

Nicotra v Dignam

2020 NY Slip Op 31934(U)

May 28, 2020

Supreme Court, New York County

Docket Number: 655841/17

Judge: Nancy M. Bannon

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

-----x
ELISABETTA NICOTRA and NICOLAI SARAD,

Plaintiff,

DECISION AND ORDER

- v -

Index No. 655841/17

TRICIA DIGNAM, GLENN ENOCH, THEODORA
LURIE, JOEL KAYE, ALEXEY KOTOV and
FELIPE GAMBA

MOT SEQ 003, 004,
005

Defendants.

-----x
NANCY M. BANNON, J.:

I. INTRODUCTION

This is an action by a shareholder of a cooperative corporation against all of the other shareholders of the cooperative for breach of contract and breach of fiduciary duty.

In MOT SEQ 003 the defendants move (i) pursuant to CPLR 6301 to restrain and enjoin the plaintiffs from contacting the defendants' insurance carriers or any other third persons to discuss the case or the facts alleged in the complaint, except through their attorney and only for legitimate litigation objectives, (ii) pursuant to CPLR 3103(a) for a protective order striking the plaintiffs' latest set of interrogatories dated November 19, 2019, and (iii) pursuant to 22 NYCRR 130-1.1 for sanctions. The plaintiffs oppose the motion, and in response, cross-move (i) pursuant to CPLR 3124 for an order compelling the defendants to answer six sets of voluminous interrogatories, and

(ii) pursuant to 22 NYCRR 130-1.1 for sanctions against the defendants.

In MOT SEQ 004, the plaintiffs move for an order (i) pursuant to CPLR 3124 compelling the defendants to produce all documents withheld as privileged as set forth in defendants' privilege log dated June 14, 2018 and all documents in the plaintiffs' document request dated November 28, 2017, (ii) finding that the defendants have waived any applicable privileges to the documents produced on February 19, 2019 that were previously listed on the defendants' privilege log, (iii) compelling defendant Gamba to appear for an additional four-hour continued deposition regarding documents produced in post-EBT discovery, and (iv) awarding attorneys' fees and costs relating to alleged improper conduct by the defendants under 22 NYCRR 130-1.1. The defendants oppose the motion and, in response, cross-move for (i) a protective order pursuant to CPLR 3103(a) precluding the plaintiffs from seeking further discovery in this matter, and (ii) sanctions pursuant to 22 NYCRR 130-1.1 in the amount of their costs and attorneys' fees in connection with MOT SEQ 004.

In MOT SEQ 005, the defendants move for summary judgment pursuant to CPLR 3212 dismissing the plaintiffs' complaint. The plaintiffs oppose the motion and, in response, cross-move for

partial summary judgment for liability on the complaint and to dismiss the defendants' first, second, fourth, seventh, and eighth affirmative defenses.

As discussed herein, the defendants' motion for summary judgment dismissing the complaint (MOT SEQ 005) is granted. The plaintiffs' cross-motion for partial summary judgment is denied. The branches of MOT SEQ 003 seeking injunctive relief and a protective order are denied as moot, and the branch of the defendants' motion seeking sanctions pursuant to 22 NYCRR. 130-1.1 is granted. The plaintiffs' cross-motion in MOT SEQ 003 is denied. The plaintiffs' motion and the defendants' cross-motion under MOT SEQ 004 are each denied in their entirety.

II. BACKGROUND

The plaintiffs Elisabetta Nicotra and Nicolai Sarad are the owners of the shares appurtenant to one of the five units of a residential cooperative corporation located at 434 West 23rd Street in Manhattan. The defendants are all of the other shareholders in this small cooperative, *i.e.* the plaintiffs' neighbors, Tricia Dignam, Glenn Enoch, Thedora Lurie, Joel Kaye, Alexey Kotov and Felipe Gamba. Pursuant to the cooperative's bylaws, one owner of each of the five apartments in the coop is a member of the cooperative's five-person board of directors, one of whom is plaintiff Nicotra. The plaintiffs first commenced

this action by summons with notice on September 13, 2017. On November 6, 2017, after the defendants served a demand for a complaint, they filed a 46-page rambling complaint.

This action arises out of two separate incidents related to the outdoor terrace above the plaintiffs' apartment. First, the plaintiffs claim that on April 13, 2015 the automatic watering system on the deck of the apartment above theirs malfunctioned and caused water to seep into the plaintiffs' apartment. At the time Joseph Brucchieri, who is not named as a defendant in this action, purportedly owned the shares appurtenant to the apartment directly above the plaintiffs' apartment. On April 26, 2015, Brucchieri and his father repaired the deck to prevent any further leaks.

In January 2016, the cooperative board met and retained a professional roofing company to permanently repair the underside of Brucchieri's deck. The repair was completed in March 2016. The plaintiffs admit that that none of the defendants named in this action were in any way the cause of the leak or the approximately \$5,600.00 in damages that the plaintiffs allege resulted therefrom. The plaintiffs also do not allege that they suffered any damages between the time that Brucchieri repaired his deck and the cooperative completed the repairs to the underside of the deck in March 2016. Instead, the plaintiffs

allege that defendants, some of whom were board members at the time of the leak, are personally liable for their damages because the cooperative purportedly failed to permanently repair the underside of the deck above their apartment sooner than they did.

Shortly after repairing his deck in 2015, Brucchieri sold his apartment to defendants Gamba and Kotov. The second incident that forms the basis for the allegations of wrongdoing in the complaint occurred after the sale. Specifically, on September 14, 2015, Gamba and Kotov began installing a new awning on the deck. The plaintiffs interfered with the installation by demanding that the workers stop shortly after the installation commenced. At the time the plaintiffs stopped the work, only two of the awning's brackets had been installed on the building's exterior. No further work to install the awning was ever performed.

The plaintiffs retained an attorney who wrote a demand letter to the defendants. This letter, dated October 8, 2015, demanded that defendants Gamba and Kotov be forced to cease and desist all work on the awning on the grounds that the awning installation violated the building's alteration rules. Immediately thereafter, on October 9, 2015 and October 11, 2015, respectively, the plaintiffs lodged complaints against Gamba and

Kotov with the New York City Department of Buildings and the New York City Fire Department. Gamba and Kotov attempted to appease the plaintiffs' lawyers' letter by formally applying to the board for permission to install the awning. In connection with the application, they retained engineers and architects who submitted plans to the cooperative in support of their alteration application. However, before the cooperative board could authorize the awning installation, the Department of Buildings issued a violation, unrelated to the awning, regarding Gamba and Kotov's deck. Thereafter, Gamba and Kotov chose to withdraw their application and abandon the project completely, so that they could focus on making their deck building-code compliant. Critically, the complaint does not allege any facts from which the court can infer that the plaintiffs suffered any damages resulting from the two brackets installed during Gamba and Kotov's aborted attempt to build an awning on their deck.

The complaint alleges 12 causes of action. The first cause of action is styled as one for "breach of contract and aiding and abetting breach of the proprietary lease." The second cause of action is styled as one for tortious interference with the plaintiffs' proprietary lease and aiding and abetting such interference. The third cause of action is for breach of fiduciary duty and aiding and abetting breach of fiduciary duty. The fourth cause of action is a hybrid cause of action for the

breach of the covenant of good faith and fair dealing and purported breaches and "violations of appropriate building codes." The fifth cause of action is styled as one for "action in support of a breach and violation and aiding and abetting a violation." The sixth cause of action alleges breach of the duty of good faith, loyalty, and care and ultra vires actions. The seventh cause of action is for "tortious actions outside the scope of authority granted under the proprietary lease alleged to be against the best interests of the cooperative." The eighth cause of is for breach of the warranty of habitability and quiet enjoyment. The ninth cause of action is for the breach of the warranty of habitability. The tenth cause of action is entitled "tortious conduct within the regular course of business expected from a cooperative." The eleventh cause of action is for "property damage and reckless disregard in causing property damage." The twelfth cause of action alleges a claim for negligent infliction of emotional distress.

On November 27, 2017 the defendants filed their Verified Answer. The first affirmative defense in the answer pleads that the defendants' complaint should be dismissed because the plaintiffs have failed to plead a cause of action upon which relief can be granted. On December 12, 2017, the plaintiffs rejected the Verified Answer and moved to strike the Verified Answer on the grounds that it was "only" verified by one of the

defendants (MOT SEQ 001). The defendants cross-moved for sanctions. By order of this court dated January 17, 2018, the court denied the plaintiffs motion and the defendant' cross-motion for sanctions, without prejudice. The plaintiffs appealed. By decision and by order dated April 5, 2019 the Appellate Division, First Department, affirmed the order. See Nicotra v. Dignam, 170 AD3d 565 (1st Dept. 2019).

Between May 25, 2018 through May 31, 2018, after the First Department affirmed the order denying MOT SEQ 001, the plaintiffs propounded six separate sets of interrogatories on the defendants comprising a total of 400-plus demands, including subparts. Arguing that these interrogatories were a palpably improper, abusive, and a harassing misuse of the discovery device, the defendants moved for a protective order seeking to strike or modify the interrogatories and for sanctions (MOT SEQ 002). The defendants cross-moved for sanctions against defendants' counsel alleging he filed a false Affirmation of Good Faith. At oral argument on November 7, 2018, the defendants' motion was granted to the extent that the interrogatories were stricken in their current form. The court permitted the plaintiffs to file modified interrogatories, denied the defendants' second motion for sanctions without prejudice, and permitted the plaintiffs to withdraw their cross-motion for sanctions.

Additionally, in early November 2018, the defendants' three insurance carriers, Amica, Metlife, and Allstate, each received a letter purporting to be written by an 'insider to the Edmonds firm' (the firm representing the defendants in this matter), urging the insurance carriers to investigate the underlying claims in this matter, alluding to potential insurance fraud on the defending insurance carriers. The defendants claim that the plaintiffs impersonated the defendants' lawyers and wrote to its insurers to undermine the insurance carriers' obligation to defend this case and maximize the defendants' financial damage in this vexatious lawsuit.

On November 19, 2018, the plaintiffs e-filed six sets of interrogatories, minimally changing the burdensome and palpably improper interrogatories that were stricken by the court.

III. DISCUSSION

MOT SEQ 005 - The Parties' Motions for Summary Judgment

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985).

The motion must be supported by evidence in admissible form, see Zuckerman v City of New York, 49 NY2d 557 (1980), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of their motion, the defendants submit, *inter alia*, the affirmation of Neil G. Marantz, Esq., duly affirmed on April 23, 2019, the affidavit of defendant Glenn Enoch, the affidavit of defendant Felipe Gamba-Paredes, excerpts of the deposition transcript of plaintiff Sarad, excerpts from plaintiff Nicotra's deposition transcript, and a copy of the plaintiff's proprietary lease. These submissions demonstrate that the defendants have met their *prima facie* burden entitling them to summary judgment dismissing the complaint.

1. First Cause of Action for Breach of Contract and Aiding and Abetting Breach of Contract

To establish entitlement to summary judgment dismissing a cause of action for breach of contract, a defendant must demonstrate either 1) the nonexistence of a contract, 2) that

the plaintiff did not perform under the contract between the parties, 3) that the defendant did not breach the contract between the parties, or 4) that the defendant's breach did not result in damages to the plaintiff. See Markov v Katt, 176 AD3d 401 (1st Dept. 2019); Harris v Seward Park Hous. Corp., 79 AD3d 425 (1st Dept. 2010). Here, the defendants' submissions demonstrate that there is no existing contract between the plaintiffs and any of the defendants, such that summary judgment is warranted.

In their papers, the plaintiffs only allege that the defendants breached the plaintiffs' proprietary lease. However, the plaintiffs' proprietary lease is only between the cooperative as a lessor and the plaintiffs as lessees, and as such, the plaintiffs' claims only lie against the cooperative, a non-party to this action. Thus, the plaintiff's proprietary lease cannot form the basis for a claim for breach of contract against the defendants.

To the extent that the plaintiffs, in opposition, attempt to argue that their breach of contract claim is grounded in an alleged breach of the defendants' proprietary leases and that they are third party beneficiaries to those leases, any such argument is meritless. The Court of Appeals in Dormitory Auth. of the State of N.Y. v Samson Constr. Co., 30 NY3d 704 [2018] held that a third party may only sue as a beneficiary on a

contract following a showing that the contract was intended to benefit the third party. Absent such intent, the third party is merely an incidental beneficiary with no right to enforce the particular contracts. Id. In determining whether a shareholder in a cooperative is a beneficiary to a proprietary lease under Dormitory Auth. of the State of N.Y., the First Department recently held in Ran v Weiner 170 AD3d 425 [1st Dept. 2019], that under a lease containing the same provisions as the plaintiffs' proprietary lease, specifically that "[t]he Lessor shall not be responsible to the Lessee for the nonobservance or violation of House Rules by any other lessee or person," a plaintiff's cause of action for breach of contract against another member of a cooperative, and not the cooperative itself, must fail as the plaintiff was not an intended beneficiary of the lease.

Moreover, even were the plaintiff able to establish that it was a beneficiary of the defendants' proprietary leases, which it is not, the plaintiffs fail to allege how the defendants' breached their proprietary leases, beyond Gamba and Kotov briefly attempting to install an awning on their deck. To the extent that such a breach could be actionable, the plaintiffs also fail to adduce admissible evidence from which the court could infer that defendants Gamba and Kotov's installation of two brackets in the side of the building caused the plaintiffs damages, particularly as Gamba and Kotov undisputedly removed

the brackets from their deck at their own expense. As such, the plaintiffs' fail to raise a triable issue of fact, and summary judgment dismissing the first cause of action is warranted.

The portion of the first cause of action for aiding and abetting breach of contract is also dismissed as, even assuming New York recognized such a cause of action (which the plaintiffs have not established) there is no underlying viable breach of contract claim alleged by the plaintiffs. See Kagan v HMC-New York, Inc., 94 AD3d 67 (1st Dept. 2012); Kaufman v Cohen, 307 AD2d 113 (1st Dept. 2003).

2. The Second Cause of Action for Tortious Interference and Aiding and Abetting Tortious Interference

To establish summary judgment dismissing a cause of action for tortious interference, a defendant must demonstrate either that 1) no valid contract existed, 2) the defendant had no knowledge of the contract or did not intentionally interfere with it, 3) there was no resulting breach of contract resulting from the defendant's purported interference, or 4) that the plaintiff did not suffer damages. See Hoag v Chancellor, Inc., 246 AD2d 224 (1st Dept. 1998).

Here, the defendants demonstrate, *prima faice*, through the affidavits of defendants Glenn Enoch and Felipe Gamba-Paredes that they did not intentionally interfere with a valid contract,

resulting in a breach, as the only cognizable breach of contract alleged by the plaintiffs is Gamba and Kotov's attempt to install an awning on their deck, which the defendants' submissions demonstrate Gamba and Kotov believed that they could rightfully do. Inasmuch as the plaintiffs' appear to be claiming that the defendants interfered with their proprietary lease, the defendants correctly argue that the plaintiffs' second cause of action is based upon extremely vague allegations merely averring that the certain unspecified actions by the defendants somehow "interfered" with their proprietary lease "and their reasonable contractual expectations."

Fatally, in opposition to the defendants' motion for summary judgment, the plaintiffs fail to explain, much less adduce admissible evidence of any breach of their proprietary lease. As such, the defendants' motion for summary judgment to dismiss the portion of the second cause of action purporting to assert a claim for tortious interference is granted.

As with the claim alleging aiding and abetting breach of contract, the portion of the second cause of action for aiding and abetting tortious interference falls with the tortious interference claim. See *IDX Capital, LLC v Phoenix Partners Grp.*, 83 AD3d 569 (1st Dept. 2011). As such, that portion of the defendants' summary judgment motion is also granted.

3. Third Cause of Action for Breach of Fiduciary Duties and the Aiding and Abetting Thereof

Once again, the defendants correctly argue that they are entitled to summary judgment dismissing the third cause of action as it fails to state a claim as a matter of well-settled First Department law. A breach of fiduciary duty claim does not lie against individual cooperative board members where there is no allegation of "individual wrongdoing by the members... separate and apart from their collective actions taken on behalf of the" cooperative. Hersh v One Fifth Ave. Apt. Corp., 163 AD3d 500, 502 (1st Dept. 2018); see also 20 Pine St. Homeowners Assn. v 20 Pine St. LLC, 109 AD3d 733 (1st Dept. 2013); Brasseur v Speranza, 21 AD3d 297 (1st Dept. 2005).

Here, there is no claim against the defendants that concerns actions taken outside of their decision-making authority as collective members of the cooperative. The allegations in the complaint are solely predicated upon the defendants' collective failure to take actions when and how the plaintiffs desired, such as the scheduling of permanent roof repairs following the Brucchieri leak, or in stopping Gamba and Kotov's awning installation before the plaintiffs complained that it was improper.

Moreover, as with all of the other claims, a breach of fiduciary duty claim requires proof of damages directly caused

by the defendants' misconduct. See Palmetto Partners, L.P. v AJW Qualified Partners, LLC, 83 AD3d 804 (2nd Dept. 2011). As discussed herein, the plaintiffs have not submitted admissible proof of damages beyond the \$5,600.00 in damages solely attributable to the Brucchieri leak, for which none of the defendants are liable. In the excerpt of plaintiff Sarad's deposition, submitted by the defendants, Sarad admits that no further water damage occurred between the time that Brucchieri and his father temporarily patched the roof in April 2015 and the board's subsequent retaining of a roofing company to make permanent repairs in January 2016. Furthermore, to the extent that the plaintiffs allege a breach of fiduciary duty based upon their fears of the board accepting Gamba and Kotov's proposed awning installation plan, the board never voted on the proposal due to the plaintiffs' obstruction, and therefore, no cognizable damages arise therefrom.

Inasmuch as the defendants have established their entitlement to summary judgment on the plaintiffs third cause of action for breach of fiduciary duty, the remaining portion of the cause of action alleging the defendants' aiding and abetting of the alleged breaches is also dismissed, as there can be no "aiding and abetting" of breach of fiduciary duty if such a breach did not occur. See Kagan v HMC-New York, Inc., 94 AD3d

67, 73 (1st Dept. 2012); Kaufman v Cohen, 307 AD2d 113 (1st Dept. 2003)

4. Fourth Cause of Action for Breach of the Covenant of Good Faith and Fair Dealing and Reckless Disregard of the Duty of Fair Conduct and Self-Appointment to Decision Making Roles in Breach of the Cooperative Bylaws and BCL

The defendants establish their entitlement to summary judgment dismissing the fourth cause of action as a matter of law. A cause of action for breach of the covenant of good faith and fair dealing cannot be sustained where, as here, there is no contract between the parties. See Ahead Realty LLC v India House, Inc., 92 AD3d 424 (1st Dept. 2012); Duration Mun. Fund, L.P. v J.P. Morgan Sec. Inc., 77 AD3d 474 (1st Dept. 2010).

As discussed herein, the only contract at issue is the plaintiffs' own proprietary lease to which the defendants are not parties. There is no contract between the plaintiffs and the defendants. See Ran v Weiner, supra. Thus, the defendants are entitled to summary judgment dismissing the portion of the fourth cause of action alleging a breach of the duty of good faith and fair dealing.

Additionally, despite the plaintiffs' failing to cite to the specific provisions of the Business Corporations Law that they seek relief under, the plaintiffs appear to argue that they are entitled to relief due to the defendants improperly appointing themselves to decision making roles in the

cooperative in violation of BCL § 715, and failing to heed the plaintiffs' counsel on areas within their expertise in violation of BCL § 717 (a) (2). However, neither provision of the BCL provides a statutory right for a private action. See CPC Int'l Inc. v McKesson Corp., 70 NY2d 268 (1987). Thus, the defendants are entitled to summary judgment dismissing the portion of the fourth cause of action alleging violations of the Business Corporations Law as well.

5. Fifth Cause of Action Support of a Breach and Violation and Aiding and Abetting a Violation

The plaintiffs' fifth cause of action is styled as an "action in support of a breach and violation and aiding and abetting a violation." The defendants establish their entitlement to summary judgment dismissing the fifth cause of action, as such a cause of action is not viable under New York law.

The plaintiffs appear to be arguing that they are entitled sustain a cause of action against the defendants because they failed to stop the attempted awning installation by Gamba and Kotov and such installation violated the New York City building code.

However, contrary to the plaintiffs' argument, even if the plaintiffs had standing to assert claims under these sections of the building code, for which they cite no authority, the

verified complaint concedes the absence of any damages flowing therefrom. The verified complaint expressly avers that after Gamba and Kotov commenced the awning installation project without the approval of the cooperative corporation, and that they subsequently paid all costs associated with the violation and "the cost of removing brackets from the building wall" demonstrating that the cooperative corporation did not suffer any damages for which the plaintiffs could arguably recover.

6. Sixth Cause of Action for Breach of the Duty of Good Faith, Loyalty and Care to the Cooperative and Ultra Vires Actions

The plaintiffs' sixth cause of action alleges breach of the duty of good faith, loyalty and care to the cooperative and ultra vires actions. The defendants establish their entitlement to summary judgment on the sixth cause of action, as such a cause of action is in the nature of a shareholder's derivative action, and the plaintiffs only seek to recover individually.

The plaintiffs' argument that the cause of action is viable because they properly alleged that "it would be futile to demand that the Coop bring this claim against the Defendants," is misplaced. The plaintiffs do not purport to bring this claim derivatively on behalf of the corporation. Instead, they are suing directly for damages in their individual capacities. However, the only conceivable damages alleged would belong to the cooperative corporation. Thus, any such claim could only be

brought derivatively. As it is well settled that an individual shareholder cannot secure a personal recovery for an alleged wrong done to a corporation, the defendants are entitled to summary judgment dismissing this claim. See Marx v Akers, 88 NY2d 189 (1996); MatlinPatterson ATA Holdings LLC v Fed. Express Corp., 87 AD3d 836 (1st Dept. 2011).

Moreover, even if the court construed this cause of action as a derivative claim brought on behalf of the cooperative corporation, which it does not, the assertions in the verified complaint of demand futility would fail to satisfy the requirements of BCL § 626. The plaintiffs' conclusory assertion in the verified complaint that a demand on the board "would be futile," which is the only proof of demand futility the plaintiffs submit on this summary judgment motion, is inadequate to raise a triable issue of fact. Business Corporation Law § 626 (c) requires proof that a derivative plaintiff had a reason for not making a demand on the board, and the Appellate Division has held, that a failure to "set forth with particularity that a demand would be futile... and instead merely assert[] conclusory allegations of wrongdoing and control" warrants dismissal. Danzy v NIA Abstract Corp., 40 AD3d 804, 805 (2nd Dept. 2007), *citing* Bansbach v Zinn, 1 NY3d 1, 11 (2003).

7. Seventh Cause of Action for Multiple Continuous Tortious Actions in Bad Faith

The plaintiffs allege in their seventh cause of action multiple continuous tortious actions in bad faith, outside the scope of authority, and against the best interests of the corporation. Specifically, the complaint alleges that the defendants, "[a]gainst the rule of prudent judgment... refused to inform themselves about standard principles and applicable laws and rules."

As correctly noted by the defendants this cause of action impermissibly attempts to plead a catch-all claim in conclusory form for "tortious actions, inactions and conduct" and "breaches of contract" that do not survive summary judgment. Like many of the other claims discussed herein, it also improperly alleges purported damages belonging exclusively to the corporation, and not personal damages to the plaintiffs.

8. Eighth Cause of Action for Multiple Individual Intentional Tortious Actions

The plaintiffs' eighth cause of action alleges "multiple individual intentional tortious action taken with arbitrariness, favoritism, discrimination and malice, and retaliatory conduct." The plaintiffs allege that the defendants are liable to them for damages because they "intentionally" failed to follow the proprietary lease and by-laws. However, this cause of action is duplicative of the first cause of action for breach of contract,

which as discussed herein is not viable as against the defendants.

To the extent that the plaintiffs argue that the cause of action should survive summary judgment inasmuch as they allege that the defendants committed the alleged breaches with intent, it is well settled that a breach of contract is compensable by contract damages alone. See Megaris Furs v Gimbel Bros., 172 AD2d 209 (1st Dept. 1991). "An intention not to perform does not bring on heavier damages than actual nonperformance." McMahan & Co. v Bass, 250 AD2d 460, 463 (1st Dept. 1998) *citing* Briefstein v P.J. Rotondo Const. Co., 8 AD2d 349, 350 (1st Dept. 1959).

9. Ninth Cause of Action for the Breach of the Warranty of Habitability

The plaintiffs in their ninth cause of action allege breach of the warranty of habitability under RPL § 235(b). This cause of action cannot be sustained for the same reasons the first cause of action is untenable: it seeks to hold the defendants liable for having "breached their obligations" under the proprietary lease. However, again, the defendants have no obligations under the plaintiffs' proprietary lease as a matter of law, as there is no privity between the plaintiffs and the defendants.

Moreover, to sustain a claim for the breach of the warranty of habitability under RPL § 235(b), the Court of Appeals

requires proof of "conditions that materially affect the health and safety of tenants." Park W. Mgmt. Corp. v Mitchell, 47 NY2d 316, 328 (1979).

Here, however, the plaintiffs fail adduce any proof of a threat to their health and safety, as caused by Brucchieri leak, as the only conditions resulting from the leak were minor water damage in the plaintiffs' guest room. Thus, summary judgment dismissing the plaintiffs' ninth cause of action is warranted.

10. Tenth Cause of Action for Tortious Interference with the Regular Conduct of Business

The plaintiffs allege in their tenth cause of action tortious interference with the regular conduct of business expected from a cooperative corporation. Such a claim is also not legally cognizable and fails to state a claim for which relief may be granted under New York law. The cause of action rehashes the plaintiffs' prior unviable claims, and is essentially duplicative of the second cause of action that was properly dismissed.

Moreover, the plaintiffs fail to point to any authority or raise any triable issue of fact in regard to the impropriety of the tenth cause of action. Therefore, summary judgment dismissing the tenth cause of action is granted.

11. Eleventh Cause of Action for Property Damage

The plaintiffs allege in their eleventh cause of action property damage and reckless disregard in causing the property damages. The defendants have established *prima facie* their entitlement to summary judgment on this cause of action as there is no property damage at issue. The plaintiffs, in their deposition testimony, admit that the only actual damages they suffered were \$5,600 in damages to their wall resulting for the Brucchieri leak. Moreover, plaintiff Nicotra acknowledged in her deposition testimony that the plaintiffs decided retroactively that the defendants should be liable for such damages because the plaintiffs feel that the defendants were not sufficiently prompt in scheduling the permanent roof repair of the building.

Additionally, as Sarad admitted in his deposition, the eight months that the cooperative took to permanently fix the underside of the deck after the Brucchieri leak did not result in further damages to the plaintiffs' apartment.

More importantly, even if there were a showing of damages due to the eight-month gap between the leak and the repair by the cooperative corporation and those damages were attributable to the defendants who are members of the board, the plaintiffs still fail to overcome the high standard of proof required for the courts to question the decision of the board of a cooperative corporation concerning the manner and extent of

repairs to their building, which decisions are exclusively within the scope of their authority. See Matter of Levandovsky v One Fifth Ave. Apt. Corp., 75 NY2d 530 (1990); Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium, 65 AD3d 985 (1st Dept. 2009).

As such, summary judgment dismissing the eleventh cause of action is granted.

12. Twelfth Cause of Action for Negligent Infliction of Emotional Distress

The plaintiffs allege in their twelfth cause of action negligent infliction of emotional distress. A claim for intentional infliction of emotional distress requires proof of (1) extreme and outrageous conduct; (2) an intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (3) a causal connection between the conduct and the injury; and (4) severe emotional distress. See Howell v N.Y. Post Co., 81 NY2d 115 (1993). These requirements "are rigorous, and difficult to satisfy" and liability can be "found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Id. at 122.

Here the plaintiffs utterly fail to demonstrate, or cite any authority for the proposition that the defendants' purported *inaction*, to the extent that it was even wrongful constitutes extreme or outrageous conduct. At most, the plaintiffs are contending that the defendants who are on the board (i) waited eight months to permanently repair the underside of the deck after a shareholder temporarily repaired a leak that caused a mere \$5,600.00 in damages and (2) failed to stop the installation of an awning before they complained. This is nothing like the conduct required by settled law to constitute behavior "beyond all possible bounds of decency," "utterly intolerable in a civilized community," or "so extreme as to exceed all bounds of decency." Goldstein v Massachusetts Mut. Life Ins. Co., 60 AD3d 506, 510 (1st Dept. 2009).

Further undercutting any claim for negligent infliction of emotional distress is the utter lack of proof that the claimant's physical safety was jeopardized or that the defendants exposed them to an unreasonable risk of bodily injury or death. See Bovsun v Sanperi, 61 NY2d 219 (1984). This complaint, at its core, is about (i) a leak in a deck that allegedly caused \$5,600.00 in damages that the plaintiff originally agreed to pay and (ii) the aborted installation of an awning. Bringing a claim for negligent infliction of emotional distress based on these facts is consistent not with misconduct

by the defendants. Rather, it is consistent with the plaintiffs' vexatious abuse and misuse of the courts and the judicial process as a means of harassing the defendants, which forced them to needlessly incur significant professional fees and led to two prior motions for sanctions by the defendants that were denied without prejudice.

13. The Plaintiffs' Cross-Motion

In as much as summary judgment dismissing the complaint is granted, the plaintiffs' cross-motion is denied as moot.

MOT SEQ 003 - Motion for Preliminary Injunction, Protective Order, and Sanctions

Also moot in light of the complaint's dismissal with prejudice is the defendants' motion for a preliminary injunction and for a protective order pursuant to CPLR 3103(a) striking the plaintiffs' latest set of interrogatories dated November 19, 2019. As such those portions of the motion are denied.

However, the portion of MOT SEQ 003 seeking sanctions pursuant to 22 NYCRR 130-1.1(a) is granted to the extent that a hearing shall be held regarding the appropriate sanctions in connection with the misconduct alleged in MOT SEQ 003. 22 NYCRR 130-1.1(a) provides, in relevant part, that the court, "in its

discretion, may award to any party or attorney in any civil action ... costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, resulting from frivolous conduct." "In addition to or in lieu of awarding costs, the court, in its discretion may impose financial sanctions upon any party or attorney in a civil action or proceeding who engages in frivolous conduct." 22 NYCRR 130-1.1(b) provides that the court, as appropriate, "may make such award of costs or impose such financial sanctions against ... a party to the litigation." Frivolous conduct includes conduct that is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law, is undertaken primarily to harass or maliciously injure another, or asserts material factual statements that are false. See 22 NYCRR 130-1.1(c).

"In determining whether the conduct undertaken was frivolous, the court shall consider, among other issues the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether or not the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of ... the party." Id.

Here, the plaintiffs have engaged in a relentless series of harassing and abusive litigation tactics that constitute frivolous conduct under 22 NYCRR 130-1.1(c), including the conduct for which the defendants seek sanctions in this motion.

For example, at oral argument on November 7, 2018, the defendants' first motion to strike the plaintiffs' interrogatories was granted to the extent that the interrogatories were stricken in their current form as being palpably improper, abusive and, harassing misuse of the discovery device. The court permitted the plaintiffs to file modified interrogatories, and the defendants' motion for sanctions was denied without prejudice. However, the plaintiffs chose to continue abusing the discovery process and harass the defendants with equally improper and abusive interrogatories consisting of at least 90 subparts, requiring the defendants to move yet again, to strike them, a motion that would have been granted but for the dismissal of this lawsuit.

Additionally, a hearing is necessary to determine if the plaintiffs attempted to obstruct the defendants' insurance coverage for this litigation by submitting an "anonymous" and potentially defamatory letter, holding themselves out to be "an insider to the Edmonds firm" and suggesting that the defendants were committing insurance fraud in what the defendants contend

is a violation of NY CLS Penal § 190.25 (Criminal Impersonation in the Second Degree). If proven to be true, this may also constitute grounds for awarding sanctions for frivolous litigation conduct.

The portion of the plaintiffs' cross-motion compelling a response to their improper interrogatories is denied as moot. The portion plaintiffs' cross-motion for sanctions motion is meritless, retaliatory, and, as such, is denied.

MOT SEQ 004 - Motion to Compel Discovery and Sanctions

This motion by the plaintiffs, which seeks discovery and sanctions is likewise denied. The branch of the motion seeking to compel document discovery and for certain rulings concerning privilege is denied as moot in light of the court's having granted summary judgment dismissing the complaint in its decision on MOT SEQ 005. The portion of the plaintiffs' motion for sanctions is denied for the same reasons as the court denied the sanctions requested in the plaintiffs' cross-motion in connection with MOT SEQ 003. The portion of the defendants' cross-motion for a protective order is denied as moot, and the portion of the defendants' motion for sanctions is duplicative of the sanctions requested in MOT SEQ 003 and thus, it is denied.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the defendants' motion for summary judgment dismissing the plaintiffs' complaint as against them **(MOT SEQ 005)** is granted in its entirety and the complaint is dismissed with prejudice, and it is further,

ORDERED that the plaintiffs' cross-motion to **(MOT SEQ 005)** for partial summary judgment for liability on the causes of action in the complaint and to dismiss the defendants' first, second, fourth, seventh, and eighth affirmative defenses is denied; and it is further,

ORDERED that the defendants motion for an order (i) pursuant to CPLR 6301 restraining and enjoining the plaintiffs from contacting the defendants' insurance carriers or any other third persons to discuss the case or the facts alleged in the complaint, except through their attorney and only for legitimate litigation objectives, (ii) pursuant to CPLR 3103(a) issuing a protective order striking the plaintiffs' latest set of interrogatories dated November 19, 2019, and (iii) pursuant to 22 NYCRR. 130-1.1 awarding sanctions against the plaintiffs **(MOT SEQ 003)**, is granted to the extent of ordering a hearing to determine the appropriate sanctions against the plaintiffs for their frivolous litigation conduct in filing a second set of

improper interrogatories and for their alleged attempt to interfere with the defendants' insurance coverage, and is otherwise denied; and it is further,

ORDERED that the plaintiffs' cross-motion to **(MOT SEQ 003)** (i) pursuant to CPLR 3124 compelling the defendants to answer their interrogatories, and (ii) for sanctions pursuant 22 NYCRR 130-1.1 is denied; and it is further,

ORDERED that the plaintiffs' motion to compel discovery and for other relief is denied **(MOT SEQ 004)**; and it is further,

ORDERED that the defendants' cross-motion to **(MOT SEQ 004)** for a protective order and for sanctions is likewise denied; and it is further,

ORDERED that the parties are to contact the court on or before July 31, 2020 to schedule the hearing to determine the appropriate sanctions against the plaintiffs for their frivolous litigation conduct in filing a second set of improper interrogatories and for their alleged attempt to interfere with the defendants' insurance coverage.

This constitutes the Decision and Order of the court.

Dated: May 28, 2020

ENTER:


NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON