Lisa Goldberg Qualified Personal Residence Trust v Board of Mgrs. of the Madison Sq. Condominium
2019 NY Slip Op 30144(U)
January 17, 2019
Supreme Court, New York County
Docket Number: 161672/14
Judge: Carol R. Edmead
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35
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DECISION/ORDER
Index no. 161672/14
Motion seq. Nos.
004 and 005

THE LISA GOLDBERG QUALIFIED PERSONAL RESIDENCE TRUST U/A/D/ DECEMBER 12, 2012 By LISA GOLDBERG AS TRUSTEE,

Plaintiff,

-against-

THE BOARD OF MANAGERS OF THE MADISON SQUARE CONDOMINIUM, NEW BEDFORD MANAGEMENT CORP., JEROME BERARD, GEORGE HIGGINS, JULIA SALAMON, and ALI REZA MOMTAZ,

Defendant.
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HON. CAROL R. EDMEAD, J.S.C.:

In an action involving an intermittent leak in a condominium unit, defendants The Board of Managers of the Madison Square Condominium (the Board) and New Bedford Management Corp. (New Bedford) moves, pursuant to CPLR 3212, to dismiss all claims and cross claims as against them; the Board and New Bedford also seek costs and attorney's fees (motion seq. No. 004). Separately, defendants George Higgins (Higgins) and Ali Reza Momtaz (Momtaz) move for summary judgment dismissing all claims and cross claims as against them; Higgins and Momtaz also seek costs and attorney's fees (motion seq. No. 005). These motions are hereby consolidated for disposition.

BACKGROUND

Plaintiff the Lisa Goldberg Qualified Personal Residence Trust U/A/D December 12, 2012 by Lisa Goldberg as Trustee (Plaintiff, or Goldberg) is an individual unit owner at a condominium located at 117 East 24th Street. Prior to 2012, Goldberg owned the unit

individually, but in that year Goldberg transferred ownership to trust which is the plaintiff in this matter. Higgins and Momtaz own a unit directly above Goldberg. Higgins was formerly a member of the Board. New Bedford is the managing agent of the condominium.

This action arises from an intermittent leak in Goldberg's apartment which, ostensibly, has been corrected. Plaintiff filed the complaint in November 2014. The first cause of action alleges that all defendants are liable for negligence, while the second and third causes of action, respectively, are for trespass and nuisance against all defendants. The fourth cause of action, brought against the Board and Higgins, is for breach of fiduciary duty.

DISCUSSION

"Summary judgment must be granted if the proponent makes 'a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact,' and the opponent fails to rebut that showing" (*Brandy B. v Eden Cent. School Dist.*, 15 NY3d 297, 302 [2010], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). However, if the moving party fails to make a *prima facie* showing, the court must deny the motion, "'*regardless of the sufficiency of the opposing papers*'" (*Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008], quoting *Alvarez*, 68 NY2d at 324).

I. Negligence

To establish negligence, a plaintiff is required to prove: "the existence of a duty, that is, a standard of reasonable conduct in relation to the risk of reasonably foreseeable harm; a breach of that duty and that such breach was a substantial cause of the resulting injury" (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006] citing, *inter alia, Palsgraf v Long Is. R.R. Co.*, 248 NY 339 [1928] [other citation omitted]).

A. New Bedford

The Board and New Bedford each argue that they did not have a duty to Plaintiff. As to New Bedford, the Board and New Bedford argue that it cannot be held liable in negligence, as it did not have complete control over the condominium. In support of this proposition, the Board and New Bedford cite to *Hakim v 65 Eighth Ave., LLC* (42 AD3d 374 [1st Dept 2007]). The question in *Hakim* involved whether the owner of a management company could be held personally liable for alleged nonfeasance. While this scenario is remote from the questions presented here, *Hakim* did uphold an applicable principle, articulated in a much older case, *Gardner v 1111 Corp.* (286 AD 110 [1st Dept 1955]), which held that "where a managing agent has complete and exclusive control of the management and operation of the building - in other words where he stands in the owner's shoes so to speak - he is liable for negligence just as the owner would be and cannot be excused by claiming that he was guilty only of nonfeasance" (*id.* at 112). However, *Gardner* held that if the managing agent "were not in complete and exclusive control then there would be no liability on its part since a managing agent not in complete control is not liable for mere nonfeasance" (*id.*).

The Board and New Bedford also cite to this court's decision in *Hammani v K & T Realty Assoc.* (2011 NY Slip Op 33945), for the proposition that a managing agent will ordinarily have no duty unless it has "complete and exclusive control" (*id.* at *3, citing *Howard v Alexandra Restaurant*, 84 AD3d 498 [1st Dept 2011]). To show that New Bedford did not have such control, the Board and New Bedford submit the management agreement between the two parties (NYSCEF doc No. 165). The agreement provides that maintenance workers will be the Board's employees, rather than New Bedford's:

> "Such persons, in each instance, shall be Owner's and not Agent's employees. All decisions concerning employment and working conditions shall be made by

> Owner and any actions of Agent regarding employees shall be undertaken by Agent as Owner's agent acting at Owner's direction. Agent shall advise Owner concerning work schedules of employees and notify Owner in writing about employee vacation, sick or personal days. Prior to hiring any prospective employee, Agent shall verify such person's ability to physically perform in the position and confirm that such person has the training, permits and/or licenses to perform all duties required by the job description. Agent shall diligently check all references for all prospective employees, including, without limitation, performing a criminal background investigation. Notwithstanding the above, the hiring of any employee shall be the responsibility and decision of Owner"

(*id.*, § 2.1).

The Board and New Bedford also refer to another section of the maintenance contract that provides that any repair over $2,000 must be approved by the Board (*id.*, § 2.3). Through these provisions of the maintenance contact, the Board and New Bedford make a *prima facie* showing that New Bedford does not have a duty to Plaintiff, as it did not have complete and exclusive control over the common areas of the condominium. As Plaintiff fails to rebut this showing, or otherwise raise a question of fact that one of the exceptions of *Espinal v Melville Snow Const.* (98 NY2d 136 [2002]) is applicable, the negligence claim as against New Bedford must be dismissed.

B. The Board

As to the Board, the Board and New Bedford argue that any duty that the Board has to Plaintiff is entirely contractual. As a corollary of this assertion, the Board and New Bedford, citing, among others, to *Regini v Board of Mgrs. of Loft Space Condominium* (107 AD3d 496 [1st Dept 2013]), argue that the Board has no duty and thus cannot be liable to Plaintiff for negligence.

Regini held that the plaintiff's "negligence claim should be dismissed as duplicative of his contract claim," as the plaintiff did not allege any duty other than that which arose from the contract between the condominium and the plaintiff (107 AD3d at 497). Thus, the *Regini* line of

cases relied on by the Board and New Bedford stand for the simple proposition that plaintiffs cannot bring contract and negligence claims against a board where the duties involved overlap entirely. Here, plaintiff has no contractual claim. Thus, there is no overlap and no issue as to duplicative claims, the Board and New Bedford have failed to make a *prima facie* showing of entitlement to summary judgment based on a lack of duty.

Under the condominiums organizing documents, the Board plainly has a duty to maintain common areas. In opposition, Plaintiff submits an affidavit from Stephen Morse (Morse), an engineer. Morse acknowledged that following repairs in October 2017, the leak has not recurred. However, he opines that

> "if the Board and/or the 11th Floor Unit owners had taken action to investigate and, ultimately, resolve the ongoing leaks, the leaks would have undoubtedly been cured years before they finally were cured in 2015, and subsequently again in 2017 .... [T]he issues relating to the waste pipe, the wax ring and the caulking to seal the toilet base to the floor were readily discoverable had [the Board] and/or the 11th Floor Unit owners taken any action to meaningfully investigate and ultimately, resolve the ongoing leaks. Accordingly ... this conduct and inaction by the Board and/or the 11th Floor Unit owners could have resulted in far less damage to Plaintiff's Apartment had the conditions not been ignored for years"

(NYSCEF doc No. 273, ¶¶ 21-23).

Thus, Morse opines that conditions spanning the common areas (the waste pipe) and Higgins' and Momtaz's unit (Unit 11) caused the damage complained of by Plaintiff. In other words, Plaintiff raises an issue of fact as to whether the Board negligently maintained a common area of the condominium. Thus, the branch of the Board and New Bedford's motion that seeks dismissal of negligence claim against the Board must be denied.

C. Higgins and Momtaz

Higgins and Momtaz also argue that they had no duty to Plaintiff. This argument relies on the well settled proposition that "a claim arising from the condition or operation of the common elements does not lie against the owners of the individual units" and that "the proper defendant on such a claim is the board of managers" (*Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 48). This principle is unassailable, but Plaintiff argues that there is an issue of fact as to whether the leaks arose, at least partially, out of Higgins and Momtaz's maintenance of parts of their own bathroom, such as the seal around their toilet, which, Plaintiff argues, are not common elements of the Condominium.

The condominium's bylaws provide that:

> "maintenance, repairs and replacements, whether structural or non-structural, ordinary or extraordinary, in or to the Common Element, whether such Common Elements are located outside a Unit or inside a Unit, shall be made by the Condominium Board and the cost and the cost and expense thereof shall be charged to Unit Owners as a Common Expense"

(NYSCEF doc No. 97, ¶ 10).

Furthermore, the bylaws define "Common Elements" as "all central and appurtenant installations for services such as power, light, telephone, television, gas, hot and cold water, heat and (including all pipes, ducts, wires, chutes, cables and conduits used in connection therewith) whether located in Common Areas or in Units" (NYSCEF doc No. 96, § 8 [g]). Here, the conditions which Plaintiff alleges caused the leaks, including the allegedly defective seal around the toilet, all relate to appurtenances to the toilet piping. Accordingly, they are Common Elements (*see generally Royal York Owners Corp. v Royal York Assoc., L.P.*, 43 AD3d 357 [1st Dept 2007]). As the allegedly defective conditions all relate to common areas, Higgins and

Momtaz do not owe Plaintiff a duty relating to them and the negligence claims against Higgins and Momtaz must be dismissed.

II. Trespass

The Court of Appeals has held that

> "Trespass is an intentional harm at least to this extent: while the trespasser, to be liable, need not intend or expect the damaging consequence of his intrusion, he must Intend the act which amounts to or produces the unlawful invasion, and the intrusion must at least be the immediate or inevitable consequence of what he willfully does, or which he does so negligently as to amount to willfulness. To constitute such a trespass, the act done must be such as will to a substantial certainty result in the entry of the foreign matter"

(*Phillips v Sun Oil Co.*, 307 NY 328, 331 [1954] [internal quotation marks and citation omitted]).

As the First Department has articulated this principle: "[a] claim for trespass requires an affirmative act constituting or resulting in an intentional intrusion upon plaintiff's property" (*Congregation B'Nai Jehuda v. Hiyee Realty Corp.*, 35 AD3d 311, 312 [1st Dept 2006]).

A. The Board and New Bedford

The Board and New Bedford argue that the trespass claim must be dismissed as against them, as there is no evidence that they did anything to affirmatively cause the leak. Plaintiff, citing to *Berenger v 261 W. LLC* (93 AD3d 175 [1st Dept 2012]), argue that the Board's intentional inactions, constitute an "affirmative act" sufficient to serve as a predicate for a trespass claim.

In Berenger, the Court held that a claim for trespass could not be dismissed, as there was a question as whether the defendants, "by intentionally not repairing" a cooling tower that was leaking glycol, had willfully intruded on plaintiff's property (*id.* at 182). Courts, however, have limited the precedential scope of *Berenger* by noting that the Court "permitted the plaintiff's tort-

based claims to survive summary judgment on public policy grounds" (*Obolewicz v CRP/Extell Parcel 1, L.P.*, 2012 NY Misc LEXIS 5472 [Sup Ct, NY County 2012, Singh, J.]).

Here, as Plaintiff's claims relate to the Board and New Bedford's inaction, rather than any affirmative acts they took to cause the leaks, they are entitled to dismissal of these claims as against them (*see Estrategia Corp v Lafayette Commercial Condo,* 2011 NY Slip Op 33405 [U] [Sup Ct, NY County 2011] [allegations of inaction could not amount to a viable claim for trespass in a case involving a sprinkler leak]). Thus, the trespass claims must be dismissed as against the Board and New Bedford.

B. Higgins and Momtaz

Higgins and Momtaz also argue, among other things, that the trespass claims as against them must be dismissed for a lack of an affirmative act that caused the leaks. However, despite general allegations regarding the failure to address the leaks, Plaintiff cannot point to a specific affirmative act by Higgins and Momtaz that caused the leaks or their continuation. Thus, the trespass claims must be dismissed as against Higgins and Momtaz.

III. Nuisance

Unlike trespass, inaction is built into elements of the nuisance. The Court of Appeals has held that the elements of a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (Berenger v 261 W. LLC, 93 AD3d 175 [1st Dept 2012]).

A. The Board and New Bedford

The Board and New Bedford argue that they did nothing intentional to cause the leaks into Plaintiff's apartment. Plaintiff does not address New Bedford in defending its nuisance claim. Thus, Plaintiff has effectively abandoned its nuisance claim as against New Bedford (*see Gary v Flair Beverage Corp.*, 60 AD3d 413, 413 [1st Dept 2009]) and the branch of the Board and New Bedford's motion seeking dismissal of this claim must granted.

As to the Board, Plaintiff argues that the Board's failure to adequately investigate and remedy the problem satisfies the intentionality requirement of a nuisance claim. The Board and New Bedford argue that they did nothing intentional to cause the leaks or their continuation, even though their efforts to investigate and remedy the leaks were not successful for several years.

In *Leberman v Cayre Synergy* (108 AD3d 426 [1st Dept 2013]), a case involving a roof leak in a condominium, the First Department held that there was a "triable issue of fact whether the sponser's allowing water to continue infiltrating their unit was intentional" (*id.* at 427). Similarly, there is a question of fact as to whether the Board's delays in diagnosing and remedying the cause of the leaks was intentional. As a question of fact remains, the branch of the Board and New Bedford's motion seeking dismissal of Plaintiff's cause of action for nuisance against the Board must be denied.

B. Higgins and Momtaz

Higgins and Momtaz argue that they did nothing to intentionally cause or prevent the remediation of the leaks. However, Plaintiff claims that Higgins and Momtaz prevented the timely remediation of the leaks by making it difficult to access their apartments. Plaintiff submits

the deposition testimony of Jerome Berard (Berard), who testified that difficulty obtaining access to Unit 11 to investigate the cause of the leaks was a recurring issue (Berard tr at 90-91).

Higgins and Momtaz argue that the history of multiple inspections shows that they provided access. Momtaz submits an affidavit in which she states:

> "I never denied anyone access to the apartment with regard to the plaintiff's complaint of a leak. Whenever anyone has asked that an appointment be scheduled to investigate the leak, one was scheduled. I never made an appointment regarding the leak and failed to keep it. On the other hand, there were two occasions documented by emails, where an appointment was made to allow entry into our apartment and plaintiff contacted us to cancel"

(NYSCEF doc No. 130, ¶ 12).

Higgins also submits an affidavit in which he states:

> "In response to plaintiff's complaints of leaks, I permitted access to the apartment … I responded to emails regarding the leaks; whether it was to advise that we were not home, not using any appliance or fixture or whether it was to coordinate inspections in my apartment. I placed my insurance carrier on notice of plaintiff's complaints and asked that someone come to apartment to look for the leak. This occurred in 2010. I expressed to the other board members during our meetings that I was fine with work being performed in my apartment to find the source of the leak. I did, however, indicate that I would like the apartment put back the way it was before any such work was performed"

(NYSCEF doc No. 129, ¶ 23).

In opposition, Plaintiff disputes the proposition that Higgins and Momtaz readily provided access to the apartment. In addition, to Berard's testimony that it was difficult to access the apartment, Plaintiff refers to the deposition testimony of board member Robert Eng (Eng) and New Bedford's Marcia James. Eng testified that the Board had difficulty accessing Momtaz and Eng's apartment because Momtaz had "a habit of never answering the door even when you make an appointment with him" (NYSCEF doc No. 191 at 232). James also testified that there was an issue with Higgins and Momtaz not being cooperative in allowing plumbers access to their apartment to do inspections regarding the source of the leaks.

Here, there is factual dispute as to whether Momtaz and Higgins's alleged failure to allow access to their apartment constitutes an intentional and substantial interference with Plaintiff's ability to enjoy her apartment. As such, the branch of Momtaz and Higgins motion that seeks dismissal of Plaintiff's nuisance claim as against them is denied.

IV. Breach of Fiduciary Duty

Under the business judgment rule, courts typically defer to the decisions of a condominium or cooperative's board of directors (*see 40 W. 67th Street Corp. v Pullman*, 100 NY2d 147 [2003]). However, boards and board members may face breach of fiduciary duty claims where they act in bad faith (*id.* at 155).

A. The Board

Plaintiff argues that the Board acted in bad faith in two ways: (1) that it allowed Higgins, formerly one of its members, to cause it to be unresponsive to Plaintiff's complaints of leaks and (2) that it abdicated responsibility to maintain to the common areas of the condominium.

In support of the first claim, plaintiff submits Eng's testimony that Higgins was not only cooperative up to a certain point, that he would "speak nicely, but not be able to deliver" (NYSCEF doc No. 191 at 210). Eng also acknowledged, effectively, that Higgins had a conflict of interest between his role on the board and his personal interest as a unit owner (*id.*). However, Plaintiff is unable to connect this conflict with any specific action taken by the Board. Instead, Plaintiff argues that this conflict motivated Higgins's conduct as a unit owner. More specifically, Plaintiff connects Higgins' conflict with his alleged failure to provide access to the Board for inspections.

As to the Board's responsibility to maintain the common areas of the condominium, the court has already decided that there is a question of fact as to whether the Board discharged this

responsibility negligently. However, there is no question of fact as to whether they did so in bad faith. Contrary to Plaintiff's position, Berard's failure to personally read complaint emails from other unit owners (NYSCEF doc No. 196 at 67) does not constitute bad faith where the Board had New Bedford in place to troubleshoot such complaints.

As Plaintiff fails to raise an issue of fact as to whether the Board acted in bad faith, the branch of the Board and New Bedford's motion seeking dismissal of breach of fiduciary duty claim against the Board must be granted. Plaintiff's reliance on *Lorne v 50 Madison Ave. LLC* (65 AD3d 879) is unpersuasive, as the First Department, despite Plaintiff's characterization of the Court's holding, dismissed the fiduciary duty claims before it (*id.* at 882).

B. Higgins

For the same reason that the first claim of bad faith against the board is not persuasive, the claim for breach of fiduciary duty against Higgins fails. That is, Plaintiff fails to raise a question of fact as to bad faith conduct by Higgins *as a member of the board* (emphasis added). That is, the alleged bad conduct -- failure to provide access was in Higgins's capacity as a unit owner. Thus, the breach of fiduciary duty claim as against Higgins must be dismissed.

V. Attorney's Fees

While the Board and New Bedford, as well as Higgins and Momtaz, all move for attorney's fees, they make no argument as to why they would be entitled to them. As such, the branch of each motion that seeks attorney's fees is denied.

VI. Cross Claims

The Board makes an unrebutted showing that it is entitled to dismissal of Higgins and Momtaz's claim for contractual indemnification as against it. However, neither the Board, nor Higgins and Momtaz are entitled to dismissal of their mutual cross claims for contribution and

common-law negligence, as there remains a question of fact as to the active wrongdoing of all three parties (see *Godoy v Abamaster of Miami*, 302 AD2d 57, 61 [2nd Dept 2003] and *McCarthy v Turner Constr., Inc.*, 17 NY3d 369, 375 [2011]). As the court has dismissed all affirmative claims of wrongdoing as against New Bedford, all cross claims as against must be dismissed as well.

CONCLUSION

Accordingly, it is hereby

ORDERED defendants The Board of Managers of the Madison Square Condominium (the Board) and New Bedford Management Corp. (New Bedford)'s motion for summary judgment is granted only to the following extent:

- all claims and cross claims as against New Bedford are dismissed;
- Plaintiff's claim for trespass and breach of fiduciary duty as against the Board are dismissed;
- all cross claims for contractual indemnification against the Board are dismissed;

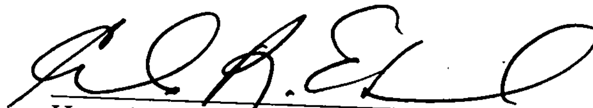
and it is further

ORDERED that defendants George Higgins (Higgins) and Ali Reza Momtaz's motion for summary judgment is granted only to the extent that Plaintiff's claims for negligence and trespass as against them, as well as the claim of breach of fiduciary duty as against Higgins, are dismissed; and it is further

ORDERED that the Clerk shall order judgment accordingly and the action shall proceed against the remaining defendants on the remaining claims; and it further

ORDERED that counsel for the Board and New Bedford is to serve a copy of this order, along with notice of entry, on all parties within 10 days of entry.

Dated: January 17, 2019



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.