

**Disbrow v Normandie Condominium**

2020 NY Slip Op 33706(U)

October 30, 2020

Supreme Court, New York County

Docket Number: 651602/2020

Judge: Laurence L. Love

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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. LAURENCE L. LOVE PART IAS MOTION 63M**

*Justice*

-----X INDEX NO. 651602/2020

CAROLYN DISBROW,

09/28/2020

Plaintiff,

10/14/2020

10/14/2020

- v -

MOTION DATE 10/14/2020

THE NORMANDIE CONDOMINIUM, THE BOARD OF MANAGERS OF THE NORMANDIE CONDOMINIUM, METRO MANAGEMENT & DEVELOPMENT, INC., GLOBAL SOLUTIONS APPLIANCE REPAIR INC., GLOBAL SOLUTIONS APPLIANCE REPAIR NYC LLC, HADAS JACOBI, BRIAN STRONG, KERI STRONG

MOTION SEQ. NO. 001 002 003 004

**DECISION + ORDER ON MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 34, 63, 64, 65, 66, 67, 68

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 21, 22, 23, 24, 25, 26, 36, 59, 60, 61, 62, 69

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 27, 28, 29, 30, 31, 32, 33, 46, 47, 48, 49, 50, 70

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 37, 38, 39, 40, 41, 42, 43, 44, 45, 51, 52, 53, 54, 55, 56, 57, 58

were read on this motion to/for DISCOVERY.

Upon the foregoing documents,

This litigation involves plaintiff's apartment at 100 W. 119th Street, Unit 2B, New York, New York in the Normandie Condominium. Plaintiff's complaint states, "[t]his case arises out of the defendants' various acts and omissions in violation of their contractual, tort and fiduciary duties to repair and restore Disbrow's apartment unit in the condominium after the unit suffered

substantial damage caused by multiple water leaks, one emanating from another apartment unit in the condominium and a second leak emanating from a waste pipe under the control of the condominium into Disbrow's unit." Defendant's complaint continues, "Disbrow was forced to abandon her home for approximately thirteen months, all the while being simultaneously required to expend substantial sums out of her own pocket for repair construction costs, temporary housing costs, storage costs, and other personal expenses. Disbrow continued to bear the cost of mortgage payments, property tax payments, and common charge payments, even as she was being deprived of the use and enjoyment of her home." Plaintiff alleges causes of action for breach of contract, negligence, and breach of fiduciary duty with damages estimated to be not less than \$150,000.

A summons and complaint were filed on March 10, 2020. Defendants, The Normandie Condominium, The Board of Managers of the Normandie Condominium, and Metro Management & Development, Inc. (together "Normandie") filed an answer with cross claims on May 14, 2020. Brian Strong and Keri Strong filed an answer on May 19, 2020. Global Solutions Appliance Repair Inc., Global Solutions Appliance Repair NYC LLC, and Hadas Jacobi have not answered in this action. Hadas Jacobi has appeared through filing a motion.

Upon Carolyn Disbrow's Memorandum of Law, it is alleged, "[o]n May 25, 2018, Disbrow suffered extensive water damage in her condominium unit on the second floor of the Normandie Condominium. Disbrow learned that the water damage was caused by a leak from an open water line in a condominium unit on the sixth floor. Specifically, the water line had been negligently left open while repairs were being performed to a malfunctioning refrigerator in the sixth-floor unit. At the time the refrigerator malfunctioned, necessitating the repair, the sixth-

floor unit was occupied by Jacobi, and Jacobi hired the appliance repair company who ultimately caused the leak, damaging Disbrow.”

Upon a motion to dismiss, brought pursuant to CPLR 3211(a)(7), the court’s sole focus must be to determine whether the proponent of the pleadings has a cause of action (see *EBC I, Inc. v. Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]). The Court should construe the pleadings in a liberal fashion by accepting the facts alleged in the complaint and interpreting them in a light most favorable to the plaintiff (see *Duran v. Bautista*, 47 Misc. 3d 1207(A) [Sup. Ct. N.Y. Cnty. April 7, 2015]).

Motion Sequence Number One has defendant Hadas Jacobi seeking a dismissal for failure to state a cause of action, CPLR 3211(a)(7) in plaintiff’s sixth cause of action for negligence, while plaintiff Carolyn Disbrow cross-moves, as alternative relief, to amend her complaint, CPLR 3025(b).

Ms. Jacobi had sold Unit 6B to Brian and Kerri Strong on April 10, 2018. As part of the sale, Ms. Jacobi agreed to have the refrigerator repaired post-closing and retained GS Entities to do the work. Ms. Jacobi was permitted to occupy and possess the sixth-floor unit from April 1, 2018 through May 31, 2018. Jacobi’s memorandum of law states, “GS Entities was retained as an independent contractor to perform the repair work in its professional capacity. Since GS Entities was an independent contractor and was not Ms. Jacobi’s employee or servant, Ms. Jacobi cannot be liable for GS Entities’ negligence.”

In order to set forth a prima facie case of negligence, a plaintiff is required to allege 1) the existence of a duty on defendant’s part as to plaintiff; 2) a breach of this duty; and 3) that such breach was a substantial cause of the resulting injury (see *Merino v New York City Transit Auth.*, 218 A.D.2d 451, 457 [1st Dept 1996]). When a party contracts to inspect and repair and

possesses the exclusive management and control of real or personal property which results in negligent infliction of injury, its assumed duty extends to noncontracting individuals reasonably within the zone and contemplation of the intended safety services (see *Palka v Servicemaster Mgmt. Servs. Corp.*, 83 N.Y.2d 579, 589 [1994]).

Motion Sequence Number two has defendant Hadas Jacobi seeking a dismissal of the cross claim, for failure to state a cause of action, CPLR 3211(a)(7), against the Normandie Condominium, The Board of Managers of the Normandie Condominium, and Metro Management & Development, Inc.

Normandie states in their affirmation in opposition, “[i]t appears that the subject refrigerator malfunctioned at a time when the duty and responsibility to maintain same was vested in Jacobi and/or Strongs or both collectively. It appears that Jacobi had actual notice of the issue with the subject refrigerator, failed to act reasonably and as a result of Jacobi’s actions/inactions, the alleged leak occurred damaging plaintiff’s condominium unit.”

The Declaration of Condominium for Normandie states in relevant part in the Third Article Section (f)(i) that, “[e]ach unit includes, and each Unit Owner shall be responsible for ... all plumbing, gas and heating fixtures and equipment such as refrigerators. Plumbing, gas and heating fixtures and equipment as used in the preceding sentence shall include ... water pipes from branch or fixture shutoff valves attached to fixtures, appliances and equipment and the fixtures, appliances and equipment to which they are attached, and any special pipes or equipment which a Unit Owner may install within a wall or ceiling, or under the floor.”

It is well-established that a defendant may seek contribution from a third party even if the injured plaintiff has no direct right of recovery against that party, either because of a procedural bar or because of a substantive legal rule (see *Klinger v. Dudley*, 41 NY2d 362 [2009]). A claim

of contribution may be asserted if there has been a breach of a duty that runs from the contributor to the defendant who has been held liable (see *Guzman v. Haven Plaza Hous. Dev. Fund Co.*, 69 NY2d 559 [1987]). The Declaration of Condominium for Normandie lays out the responsibilities and duties of unit owners.

Motion Sequence Number three has defendant Hadas Jacobi seeking dismissal of the cross claim of defendants Brian Strong and Kerri Strong per a defense on documentary evidence, CPLR 3211(a)(1) and a failure to state a cause of action, CPLR 3211(a)(7).

Hadas Jacobi's affidavit references the possession agreement between the Strongs and Jacobi. Paragraph seven of the Jacobi affidavit states, "[t]he possession agreement clearly provides that I would indemnify the Strongs only for 'any and all claims arising after the [April 10, 2018] closing date during the period of [my] occupancy resulting from [my] negligence, active or passive, or the negligence of [my] agents, servants or employees.'" Paragraph six of Jacobi's affidavit states, "I then occupied the Strongs' Unit until May 18, 2018."

The Strongs' affirmation in opposition states that, "[u]nder the terms of the agreement Jacobi maintained access/occupancy of the Unit through May 31, 2018."

A motion to dismiss a complaint based on CPLR 3211(a)(1) is appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law (see *First Choice Plumbing Corp. v. Miller Law Offices, PLLC*, 164 A.D.3d 756, 757 [2nd Dept. 2018]). In order for evidence to qualify as 'documentary,' it must be unambiguous, authentic, and undeniable (see *Id.*).

Motion Sequence Number four has Normandie seeking an order to compel plaintiff to provide responses to defendants' demand for a verified bill of particulars and combined demands dated May 14, 2020.

A preliminary conference was scheduled for May 26, 2020 but did not occur. The discovery issues are to be addressed at a preliminary conference via Microsoft Teams scheduled for December 2, 2020 at 10:00 a.m.

When evaluating a motion to dismiss, court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (see *Sokol v. Leader*, 74 AD3d 1180, 1181 [2nd Dept 2010]).

It is well settled that on a pre-answer motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction and the plaintiff's allegations are accepted as true and afforded the benefit of every possible favorable inference (see *Eisner v Cusumano Const., Inc.*, 132 AD 940, 941 [2nd Dept 2015]).

Where evidentiary material is submitted and considered on a motion to dismiss a complaint, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact as claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate (see *Gawrych v. Astoria Federal Savings and Loans*, 148 AD3d 681, 682 [2nd Dept 2017]). Their remain questions about the occupancy agreement between Jacobi and the Strongs, and whether it ended prior to May 25, 2018 or was it still in effect through May 31, 2018. Questions still remain about maintenance requirements and certain

indemnification obligations related to the buyer and seller of apartment 2B at 100 W. 119th Street, New York, NY.

ORDERED that motion sequence number one is Denied.

ORDERED that motion sequence number two is Denied.

ORDERED that motion sequence number three is Denied.

ORDERED that motion sequence number four is Denied.

10/30/2020  
DATE

  
LAURENCE L. LOVE, 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