SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ALEXANDER M. TISCH **PART** IAS MOTION 18EFM
Justice

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GERALDINE ANDREAS, A/K/A GERI ANDREAS, AND CHRISTOPHER DARK A/K/A CHRISTOPHER J.L. DARK INDIVIDUALLY, AND AS A SHAREHOLDERS OF 186 TENANTS CORP., AND IN THE RIGHT OF 186 TENANTS CORP., AND ON BEHALF OF ALL OTHER SHAREHOLDERS OF SAID CORPORATION, SIMILARLY SITUATED,

Plaintiff,

- v -

186 TENANTS CORP., JUSTINE CUSHING, ALICE FRY GARCIA, CARLOS GARCIA, AND CHRISTOPHER O'NEIL,

Defendants.

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INDEX NO. 156486/2016

MOTION DATE 05/15/2019, 05/15/2019, 05/15/2019, 05/15/2019

MOTION SEQ. NO. 004 005 006 007

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 154, 158, 163, 167, 171, 172, 192

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 005) 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 155, 159, 164, 168, 173, 174, 175, 176, 177, 189, 190, 191

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 006) 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 156, 160, 165, 169, 178, 179, 180, 181, 182, 193, 194

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 007) 139, 140, 141, 142, 157, 161, 166, 170, 183, 184, 185, 186, 187, 188

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, all defendants move to dismiss certain claims in plaintiffs' complaint insofar as asserted against them.

By way of background, this action involves a dispute between the plaintiff's Geraldine Andreas and Christopher Dark, who are shareholders of a unit in the cooperative apartment building located at 186 East 75th Street in the County, City and State of New York, for alleged water damage to their unit/apartment. Defendants Justine Cushing, Alice Fry Garcia, Carlos Garcia and Christopher O'Neil

are the other shareholders of units/apartments in the building (there are four units). 186 Tenants Corp. is the cooperative housing corporation that owns the property and building.

On a motion to dismiss, the court "must accept the facts alleged in the [complaint] as true, [plaintiffs] must be afforded every possible favorable inference, and we must determine whether the facts alleged by [plaintiffs] fit within any cognizable legal theory" (*Lawrence v Miller*, 11 NY3d 588, 595 [2008]). "[T]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]).

A motion to dismiss a complaint based upon documentary evidence "may be appropriately granted where the documentary evidence utterly refutes the plaintiff's factual allegation, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994] ["Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law"]).

Initially, the Court notes that those branches of all the motions seeking to dismiss the sixth, seventh and eighth causes of action are granted, as the parties noted during oral argument before the Court on May 15, 2019 that the claims to produce books and records are moot because said documentation has been provided. Therefore, while describing each motion below, the Court leaves out any discussion with respect to these claims.

Motion Sequence No. 5

In motion sequence no. 5, all defendants move to dismiss the fourth, and ninth and tenth causes of action pursuant to CPLR 3211 (a) (1), (3), and (7).

Fourth Cause of Action

In moving to dismiss the fourth cause of action against the Garcia's concerning their air conditioning unit, counsel for defendants readily concedes many disputed facts, which make it abundantly clear that this claim should not be dismissed. Indeed, defendants rely upon Fry Garcia's affidavit[1] to claim that the air conditioning unit was installed by prior tenants and that, if there is any water leaking, "it must be coming from the outside of the Building . . . , which means that any damage therefrom would be the responsibility of the Corporation, not the Garcias, to remedy" (NYSCEF Doc. No. 124 at 4). However, "affidavits submitted by the defendant will seldom if ever warrant the relief he seeks unless too the affidavits establish conclusively that plaintiff has no cause of action" (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633, 636 [1976]; *see Lawrence v Miller*, 11 NY3d 588, 595 [2008]). Here, it cannot be said that the Fry Garcia affidavit, or defense counsel's speculations, conclusively establish that plaintiff has no negligence claim against the Garcia's as a matter of law. Accordingly, that branch of the motion is denied.

Ninth Cause of Action[2]

"As a general proposition, where a corporation suffers loss because of the acts of officers, directors, or others which diminish or render valueless the shares of stock of a stockholder, the stockholder does not have a direct cause of action for such damages, but has a derivative cause of action on behalf of the corporation to recover the loss for the benefit of the corporation" (*Strain v Seven Hills*

[1] Contrary to defendants' assertions, the Fry Garcia affidavit is "not 'documentary evidence' within the intendment of a CPLR 3211(a)(1) motion to dismiss" (*Fontanetta v Doe*, 73 AD3d 78, 86 [2d Dept 2010]; *see Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

[2] Defendants' notice of motion indicates that dismissal of this claim is sought based upon plaintiffs' lack of capacity (CPLR 3211 [a][3]). However, this does not appear to be the appropriate ground because defendants do not argue that plaintiffs, as shareholders of the corporation, do not have the power to appear before a court and bring an action. Indeed, Business Corporation Law § 626 expressly permits shareholder derivative actions. Thus, capacity — a concept purely dependent upon the plaintiffs' status — is not really at issue here (*see Community Bd. 7 of Borough of Manhattan v Schaffer*, 84 NY2d 148, 155 [1994]). Rather, defendants' objections appear to be related to the relief that plaintiffs seek, which is more appropriately grounded in either standing or premised upon a failure to state a cause of action, which are distinctly different concepts (*see Community Bd. 7 of Borough of Manhattan*, 84 NY2d 148; *Security Pac. Natl. Bank v Evans*, 31 AD3d 278, 279 [1st Dept 2006]).

Assoc., 75 AD2d 360, 371 [1st Dept 1980]). This is to be distinguished from individual, direct claims, which seek to "vindicate [] personal rights as an individual and not as a stockholder on behalf of the corporation" (*Rossi v Kelly*, 96 AD2d 451, 452 [1st Dept 1983]).

Defendants claim that the cause of action alleges the same type of damages or issues that concern the plaintiffs' unit and is therefore not appropriately pursued as a shareholder derivative claim. However, the allegations concerning the Corporation's insolvency, and inability to pay debts and taxes is not particular to plaintiffs or their unit (*see Yudell v Gilbert*, 99 AD3d 108, 114 [1st Dept 2012] ["Allegations of mismanagement or diversion of corporate assets also plead a wrong to the corporation"]). Additionally, the amended complaint alleges that the inspection reports indicate that some water problems concern the building as a whole, and not just plaintiffs' unit (amended complaint at ¶¶ 427 [c]; 428 [a]).

Defendants also claim that plaintiffs are not the proper parties to bring the derivative claim because of conflicts of interest; and even if they were, the claim should be severed. Severance would be an inappropriate remedy here (*see generally Shanley v Callanan Indus., Inc.*, 54 NY2d 52, 57 [1981]). However, the Court finds that the claim would naturally be limited to the affairs of the Corporation and the Building, separate and apart from any issues with plaintiffs' unit. Accordingly, that branch of the motion to dismiss the ninth cause of action is denied without prejudice.

Tenth Cause of Action

"It is well settled that the breach of warranty of habitability does not . . . apply to a cooperative apartment that the shareholder does not reside in or resides in part time" (*170 W. End Ave. Owners Corp v Turchin*, 37 Misc 3d 1226[A], 2012 NY Slip Op 52185[U], *10 [Civ Ct, NY County 2012], citing *Genson v Sixty Sutton Corp.*, 74 AD3d 560 [1st Dept 2010]). Defendants submit the affidavit of plaintiff Andreas, submitted in connection with a prior motion in this action, which states that, "[s]ince May 1, 2010" and "[a]t all pertinent times" the plaintiffs have been living in Tokyo, Japan, and they only "visit

New York City about 3-4 times per year for about 5 days per visit" (NYSCEF Doc. No. 29, ¶ 7). The contention that the warranty of habitability does not apply to part-time residency was not refuted by plaintiffs. The Court also notes that the provision of the proprietary lease cited by plaintiffs is in the context of fire damage, which is not applicable here. Accordingly, the Court dismisses the tenth cause of action.

The Court notes that defendants inappropriately argue for the first time in reply papers that all claims against the corporation should be dismissed based on language in the proprietary lease — such contentions will not be entertained by the Court (*see Lumbermens Mut. Cas. Co. v Morse Shoe Co.*, 218 AD2d 624, 625–26 [1st Dept 1995]). The remainder of the reply essentially points the finger to plaintiffs. However, even if the plaintiffs were part of the problem, whether due to Andreas' service as a director and/or officer, or because the plaintiffs allegedly did not make any repairs using the settlement money received, it might only give rise to comparative fault or a contribution to their damages but would not warrant dismissal of all claims.

Motion Sequence No. 6

Defendant Cushing individually moves to dismiss the first, third, and ninth causes of action pursuant to CPLR 3211 (a) (1), (5), and (7). Defendant Cushing conceded at oral argument that the first cause of action was asserted against the 186 Tenants Corp. only, and therefore not applicable to her.

Third Cause of Action

In support of her motion to dismiss, Cushing submits a release and stipulation of discontinuance by the plaintiffs dated March 27, 2017 (NYSCEF Doc. No. 126). The stipulation indicates that the discontinuance is partial, but does not say to what extent (*see id.*). The release language is broad, stating that plaintiffs release Cushing from liability as to "all actions, causes of action, suits debts, sums of money, [etc.]" which the plaintiffs "ever had, now have, or hereafter can, shall, or may have" for anything connected to the instant action up until the date of the release (*id.*). Coincidentally, the

amended complaint alleges that a second water leak emanated from Cushing's unit, causing new and additional damage from Cushing's radiator and/or bathroom plumbing in "March or April 2017" (see amended complaint at ¶¶ 180-83) — around the same date of the release, March 27, 2017. The amended complaint goes on to allege that, "[o]ver an extended period of time leading up until and including March or April 2017, water was leaking from the radiator and/or bathroom plumbing within defendant Cushing's Unit 2" (¶ 191).

"The meaning and coverage of a release 'necessarily depends, as in the case of contracts generally, upon the controversy being settled and upon the purpose for which the release was actually given'" (*Long v O'Neill*, 2013 NY Slip Op 33854[U], 2013 WL 6702182 [Sup Ct, NY County 2013] [quoting *Cahill v Regan*, 5 NY2d 292, 299 (1959)], *affd* 126 AD3d 404 [1st Dept 2015]). A release, if valid, could completely bar "an action on a claim which is the subject of the release" (*Glob. Precast, Inc. v Stonewall Constr. Corp.*, 78 AD3d 432, 432 [1st Dept 2010]).

The amended complaint clearly alleges that the leak occurred up to and including March or April 2017, i.e., the date of the release, but makes no allegation of separate, new, or additional damage beyond that time. Thus, the Court finds that the third cause of action is temporally encompassed within the parameters of the release language.

Further, there is a clear overlap in the third cause of action and the claims settled and released as described in the first cause of action, i.e., the water leaking from the Cushing's radiator. Adding the words "bathroom plumbing" would not bring the instant claim outside the scope of the release because the release, by its clear wording, applied to any claim the plaintiffs could have had related to that leak and property damage — whether caused by the radiator and/or bathroom plumbing (*see Long*, 126 AD3d at 407-08).

In opposition, plaintiffs cite no case law demonstrating that the release language should be interpreted any other way, nor any legitimate basis for setting aside the release. The Court rejects any

argument that the release should be set aside because of a purported breach of good faith and fair dealing. If plaintiffs reasonably expected Cushing to take any affirmative action with respect to her unit, the settlement documents should have explicitly said so (*see Long*, 126 AD3d at 408). The Court cannot read in a specific, unique promise to act that isn't there (*see generally Palmer v Spaulding*, 299 NY 368, 372 [1949] ["It is a strong thing so to read into a statute words which are not there and, in the absence of a clear necessity, it is a wrong thing to do"]). In any event, the argument is disingenuous as plaintiffs' own reports indicate that the radiator was repaired. Further, Cushing notes that none of the reports made upon inspections after March or April 2017 indicate that there was a new leak, radiator or otherwise.

Plaintiffs' argument that Cushing breached her fiduciary duty is equally without any merit as the claim concerns Cushing's status as an individual shareholder and unit owner, and is not asserted in her capacity as a director of the corporation.

Accordingly, the third cause of action is dismissed insofar as asserted against defendant Cushing.

Ninth Cause of Action

This branch of the motion seeking dismissal of the ninth cause of action is denied for the same reasons as stated above under motion sequence no. 5.

Motion Sequence No. 7

Defendant O'Neil individually moves to dismiss the fifth cause of action pursuant to CPLR 3211 (a) (7), arguing that 186 Tenants Corp. is responsible for repairing the roof according to the proprietary lease. As plaintiffs point out in opposition, the proprietary lease states that the lessee should bear the expense of repairing, e.g., the roof if the lessee caused the need for such repairs. More specifically, the proprietary lease states as follows:

> The Lessor shall keep in good repair the building's foundations, sidewalks, walls, supports, beams, roofs, gutters, fences, cellars, chimneys, entrances, street and court doorways, main halls, main stairways, pumps, tanks, pipes, electrical conduits, and all plumbing and apparatus intended for the general service of the building, it being agreed that the Lessee shall give the Lessor prompt notice of any accident or defect known to the Lessee and requiring repairs to be made; and all such repairs shall be at the expense of

> the Lessor, unless the same shall have been rendered necessary by the act or neglect or carelessness of the Lessee, or any of the family, guests, employees or undertenants of the Lessee, in which case the expense is to be borne by the Lessee (NYSCEF Doc. No. 142 at 3).

Because the amended complaint alleges that O'Neil renovated unit 4 and caused damage to the roof, these allegations sufficiently state a claim on behalf of the *corporation* to recover the expenses of repair from O'Neil — however, the allegations in the amended complaint and the proprietary lease do not state a claim against O'Neil individually by plaintiffs. The responsibility to maintain and repair the roof is still with the corporation, although it may seek the expenses to be borne by lessee, O'Neil. Accordingly, the Court grants the motion and the fifth cause of action is dismissed.

Motion Sequence No. 4

Defendants 186 Tenants Corp., Justine Cushing, and Christopher O'Neil move, pursuant to CPLR 3211 (a) (1) and (7), to dismiss the entire complaint, but focus on the first and second claims and relies on the other co-defendants' motion papers (*supra*) regarding the remaining claims. Both causes of action are against the corporation — the first sounding in negligence and the second in breach of contract (breach of the proprietary lease). In this motion, defendants make numerous factual allegations, including, e.g., that plaintiffs' failure to repair the water damage, coupled with plaintiff Andreas' control over the building as president, constitute a complete defense to the first and second causes of action.[3] Defendants cite absolutely no case law in support of this argument. The Court disagrees, and this motion shows how dismissal is completely inappropriate given the factual allegations in dispute. As the Court noted above in the discussion on motion sequence no. 5, the claim that Andreas is, in some part, responsible for the deteriorating condition of the building, is not a complete defense to the action. Also, as set forth in motion sequence no. 5, the Court will not entertain new arguments made in reply papers.

[3] Defendants moved pursuant to, inter alia, CPLR 3211 (a) (1), and submitted the proprietary lease, but do not reference it at all to show how it may conclusively establish a defense as a matter of law (*see Goshen*, 98 NY2d 314; *Leon*, 84 NY2d 83).

In conclusion, it is hereby ORDERED that the motions are granted to the extent that plaintiffs' sixth through eight causes of action are dismissed; and it is further

ORDERED that motion sequence no. 4 is denied; and it is further

ORDERED that motion sequence no. 5 is granted to the extent that the tenth cause of action against the corporation is dismissed; the remainder of the motion is otherwise denied; and it is further

ORDERED that motion sequence no. 6 is granted to the extent that the third cause of action against Cushing is dismissed; and the motion is otherwise denied; and it is further

ORDERED that motion sequence no. 7 is granted to the extent that the fifth cause of action against defendant O'Neil is dismissed; and it is further

ORDERED that defendants are directed to serve an answer to the amended complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that all parties are directed to appear for a preliminary conference in Part 18, located in Room 623 of 111 Centre Street on September 4, 2019 at 9:30 a.m.

This constitutes the decision and order of the Court.

8/7/2019
DATE

ALEXANDER M. TISCH, J.S.C.

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