SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH **PART** IAS MOTION 32

Justice

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KRISTOFFER MACK,

Plaintiff,

- v -

PARK AVENUE AND SEVENTY-SEVENTH STREET CORPORATION, ROBERT O'HARA

Defendants.

INDEX NO. 156365/2017

MOTION DATE 01/08/2019

MOTION SEQ. NO. 002

DECISION AND ORDER

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85,

were read on this motion to/for SUMMARY JUDGMENT.

The motion by plaintiff for partial summary judgment is granted in part and denied in part. The cross-motions by defendants are granted in part and denied in part.[1]

Background

This action arises out of water damage suffered in plaintiff's apartment. Plaintiff is a shareholder in a co-op, defendant Park Avenue and Seventy-Seventh Street Corporation (the "Coop") located at 850 Park Avenue in Manhattan. On September 2, 2016, a toilet in defendant O'Hara's apartment (two floors above plaintiff's apartment) began leaking a tremendous amount of water. Plaintiff contends that the flushometer in the toilet malfunctioned while O'Hara argues that the flooding arose when the building turned the water back on after it had shut it off.

[1] Defendant Park Avenue and Seventh-Seventh Street Corporation objects to O'Hara's reply papers in support of O'Hara's cross-motion. While this Court generally considers reply papers for cross-motions, the Court did not consider it for purposes of this motion.

O'Hara insists that when the water was turned back on, it created a water hammer—a sudden surge in water pressure—and this caused the toilet to malfunction and leak.

Plaintiff contends that O'Hara failed to maintain his toilet and the Coop failed to meet its obligations under the proprietary lease. Plaintiff moves for summary judgment on his first (declaratory judgment), second (breach of contract), third (breach of proprietary lease), sixth (breach of warranty of habitability), seventh (breach of quiet enjoyment), eighth (constructive/actual eviction) and ninth (negligence) causes of action.

The Coop cross-moves for summary judgment dismissing plaintiff's fourth (breach of fiduciary duty), fifth (conversion), seventh (breach of quiet enjoyment), eighth (constructive/actual eviction), ninth (negligence), tenth (intentional infliction of emotional distress), eleventh (negligent infliction of emotional distress) and thirteenth (misappropriation) causes of action as well as O'Hara's cross-claims. Defendant O'Hara cross-moves for summary judgment dismissing plaintiff's claim for negligence and cross-claims lodged against him.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make 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 from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492, 955 NYS2d 589 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York,* 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec, Ltee.* 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

Declaratory Judgment

Plaintiff moves for a declaratory judgment that it is entitled to insurance proceeds distributed to the Coop specifically for plaintiff's apartment. The Coop does not oppose this branch of the motion. Therefore, the branch of plaintiff's motion seeking a declaratory judgment that he is entitled to insurance proceeds totaling $57,620.86 is granted.

Breach of Contract & Breach of Proprietary Lease

The branches of plaintiff's motion that sought summary judgment for breach of contract and breach of the proprietary lease are denied. As an initial matter, plaintiff did not attach the operative proprietary lease. It is the movant's burden to establish that he is entitled to summary judgment. In reply, plaintiff admits that there may be differences is the two versions of the proprietary leases but insists that the two leases are "substantially identical" (NYSCEF Doc. No. 76, ¶ 33). The Court has no idea what this means. It is not the Court's role to investigate the two proprietary leases and determine whether it was prejudicial for plaintiff to fail to include it in his moving papers. It is plaintiff's job to meet his prima facie burden with the correct papers.

Even if the Court were to ignore plaintiff's error, the Court would deny these branches of the motion. Plaintiff contends that the Coop was required to maintain the structural parts of the building, including the subfloors. In opposition, the Coop attaches the affidavit of Mr. Wollman (the managing agent) who claims that the Coop admits it is responsible for fixing the subfloors but that plaintiff refused to let the Coop do its work. That raises an issue of fact with respect to these causes of action. If the Coop's version is accurate—that plaintiff prevented the Coop from fixing his apartment—then the Coop cannot be found to have breached the proprietary lease. The branches of plaintiff's motion seeking summary judgment on the second and third causes of action are denied.

Breach of Warranty of Habitability

"Pursuant to Real Property Law § 235–b, every residential lease contains an implied warranty of habitability which is limited by its terms to three covenants: (1) that the premises are fit for human habitation, (2) that the premises are fit for the uses reasonably intended by the parties, and (3) that the occupants will not be subjected to conditions that are dangerous, hazardous or detrimental to their life, health or safety" (*Solow v Wellner*, 86 NY2d 582, 587-88, 635 NYS2d 132 [1995] [internal quotations omitted]).

Plaintiff claims that the damage to his apartment rendered it uninhabitable for 18 months (NYSCEF Doc. No. 33, ¶ 18). In opposition, the Coop contends that plaintiff frustrated the Coop's efforts to repair plaintiff's apartment by raising numerous objections with the work to be done. Mr. Wollman contends that plaintiff did not permit the Coop to replace the subfloor because plaintiff's experts disagreed with the Coop's experts (NYSCEF Doc. No. 66 at 3-4).

The affidavit of Mr. Wollman raises issues of fact that compel this Court to deny this branch of plaintiff's motion. If Mr. Wollman's assertions prove accurate, then a jury could find

that plaintiff's apartment was uninhabitable because plaintiff did not allow the Coop to make the necessary fixes. Plaintiff cannot create an uninhabitable condition by refusing repairs and then recover against the Coop for it. And, of course, simply because there was a leak that caused damage to plaintiff's apartment does not mean that plaintiff is automatically entitled to recover on this claim. Sometimes accidents happen; the question is whether the Coop responded quickly enough or whether it allowed plaintiff's apartment to become unlivable.

Quiet Enjoyment/Actual Eviction

"To make out a prima facie case of breach of the covenant of quiet enjoyment, a tenant must establish that the landlord's conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises. There must be an actual ouster, either total or partial, or if the eviction is constructive, there must have been an abandonment of the premises by the tenant" (*Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250, 806 NYS2d 495 [1st Dept 2005]).

Plaintiff moves for summary judgment on its claim for breach of the covenant of quiet enjoyment and the Coop cross-moves for summary judgment dismissing this cause of action. Plaintiff claims that there is no dispute that the Coop ousted plaintiff from his home for 18 months and that the ouster was the Coop's fault. In opposition and in support of its cross-motion, the Coop insists that it cannot be held liable for plaintiff's ouster because another defendant (O'Hara) was responsible for the flood.

These branches of plaintiff's motion and the Coop's cross-motion are denied because there is an issue of fact regarding how quickly the Coop sought to repair plaintiff's apartment after the leak. If a jury credits plaintiff's account that the Coop was difficult and obstinate, they might find that the Coop was to blame for ousting plaintiff from his apartment for so long.

Conversely, the jury could find that plaintiff was too particular and caused his own ouster based on the Coop's contention that every other apartment in the building was repaired without a problem.

Negligence

Plaintiff alleges that both the Coop and O'Hara were negligent, and their negligence caused the damage to plaintiff's apartment. Plaintiff contends that O'Hara should have replaced his old toilet and the Coop failed to timely repair the damages. This branch of plaintiff's motion is denied because the claim against the Coop is duplicative and, as will be discussed below, the Court finds that O'Hara was not negligent as a matter of law.

The Coop cross-moves to dismiss the negligence claim and contends that it is duplicative of plaintiff's breach of contract claim. The Court agrees, and this claim is severed and dismissed as to the Coop because the Coop's duty arises from the proprietary lease (*see Baker v 16 Sutton Place Apartment Corp.*, 2AD3d 119, 121, 768 NYS2d 198 [1st Dept 2003]).

O'Hara also cross-moves on the negligence claim and contends that he was not negligent because his expert (Mr. Delano) found that there was nothing wrong with the toilet prior to the leak and that the leak occurred due to a poorly coordinated restoration of water service. The sudden increase in pressure (the water hammer) from turning the water back on caused the leak.

In opposition to O'Hara's cross-motion, the Coop contends that O'Hara had a duty to maintain his toilet in good condition and points out that no other toilet in the building experienced a similar reaction to the purported water hammer. The Coop infers that the accident must have been caused by O'Hara's toilet rather than the Coop.

Here, the Court finds that O'Hara is entitled to summary judgment dismissing the negligence claim against him. In support of this branch of O'Hara's cross-motion, he attaches

Delano's affidavit, his own affidavit and an affidavit from his step-daughter. Mr. Delano concludes that "[t]here were no signs of leaking, corrosion or of any long-term issues that would have served as a warning to the event" (NYSCEF Doc. No. 61 at 6). Mr. Delano added that "The event is likely associated with the water service interruption immediately prior to the loss. The restoration of water may have caused a pressure surge that both dislodged the toilet adaptor and caused the Flushometer to stick in the run position" (*id.*). "The occupants of Apartment 10D could not have foreseen the events of September 2, 2016 that caused the water leak" (*id.* at 7).

Robert O'Hara acknowledges that he saw a small drip coming from the handle of the toilet in February 2016 and that he told the super who had the leak repaired (NYSCEF Doc. No. 62, ¶ 5). Mr. O'Hara contends he had no reason to suspect that the toilet had any issues that required repair prior to the September 2016 incident (*id.* ¶ 7). Katherine O'Hara Sweeney (Mr. O'Hara's step-daughter) claims that she used the toilet daily from August 29, 2016 to September 1, 2016 while she stayed at her parents' apartment (NYSCEF Doc. No. 63, ¶ 4). Ms. Sweeney contends that she did not see any water leaking from the toilet during her visit (which ended the day before the incident) (*id.* ¶¶ 5, 6).

O'Hara has established his prima facie burden for summary judgment. In order to be held liable under a theory of negligence, plaintiff must show that his damages "were due to failure of the defendant to do or [his] omission to do what a reasonable and prudent man would have done or would have omitted to do in the exercise of ordinary care under all the circumstances" (*Sadowski v Long Island R. Co.* 292 NY 448, 454 [1944]). The reasonable person in these circumstances would have done exactly what O'Hara did prior to the leak: *nothing*.

People ordinarily do not change toilets because they are old; they make a change only after there is an incident. Toilets don't receive preventative maintenance unless there is a warning sign. Instead, people wait until there is an issue and either fix the toilet or get a new one. This Court is unable to find that O'Hara had a duty to have his toilet routinely checked by a plumber when nothing was wrong. A toilet is not a car or an airplane where a reasonable person is likely to get the machine periodically checked out. To find that there is an issue of fact here is tantamount to holding that a jury could find that a O'Hara was negligent for not paying to have a plumber inspect his fully functioning toilet. This Court does not believe that is a question for a jury.

Moreover, there is no basis to find that O'Hara had any specific reason to believe the toilet was about to malfunction. His step-daughter used the toilet right up until the day before the incident and did not notice anything. There is nothing in this record that suggests that O'Hara could be found negligent for not knowing that his toilet was about to leak. The fact that the toilet was fixed seven months prior to the leak is not enough to put O'Hara on notice that he needed a new toilet or that his toilet needed significant repair.

To be clear, this finding has nothing to do with whether the leak was caused by the water hammer or by the toilet itself. Obviously, if the leak was solely caused by the sudden pressure increase (as Delano believes), then O'Hara would not be negligent. But if the leak happened because of the toilet, that does not mean that O'Hara was negligent. In retrospect, it is easy to claim that O'Hara should have known that he needed a new toilet—but the question is whether a reasonable person would have known that a new toilet was needed *prior to* the leak. This is not a case where the toilet needed constant repairs or where O'Hara ignored advice from a plumber

that the toilet needed to be replaced. Instead, there is nothing in these papers that suggests that O'Hara should have known that there may have been a weakness in the plumbing.

