

Mancuso v 307 W. 126 Condominium

2021 NY Slip Op 32116(U)

October 5, 2021

Supreme Court, New York County

Docket Number: Index No. 155211/2020

Judge: Shawn T. Kelly

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

-----X
STELLA MANCUSO,

Plaintiff,

- v -

307 W. 126 CONDOMINIUM, MATTHEW ADAM
PROPERTIES, INC., BOARD OF MANAGERS OF 307 W.
126 CONDOMINIUM, CONSOLIDATED EDISON,
INC., THE OAKMONT 307 W 126 LLC., PATRICK
FOGARTY, MOTONOBU OTSU, MENACHEM KATZ,
RONALD BURNS, ERIK YATES, BRIAN HOYER,
CHARLES MORLEY, CHRISTINE GREGORY, BRENTON
GREGORY-MORLEY, PATRICE TURNER, ALLYSON
BACKUS-HYMANS, ERIN KATHLEEN STEVENS, JAMES
AND JUDY MCCOY 307 W 126 ST NEW YORK NY
10027, LLC., JONATHAN LEE, XYZ CORP.

Defendant.
-----X

INDEX NO. 155211/2020
MOTION DATE 07/30/2021
MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

HON. SHAWN KELLY:

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 37, 39, 40, 41, 42

were read on this motion to/for

DISMISS

In this personal injury action, Plaintiff contends that on July 17, 2017 she sustained serious injuries when she tripped and fell on a sidewalk adjacent to the property located at 307 W. 126th Street, New York, New York. The property at 307 W. 126th Street is a ten-unit condominium.

Defendants Patrick Fogarty, Motonobu Otsu, Menachem Katz, Ronald J. Burns, Jr., Erik J. Yates, Brian Hoyer, Charles H. Morley, Christine Gregory, Brenton Gregory-Morley, Patrice Turner, Allyson Backus-Hymans, Erin Kathleen Stevens, James and Judy McCooy, and Jonathan S. Lee (collectively "Individual Owners") move to dismiss the plaintiff's claims against the Individual Owners and all cross-claims against them, pursuant to CPLR §3211(a)(7); or, in the

alternative, to dismiss the plaintiff's claims against the Individual Owners and all cross-claims against, it, pursuant to CPLR §3212; amending the caption to remove these moving defendants pursuant to CPLR §3205; striking portions of plaintiff's Notice to Admit pursuant to CPLR §3103; and for such other and further relief as this Court deems just and proper.

The Individual Owners contend that Plaintiff brought suit against a myriad of entities, including the Individual Owners, who own individual units inside the condominium at issue. Further, they allege that it is settled law that the owner of an individual unit inside a building is not an "owner" for purposes of §7-210 of the Administrative Code, and therefore owes no duty to Plaintiff.

In opposition, Plaintiff contends that without discovery she cannot determine who or what entity managed the property, but would consider dismissing against the Individual Owners without prejudice, so long as there was a waiver of any statute of limitations defense. Further, Plaintiff states that she would consider dismissing against the Individual Owners if the Defendants respond to the Notice to Admit.

Analysis

On a CPLR §3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true" (*Alden Global Value Recovery Master Fund, L.P. v KeyBank National Association*, 159 AD3d 618, 621-22 [2018]). In addition, "on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Id.* at 622). However, vague and conclusory allegations cannot survive a motion to dismiss (*see, Kaplan v Conway and Conway*, 173 AD3d 452, 452-53 [2019]; *D. Penguin*

Brothers Ltd. v City National Bank, 270 NYS3d 192, 192 [2018] [noting that “conclusory allegations fail”]; *R & R Capital LLC, et al., v Linda Merritt*, 68 AD3d 436, 437 [2010]).

The criterion for establishing whether a Complaint should be dismissed pursuant to §3211(a)(7) 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 *Foley v D’Agostino*, 21 AD2d 60, 64-65 [1964]). Whether the pleader will ultimately be able to establish the allegations in the pleading is irrelevant to the determination of a motion to dismiss pursuant to CPLR §3211(a)(7) (see *EBC I, Inc., v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005]; *Polonetsky v Better Homes Depot*, 97 NY2d 46, 54 [2001][motion must be denied if “from [the] four corners [of the pleadings] factual allegations are discerned which taken together manifest any cause of action cognizable at law”]).

