causes of action against it should be dismissed for failure to state claims for relief (i.e., pursuant to CPLR 3211 (a) (7)), because they are all barred by the Martin Act (i.e., General Business Law § 352 et seq.). *See* defendant's mem of law (motion sequence number 002) at 9-13. Under the Martin Act, the New York State Attorney General (NYAG) has the exclusive authority to investigate and enjoin fraudulent

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[2] The sponsor's motion does not request dismissal of the cross claim that the condominium and the board raised against it in their answer.

practices in the offering and sale of condominium apartment units. *See Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 349-350 (2011), *citing Kerusa Co., LLC v W10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 243 (2009). In examining Martin Act precedent, the Court of Appeals has adopted:

> ". . . the proposition that a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute. But, an injured investor may bring a common-law claim (for fraud or otherwise) that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies."

Assured Guar. (UK) Ltd., 18 NY3d at 353. Here, the sponsor argues that none of Gray's claims against it constitute common-law causes of action that could be reasonably deemed to stand apart from alleged Martin Act violations. The sponsor specifically asserts that "all of plaintiff's claims for relief . . . derive from the allegation that the sponsor should have disclosed, but instead omitted, from the offering plan facts concerning alleged structural defects existing in the building," and that "this allegation . . . rests entirely on alleged omissions that, but for the Martin Act . . ., would not be required by law to be disclosed at all." *See* defendant's mem of law (motion sequence number 002) at 10-11. Gray disputes this. *See* Silberman affirmation in opposition, ¶¶ 6-11.

The court notes that Gray's complaint does not set forth any causes of action for fraud. Gray's second and third causes of action claim breach of contract, however, and allege that defendants breached "the terms of the offering plan and the by-laws" by "failing to provide a condominium unit free and clear of all material defects." *See* notice of motion, exhibit B (complaint), ¶¶ 27-34. The Appellate Division, First Department has plainly held that "[t]he

Martin Act . . . does not bar a common-law breach of contract claim." *Board of Mgrs. of the S. Star v WSA Equities, LLC*, 140 AD3d 405, 405 (1st Dept 2016) *citing 885 W.E. Residents Corp. v Coronet Props. Co.*, 220 AD2d 305 (1st Dept 1995). The sponsor argues that Gray's causes of action "are nothing more than variously stated claims for damages based on allegations of concealment by the sponsor, [and] predicated directly on representations concerning the physical condition of the building as set forth in the plan." *See* defendant's mem of law at 12. This does not appear to be the case. Gray's complaint contains no allegations of "concealment," but, rather, alleges that the defendants (including the sponsor) breached those provisions of the plan and the by-laws that set forth the sellers' responsibilities to deliver a non-defective apartment unit. In contrast, the sponsor's motion bases its "concealment" allegation, solely on a selective reading of the language of two portions of the plan which refer to the termination of the sponsor's responsibilities upon the sale of a residential unit. *See* notice of motion, Quaco aff, ¶¶ 15-19. However, Gray does not refer to these contractual provisions in her complaint. Rather, the complaint facially alleges that the sponsor breached *several* - albeit unspecified - provisions of the building's plan and by-laws, and not just those provisions that refer to the Martin Act's disclosure requirements. As was previously mentioned, CPLR 3211 obliges the court to accord Gray's complaint "a liberal construction" and "every possible favorable inference." *Chanko v American Broadcasting Cos. Inc.*, 27 NY3d at 52. As a result, the court will accord Gray the benefit of the doubt, and give her the opportunity to establish a breach of contract claim on non-Martin Act grounds. Therefore, the court rejects the sponsor's Martin Act argument as regards Gray's second and third causes of action. Unfortunately, at this juncture, the court cannot also address the sponsor's Martin Act argument as it applies to Gray's other causes of action. The

sponsor's assertion that Gray's causes of action are solely "based on allegations of concealment" is a broad, blanket statement which, if true, would mandate the dismissal of some or all of those claims. However, the sponsor's motion is devoid of any argument as to how the text of the complaint shows that Gray's causes of action are unequivocally "based on allegations of concealment." Thus, the sponsor has plainly failed to meet its burden of proof regarding the application of the Martin Act in the context of this dismissal motion. This does not end the inquiry, however, since the sponsor also seeks dismissal of Gray's claims against it on the alternative ground that they fail to state valid claims for relief. Therefore, each cause of action will be examined as they relate to the sponsor.

As was previously mentioned, Gray's second and third causes of action allege breach of contract. *See* notice of motion, exhibit B (complaint), ¶¶ 27-34. The proponent of a breach of contract claim must plead the existence and terms of a valid, binding contract, its breach, and resulting damages. *See e.g. Gordon v Dino De Laurentiis Corp.*, 141 AD2d 435 (1st Dept 1988). Gray has done so. *See* notice of motion, exhibit B (complaint), ¶¶ 27-34. The sponsor nevertheless argues that any contractual obligation that it had to Gray was "extinguished (upon closing) by the doctrine of merger." *See* defendant's mem of law at 14-16. The sponsor cites the holding of the Appellate Division, Second Department, in *Dourountoudakis v Alesi* (271 AD2d 640 [2d Dept 2000]), wherein it observed that:

> "[i]t is well settled that 'the obligations and provisions of a contract for the sale of land are merged in the deed and, as a result, are extinguished upon the closing of title' unless 'there is a clear intent evidenced by the parties that a particular provision shall survive delivery of the deed, or where there exists a collateral undertaking.'"

271 AD2d at 641 (internal citation omitted). The sponsor then argues that "inasmuch as there is

no dispute that the sponsor's obligation to the plaintiff with respect to the unit ceased upon delivery of the deed, plaintiff lacks standing to assert any claims against sponsor. . . ." *See* defendant's mem of law at 15. Gray responds that such a dispute does indeed exist, because the rider annexed as exhibit E to her purchase agreement for apartment 6A, which the sponsor signed, specifically stated that: "sponsor agrees to fix ceiling water damage." *See* Silberman affirmation in opposition, ¶ 10; notice of motion, exhibit A. The sponsor does not address this evidence in its reply papers, but merely repeats its earlier Martin Act argument. *See* Scheiber reply affirmation, ¶¶ 8-13. As was previously discussed, that argument fails to the extent that Gray's breach of contract claims do *not* deal with the Martin Act's disclosure requirements. The sponsor's merger doctrine argument fails as well, because the rider provision obliging the sponsor to perform post-closing repair work in unit 6A that it was not otherwise required to do plainly evinces "a clear intent . . . that a particular provision shall survive delivery of the deed, [and/or constitutes] . . . a collateral undertaking." Thus, the sponsor's merger argument is flatly contradicted by the documentary evidence. Therefore, the court denies so much of the sponsor's motion as seeks dismissal of Gray's second and third causes of action.

Gray's first cause of action sounds in negligence. *See* notice of motion, exhibit B (complaint), ¶¶ 24-26. Pursuant to New York law, "the traditional common-law elements of negligence" are: "duty, breach, damages, causation and foreseeability." *Hyatt v Metro-North Commuter R.R.*, 16 AD3d 218, 218 (1st Dept 2005). Gray's claim does not identify a particular duty of care, but merely asserts that: "the damages causes to the unit . . . were caused solely and proximately by the negligence of the defendants without any contributing fault or negligence . . . by the plaintiff." *See* notice of motion, exhibit B (complaint), ¶ 25. The sponsor argues that

Gray's negligence claim is duplicative of her breach of contract claims. *See* defendant's mem of law at 13-14. Gray's opposition papers fail to address this argument. "'It is a well-established principle that a simple breach is not to be considered a tort unless a legal duty independent of the contract has been violated.'" *Dormitory Auth. of the State of NY v Samson Constr. Co.*, 2018 NY Slip Op 01115; 2018 NY LEXIS 218 *8 (Ct App Feb. 15, 2018), *quoting Clark-Fitzpatrick, Inc. v Long Island RR Co.*, 70 NY 2d 382, 389 (1987). "This legal duty must spring from circumstances extraneous to, and not constituting elements of the contract, although it may be connected therewith and dependent upon the contract." *Clark-Fitpatrick*, 70 NY 2d at 389. Here, Gray's failure to allege that the sponsor owed her a duty of care beyond that set forth in the plan and the by-laws is fatal to her negligence claim. *Board of Mgrs. of the Crest Condominium v City View Gardens Phase II, LLC* (35 Misc 3d 1223[A], 2012 NY Slip Op. 50826[U], [Sup Ct Kings County, 2012]) (dismissing the plaintiff's negligence claim against the sponsor because no legal duty beyond the contract alleged). Therefore, the court grants so much of the sponsor's motion as seeks dismissal of Gray's first cause of action

Gray's fourth cause of action alleges breach of fiduciary duty. *See* notice of motion, exhibit B (complaint), ¶¶ 35-40. To state a claim for breach of fiduciary duty, a plaintiff must plead the existence of a fiduciary relationship, the defendant's breach thereof, and resulting damages. *See eg Kurtzman v Bergstol*, 40 AD3d 588 (2d Dept 2007). The sponsor argues that this cause of action should be dismissed on the ground that a condominium unit owner may not assert such a claim against a condominium building's sponsor, as a matter of law. *See* defendant's mem of law at 14. Again, Gray's opposition papers do not address this argument. To support its argument, the sponsor cites the 1996 decision of the Appellate Division, Second

Department, in *Board of Mgrs. of Acorn Ponds at N. Hills Condominium I v Long Pond Invs.* (233 AD2d 472 [2d Dept 1996]), which found that:

> "Although the current board of managers of a condominium may seek recovery from the members of the initial board of managers for the breach of fiduciary duties owed to the condominium and its unit owners, the plaintiffs failed to establish a basis for such liability on the part of the defendants, who were the sponsors of the condominium."

233 Ad2d at 472-473 (internal citation omitted). Moreover, in a more recent Second Department decision the Court squarely held that "[t]here is no fiduciary relationship between the sponsor and the condominium [unit owners]." *Caprer v Nussbaum* (36 AD3d 176, 191 [2d Dept 2006]). Consequently, the sponsor is correct that Gray's claim against it for breach of fiduciary duty must fail, as a matter of law. Therefore, the court grants so much of the sponsor's motion as seeks the dismissal of Gray's fourth cause of action.

The sponsor next argues that "Gray's fifth, sixth, seventh, eighth and fourteenth causes of action seek an unavailable remedy." *See* defendant's mem of law at 16. Those causes of action respectively assert claims for: breach of the covenant of quiet enjoyment (5); a rent abatement (6); constructive eviction (7); breach of the warranty of habitability (8); and an injunction (14). *See* notice of motion, exhibit B, ¶¶ 41-60, 104-110. The sponsor argues that the first four of these cannot be maintained, as a matter of law, unless there is a landlord/tenant relationship between the parties. *See* defendant's mem of law at 16. Gray does not address this contention in her opposition papers. In any case, the sponsor is correct. *See e.g. Katz v Board of Mgrs., One Union Sq. E. Condominium, N.Y., N.Y.*, 83 AD3d 501 (1st Dept 2011). Therefore, the court grants so much of the sponsor's motion as seeks the dismissal of Gray's fifth, sixth, seventh and eighth causes of action.

Gray's fourteenth cause of action for injunctive relief alleges that:

> "108. The plaintiff is entitled to an order of this Honorable Court directing the defendants to immediately perform all necessary repairs to the Unit fully, completely and professionally so as to prevent further incurring of expenses and damages herein; and
>
> "109. The plaintiff is further entitled to an order of this Honorable Court enjoining the defendants from foreclosing upon or otherwise enforcing their claimed lien during the pendency of this action; . . ."

See notice of motion, exhibit B (complaint), ¶¶ 108-109. Perhaps inadvertently, the sponsor includes this cause of action along with the above-discussed fifth, sixth, seventh and eighth claims in its dismissal argument based on lack of a landlord/tenant relationship. *See* defendant's mem of law at 16. However, that argument is clearly inapposite as regards Gray's requests for injunctive relief. Gray does not mention her fourteenth cause of action in her opposition papers. However, the first of Gray's two proposed injunctions may be interpreted as applying to the rider to her purchase agreement wherein the sponsor agreed "to fix ceiling water damage," while the second proposed injunction clearly applies to the notice of lien, which the sponsor is not a party to. No favorable inference would support a reading of the complaint that would allow the second proposed injunction to survive as against the sponsor. Therefore, the court grants so much of the sponsor's motion as seeks the dismissal of the second request for injunctive relief that is contained in Gray's fourteenth cause of action, but denies the motions as regards the first request for injunctive relief that is set forth therein.

Gray's fifteenth cause of action seeks awards of court costs and attorney's fees. *See* notice of motion, exhibit B (complaint), ¶¶ 111-112. The sponsor argues that there is no contractual basis upon which Gray can base a request for legal fees against it. *See* defendant's

mem of law at 16-17. The sponsor further asserts that section 32 of Gray's purchase agreement grants it the contractual authority to seek an award of attorney's fees against her. *Id.* Gray's opposition papers do not mention her fifteenth cause of action. CPLR 8101 provides that "[t]he party in whose favor a judgment is entered is entitled to costs in the action, unless otherwise provided by statute or unless the court determines that to so allow costs would not be equitable, under all of the circumstances." By contrast, "[u]nder the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v AGS Computers*, 74 NY2d 487 (1989); *see also Sykes v RFD Third Ave. I Assoc., LLC*, 39 AD3d 279 (1st Dept 2007). Here, it is indeed the case that the purchase agreement does not appear to contain a provision authorizing Gray to seek an award of attorney's fees against the sponsor. *See* notice of motion, exhibit A. This would not affect Gray's right to seek an award of court costs against the sponsor, should she eventually be the "prevailing party" in this action, however. The court does not reach sponsor's argument that it may seek an award of attorney's fees against Gray, since the sponsor has not yet filed an answer including such a claim, and it is improper for the court to opine on the viability of potential claims. Therefore, the court grants the sponsor's motion solely to the extent of limiting Gray's fifteenth cause of action against it to an award of court costs. Accordingly, the court grants the sponsor's motion in part, and denies it in part, as set forth above.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the order to show cause of plaintiff Allyson Gray (motion sequence

number 001) is, in all respects, denied; and it is further

ORDERED that the motion, pursuant to CPLR 3211 (a) (7), of defendant 264 H20 Borrower, LLC (motion sequence number 002) is granted solely to the extent that the first, fourth, fifth, sixth, seventh and eighth causes of action of the complaint are dismissed as against said defendant, but is otherwise denied; and it is further

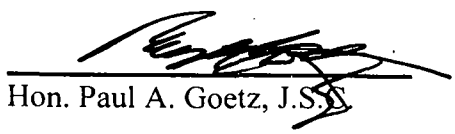
ORDERED that plaintiff Allyson Gray is granted leave to serve an amended complaint so as to replead the fourteenth and fifteenth causes of action as against defendant 264 H20 Borrower, LLC to include the limitations set forth in this decision within 20 days after service on plaintiff's attorney of a copy of this order with notice of entry; and it is further

ORDERED that defendant 264 H20 Borrower, LLC is directed to serve an answer to the amended complaint within 20 days after service of a copy of said amended complaint upon it by plaintiff's attorney; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 320, 80 Centre Street, on May 17, 2018, at 9:30 AM.

Dated: New York, New York
March 28, 2018

ENTER:



Hon. Paul A. Goetz, J.S.C.