

Pokoik v Condominium Bd. of the Chatham Condominium
2018 NY Slip Op 30726(U)
April 20, 2018
Supreme Court, New York County
Docket Number: 654223/2015
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. BARBARA JAFFE
Justice

PART 12

-----X

LEON POKOIK, *et al.*,
Plaintiffs,

INDEX NO. 654223/2015

MOTION DATE _____

MOTION SEQ. NO. 2

- v -

CONDOMINIUM BOARD OF THE CHATHAM
CONDOMINIUM, RESIDENTIAL BOARD OF THE
CHATHAM CONDOMINIUM, COMMERCIAL
BOARD OF THE CHATHAM CONDOMINIUM,
CHATHAM CONDOMINIUM,

DECISION AND ORDER

Defendants.

-----X

By notice of motion, defendants move pursuant to CPLR 3211 for an order dismissing the complaint. Plaintiffs oppose and cross-move for an order granting them summary judgment on their first and second causes of action and directing a hearing on damages, and dismissing defendants' first to thirteenth affirmative defenses. Defendants oppose the cross motion.

I. PERTINENT BACKGROUND

Plaintiffs own an apartment at defendant Chatham Condominium. They assert that since 2010, there have been leaks into their apartment emanating from the ceiling and above a terrace door, which was damaged thereby, and that they have unsuccessfully attempted to fix the leaks. According to plaintiffs, Chatham and its Board of Directors are obligated by the

condominium offering plan to repair the leaks, as they arise from general common elements and/or would need structural repairs by the Board. Despite due demand, defendants have failed to repair the leaks. (NYSCEF 1).

Plaintiffs thus allege as a first cause of action that defendants breached their fiduciary duty by failing to remedy the leaks, and as a second cause of action that defendants thereby breached the condominium offering plan. They also seek a judgment declaring that defendants are obligated to perform the repairs, and injunctive relief directing the repairs. (*Id.*).

By answer dated February 12, 2016, defendants deny plaintiffs' allegations and assert as affirmative defenses: (1) failure to state a claim; (2) that the alleged leaks are emanating from plaintiffs' terrace and/or terrace doors and thus remain plaintiffs' responsibility to repair; (3) claims are barred by the terms of the condominium's declaration, by-laws, and other governing documents; (4) claims are barred by documentary evidence; (5) any damages have been caused by plaintiffs' actions; (6) defendants' actions and determinations are shielded from judicial review by the business judgment rule; (7) plaintiffs' damages were sustained by intervening causes and did not result from defendants' conduct, acts, or omissions; (8) claims are barred by waiver, release, estoppel, and/or laches; (9) claims are barred by plaintiffs' unclean hands; (10) defendants have fully complied with their obligations under the governing documents; (11) necessary parties have not been named; (12) as plaintiffs have an adequate remedy at law, they are not entitled to a declaratory judgment; and (13) plaintiffs are not entitled to injunctive relief. (NYSCEF 6).

I. MOTION TO DISMISS

A. Breach of fiduciary duty

1. Contentions

Defendants assert that plaintiffs' cause of action for a breach of fiduciary duty is time-barred as the alleged leaks began in 2010, and the instant action was not commenced until 2015. They also contend that the claim is fatally duplicative of the breach of contract claim, and that there is no evidence of misconduct on their part. To the extent that they had a duty to repair the leaks, defendants observe that although tests of the building's facade reveal no water infiltration, they nonetheless improved the facade's waterproofing and caulking, and that any other repairs remain plaintiffs' responsibility. (NYSCEF 60).

Plaintiffs assert that defendants waived their statute of limitations argument by failing to allege it as an affirmative defense or by moving pre-answer to dismiss. They also argue that a six-year, rather than three-year, statute of limitations governs as their claim is primarily equitable, as they seek a declaratory judgment and injunction directing defendants to repair the leaks, and that in any event, the leaks progressed through 2016 and defendants maintained a continuing duty to repair them. They also deny defendants' lack of misconduct. (NYSCEF 77).

In reply, defendants deny having waived the statute of limitations defense and assert that plaintiffs had a full opportunity to respond to it, that the claim seeks money damages and not equitable relief, and that the six-year statute of limitations is inapplicable absent any alleged additional breaches by defendants. (NYSCEF 86).

2. Analysis

Pursuant to CPLR 3211(e), a defense that a claim is time-barred is waived unless raised in a pre-answer motion to dismiss or an answer. Having failed to raise the defense either way, it is waived. (*Eke v City of New York*, 116 AD3d 403 [1st Dept 2014] [statute of limitations defense waived by failure to plead it in answer]).

However, a waiver may be retracted if the defense is raised in connection with a motion for summary judgment. (*See Horst v Brown*, 72 AD3d 434 [1st Dept 2010, Roman, J., dissenting], *app dismissed* 15 NY3d 743] [court properly considered unpleaded statute of limitations defense raised for first time in opposition to summary judgment]; *Allen v Matthews*, 266 AD2d 782 [3d Dept 1999] [in absence of surprise or prejudice to opposing party, unpleaded defense may be used to defeat summary judgment or as basis for affirmative relief]). As plaintiffs oppose the defense on the merits, they are not prejudiced.

