

<b>Salvator v 55 Residents Corp.</b>
2020 NY Slip Op 31986(U)
June 15, 2020
Supreme Court, New York County
Docket Number: 154509/2015
Judge: Paul A. Goetz
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. PAUL A. GOETZ** PART IAS MOTION 47EFM

*Justice*

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SCOTT SALVATOR,

Plaintiff,

- v -

55 RESIDENTS CORP., BOARD OF DIRECTORS OF 55  
RESIDENTS CORP., AND AKAM ASSOCIATES, INC.,

Defendants.

-----X

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MOTION DATE	
MOTION SEQ. NO.	007
<b>DECISION + ORDER ON MOTION</b>	

The following e-filed documents, listed by NYSCEF document number (Motion 007) 228-248, 251-273, 276-282

were read on this motion to/for DISMISS/SUMMARY JUDGMENT.

Plaintiff Scott Salvator, the owner of a unit in a cooperative building owned and managed by defendants, commenced this action in May 2015 seeking injunctive relief and money damages for water damage and mold growth in his apartment caused by an allegedly undersized drain on the landing outside of his apartment. Plaintiff then filed an amended complaint in February 2017 in which he also alleges a problem with an illegal laundry vent located near his bedroom window. By order dated January 9, 2019, this court granted in part plaintiff's motion to serve a second amended complaint to the extent he sought to assert additional allegations regarding defendants' replacement of the drain in June 2017, and to add a claim for trespass based on defendants' entry and repairs to plaintiff's apartment in March 2018. The court denied plaintiff's motion to the extent he sought to assert a claim for intentional infliction of emotional distress and denied, without prejudice, defendants' cross-motion to dismiss the complaint.

After answering the second amended complaint, defendants now move pursuant to CPLR 3211 and CPLR 3212 to dismiss all claims against the managing agent, defendant Akam

Associates, and to dismiss the trespass and breach of fiduciary duty claims against all defendants. Plaintiff opposes the motion and cross-moves to renew his motion to amend to assert a claim for intentional infliction of emotional distress and to strike defendants' answer based on their alleged failure to timely serve plaintiff with the expert report of Rand Engineering dated April 10, 2018.

Turning first to defendants' motion, defendants argue that plaintiff's trespass claim must be dismissed because defendants' entry into plaintiff's apartment in March 2018 was authorized under the lease. Paragraph 25 of the lease provides that the cooperative and its agents have the right to enter plaintiff's apartment at a reasonable time upon notice in order to make repairs. Affirmation of Chad E. Sjoquist dated October 15, 2019, Exh. P, para. 25. Here, defendants notified plaintiff of their intention to enter his apartment on March 26, 2018, by sending a letter to plaintiff's counsel. Sjoquist Aff., Exh. R. Plaintiff argues that defendants' entry was unauthorized because defendants did not send the letter to plaintiff's address at the building by registered mail, as required by the lease. Sjoquist Aff., Exh. P, para. 27. However, as defendants point out, their service to plaintiff's counsel was reasonable under the circumstances given that the parties were in the midst of litigation and defendants' counsel was prohibited from communicating directly with plaintiff. Further, defendants were aware that plaintiff did not reside in the unit and they wanted to ensure that plaintiff received actual notice of their intention to enter the apartment, which cannot be disputed given that plaintiff's counsel responded to the letter. Sjoquist Aff., Exh. S. To the extent that plaintiff complains about the workmanship of defendants' repairs, these allegations are insufficient to state a claim for trespass. *See Community Counseling & Mediation Services v. Chera*, 95 A.D.3d 639, 639-640 (1<sup>st</sup> Dep't 2012). Accordingly, plaintiff's trespass cause of action will be dismissed.

With respect to the breach of fiduciary claim, defendants argue that this claim should be dismissed as duplicative of the breach of contract claim because it arises out of the same allegations and seeks the same damages. “It is well-settled that the same conduct which may constitute the breach of a contractual obligation may also constitute the breach of a duty arising out of the relationship created by contract but which is independent of the contract itself.” *37 East 50<sup>th</sup> Street Corp. v. Restaurant Group Management Services*, 156 A.D.3d 569, 570-71 (1<sup>st</sup> Dep’t 2017) (citing *Mandleblatt v. Devon Stores*, 132 A.D.2d 162, 167-68 (1<sup>st</sup> Dep’t 1987)). Here, plaintiff’s breach of fiduciary claim is not duplicative of the breach of contract claim because the breach of fiduciary duty claim is asserted only as against defendant Board of Directors, which is not bound by the proprietary lease. Accordingly, plaintiff’s breach of fiduciary claim not be dismissed.

Finally, defendants argue in support of their motion that all of the claims asserted against defendant Akam Management must be dismissed because it was acting as an agent for a disclosed principal and it did not exercise complete and exclusive control of the building. It is well-established that a managing agent of a building owner generally may not be held liable for breach of the owner’s contractual duties since it is acting as an agent for a disclosed principal. *Brasseur v. Speranza*, 21 A.D.3d 297, 299 (1<sup>st</sup> Dep’t 2005). Other than the second cause of action for an injunction, which appears to be moot given defendants’ repairs, plaintiff’s remaining claims against defendant Akam are based on breach of contract. *Sjoquist Aff., Exh. C* (Second Amended Complaint, paras. 58-73, 86-98). Accordingly, the claims against defendant Akam must be dismissed.

Turning to the cross-motion, plaintiff moves to renew its motion to amend to assert a claim for intentional infliction of emotional distress. Plaintiff’s motion is based on newly discovery evidence from non-party Rand Engineering, which was retained by defendants. In the non-party

deposition of Rand Engineering held on July 16, 2019 and the Rand report dated April 10, 2018, but not provided to plaintiff until June 3, 2019, plaintiff learned that Rand Engineering had informed defendants that, in its opinion, the laundry vent located below plaintiff's apartment was illegal and should be removed. However, this evidence does not change the calculus and plaintiff's proposed claim for intentional infliction of emotional distress remains insufficient as a matter of law. *Baker v. 16 Sutton Place*, 2 A.D.3d 119, 121 (1<sup>st</sup> Dep't 2003). Further, plaintiff's request for the drastic sanction of striking a pleading must be denied. Not only has plaintiff failed to submit an affirmation of good faith as required under Uniform Rule 202.7, plaintiff fails to show that it was prejudiced by defendant's alleged delay in producing this report, particularly given defendants' production of other material from Rand Engineering in January 2019. Accordingly, it is

ORDERED that defendants' motion is granted to the extent that the fifth cause of action for trespass is dismissed and the second amended complaint is dismissed as against defendant Akam Management, and is otherwise denied; and it is further

ORDERED that plaintiff's cross-motion is denied; and it is further

ORDERED the complaint is dismissed as against defendant Akam Management and the Clerk shall enter judgment accordingly, with costs and disbursements awarded to said defendant; and it is further

ORDERED that the caption shall be amended to remove defendant Akam Management and all subsequent pleadings and papers filed in this action shall bear the amended caption; and it is further

ORDERED that movant is directed to e-file a "Notice to County Clerk" form (Form EF-22, available on NYSCEF) attached to a copy of this order with notice of entry for the County Clerk who shall mark the records to reflect the amended caption.

6/15/20  
DATE

  
PAUL A. GOETZ, J.S.C.

CHECK ONE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
<input type="checkbox"/>	GRANTED			<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE