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| Fellner v 40 E. 88 Owners, Inc. |
| 2020 NY Slip Op 30922(U) |
| April 3, 2020 |
| Supreme Court, New York County |
| Docket Number: 158234/2018 |
| Judge: Francis A. Kahn, III |
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

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|---|----------------------------------|----------------------------|----------------------|
| PRESENT: | <u>HON. FRANCIS A. KAHN, III</u> | PART | IAS MOTION 32 |
| | <i>Acting Justice</i> | | |
| -----X | | INDEX NO. | <u>158234/2018</u> |
| DONALD FELLNER, | | MOTION DATE | <u>N/A</u> |
| | Plaintiff, | MOTION SEQ. NO. | <u>002</u> |
| | - v - | | |
| 40 EAST 88 OWNERS, INC. and ORSID REALTY CORP., | | DECISION + ORDER ON | |
| | Defendant. | MOTION | |
| -----X | | | |

The following e-filed documents, listed by NYSCEF document number (Motion 002) 26-32, 34-38 were read on this motion to/for DISMISS

Upon the foregoing documents, the motion¹ is determined as follows:

Plaintiff is the owner of shares and holder of a proprietary lease in co-operative apartment 12C located at 40 East 88th Street. Defendants are the co-operative corporation and managing agent for the building where Plaintiff's apartment is located. The parties' dispute is over a very small area, to wit approximately nine square feet², adjacent to Plaintiff's apartment. The area is accessible via two doors, one opening onto the hallway outside Plaintiff's apartment and the other by way of a door in Plaintiff's kitchen. The door in the hallway is steps away from the main door to Plaintiff's co-operative apartment. By using the doors in question, it is possible to access Plaintiff's apartment from the hallway.

Defendants term this space a "water closet" and assert that it is and has always been a part of the "common areas" of the co-operative corporation. Apparently, all the C-line apartments in the building have identical "water closets". Plaintiff pleads alternatively in the complaint that the area is part of Plaintiff's leasehold, appurtenant thereto, and/or owned by him in fee simple.

The within dispute arose out of a decision by the co-operative board to upgrade the electrical service in the building and to utilize the "water closets" in all the C-line apartments through the installation of vertical electrical conduits. After installation, the conduits blocked

¹ While *sub judice*, this action was reassigned to Justice Bluth. However, this court will render the decision as the motion was orally argued before this court.

² Out of this ostensible cubbyhole, the parties have cultivated a litigation that is metaphorically far larger than the area in contest. To put the matter in perspective, the 80 [eighty] pages of legal memoranda submitted in support and opposition to this motion, if spread out contiguously, would create an area over five time greater than the one in question.

access to the "water closet" via the door in all the C-line apartments, including 12C. Plaintiff claimed he never received notice of the construction and that the notices issued by Defendants did not accurately describe that access to the "water closets" would be entirely blocked.

Plaintiff commenced the within action by filing a summons with notice and moved by order to show cause for the issuance of a preliminary injunction. By decision and order dated November 13, 2018, Justice Lynn R. Kotler denied Plaintiff's motion finding Defendants came "forward with proof that it repeatedly advised plaintiff of the impact of the electrical upgrade project" and Plaintiff had "not demonstrated a likelihood of success on the merits". Subsequently, Plaintiff filed a complaint alleging nine causes of action: [1] declaration of easement by implication, [2] permanent injunction, [3] breach of covenant of quiet enjoyment, [4] private nuisance, [5] negligence, [6] declaratory judgment, [7] negligent misrepresentation, [8] breach of the implied covenant of good faith and fair dealing, and [9] wrongful eviction.

Now, Defendants move to dismiss the complaint pursuant to CPLR §3211[a][1], [5] and [7] based on expiration of the statute of limitations and failure to state a claim.

Movant's assertion that CPLR §217[1] is applicable to this action and that all causes of action are barred as a result is misplaced. Contrary to Defendants' assertion, the limitations period applicable to actions under Article 78 of the Civil Practice Law and Rules is not pertinent here. None of the nine causes of action seek to directly challenge and/or reverse the decision of the cooperative board. Rather, the claims predominantly sound in breach of contract and tort to which CPLR §217 is inapplicable (*see Abelesz v City of New York*, 175 AD3d 1225 [2nd Dept 2019]). Nor can the relief sought be considered incidental to an Article 78 action (*see Hertzell v Town of Putnam Val.*, 131 AD3d 921 [2nd Dept 2015]).

On a motion to dismiss for failure to state a cause of action pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true and liberally construed (*see Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). In determining such a motion, "the 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" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also (Morone v Morone*, 50 NY2d 481, 484 [1980]; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 634 [1976]).

In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the defendant (*see Guggenheimer*, *supra*; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, *supra*; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

The Plaintiff's first cause of action for declaration of an easement fails on its face and is dismissed. A foundational element of such a claim is that the proponent is an owner or holder of title to an interest in real property (*see RPAPL §1501; Simone v Heidelberg*, 9 NY3d 177 [2007];

2281 First Realty, LLC v Warminster Invs. Corp., 88 AD3d 456 [1st Dept 2011]). The factual claim in the complaint that Plaintiff is “the owner in fee simple” of the water closet is indisputably contradicted by the proffered evidence. At best herein, Plaintiff can claim the water closet is part of his co-operative apartment which makes it part of his leasehold appurtenant to his shares in the co-operative corporation which is personalty, not realty (*see Loscalzo v 507-509 President St. Tenants Assn. Hous. Dev. Fund Corp.*, 153 AD3d 614 [2nd Dept 2017]).

To state a claim for breach of the covenant of quiet enjoyment, Plaintiff must allege the landlord’s conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises, either totally or partially (*see Jackson v Westminster House Owners Inc.*, 24 AD3d 249 [1st Dept 2005]). Contrary to Defendants’ argument, Plaintiff sufficiently alleged he was ousted from a portion, albeit minor, of his leasehold apartment and this claim has not been contradicted with undisputed evidence as a matter of law. Accordingly, the branch of the motion to dismiss Plaintiff’s third cause of action is denied.

A private nuisance cause of action is stated by alleging “(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person’s property right to use and enjoy land, (5) caused by another’s conduct in acting or failure to act.” (*61 West 62 Owners Corp. v CGM EMP LLC*, 77 AD3d 330, 334 [1st Dept 2010]). In its motion, Defendants posit that the third and fourth elements of the have not been stated. Defendants’ assertion that blocking one of two entrances to Plaintiff’s apartment is akin to “ordinary events” of apartment living and therefore not unreasonable as a matter of law is untenable. The claim that Plaintiff lacks a “property right to use and enjoy land” in the area in question is unsupported. The proprietary lease provides that “the apartment” means the room in the building as partitioned on the date of the execution of this lease designated by the above-stated apartment number, together with their appurtenances and fixtures and any closets, terraces, balconies, roof, or portion thereof outside of said partitioned rooms, which are allocated exclusively to the occupant of the apartment.” Movant has not submitted evidence which unequivocally proves the disputed water closet was not included in apartment 12C. Moreover, nothing in the proprietary lease, co-operative by-laws, house rules, board minutes, floor plans or other governing documents annexed to the motion define the water closets at issue as common areas. Indeed, it does not appear common areas are defined in these documents at all. Ambiguous or absent language in these documents renders the resolution of whether the disputed area is a common area to extrinsic evidence (*see 1058 Corp. v Ergas*, 174 AD2d 415, 417 [1st Dept 1991]) and not resolvable on this motion. Accordingly, the branch of the motion to dismiss Plaintiff’s fourth cause of action is denied.

The fifth cause of action in negligence appears to only be stated against Defendant Orsid Realty Corp. (“Orsid”) as managing agent. This claim fails as a matter of law as Orsid owes no duty to Plaintiff nor is he a third-party beneficiary of the agreement between Defendant 40 EAST 88 Owners, Inc. (“Owners”) and Orsid. Additionally, Plaintiff alleged in the complaint that Orsid’s acts when it planned and executed the electrical upgrade were undertaken intentionally, not negligently.

As to the sixth cause of action, in a declaratory judgment action, the court may render a “judgment having the effect of a final judgment as to the rights and other legal relations of the

parties to a justiciable controversy whether or not further relief is or could be claimed” (CPLR §3001). “The general purpose of the declaratory judgment is to serve some practical end in quieting or stabilizing an uncertain or disputed jural relation either as to present or prospective obligations” (*James v Alderton Dock Yards*, 256 NY 298, 305 [1931]; see Siegel, NY Prac §436, at 738 [4th ed]). Here, Plaintiff seeks a declaration that the proprietary lease does not authorize Defendants to enter his apartment and install the disputed electrical conduits. Although, Movant is correct that the proprietary lease contains a right to enter Plaintiff’s apartment to “make or facilitate repairs” or to “cure any default”, the movant does not establish as a matter of law that the work performed constituted a repair or cure within the lease. To the extent Defendants’ argument is premised on a claim the water closet is a common area, that fails based upon the court’s finding supra. Accordingly, the branch of the motion to dismiss Plaintiff’s sixth cause of action is denied.

“A claim for negligent misrepresentation requires the plaintiff to demonstrate (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]). “[L]iability for negligent misrepresentation has been imposed only on those persons who possess unique or specialized expertise, or who are in a special position of confidence and trust with the injured party such that reliance on the negligent misrepresentation is justified.” (*Fresh Direct, LLC v Blue Martini Software, Inc.*, 7 AD3d 487, 489 [2nd Dept 2004], quoting *Kimmell v Schaefer*, 89 NY2d 257, 263 [1996]). Defendants’ attempt to analogize the relations between Plaintiff and Owners and Orsid as an arm’s length transaction is misplaced. Plaintiff was not a contract vendee or in an ordinary business relationship with these defendants, but a shareholder of Defendant Owners which retained Orsid to fulfil its corporate fiduciary and non-delegable proprietary obligations. Defendant has also not demonstrated conclusively that its statements regarding the installation of the electrical risers were sufficient. Plaintiff is correct that none of the notices expressly state that the work will permanently block access to the hallway via the water closets in the C-line apartments. Accordingly, the branch of the motion to dismiss Plaintiff’s seventh cause of action is denied.

“For a complaint to state a cause of action alleging breach of an implied covenant of good faith and fair dealing, the plaintiff must allege facts which tend to show that the defendant sought to prevent performance of the contract or to withhold its benefits from the plaintiff” (*Aventine Inv. Mgmt., Inc. v. Canadian Imperial Bank of Commerce*, 265 AD2d 513, 514 [2nd Dept 1999]). In other words, a claim is stated when it is pled “a party to a contract act[ed] in a manner that, although not expressly forbidden by any contractual provision, . . . deprive[ed] the other party of the right to receive the benefits under their agreement” (*Jaffe v. Paramount Communs.*, 222 AD2d 17, 22-23 [1st Dept 1996]). Plaintiff has specifically pled he was deprived of his implied use of access to his apartment based upon his express right to use common elements to facilitate this access. According, the branch of Defendants’ motion to dismiss Plaintiff’s eighth cause of action is denied.

Plaintiff’s ninth cause of action for wrongful eviction fails as a matter of law as the blocking of ingress and egress through an alternate access point to the apartment does not

constitute a deprivation of a substantial portion of the premises (*see Cut-Outs, Inc. v. Man Yun Real Estate Corp.*, 286 AD2d 258, 261 [1st Dept 2001]).

Plaintiff's second cause of action for a preliminary injunction also fails as a matter of law since the alleged wrongs may be adequately compensated by a money judgment and the other relief he seeks appears to be incidental (*see Credit Agricole Indosuez v Rossiyskiy Kredit Bank*, 94 NY2d 541, 548 [2000]).

Accordingly, Defendants' motion is granted only to the extent that Plaintiff's first, second, fifth and ninth causes of action are dismissed. The balance of the motion is denied.

4/3/2020

DATE

FRANCIS A. KAHN, III, A.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