It is well established that the owner of residential units in a condominium is not an “owner” for the purposes of Administrative Code § 7-210 (see *Keech v 30 E. 85th St. Co., LLC*, 154 AD3d 504 [1st Dept 2017]; *Fayolle v E. W. Manhattan Portfolio L.P.*, 108 AD3d 476 [1st Dept 2013]; *Araujo v Mercer Square Owners Corp.*, 95 AD3d 624 [1st Dept 2012]). Instead, “[a] claim arising from the condition or operation of the common elements does not lie against the owners of the individual units; the proper defendant on such a claim is the board of managers” (*Jerdonek v 41 W. 72 LLC*, 143 AD3d 43, 48 [1st Dept 2016]). Further, a statute imposing obligations or liabilities upon the “owner” of real property does not give rise to a claim against the owners of individual condominium units where the claim arises from the common elements or concerns a duty not connected with any individual unit (*Id.* at 48).

The only factual allegations alleged against the Individual Owners are that they had a duty to maintain the adjacent sidewalk. Plaintiff does not contend that the individual condominium units are connected to the alleged accident. Instead, Plaintiff argues that the Individual Owners' motion should be denied because she has not yet established how the building was managed, who the Board of Managers was, or who maintained the sidewalk. Further, Plaintiff contends that if Defendants provide responses to the Notice to Admit, she will agree to discontinue without prejudice against the Individual Owners. Plaintiff has not demonstrated any legal basis to deny the Individual Owners' motion. Therefore, the Individual Owners' motion to dismiss is granted.

Notice to Admit

Additionally, Individual Owners move to strike Items 5-11 of Plaintiff's Notice to Admit and for a protective Order pursuant to CPLR §3103. Specifically, Individual Owners contend that Items 5-10 demand admissions of material issue and ultimate facts, and by using the word "Premises", fail to distinguish the Common Elements from the individual units (NYSCEF Doc. No. 33). Individual Owners also argue that Item 11, wherein plaintiff alleges the existence of insurance coverage is improper to include in such a disclosure device and must be stricken.

In opposition, Plaintiff contends that Individual Owners improperly submitted objections or denials to six out of eleven of the allegations and would not admit or deny whether co-defendant Matthew Adam Properties, Inc. managed the Premises at the time of the incident. Plaintiff argues that as to Item 11, the issue of insurance is discoverable, even if it may not be admissible at trial.

In reply, Individual Owners state that they have provided proof of insurance coverage, including providing a full copy of the insurance policy to counsel for plaintiff on December 23,

2020. Additionally, as to Item 10, the Response to Plaintiff's Notice to Admit, admits Item 10. (NYSCEF Doc. No. 34) Therefore, this decision will only address Items 5-9 of the Notice to Admit.

Items 5 and 6 read:

5. That Defendant 307 W. 126 Condominium has a duty to maintain the sidewalk of the Premises, including performance of any repairs required thereto.

6. That on July 17, 2017 and a period of time preceding said date, the Defendant 307 W. 126 Condominium had a duty to maintain the sidewalk of the Premises, including performance of any repairs required thereto.

(NYSCEF Doc. No. 33)

These Items ask for admissions to the underlying factual issues of the lawsuit. The purpose of a notice to admit is to save a party the trouble and expense of proving a readily admissible fact (*see Spinner v The Phoenix Insurance Com.*, No. 18665/10, 2011 WL 4528675 [2011]). The notice to admit is used to establish that certain facts are not in dispute and to eliminate the need for proof of that fact at trial (*Id.*). Accordingly, Items 5 and 6 are improperly posed.

Item 7 states, "7. The Defendant Matthew Adams Properties, Inc. manages the Premises." (NYSCEF Doc. No. 33). Defendants respond "deny." Accordingly, Plaintiff incorrectly argues that this admission was not responded to.

Items 8 and 9 read:

8. The Defendant Matthew Adams Properties, Inc. managed the Premises on July 17, 2017 and for a period of time prior thereto.

9. That Defendant Matthew Adams Properties, Inc. duty to manage the Premises was pursuant to a written contract.

(NYSCEF Doc. No. 33).

Defendants contend that they take issue with the word "Premises" and responded, "Defendant cannot admit or deny the allegations contained herein." Discovery has not been completed yet,

nor have depositions occurred. Plaintiff is relying upon the Notice to Admit to provide information which would more properly be sought through discovery. Accordingly, Defendants motion to strike is granted solely to the extent that further responses are not required for Items 5, 6, 8 and 9.

Accordingly, it is hereby

ORDERED that the motion of Defendants Patrick Fogarty, Motonobu Otsu, Menachem Katz, Ronald J. Burns, Jr., Erik J. Yates, Brian Hoyer, Charles H. Morley, Christine Gregory, Brenton Gregory-Morley, Patrice Turner, Allyson Backus-Hymans, Erin Kathleen Stevens, James and Judy Mccoy, and Jonathan S. Lee to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that Defendants' motion to strike the Notice to Admit is granted solely to Items 5, 6, 8 and 9 as discussed herein; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

10/5/2021

DATE



SHAWN KELLY, J.S.C.

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: