SHORT FORM ORDER

INDEX No. 625232/2018

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 27 - SUFFOLK COUNTY

PRESENT:

Hon. ROBERT F. QUINLAN
Justice of the Supreme Court

MOTION DATE: 04/16/2019
SUBMIT DATE: 05/30/2019
Mot. Seq.: #001 - Mot D

----------X

EILEEN NEMEROFF,

Plaintiff,

- against -

HAMPTONS LITTLE NECK, LLC, KENILWORTH EQUITIES, LTD., POND CROSSING AT SOUTHAMPTON CONDOMINIUM ASSOCIATION, ROBERT E. MORROW, DINA M BEAN,

Defendants.

----------X

OSBORN LAW, P.C.
Attorneys for Plaintiff
200 North Sea Road, Suite B
Southampton, NY 11968

LAW OFFICE of CHARLES F. HARMS, JR
Attorneys for Defendants Kenilworth Equities, Ltd., and Pond Crossing at Southampton Condominium Association
900 Stewart Avenue, Suite 400
Garden City, NY 11530

LEWIS BRISBOIS BISGAARD & SMITH LLP
Attorneys for Defendants Robert E. Morrow and Dina M. Bean
77 Water Street, Suite 2100
New York, NY 10005

Upon the following papers read on this application for an order dismissing the action as against defendants Robert E. Morrow and Dina M. Bean; Notice of Motion dated March 22, 2019 and supporting papers (Doc #5-12); Memorandum of Law in Opposition to Defendants' Motion to Dismiss (Doc #15); Replying Affirmation (Doc #16); it is

ORDERED this motion by defendant Robert E. Morrow for an order dismissing the complaint pursuant to CPLR sections 3211(a) (1), (a)(5) and (a)(7) is granted; and it is further

ORDERED that this motion by defendant Dina M. Bean for an order dismissing the complaint pursuant to CPLR 3211(a)(7) and 3016(b) is granted; and it is further,

ORDERED that the part of the motion for an order dismissing the cross-claim for indemnification asserted by defendants Pond Crossing at Southampton Condominium Association and Kenilworth Equities, Ltd. against defendants Robert E. Morrow and Dina M. Bean pursuant to CPLR 3211(a)(7) is granted; and it is further

ORDERED that all attorneys for the parties are directed to appear in the courthouse located at One Court Street, Riverhead, in the Differentiated Case Management Part, for a preliminary conference on November 18, 2019 at 9:30 A.M. (*see* 22 NYCRR § 202.12).

Plaintiff resides at 20 Pond Crossing in Southampton, Suffolk County, a condominium unit within the Pond Crossing at Southampton condominium community ("the property"). In the winter of 2016 pipes in the second floor bathroom burst causing a flood and water damage to plaintiff's home. On behalf of defendant Pond Crossing at Southampton Condominium Association ("the association") defendants Dina M. Bean ("Bean"), a member of the association's Board of Managers ("the Board"), and Kenilworth Equities

Ltd. ("Kenilworth"), the property manager , negotiated a settlement with the insurance company for the flood damage to the property in the amount of $146,101.85.

Plaintiff commenced this action by filing the summons and complaint on December 23, 2018. In her complaint plaintiff alleges defendant Robert E. Morrow ("Morrow"), and Hamptons Little Neck, LLC, developed the condominium community and that Morrow and Hamptons Little Neck, LLC breached their duty to plaintiff to design and build plaintiff's home, which she purchased in 2008. Plaintiff further claims that Bean failed to properly negotiate plaintiff's claim for insurance proceeds after the flood at the property and alleges a cause of action for negligent infliction of emotional distress against Bean individually stemming from her role as president of the association and principal of Kenilworth. Plaintiff claims Bean owed her a duty of care including a duty to represent and protect plaintiff's interests in connection with insurance companies after the loss, that Bean breached that duty which resulted in emotional harm and mental injury suffered by plaintiff. Plaintiff also alleges Bean breached her fiduciary duty to plaintiff to represent and protect her interest in her home, and a duty to represent plaintiff's interests in connection with negotiations with the insurance company relating to the flooding of plaintiff's home.

Defendants Morrow and Bean now move to dismiss the action in its entirety as against them in their individual capacities. Morrow moves to dismiss arguing that the causes of action are barred by the statute of limitations, that there is documentary evidence resolving the factual issues, and that that the complaint fails to state a cause of action. Bean moves to dismiss the action against her claiming that the complaint fails to state a cause of action. Both Morrow and Dean move to dismiss the cross-claim for indemnification asserted by the Association and Kenilworth for failure to sufficiently plead the claim.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, the moving defendant must establish, prima facie, that the time in which to commence the action has expired. (*see Beizer v Hirsch*, 116 AD3d 725 [2d Dept 2014]; *Zaborowski v Local 74, Serv. Empls. Intl. Union, AFL–CIO*, 91 AD3d 768 [2d Dept 2012]). All liability for defective construction has its genesis in the contractual relationship of the parties (*see Town of Oyster v Lizza Indus., Inc.*, 22 NY3d 1024 [2013]). A breach of contract action must be commenced within six years from the accrual of the cause of action (CPLR 203[a]; 213[2]). In construction cases any claim accrues when the work is completed (*Cabrini Medical Center v Desina*, 64 NY2d 1059 [1985]). A motion pursuant to CPLR 3211(a)(1) to dismiss based on documentary evidence may be appropriately granted only where the documentary evidence utterly refutes the plaintiff's factual allegations, thereby conclusively establishing a defense as a matter of law (see *25–01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850 [2d Dept 2015]). In order for evidence submitted in support of a CPLR 3211(a)(1) motion to qualify as 'documentary evidence,' it must be unambiguous, authentic, and undeniable (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]).

In her complaint plaintiff alleges she purchased her home in 2007. In support of the motion Morrow submits the purchase agreement between plaintiff and Hamptons Little Neck, LLC dated October 5, 2007 and the certificate of occupancy issued by the Town of Southampton dated October 1, 2008. Based on the documentary evidence, whether calculated from the date of the purchase agreement or the certificate of occupancy, Morrow has established, prima facie, that the time in which to commence this action expired on the first and second causes of action. The burden then shifts to plaintiff to raise an issue of fact as to whether the statute of limitations is tolled or is otherwise inapplicable (*see Beizer v Hirsch, supra*; *Zaborowski v Local 74, Serv. Empls. Intl. Union, supra*). In her opposition plaintiff does not address Morrow's motion

to dismiss instead focusing only on those causes of action involving defendant Bean. Accordingly that part of the application pursuant to CPLR 3211(a)(1) and (5) dismissing the first and second causes of action for negligence and strict liability as against defendant Morrow are granted.

Plaintiff has failed to assert a claim against Morrow as principal of Hamptons Little Neck, LLC. On a motion to dismiss for failure to state a claim pursuant to CPLR 3211(a)(7), the court must determine, accepting as true the factual averments of the complaint and according the plaintiff the benefit of all favorable inferences, whether the plaintiff can succeed upon any reasonable view of the facts as stated (*Country Pointe at Dix Hills Home Owners Assn., Inc. v Beechwood Organization,* 80 AD3d 643 [2d Dept 2011]; *Schneider v Hand,* 296 AD2d 454 [2d Dept 2002]). Although the facts pled are presumed to be true and are to be accorded every favorable inference, bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration, nor are legal conclusions or factual claims which are inherently incredible (*Nasca v Sgro,* 101 AD3d 963 [2d Dept 2012]). The general rule is that a corporation exists independently of its owners, who are not personally liable for its obligations, and that individuals may incorporate for the express purpose of limiting their liability (*see Bartle v Home Owners Coop.*, 309 NY 103 [1955]; *Seuter v Lieberman,* 229 AD2d 386 [1996]). The concept of piercing the corporate veil is an exception to this general rule, permitting, in certain circumstances, the imposition of personal liability on owners for the obligations of their corporation *(see Matter of Morris v. New York State Dept. of Taxation & Fin.*, 82 NY2d 135 [1993]). Here plaintiff's complaint is devoid of any allegations as to Morrow's conduct as principal of Hamptons Little Neck, LLC, indeed the only allegation in the complaint is one identifying Morrow as principal of Hamptons Little Neck, LLC, as such the allegations are insufficient to impose personally liability on Morrow for the obligations of Hamptons Little Neck, LLC (*see Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122 [2d Dept 2009]; *aff'd,* 16 NY3d 775 [2011]). Accordingly that part of the application pursuant to CPLR 3211(a)(7) dismissing the complaint against Morrow is granted.

The court turns next to the allegations in the complaint against Bean individually, stemming from her role as principal of defendant Kenilworth, and as a member of the Board of Managers of the association. In the complaint plaintiff claims Bean told her that repairs to her home as a result of the flood were "not my responsibility." However as pled in the complaint the association, through its property manager Kenilworth, submitted a claim to the insurance company for the damage to the property. An adjuster inspected the damage, and submitted a rebuilt estimate in the amount of $107,821.54. Unhappy with that amount plaintiff's personal insurance company, USAA, conducted an inspection and submitted a rebuild estimate in excess of $400,000.00. Plaintiff claims Bean, Kenilworth, and the association, dismissed the idea that the rebuild could cost that amount, plaintiff requested a second inspection of the home, instead defendants Bean, Kenilworth, and the association pressured plaintiff to accept the initial amount but eventually agreed to a second inspection which came in at $118,769.42. Plaintiff then obtained her own rebuild bid in the approximate amount of $305,000.00. Plaintiff continued to urge Bean to go back to the insurance company to obtain additional money for the rebuild and plaintiff claims little if anything was done by Bean to try and extract additional insurance proceeds, rather than fighting for plaintiff, defendant Bean was fighting for the insurance company. Plaintiff alleges Bean was afraid that if she pressured the insurance company the premiums would increase and Bean and Kenilworth would have to increase the monthly homeowner dues for residents of the condo association. Then the Board of Managers of the association settled the claim on behalf of plaintiff in December 2017 for $141,101.85. Deeming that amount insufficient to pay for the rebuild, plaintiff commenced this action.

In her third cause of action plaintiff claims Bean owed her a duty of care including a duty to represent and protect plaintiff's interests in connection with insurance companies after the loss, that Bean breached that duty which resulted in emotional harm and mental injury suffered by plaintiff. The fifth cause of action alleges breach of fiduciary duty against defendants Bean, the association and Kenilworth alleging those entities owned a fiduciary duty to plaintiff to represent and protect her interest in her home, and a duty to represent plaintiff's interests in negotiations with the insurance company relating to the flooding of plaintiff's home.

Defendant Bean moves to dismiss the action against her claiming that the complaint fails to state a cause of action. To the extent plaintiff alleges a cause of action against Bean as a principal of Kenilworth, that cause of action fails for the same reasons set forth previously as to Morrow, and that part of defendant's application pursuant to CPLR 3211(a)(7) dismissing the complaint against Bean individually is granted as plaintiff's complaint is devoid of facts sufficient to impose personally liability on Bean for the obligations of Kenilworth (*see Union Free School Dist. v Sandpebble Bldrs., Inc.*, 66 AD3d 122 [2d Dept 2009]; *aff'd*, 16 NY3d 775 [2011]). Moreover since a managing agent owes a fiduciary duty only to the condominium entity, not to individual unit owners (*see Caper v Nussbaum*, 36 AD3d 176[2d Dept 2006]), it follows that Bean, as principal of the managing agent, Kenilworth, does not owe a fiduciary duty to plaintiff, an individual unit owner.

Next Bean argues the complaint should be dismissed against her, individually because her conduct as a member of the Board of Managers of the association is protected under the business judgment rule. The business judgment rule, which applies to condominium boards, prohibits judicial inquiry into the actions of the board as long as the board acts for the purpose of the condominium, within its authority and in good faith (*see Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]; *Schoninger v Yardarm Beach Homeowners Assn.*, 134 AD2d 1 [2d Dept 1987]; *Acevedo v Town 'N Country Condo., Section I, Bd. of Managers*, 51 AD3d 603 [2d Dept 2008]). The business judgment rule protects not only the board but individual board members from judicial interference (*Pelton v 77 Park Ave. Condominium*, 38 AD3d 1[1st Dept 2006]). For a board member to be held individually liable plaintiff is required to plead with specificity independent tortious acts by the individual board member to overcome the public policy that supports the business judgment rule (*see Murtha v Yonkers Child Care Ass'n, Inc.*, 45 NY2d 913 [1978]).

In opposition plaintiff argues Bean is not protected by the business judgment rule because the By-Laws of the association state that members of the Board are not exempt from suit for willful misconduct or bad faith (see By-Laws annexed as Exhibit "D" to plaintiff's motion) and further plaintiff has adequately pled a cause of action for breach of fiduciary duty. Contrary to plaintiff's assertions the complaint fails to plead with specificity individual tortious acts by Bean. The only allegations are that an insurance claim was submitted as a result of flood damage to plaintiff's property, an adjuster inspected the damage and submitted an estimate which didn't meet with plaintiff's expectations, then Bean on behalf of the association and Kenilworth obtained a second estimate from an independent contractor which came in higher then the first estimate but still short of plaintiff's expectations, and finally that the claim was settled by the Board of Managers of the association for an amount deemed insufficient by plaintiff. Here the record clearly establishes that the insurance claim was settled by Bean solely as a member of the association's board of managers and plaintiff failed to allege any independent torts against Bean outside of her role as a board member, accordingly the complaint as against Bean is dismissed pursuant to CPLR 3211(a)(7) and 3016(b)

(*see Meadow Lane Equities Corp. v Hill*, 63 AD3d 699 [2d Dept 2009]; *Silverman v Nicholson*, 110 AD3d 1054 [2d Dept 2013]).

The court turns next to that part of Bean's motion to dismiss plaintiff's cause of action for negligent infliction of emotional distress. Although physical injury is not a necessary element of a cause of action to recover damages for negligent infliction of emotional distress, such a cause of action must generally be premised upon conduct that unreasonably endangers a plaintiff's physical safety or causes the plaintiff to fear for his or her own safety (*Perry v Valley Cottage Animal Hosp.*, 261 AD2d 522 [2d Dept 1999]; *see Brown v New York City Health & Hosps. Corp.*, 225 AD2d 36 [2d Dept 1996]; *Glendora v Gallicano*, 206 AD2d 456 [2d Dept 1994]). As set forth previously plaintiff has failed to establish defendant Bean breached a duty to plaintiff. Nevertheless plaintiff's third cause of action alleging negligent infliction of emotional distress, based upon plaintiff's claims that Bean failed to call, write, visit or communicate with her following the flood, thereby causing plaintiff to consult her cardiologist, requiring her to wear a heart monitor, and suffer bouts of anxiety and depression, is not conduct that unreasonably endangered plaintiff's physical safety or caused her to fear for her safety, accordingly plaintiff's third cause of action for negligent infliction of emotional distress against Bean is dismissed (*see Savva v Longo*, 8 AD3d 551 [2d Dept 2004]).

In light of the foregoing, and the failure of the co-defendants Pond Crossing at Southampton Condominium Association and Kenilworth Equities, Ltd. to oppose the motion, that part of defendants Morrow and Bean's motion for an order dismissing the cross-claim for indemnification set forth in their Answer dated February 13, 2019 is granted.

This shall constitute the decision and order of the court.

Dated: October 10, 2019

Hon. Robert F. Quinlan, J.S.C.

____ FINAL DISPOSITION __X__ NON-FINAL DISPOSITION