In opposition, plaintiff merely offers a conclusory allegation that O'Hara must have failed to keep his apartment in good condition because there was a leak. But plaintiff offers no evidence in admissible form, either from witnesses or his own expert, suggesting that O'Hara was negligent. Instead, plaintiff contends that the doctrine of *res ipsa loquitur* must apply and this doctrine makes O'Hara at least partially liable. Essentially, plaintiff claims that toilets don't malfunction in the absence of some negligence. But that simply is not accurate—*res ipsa* does not apply here because there is no showing that the accident occurred due to a condition in O'Hara's exclusive control (*see Kosakowski v 1372 Broadway Assocs., LLC,* 160 AD3d 567, 567-68 [1st Dept 2018]). The leak could have happened because of the water hammer, or the super's shoddy repairs from February 2016 or some other reason outside of O'Hara's control.

And the Coop only offers the affidavit of Mr. Wollman, the managing agent for the building. Mr. Wollman did not claim to have any personal or expert knowledge about the leak that contradicts O'Hara's claim. And the Coop did not include an affidavit from an expert or a witness with first hand knowledge that would suggest that O'Hara should have replaced or repaired his toilet prior to the leak. The Coop simply concludes it was O'Hara's fault.

The Court recognizes that plaintiff brought his motion, and thus initiated the cross-motions, before paper discovery was completed and before any depositions were conducted. That was plaintiff's decision. Therefore, the Court must consider the papers before it and, on these papers, the Court finds that O'Hara established his prima facie burden for summary judgment dismissing the negligence claim and the Coop and plaintiff failed to raise an issue of fact in response.

Breach of Fiduciary Duty

"A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim cannot stand. . . . The same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself" (*William Kaufman Org., Ltd. v Graham & James LLP*, 269 AD2d 171, 173, 703 NYS2d 439 [1st Dept 2000] [internal quotations and citations omitted]).

The Coop cross-moves for summary judgment dismissing the breach of fiduciary duty claim and claims this cause of action is duplicative of the breach of contract claim. In opposition, plaintiff claims that this cause of action is not based on the proprietary lease and instead flows from the Coop's refusal to turn over insurance proceeds until plaintiff signed a waiver of his rights.

This raises an issue of fact. Plaintiff might be able to show that the Coop acted in bad faith by withholding insurance proceeds that should have been turned over to plaintiff. The Court observes that the Coop did not oppose the branch of plaintiff's instant motion for these insurance proceeds and this decision entitles plaintiff to those proceeds. This conduct by the Coop—refusing to turn over insurance money if plaintiff did not sign a release—arises out of actions that are separate from the proprietary lease and, therefore, is not duplicative.

Conversion and Misappropriation

The Coop cross-moves for summary judgment dismissing plaintiff's conversion and misappropriation causes of action because these are duplicative of plaintiff's breach of contract

action. In opposition, plaintiff claims that this cause of action derives from the Coops' refusal to turn over the insurance proceeds.

As an initial matter, these causes of action are moot because the Court granted plaintiff's cause of action for a declaratory judgment for these insurance proceeds. And these causes of action are duplicative of plaintiff's breach of contract and breach of fiduciary duty claims. As stated above, there is an issue of fact as to whether the Coop breached its fiduciary duty with respect to withholding funds until plaintiff signed a waiver of his rights. And to the extent these claims are based on the proprietary lease, they are duplicative of the breach of contract and breach of proprietary lease causes of action.

Intentional Infliction of Emotional Distress/ Negligent Infliction of Emotional Distress

In opposition to the Coop's cross-motion, plaintiff withdrew his causes of action for intentional infliction of emotional distress (tenth cause of action) and negligent infliction of emotional distress (eleventh cause of action)

Cross-Claims: O'Hara and the Coop

"In contractual indemnification, the one seeking indemnity need only establish that it was free from any negligence and was held liable solely by virtue of the statutory liability. Whether or not the proposed indemnitor was negligent is a non-issue and irrelevant. In distinction, in the case of common-law indemnification, the one seeking indemnity must prove not only that it was not guilty of any negligence beyond the statutory liability but must also prove that the proposed indemnitor was guilty of some negligence that contributed to the causation of the accident for

which the indemnitee was held liable to the injured party by virtue of some obligation imposed by law," (*Correia v Professional Data Mgt., Inc.*, 259 AD2d 60, 65, 693 NYS2d 596 [1st Dept 1999]).

