

Borini v Sixty Sutton Corp.

2019 NY Slip Op 32490(U)

August 21, 2019

Supreme Court, New York County

Docket Number: 655375/2018

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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JOANNE BORINI, JOSEPH BORINI,

Plaintiffs,

INDEX NO. 655375/2018

MOTION DATE 08/22/2019

MOTION SEQ. NO. 003

- v -

SIXTY SUTTON CORP., HELENE BLANK, STEVE GOLD,
STEPHEN ZELMAN, MONICA STAUBER, IGOR
MURAVCHIK, DONOVAN SPAMER, MADELEINE
FELDMAN, FRANK ALWILL, BERNADETTE KRIFTCHER,
CAROL LEHTI, and JOSEPH FUREY,

Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 99, 100, 101, 102, 103, 104, 105, 107, 108, 109, 110

were read on this motion to/for

DISMISSAL

ORDER

Upon the foregoing documents, it is

ORDERED that the motion to dismiss is granted to the extent that the first, fourth, fifth, and seventh causes of action of the amended complaint are dismissed; and it is further

ORDERED that the cross motion of plaintiffs for an abatement in their obligation to pay maintenance charges is denied; and it is further

ORDERED that defendant is 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 counsel are directed to appear for a preliminary conference in Room 331, 60 Centre Street, New York, New York, on October 29, 2019, at 9:30 AM.

DECISION

As for the first cause of action entitled "Injunction", such fails to state a meritorious claim as such equitable relief is a remedy not a right. Such remedy is properly pled in the wherefore clause of plaintiffs' amended complaint, wherein they demand a permanent injunction, in the form of demanding specific performance by defendants under the alteration agreement, for example.

Plaintiffs' (fourth) claim of "Breach of Implied Duty of Good Faith and Fair Dealing" is duplicative of their causes of action for breach of lease and breach of alteration agreement, as both claims arise from the same facts and seek identical damages for each alleged breach. Netologic, Inc. v Goldman Sachs Group, Inc., 110 AD3d 433, 433-434 (1st Dept. 2013).

An examination of the allegations of the (fifth) cause of action captioned "Declaratory Judgment" reveals that it merely restates plaintiffs' claim for breach of the alteration agreement. As plaintiffs have an adequate legal remedy, its claim for declaratory judgment must be dismissed. See Cronos Group Ltd. v XComIP, LLC, 156 AD3d 54, 76 (1st Dept. 2017).

In their seventh cause of action, sounding in negligence, plaintiffs fail to allege any legal duty independent of the contractual duty defendants owed them under the proprietary lease and/or alteration agreement. Such claim is therefore duplicative and may not be maintained. See Wildenstein v 5H& Co., Inc., 97 AD3d 488, 491-492 (1st Dept. 2012).

Plaintiffs have adequately pled causes of action for breach of lease, breach of alteration agreement, breach of implied warranty of habitability, constructive eviction, and breach of fiduciary duty. For example, the directors of the Sixty Sutton Corporation owe a fiduciary duty to plaintiffs, as shareholders, and plaintiffs at bar assert a meritorious claim with its allegations that such duty was breached. See Demas v 325 West End Ave. Corp., 127 AD2d 476 (1st Dept. 1987).

With respect to plaintiffs' cross motion for an abatement of their obligation to pay maintenance charges pending resolution of this action, plaintiffs point to no provision in their proprietary lease or alteration agreement with defendant Sixty Sutton Corp. that provides for such monetary relief, except upon their succeeding on the merits of their breach of

the implied warranty of habitability or other claims. Compare
Bates Advertising USA, Inc. v 498 Seventh, LLC, 291 AD2d 179,
181 (1st Dept. 2002).

8/21/2019

DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE