

Cameron v Christopher St. Owners Corp.
2019 NY Slip Op 31839(U)
June 26, 2019
Supreme Court, New York County
Docket Number: 650566/2017
Judge: Anthony Cannataro
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANTHONY CANNATARO

PART IAS MOTION 41EFM

Justice

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INDEX NO. 650566/2017

PAUL CAMERON, DEBBIE CAMERON, KYLE CAMERON,

MOTION DATE 02/13/2019

Plaintiff,

MOTION SEQ. NO. 003 005

- v -

CHRISTOPHER STREET OWNERS CORP., BOARD OF DIRECTORS OF CHRISTOPHER STREET OWNERS CORP., KEITH E. DUNN, JOHN & JANE DOES 1-10

DECISION AND ORDER

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 71, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 89, 90, 91, 92, 93, 94, 95, 96, 98, 99, 100, 101, 102, 103, 104, 105

were read on this motion to/for AMEND CAPTION/PLEADINGS .

The following e-filed documents, listed by NYSCEF document number (Motion 005) 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119

were read on this motion to/for AMEND CAPTION/PLEADINGS .

Plaintiffs, the former owners of shares in the Christopher Street Owners Corp. cooperative, commenced this action against the cooperative corporation, the cooperative board, and Keith Dunn, the resident of the apartment beneath plaintiffs. Plaintiffs allege defendant Dunn committed nuisance behavior, and that the board and its members breached several duties to plaintiffs by failing to properly deal with the nuisance. Plaintiffs now move for leave to amend their complaint to include additional causes of

action, and defendants cross-move to dismiss the complaint pursuant to CPLR 3211. Defendants also separately move for leave to amend their answer. These motions, sequence numbers 003 and 005, are consolidated for decision herein.

Plaintiffs seek leave to assert several claims including claims for breach of fiduciary duty against the individual board members, a private nuisance claim against the corporation, the board, and the individual board members, and fraudulent inducement and fraudulent concealment claims against the corporation, the board, and the board's individual members.

Pursuant to CPLR 3025 (b), motions to amend are freely granted in the absence of prejudice or unfair surprise resulting from delay, unless the proposed amendment is plainly lacking in merit (*Thomas Crimmins Contr. Co., Inc. v City of New York*, 74 NY2d 166 [1989]).

As to plaintiffs' proposed cause of action for breach of fiduciary duty against the individual board members, board members cannot be held individually liable in the absence of their own independent tortious acts (*Konrad v 136 East 64th Street Corp.*, 246 AD2d 324 [1998]); see *Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]). Further, failure of a cooperative board to enforce bylaws against excessive noise does not give rise to a cause of action against board members in their individual capacities (*Pomerance v McGrath*, 143 AD3d 443 [2016]).

Here, unlike in the cases cited by plaintiff, the amended complaint fails to allege that the board members committed tortious acts independent of the tort alleged to have been committed by the board itself, nor has there been any suggestion that the board members acted outside of the scope of their duties (*Avramides v Moussa*, 158 AD3d 499, 499-500 [2018]; see *20 Pine St. Homeowners Assn v 20 Pine St. LLC*, 109 AD3d 733 [2013]; *Hoppe v Board of Directors of the 51-78 Owners Corp.*, 49 AD3d 477 [2008]). As such, the

proposed cause of action for breach of fiduciary duty against the individual board members plainly lacks merit.

Plaintiffs' proposed claim for nuisance also plainly lacks merit. The appropriate cause of action for a tenant, or more specifically in this case, a cooperative shareholder, who is being regularly disturbed by the noise and behavior of a resident of a neighboring apartment, is a claim for breach of the warranty of habitability. Plaintiffs have not cited any cases in which a court entertained a nuisance claim by a tenant against a landlord for excessive noise in the building. Particularly in this case, where the alleged nuisance was caused not by any action by the cooperative corporation or its officers, but by defendant Dunn, a nuisance claim against the board simply lacks merit (*see Copart Indus., Inc. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564 [1977]).

The Court next addresses the proposed claims for fraudulent inducement and fraudulent concealment. A claim for negligent misrepresentation or fraudulent misrepresentation requires the plaintiff to prove (1) the existence of a special or privity-like relationship imposing a duty on the defendant to impart correct information to the plaintiff; (2) that the information was incorrect; and (3) reasonable reliance on the information" (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). A negligent or fraudulent misrepresentation claim must be dismissed if "there is no allegation...of a relationship of trust and confidence between the parties" (*Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128 [2014]; *see also George Cohen Agency, Inc. v Donald S. Perlman Agency, Inc.*, 114 AD2d 930 [1985], app. den., 68 NY2d 603 [1986]. Moreover, a fraud claim will not survive where the alleged fraud was discoverable through due diligence (*Elghanian v Harvey*, 249 AD2d 206 [1998]; *Danann Realty Corp. v Harris*, 5 NY2d 317 [1959]; *see also, Cohen v Cerier*, 243 AD2d 670 [1997]).

In their proposed amended complaint, plaintiffs have not alleged or indicated any basis for a finding of a fiduciary or special relationship between the parties (*see*

Thompson v Cooper, 24 AD3d 203 [2005] [the proposed amendment, which seeks to add claims of fraud and fraudulent concealment based on a failure to warn was properly denied for lack of merit; in the absence of a fiduciary relationship there was no duty to warn]). Further, although plaintiffs concede that the board members informed them that that noise was a concern in the building, and that an elderly individual lived in the apartment below, plaintiffs allege that they were misled by these statements, which though accurate, contained omissions. However, in addition to there being no special relationship between the parties, plaintiffs also could have discovered the information they complain was omitted through own due diligence. As such, plaintiffs' proposed causes of action for fraudulent inducement and fraudulent concealment lack merit.

As to plaintiffs' proposed claim for punitive damage, the only cause of action that remains which seeks punitive damages is the cause of action for private nuisance against defendant Dunn. Contrary to defendants' claim, the "decision whether to award punitive damages should reside in the sound discretion of the original trier of the facts" (*Nardelli v Stamberg*, 44 NY2d 500 [1978]; see *Gellman v Seawane Golf & Country Club, Inc.*, 24 AD3d 415 [2005]; *Maitrejean v. Levon Properties Corp.*, 87 AD2d 605 [1982] order aff'd, 57 NY2d 902 [1982]). However, due to the other deficiencies in the proposed amended complaint, plaintiffs motion seeking leave to amend their complaint is denied without prejudice to resubmission of the motion with an acceptable proposed amended complaint attached.

The Court next addresses defendants' motion to dismiss. On a motion to dismiss a complaint pursuant to CPLR 3211 "the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010] [internal quotation marks omitted]; see *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87–88 [1994]).

The branches of defendants' motion which seek to dismiss the causes of action for breach of contract and breach of the warranty of habitability must be denied. Contrary to defendants' contention, the business judgment rule "does not shield cooperatives from liability for breaches of contract" (*Goldstone v Gracie Terrace Apt. Corp.*, 110 AD3d 101, 105 [2013] [internal citations omitted]; *see also Dinicu v Groff Studios Corp.*, 257 AD2d 218, 222-23 [1999]). Additionally, plaintiffs have sufficiently pleaded claims for breach of the covenant of quiet enjoyment and the warranty of habitability by alleging, among other things, that defendants failed to take appropriate and effective corrective action in response to their complaints regarding the objectionable conduct of their neighbors (*see Wortman v Solil Mgmt. Corp.*, 217 AD2d 466 [1995]; *see also Nostrand Gardens Co-op v Howard*, 221 AD2d 637 [1995]).

However, the branch of defendants' motion which seeks to dismiss plaintiffs' cause of action for breach of the implied duty of good faith and fair dealing is granted. The cause of action for breach of the implied duty of good faith and fair dealing cannot be maintained where the alleged breach is "intrinsically tied to the damages allegedly resulting from a breach of the contract" (*The Hawthorne Grp., LLC v. RRE Ventures*, 7 AD3d 320, 323 [2004]). Such a claim is subject to dismissal where a claim for breach of contract is also alleged (*see Pier 59 Studios L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 218, [2006]).

Lastly, defendants' motion to amend their answer to assert an additional affirmative defense is denied. Defendants concede that the proposed statute of limitations defense does not apply to any of the causes of action asserted by plaintiffs in their complaint, and instead apply only to causes of action defendants anticipate being added. Given the disposition of the motion to amend above, defendants' motion is similarly denied at this juncture, without prejudice.

Accordingly, it is

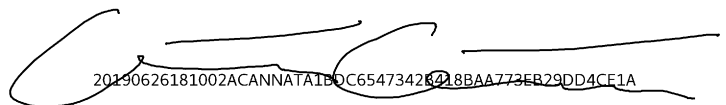
ORDERED that plaintiffs' motion seeking leave to amend their complaint is

denied without prejudice to resubmission of the motion with an acceptable proposed amended complaint attached; and it is further

ORDERED that the branch of defendants' cross-motion which seeks dismissal of the third cause of action for breach of the duty of good faith and fair dealing is granted; and it is further

ORDERED that defendants cross-motion is otherwise denied, and the action shall continue as to the remaining causes of action; and it is further

ORDERED that defendants' motion seeking leave to amend their complaint is denied without prejudice, and counsel are directed to appear for a status conference in Room 490, 111 Centre Street on July 31, 2019 at 2:15PM.


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6/26/2019
DATE

ANTHONY CANNATARO, J.S.C.

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	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
			<input type="checkbox"/>	DENIED	OTHER
					REFERENCE