O'Hara cross-moves for summary judgment in his favor and dismissing all cross-claims against him. The Coop alleged claims for for common law and contractual indemnification against O'Hara. The Coop cross-moved for summary judgment dismissing O'Hara's cross-claims against the Coop for common law indemnification and contribution.

Because the Court found that O'Hara is not negligent, the Coop's cross-claim for common law indemnification is severed and dismissed. With respect to the claim for contractual indemnification alleged against O'Hara, the Court also severs and dismisses this cause of action because O'Hara did not breach the lease. While O'Hara was required to indemnify the Coop for losses arising out of his failure to comply with a provision of the lease, there is no basis to find that he failed to maintain his toilet.

The proprietary lease provides that the Lessee:

> "shall be solely responsible for the maintenance, repair and replacement of the surfaces of walls, ceilings and floors of the apartment, and of the plumbing, gas, and heating fixtures and equipment, including but not limited to sinks, stairs, cabinets, refrigerators, bowls, tubs, air conditioning equipment, dishwashers, washing machines, dryers, ranges and other appliances and equipment and machines as may be in the apartment. Plumbing, gas and heating fixtures as used herein shall include exposed gas, steam and water pipes attached to fixtures, appliances and equipment, and the fixtures, appliances and equipment which the Lessee may install within the wall or ceiling, or under the floor, but shall not include radiators, radiator valves and traps, gas, steam, water or other pipes and conduits within the walls, ceilings or floors or heating equipment which is part of the standard building equipment" (NYSCEF Doc. No. 67 at 12).

The proprietary lease also provides that:

> "The Lessee agrees to indemnify and save the Lessor and its managing agent harmless from all liability, loss, damage and expense, including without limitation, reasonable attorney's fees and disbursements, arising from injury to person or property occasioned by the failure of the Lessee to comply with any provision hereof, or due wholly or in part to any act, default or omission of the Lessee or of any Permitted Occupant in the apartment, or by the Lessor, its agents, servants or contractors when acting as agent for the Lessee as in this lease provided. This Paragraph shall not apply to any loss or damage when the Lessor is covered by insurance which provides for a waiver of subrogation against the Lessee" (*id.* at 28-29).

As noted above, this Court found that there was no evidence that O'Hara failed to maintain the toilet and that the alleged damage did not arise from O'Hara's attempt to repair or replace the toilet. The fact is that the only evidence presented on this record is that O'Hara's expert says the accident was not O'Hara's fault and there was no reason to believe that the toilet needed replacing prior to the incident.

While the Coop contends, through the Wollman affidavit, that O'Hara was to blame, Mr. Wollman did not have personal knowledge of the incident nor did he claim to be an expert regarding how the toilet malfunctioned. And the Coop offered nothing else to rebut O'Hara's claim that he was not negligent for the leak. The Court also notes that plaintiff has no personal knowledge about the leak because he was away on vacation when the incident occurred.

Because the only cause of action alleged against O'Hara by plaintiff (negligence) is severed and dismissed, the Court also severs and dismisses O'Hara's cross-claims against the Coop as moot.

Accordingly, it is hereby

ORDERED that the motion by plaintiff for partial summary judgment is granted only to the extent that plaintiff is entitled to a declaration that he is awarded the insurance proceeds earmarked for his damages totaling $57,620.86 from defendant Park Avenue and Seventy-

Seventh Street Corporation and denied as to the remaining branches of the motion; and it is further

ORDERED that the cross-motion by defendant Park Avenue and Seventy-Seventh Street Corporation is granted only to the extent that the fifth (conversion), ninth (negligence), tenth (intentional infliction of emotional distress), eleventh (negligent infliction of emotional distress), thirteenth (misappropriation) and defendant O'Hara's cross-claims are severed and dismissed and denied as to the remaining branches of the cross-motion; and it is further

ORDERED that the cross-motion by defendant O'Hara for summary judgment dismissing plaintiff's claim and all cross-claims against him is granted and the clerk is directed to enter judgment accordingly.

Next Conference: May 7, 2019 at 2:15 p.m.

1.30.19
DATE

HON. ARLENE P. BLUTH

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED		GRANTED IN PART	X OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE