Lackey v 62 E. 87th St. Owners Corp.
2019 NY Slip Op 30738(U)
March 19, 2019
Supreme Court, New York County
Docket Number: 150323/2018
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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INDEX NO. 150323/2018

MOTION SEQ. NO. 002

WARREN LACKEY and GREGORY ERFANI,

Plaintiffs,

- v -

62 EAST 87TH STREET OWNERS CORP., MARY ELLEN BRANNIGAN, MAX ENOCK, JOHN RYAN, ERIC SHAW, and JENNIFER PRICE,

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 61, 63, 64, 65, 66, 67, 68

were read on this motion for DISMISSAL.

Upon the foregoing documents, it is ordered that the motion is **decided as follows**.

In this civil rights action, defendants 62 East 87th Street Owners Corp. ("the Co-op"), Mary Ellen Brannigan a/k/a Mary Ellen Weilage ("Brannigan"), Max Enock ("Enock"), John Ryan ("Ryan"), Eric Shaw ("Shaw"), and Jennifer Price ("Price") move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the amended complaint of plaintiffs Warren Lackey ("Lackey") and Gregory Erfani ("Erfani") in its entirety as against the individual defendants. Defendants also move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the second, fourth, seventh, and eighth causes of action as against all defendants. Plaintiffs oppose the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and caselaw, it is ordered that the motion is **decided as follows**.

FACTUAL AND PROCEDURAL BACKGROUND:

The Co-op is a cooperative housing corporation that owns an apartment building located at 62 East 87th Street in Manhattan. (Doc. 59 at 7.) Plaintiffs Lackey and Erfani are tenants of the building and, having shares of stock and a propriety lease, are shareholders of the Co-op. (*Id.*) Defendants Brannigan, Enock, Ryan, Shaw and Price are also tenants in the building and are members of the Co-op's board of directors ("the Board"). (*Id.*)

Plaintiffs' problems with defendants began even before they purchased their apartment unit. (*Id.*) Their complaint alleges that, in January of 2015, while being interviewed by the Board, plaintiffs asked whether there were any ongoing issues with the building or unit. (Doc. 56 at 4.) Although the Board told Lackey and Erfani that there were no issues, upon the final inspection, they noticed peeling paint on the bathroom ceiling as well as water damage on an interior wall. (*Id.*) When plaintiffs mentioned these issues at closing, Seth Weinstein ("Weinstein"), the property manager and an agent of the Board (*id.* at 3), informed them that there was no leak and that the peeling paint was merely a cosmetic issue (*id.* at 4).

From January to June of 2015, Lackey and Erfani interviewed several contractors about renovating their unit. (Doc. 59 at 7.) Each of the contractors purportedly expressed their opinion that the peeling paint in the bathroom was worsening over time and was most likely due to a water leak from the apartment unit above. (Doc. 56 at 4.) Weinstein and Brannigan reassured plaintiffs and insisted that a plumber had inspected that apartment and had found no water leak. (*Id.* at 4–5.) Plaintiffs subsequently began renovating their apartment in November of 2015. (*Id.* at 5.)

The renovations were completed in January of 2016. (Doc. 59 at 7.) A few months later, in June of 2016, plaintiffs noticed a water stain on their bathroom ceiling. (Docs. 56 at 5; 59 at 7.) Plaintiffs again brought up their concern to Brannigan and Enock, who told them that somebody

had already checked the unit above theirs. (Doc. 59 at 7–8.) Plaintiffs further told Brannigan and Enock that Weinstein was unresponsive to e-mails and that he was rude whenever he did communicate with them. (*Id.*) Although plaintiffs and the Board scheduled to have contractors repair the ceiling, it remained unchecked from July of 2016 to March of 2017. (Doc. 56 at 6.)

In April of 2017, plaintiffs decided to repair the ceiling themselves. (*Id.*) However, Weinstein prevented them from doing so, stating that the Board had decided to investigate the problem and that the ceiling was going to be ripped open. (*Id.*) The complaint alleges that, although Lackey and Erfani informed Weinstein that they wanted to be present during the investigation, both Weinstein and the Board: (1) refused to provide assurances that Lackey and Erfani could be present at the apartment while the investigation was being conducted; (2) refused to assure plaintiffs that the unit would be restored promptly; and (3) refused to confirm that the contractors conducting the investigation would be licensed and insured. (*Id.*) Because they were not given these assurances, plaintiffs refused access to their unit. (Doc. 59 at 8.)

On April 26, 2017, the Co-op served a "Thirty (30) Day Notice to Cure Violations," which charged Lackey and Erfani with violating paragraph 25 of their proprietary lease, "in that [they] have failed to provide unfettered access to the premises for Lessor to inspect and repair certain conditions in the bathroom and kitchen caused by a certain leak." (Doc. 53 at 7–8.) By May 31, 2017, Lackey and Erfani were still refusing entrance to their apartment, and the Co-op sent them a "Ten (10) Day Notice of Termination" informing them that their lease was to be terminated on June 16, 2017. (*Id.* at 11–12.) However, Lackey and Erfani did not vacate the apartment. (Doc. 59 at 9.)

On June 20, 2017, the Co-op commenced a holdover proceeding styled *62 E. 87th St. Owners Corp. v Lackey*, Civil Court, New York County Index Number L&T 66909/2017 ("the

holdover proceeding") against Lackey and Erfani on the basis that they had violated their lease by refusing to allow members of the Board to inspect and repair the apartment. (Doc. 53 at 4–5.) Lackey and Erfani claim that, in the holdover proceeding, they were able to obtain the "answers and assurances they needed" from the Board regarding the inspection, and that they allowed the repairs to take place in October of 2017. (Doc. 56 at 7.) In their answer to the holdover petition, they alleged violations of the warranty of habitability. (*Id.* at 15–16.) On November 1, 2017, Lackey, Erfani, and the Board stipulated that the Board's contractor would return to perform a moisture test and that Weinstein would be permitted to observe the inspection.[1] (*Id.*)

A few days later, on November 9, 2017, the Co-op performed the moisture test on plaintiffs' bathroom ceiling. (Doc. 59 at 10.) Plaintiffs allege that they got into a confrontation with Weinstein over his behavior and homophobic comments. (*Id.*) Specifically, after the test was done, and as Erfani was exiting the building, Weinstein and Brannigan's husband blocked his path and began berating him with homophobic slurs. (Doc. 56 at 7–8.) The complaint alleges that Brannigan's husband also threatened Erfani with physical violence, saying, *inter alia*, that he would "kick his ass" and "kill him." (*Id.*) As Erfani exited the building, Weinstein said, "[Y]ou won't be a resident here much longer." (*Id.* at 8.)

On December 29, 2017, the Co-op sent another termination notice to plaintiffs, informing them that the Board had elected to terminate their proprietary lease on January 15, 2018 on the ground that Erfani had attempted to physically assault Weinstein and Brannigan's husband during the November 9 confrontation. (Doc. 59 at 10.) Lackey and Erfani received this termination notice on January 10, 2018. (Doc. 56 at 8.)

[1] It is unclear from the parties' papers whether this stipulation resolved the holdover proceeding. After addressing the stipulation in their papers, both plaintiffs and defendants make no mention of any subsequent developments in the holdover proceeding. (Docs. 56 at 7; 59 at 9–10.)

Immediately thereafter, plaintiffs commenced the instant action on January 12, 2018 by filing a summons and complaint as well as an order to show cause seeking to enjoin defendants from terminating their lease. (Docs. 1–2; 59 at 11.) The claims in their complaint included, *inter alia*, causes of action seeking a declaration that the termination notice was defective on its face, as well as a permanent injunction. (*See* Doc. 1.) On February 16, 2018, the Co-op withdrew its termination notice, acknowledging that there were procedural defects in issuing it, e.g., the Board failed to provide plaintiffs with prior notice that it deemed any of their conduct objectionable. (Doc. 56 at 10.)

On March 14, 2018, plaintiffs filed an amended complaint, which withdrew their claim seeking a declaration regarding the termination notice as well as their cause of action for a permanent injunction preventing defendants from evicting them. (Docs. 56; 59 at 12.) The amended complaint asserted nine causes of action: (1) that the Board breached its fiduciary duty to plaintiffs, who are shareholders of the Co-op (Doc. 56 at 12); (2) a permanent injunction enjoining defendants from discriminating against plaintiffs (*id.* at 13); (3) that the Co-op breached the proprietary lease by failing to allow plaintiffs to conduct necessary repairs in their unit (*id.* at 13–14); (4) that the Board breached New York Business Corporation Law ("BCL") § 501(c) by treating plaintiffs differently than other shareholders of the same class (*id.* at 14–15); (5) that the Board breached New York Real Property Law ("RPL") § 223-b by voting to terminate their lease, and by doing so in retaliation for plaintiffs' allegation in its answer in the holdover proceeding that the Board had breached the warranty of habitability (*id.* at 15–16); (6) that the Board and Weinstein breached the warranty of habitability by not addressing the issues in their unit (*id.* at 16–17); (7) that the Board and Weinstein breached New York City Administrative Code § 27-2004 by harassing plaintiffs due to their sexual orientation (*id.* at 17–18); (8) that the Board and Weinstein

breached both Title 8 of the Administrative Code and New York State's Human Rights Law § 296 2-a by unlawfully discriminating against plaintiffs (*id.* at 18–19); and (9) that plaintiffs are entitled to attorneys' fees from the Co-op (*id.* at 19).

The Co-op, Brannigan, Enock, Ryan, Shaw, and Price now move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the amended complaint in its entirety as against the individual defendants. They also move, pursuant to CPLR 3211(a)(1) and (7), to dismiss the second, fourth, seventh, and eighth causes of action as against all defendants. Plaintiffs oppose the motion.

LEGAL CONCLUSIONS:

On a CPLR 3211 motion to dismiss a complaint, "the pleading is to be afforded a liberal construction." (*Leon v Martinez*, 84 NY2d 83, 87–88 [1994].) Nonetheless, CPLR 3211 (a)(1) provides for dismissal should the reviewing court find that the documentary evidence conclusively establishes a defense to the asserted claims as a matter of law. (*See 150 Broadway N.Y. Assocs., L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]; *see also Leon*, 84 NY2d at 88.) Therefore, if the complaint's "allegations are contradicted by documentary evidence, they are not presumed to be true or granted every favorable inference . . . ." (*Sterling Fifth Assocs. v Carpentille Corp., Inc.*, 9 AD3d 261, 261–62 [1st Dept 2004].)

Unlike CPLR 3211(a)(1), which allows defendants to challenge a plaintiff's complaint using the documentary evidence, CPLR 3211(a)(7) "test[s] the *facial* sufficiency of the pleading in two different ways." (*Basis Yield Alpha Fund (Master) v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014] (emphasis added).) First, "the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law." (*Id.*) Second, the court may dismiss

a claim where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (*Id.*)

A. Whether the Amended Complaint Should be Dismissed in Its Entirety as Against Individual Defendants Brannigan, Enock, Ryan, Shaw, and Price.

The primary contention between plaintiffs and defendants is whether the individual defendants named in the complaint—i.e., Brannigan, Enock, Ryan, Shaw, and Price—may be held liable for the actions of the Co-op's Board even though they are named as defendants but there are no causes of action asserted against them. Defendants argue that "[t]he Amended Complaint fails to state a single cause of action against any of the individual Defendants." (Doc. 59 at 21.) Moreover, they contend that several causes of action can only be maintained as against the Co-op, but not against individual defendants. (*Id.* at 22–23.)

In opposition, plaintiffs argue that the individual members of the Board can be held individually and personally liable if they participated in the tort or otherwise directed, controlled, approved, or ratified the decision that led to their injury. (Doc. 63 at 19.) They further assert none of the named individual defendants have denied the discriminatory treatment that plaintiffs have allegedly suffered. (*Id.* at 20.)

The business judgment rule applies to actions against directors of residential cooperative corporations, such as the Co-op and the individual Board members being sued here. (*See Jones v Surrey Co-op. Apts., Inc.*, 263 AD2d 33, 36 [1st Dept 1999].) "[A]bsent a showing of discrimination, self-dealing or misconduct by board members, corporate directors are presumed to be acting in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes." (*Id.* (internal quotations omitted).) Under this standard, plaintiffs bear the burden of pleading tortious actions by the board members whom they are suing.

(*See Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 442 [1st Dept 2009].) Even then, an inquiry into such claims is permitted only where a factual basis exists to support such a claim. (*See Jones*, 263 AD2d at 36.)

This Court determines that, under the business judgment rule, the amended complaint must be dismissed as to defendants Enock, Ryan, Shaw, and Price. As against those defendants, plaintiffs fail to state a cause of action. The amended complaint makes no mention of defendants Ryan and Price except that they are residents of Manhattan, as well as members of the Board. (Doc. 56 at 3.) The complaint mentions Enock as a Board member (*id.* at 3) with whom plaintiffs met to discuss the water leak (*id.* at 5). In this regard, the complaint merely alleges that Enock—along with defendant Brannigan—insisted that the leak could not have been coming from the apartment unit above plaintiffs' because it had already been examined. (*Id.*) Defendant Shaw is not alleged to have engaged in discriminatory conduct. Indeed, the complaint includes Shaw because he was the occupant of the apartment above plaintiffs' unit. (*Id.* at 10.) Thus, the complaint fails to establish "a showing of discrimination, self-dealing or misconduct" by these board members. (*See Jones*, 263 AD2d at 36.)

In the amended complaint, plaintiffs allege that Brannigan entered their unit without their consent and that she directed a contractor to scrape their bathroom ceiling to determine whether a leak existed. (Doc. 56 at 5–6.) Notably, it also alleges that Brannigan has exhibited animus toward minority groups. (*Id.* at 11.) Specifically, Brannigan has purportedly made discriminatory statements about Blacks, Hispanics, and Asians. (*Id.*) The complaint further asserts that Brannigan once expressed concern about a lesbian couple residing in the building. (*Id.*) Moreover, Brannigan allegedly told Erfani that a gay couple in the building was "like you, but it's alright." (*Id.*) The complaint then identifies Brannigan's behavior as underlying plaintiffs' first cause of action for

breach of fiduciary duty and bad faith (*id.* at 12), their fifth cause of action for breach of RPL § 223-b (*id.* at 15–16), their sixth cause of action for breach of the warranty of habitability (*id.* at 16–17), and their eighth cause of action for breach of both Title 8 of the Administrative Code and New York State's Human Rights Law § 296 2-a (*id.* at 18–19).

Although the complaint alleges that Brannigan treated plaintiffs rudely, the allegations fall short of stating a cause of action that would make her personally liable to Lackey and Erfani. (*See Stalker v Stewart Tenants Corp.*, 92 AD3d 550, 552 [1st Dept 2012] ("[I]ndividual directors may not be subject to liability absent allegations that they committed separate tortious acts.").) The amended complaint contains statements allegedly made by Brannigan that express animus toward Blacks, Hispanics, and Asians (Doc. 56 at 11), but not toward homosexuals, i.e., plaintiffs' own protected class. Moreover, the one statement that Brannigan made to Erfani regarding another homosexual couple in the building—i.e., that they are "like you, but it's alright" (*id.*)—is insufficient to establish that any action she took as a Board member was motivated by animus toward plaintiffs' protected class.

For the foregoing reasons, the complaint must be dismissed in its entirety as against all the individually named defendants.

B. Whether the Second, Fourth, Seventh, and Eighth Causes of Action Should be Dismissed as Against the Co-op.

The remaining branch of defendants' motion seeks to dismiss the second, fourth, seventh, and eighth causes of action as against all defendants. Because this Court has determined that the complaint must be dismissed as against the individual defendants, the only outstanding issue is whether the Co-op is entitled to dismissal of the second, fourth, seventh, and eighth causes of action.

Plaintiffs' Second Cause of Action.

Plaintiffs' second cause of action, seeking a permanent injunction, must be dismissed. Plaintiffs allege that they "will be irreparably injured if the Board is permitted to continue in its discriminatory and disparate treatment of [Lackey and Erfani]." (Doc. 56 at 13.) But because they have failed to establish that the Board's decisions were motivated by discrimination, their cause of action for a permanent injunction must be dismissed. (*See Shearson Lehman Bros. Holdings, Inc. v Schmertzler*, 116 AD2d 216, 233 [1st Dept 1986] (party applying for permanent injunction must show likelihood of success on the merits).) In particular, plaintiffs have not proffered any evidence that they were treated differently than other tenants in the building or that other tenants were not inconvenienced in renovating their units. (*See* Doc. 56.) If anything can be gleaned from the complaint, it is that Weinstein and Brannigan's husband—neither of whom are named as a defendant in the amended complaint—discriminated against plaintiffs because of their sexual orientation. (Doc. 56 at 7–8.)

Plaintiffs' Fourth Cause of Action.

The fourth cause of action alleges that the Board breached BCL § 501(c), which prohibits the "unequal treatment of shareholders holding the same class of shares." (*Wapnick v Seven Park Ave. Corp.*, 240 AD2d 245, 246 [1st Dept 1997].) Lackey and Erfani argue that the Board breached this provision because "no other shareholders have been stopped from performing ordinary repairs . . . rendering it clear that [Lackey and Erfani] have been treated differently than the rest of the shareholders in the Apartment Corporation." (Doc. 56 at 14.) Because BCL § 501(c) was not meant to protect this kind of differential treatment (*see Moltisanti v E. River Hous. Corp.*, 149 AD3d 530,

532 [1st Dept 2017] (holding that the differential treatment of plaintiffs, whereby they were not permitted to construct an enclosure without first obtaining defendants' written permission, was not protected by BCL § 501[c])), plaintiffs' third cause of action must be dismissed as against the Board pursuant to CPLR 3211(a)(7).

Plaintiffs' Seventh Cause of Action.

With respect to plaintiffs' seventh cause of action for harassment under New York City Administrative Code § 27-2004, they cite the following provisions as constituting harassment:

> (b) repeated interruptions or discontinuances of essential services, or an interruption or discontinuance of an essential service for an extended duration or of such significance as to substantially impair the habitability of such dwelling unit;
>
> (c) commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit;
>
> (g) other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy . . . .

The cited provisions are inapplicable to the facts herein. Courts have held that what constitutes an essential service is a factual inquiry, but that, *inter alia*, the removal of window screens, the failure to replace a broken door of a refrigerator, and the elimination of a terrace all constitute essential services. (*See Stratford Leasing Corp. v Gabel*, 17 AD2d 332, 333 [1st Dept 1962].) This provision is inapposite, however, since, unlike the examples above, plaintiffs'

amended complaint does not allege that they were unable to use a service—i.e., their bathroom—due to the leak. Moreover, there is no evidence that the holdover proceeding was frivolous, but was rather commenced by defendants because plaintiffs refused access to their unit. (Doc. 53.) Finally, the pleadings are insufficient to give rise to any inference that the Board acted, in a manner contrary to law, in such a way as to cause plaintiffs to vacate their apartment. Again, while the Board served a "Ten (10) Day Notice of Termination" to plaintiffs (Doc. 53 at 11–12), the evidence shows that this was due to the fact that Lackey and Erfani refused entrance to their apartment, even after the Co-op served a "Thirty (30) Day Notice to Cure Violations" (*id.* at 7–8) more than a month earlier. The seventh cause of action must therefore be dismissed as against the Board.

Plaintiffs' Eighth Cause of Action.

Plaintiffs' eighth cause of action is for human rights violations pursuant to Title 8 of the City Human Rights Law and § 296 2-a of New York State's Human Rights Law. Specifically, the complaint asserts that, "[s]ince Tenants moved into the Building, they have suffered from discrimination based on their sexual orientation by both Weinstein and Brannigan." (Doc. 56 at 18.) Plaintiffs further allege: "It is clear that the Board, as a whole, has tacitly approved and condoned unlawful discrimination of the Tenants by Brannigan and Weinstein." (*Id.* at 19.) Such a conclusory statement is insufficient to support a discrimination claim as against the Board; at the risk of sounding repetitive, plaintiffs have not proffered any evidence that the Board acted with animus toward them or that the Board's decisions were improperly motivated by Weinstein or Brannigan and her husband. (*See Morales v Patel*, 232 AD2d 319, 320 [1st Dept 1996] (affirming dismissal where the facts alleged were conclusory and therefore failed to state a claim of

discrimination or otherwise show bad faith).) For the foregoing reasons, the second, fourth, seventh, and eighth causes of action must be dismissed as against the Board.

In accordance with the foregoing, it is hereby:

ORDERED that the motion filed by defendants 62 East 87th Street Owners Corp., Mary Ellen Brannigan a/k/a Mary Ellen Weilage, Max Enock, John Ryan, Eric Shaw, and Jennifer Price, to dismiss the amended complaint of plaintiffs Warren Lackey and Gregory Erfani in its entirety as against the individual defendants is granted, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the branch of defendants' motion to dismiss the second, fourth, seventh, and eighth causes of action as against all defendants is granted to the extent that those causes of action are dismissed as against 62 East 87th Street Owners Corp., and is otherwise denied as moot; and it is further

ORDERED that the caption be amended to reflect the dismissal of the individual defendants Mary Ellen Brannigan a/k/a Mary Ellen Weilage, Max Enock, John Ryan, Eric Shaw,

and Jennifer Price, and that all future papers filed with the Court bear the amended caption; and it is further

ORDERED that, within 20 days of the entry of this order, counsel for the moving parties shall serve a copy of this order with notice of entry upon all parties, upon the Clerk of the Court (60 Centre Street, Room 141B), and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (access*ible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that this constitutes the decision and order of the court.

3/19/2019
DATE

KATHRYN E. FREED, J.S.C.

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