Nevertheless, given defendants' continuing duty to repair the building's common elements, and as it is alleged that defendants failed to do so despite being continuously notified by plaintiffs of the leaks, which constitutes a continuing wrong, defendants have not established that the three-year statute of limitations applies and has expired. (*Kaymakcian v Bd. of Mgrs. of Charles House Condominium*, 49 AD3d 407 [1st Dept 2008] [breach of fiduciary claim not time-barred as respondents had continuing duty to repair common elements, including source of recurring leaks, and failed to do so]).

However, as plaintiffs' breach of fiduciary duty claim is premised on the same facts and allegations as their breach of contract claim, and they seek the same damages for both, it is fatally duplicative. (*See 82 Retail LLC v Eighty Two Condominium*, 117 AD3d 587 [1st Dept 2014]). While plaintiffs argue that they allege that defendants engaged in fraud related

to their fiduciary duty, no such allegations are contained in the complaint. (CPLR 3016[b] [fraud claim must be pleaded with specificity]; cf. *NYAHS A Svces., Inc. v People Care Inc.*, 141 AD3d 785 [3d Dept 2016] [breach of fiduciary duty claim dismissed, even though partly based on allegations of fraud, as claim alleged virtually identical facts and theories and sought same damages as breach of contract claim]).

B. Breach of contract

Defendants deny having breached any of their obligations under the condominium's governing documents, but assert that even without a duty, they repaired the facade despite the absence of evidence that it was the source of the leaks, and otherwise observe that responsibility for the terrace and/or terrace door lies with plaintiffs only. Plaintiffs assert that defendants bear the responsibility of fixing the leaks and has not yet done so sufficiently.

The documents submitted by both parties indicate that triable issues exist as to the source and cause of the leaks, defendants' response to the leaks, and which party bears the responsibility for repairing them. Both parties rely on numerous expert and testing reports that alternatively support or undermine their claims.

Defendants correctly observe that an essential element of a breach of contract claim is that the allegedly injured party has incurred damages as a result of the breach, and the measure of damages from a breach of contract is the economic injury caused by the breach. (*Inchaustegui v 666 5th Ave. Limited Partnership*, 96 NY2d 111 [2001]). An injured party is entitled to recover only its actual loss, and the breaching party is not liable for amounts compensated through other sources. (PJI 4:20). However, defendants offer no evidence to support their claim that plaintiffs have been fully compensated through insurance proceeds.

C. Declaratory judgment and injunctive relief

As money damages will sufficiently compensate plaintiffs for their breach of contract claim, the claim for a declaratory judgment is dismissed as unnecessary and inappropriate. (*Cronos Group Ltd. v XcomIP, LLC*, 156 AD3d 54 [1st Dept 2017] [declaratory judgment claim dismissed as plaintiff had adequate legal remedy for breach of contract]). For the same reason, an injunction is not warranted. (*Mini Mint Inc. v Citigroup, Inc.*, 83 AD3d 596 [1st Dept 2011] [claim for permanent injunction seeking order that defendant repair premises dismissed as plaintiff had adequate remedy at law in form of monetary damages]).

III. PLAINTIFFS' CROSS MOTION

Given the factual issues remaining as to the cause and source of the leaks, plaintiffs' cross motion for partial summary judgment on liability is denied. Their motion for dismissal of defendants' affirmative defenses is denied as they do not demonstrate that the defenses do not apply as a matter of law or fail to state a defense, and otherwise require the resolution of facts that remain at issue. Plaintiffs' conclusory assertions as to the merits are insufficient to meet their burden. (*See e.g., Wells Fargo Bank, N.A. v Rios*, __ AD3d __, 2018 WL 1833014 [2d Dept 2018] [when moving to dismiss affirmative defense, plaintiff has burden to show that defense lacks merit as matter of law as it does not apply to facts in case or fails to state defense, and facts asserted in defense must be accepted as true]; *New Hampshire Ins. Co. v Clearwater Ins. Co.*, 129 AD3d 99 [1st Dept 2015] [affirmative defenses should not have been dismissed as triable issues remained]; *Granite State Ins. Co. v Transatlantic Reinsurance Co.*, 132 AD3d 479 [1st Dept 2015] [plaintiff moving to dismiss affirmative defense bears heavy burden of showing defense is without merit, and allegations must be

viewed in light most favorable to defendant; court should not dismiss where there remain factual issues for trial)).

IV. CONCLUSION

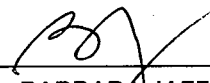
Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing plaintiffs' first, third, and fourth causes of action, and is otherwise denied; it is further

ORDERED, that plaintiffs' cross motion for partial summary judgment is denied; and it is further

ORDERED, that the parties are directed to appear for a compliance conference on July 18, 2018 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

4/20/2018
DATE



BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

- CASE DISPOSED
- GRANTED
- SETTLE ORDER
- DO NOT POST

DENIED

- NON-FINAL DISPOSITION
- GRANTED IN PART
- SUBMIT ORDER
- FIDUCIARY APPOINTMENT

OTHER

REFERENCE