

**Sklar v 650 Park Ave. Corp.**

2018 NY Slip Op 30789(U)

April 30, 2018

Supreme Court, New York County

Docket Number: 156928/2016

Judge: Paul A. Goetz

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK

Marc Sklar and Paul R. Sklar, individually and  
as executors of the Estate of Elaine Immerman,  
and Daniel Sklar, individually,

Index No.: 156928/2016

Plaintiffs,

DECISION/ORDER

-against-

Motion Sequence 002

650 Park Avenue Corporation, Residential  
Management Group, LLC d/b/a Douglas  
Elliman Property Management Company, and  
William Newhook, Douglas Danzig, Leonard  
Brumberg, Frank Moore, Virginia Sheerin,  
Bradley Sacks, Jerome Siegel, Joan Rosenberg,  
and Barry Sporer, individually,

Defendants.

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

In this action, plaintiffs, individually and on behalf of the estate of Elaine Immerman, allege that the defendant cooperative's resident manager, defendant William Newhook, disposed of plaintiffs' property following the sale of the estate's apartment. Plaintiffs allege that they were storing their property in one of the co-op's storage bins with the express permission of the buyer and the defendants. Plaintiffs assert twelve causes of action in their complaint, including conversion, trespass to property, negligence and breach of the proprietary lease.

Defendants now move to dismiss the complaint pursuant to CPLR 3211(a)(1) and (7) or alternatively, for summary judgment pursuant to CPLR 3212. Since issue has not been joined, defendants' motion for summary judgment is premature and will not be considered (CPLR 3212). On a motion to dismiss pursuant to CPLR 3211(a)(1) and (7), the court is required to accept all of the allegations in the complaint as true, and to draw all inferences from those allegations in the light most favorable to plaintiff, unless the documentary evidence conclusively

disproves an alleged fact (*Devash LLC v. German American Capital Corp.*, 104 A.D.3d 71 [1st Dep't 2013] [citing *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994)]). While the lease and assignment submitted by defendants may be considered "documentary evidence" under CPLR 3211(a)(1), the affidavit from the buyer's attorney does not qualify as documentary evidence and will not be considered (*Flowers v. 73<sup>rd</sup> Townhouse, LLC*, 99 A.D.3d 431 [1st Dep't 2012]; *Sunset Café Inc. v. Mett's Surf & Sports Corp.*, 103 A.D.3d 707 [2d Dep't 2013]).

Defendants argue that the plaintiffs' claims should be dismissed based on the language of the lease, which provides that the use of the storage bin by any person during or after the term of the lease "shall be entirely at the risk of such person, and the Lessor shall not be liable for any loss of property therein, or for any damage or injury whatever to person or property therein or in connection therewith." The house rules, which are incorporated into the lease, further provide that "[t]he use of storage and laundry facilities in the basement areas of the building shall be at the sole risk of the Lessee using the same, and the Lessor shall not be liable to the Lessee for any injury, damage or loss, whether due to negligence or otherwise . . . ." However, under General Obligations Law § 5-321, an exculpatory provision in a lease is void as against public policy and unenforceable. Accordingly, plaintiffs' causes of action cannot be dismissed on this basis.

Defendants also argue that plaintiffs' tort claims are barred by the independent tort doctrine because defendants' duties with respect to the storage bin are governed by the proprietary lease (*See Regini v. Bd. of Mngrs. of Loft Space Condo.*, 107 A.D.3d 496 [1st Dep't 2013] [dismissing negligence claim as duplicative of breach of contract claim since plaintiff did not posit any source of duty other than defendant's alleged management agreement with the board]). However, as defendants contend later in their moving brief, they did not owe any duties to plaintiffs under the proprietary lease, which according to its terms expired when plaintiffs sold

the apartment. Moreover, plaintiffs allege that defendants and the buyer expressly gave them permission to continue using the storage space after it was sold and thus defendants' duties with respect to the storage bin do not arise solely from the contract but rather from an extra-contractual promise (*37 East 50<sup>th</sup> Street Corp. v. Restaurant Group Mgmt. Services*, 156 A.D.3d 569, 570-71 [1st Dep't 2017] [holding that restaurant owner's breach of fiduciary duty claim was not duplicative of its breach of contract claim where owner's breach of fiduciary duty allegations against restaurant manager concerned breach of duty independent of the restaurant management agreement]). Thus, plaintiffs' tort claims cannot be dismissed on this basis.

Defendants next argue that plaintiffs' trespass and intentional tort claims should be dismissed as duplicative of their cause of action for conversion. "Interference with a person's property constitutes a trespass while a denial or violation of the plaintiff's dominion, rights, or possession, is the basis of an action for conversion" (*Sporn v. MCA Records, Inc.*, 58 N.Y.2d 482, 847 [1983] [internal citations and quotations omitted; holding that misappropriation of master recording of plaintiff's song constituted conversion, not trespass]). Here, plaintiffs allege that defendant Newhook "deliberately and intentionally disposed of and destroyed the plaintiffs' personal property" (*See e.g.* Amended Verified Complaint, ¶ 96). Plaintiffs allegations of a permanent interference with their property interest constitutes the tort of conversion, not trespass to property and thus this claim should be dismissed. Although plaintiffs' allegations fall squarely within a cause of action for conversion, plaintiffs' twelfth cause of action for prima facie tort may be pled in the alternative to their conversion claim and thus this cause of action will not be dismissed (*Bd. of Ed. of Farmingdale v. Farmingdale Classroom Teachers Ass'n*, 38 N.Y.2d 397, 406 [1975]).

Defendants also seek to dismiss plaintiffs' claim for tortious interference with prospective business relations. Plaintiffs' allegation that the defendants' conduct prevented plaintiffs from selling their valuable property at auction is insufficient to support this claim which requires plaintiffs to show a "but for" expectancy of obtaining a contract (*Frank Crystal & Co. v. Dillmann*, 84 A.D.3d 704, 706 [1st Dep't 2011] [holding that plaintiff's claim for tortious interference with prospective business advantage failed because there was "no certainty that [plaintiff] would have gotten or retained the contract but for defendants' alleged interference"]). Thus, this cause of action will be dismissed.

Defendants also seek to dismiss plaintiffs' claims for negligent and intentional infliction of emotional distress. Plaintiffs have failed to allege that defendants' actions endangered the plaintiffs' physical safety or caused the plaintiffs to fear for their own physical safety (*Taggard v. Costabile*, 131 A.D.3d 243, 253 [2d Dep't 2015] [analyzing elements necessary to state a claim for negligent infliction of emotional distress]). Further, defendants' alleged actions do not rise to the level of "extreme and outrageous conduct" sufficient to support a claim for intentional infliction of emotional distress (*Chanko v. American Broadcasting Cos.*, 27 N.Y.3d 46, 56 [2016]). Accordingly, these causes of action must be dismissed.

Defendants next argue that plaintiffs' breach of contract claim must also be dismissed because any contractual rights plaintiffs had to the storage bin terminated when the apartment was sold under the explicit terms of the lease. Article III of the lease states that the lease will expire upon assignment, which occurred on March 10, 2016. Since plaintiffs' claims arose after the lease expired, the cause of action for breach of the proprietary lease must be dismissed as no enforceable contract existed at the time plaintiffs' property was allegedly discarded.

Defendants also argue that the claims against the individual directors should be dismissed because plaintiffs fail to allege independent tortious conduct by any individual director and the directors cannot be held personally liable solely as a result of their positions on the condominium board (*see Hoppe v. Bd. of Directors of 51-78 Owners Corp.*, 49 A.D.3d 477 [1st Dep't 2008] [holding that leave to amend complaint to add breach of fiduciary claims against individual directors should not have been granted where complaint ascribed no independent tortious conduct to any individual director]). However, plaintiffs specifically allege that each of the individual directors, either on their own behalf or on behalf of the defendant co-op or management, instructed defendant Newhook to dispose of plaintiffs' property. If plaintiffs are able to prove these allegations, the directors may be liable for the corporations' conversion of plaintiffs' property and thus these claims cannot be dismissed (*American Exp. Travel Related Services v. North Atlantic Resources*, 261 A.D.2d 310, 311 [1st Dep't 1999] [upholding trial court's ruling that a corporate officer who participates in the commission of a tort may be held individually liable, regardless of whether the officer acted on behalf of the corporation in the course of official duties]).

Defendants also seek to dismiss plaintiffs' demand for punitive damages. "Punitive damages are permitted when the defendant's wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrates such wanton dishonesty as to imply a criminal indifference to civil obligations" (*Fragrancenet.com, Inc. v. Fragrancex.com, Inc.*, 68 A.D.3d 1051, 1052 [2d Dep't 2009] [internal citations and quotations omitted; upholding dismissal of punitive damages claim in action for conversion]). Plaintiffs' allegations of conversion do not support the imposition of punitive damages and therefore plaintiffs' claim for punitive damages will be dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the second, third, fourth, sixth and ninth causes of action and the demand for punitive damages are dismissed; and it is further

ORDERED that defendants shall file an answer to the amended verified complaint within thirty (30) days of entry of this order.

Dated: April 30, 2018

  
HON. PAUL A. GOETZ