

**Schwartz v Board of Mgrs. of 260 Park Ave. S.
Condominium**

2022 NY Slip Op 30974(U)

March 25, 2022

Supreme Court, New York County

Docket Number: Index No. 155691/2014

Judge: William Perry

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. WILLIAM PERRY PART 23

Justice

-----X

ANNA SCHWARTZ, SARAH SCHWARTZ,

Plaintiff,

- v -

BOARD OF MANAGERS OF 260 PARK AVENUE SOUTH
CONDOMINIUM,

Defendant.

-----X

BOARD OF MANAGERS OF 260 PARK AVENUE SOUTH
CONDOMINIUM

Plaintiff,

-against-

DNA CONTRACTING AND WATERPROOFING LLC

Defendant.

-----X

INDEX NO. 155691/2014

MOTION DATE 11/03/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595428/2014

The following e-filed documents, listed by NYSCEF document number (Motion 001) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48

were read on this motion to/for AMEND CAPTION/PLEADINGS

In this action, plaintiffs seek to recover damages allegedly sustained to their condominium apartment, following a series of leaks that caused extensive damage. Plaintiffs now seek to amend the complaint, *nunc pro tunc*, pursuant to CPLR §3025. In the proposed amended complaint, plaintiffs seek to interpose a claim for punitive damages against the defendant condominium board for its knowing and wonton disregard for plaintiffs' safety and for the subject condominium premises. Defendants oppose the motion.

DISCUSSION

Although "leave to amend pleadings is ordinarily freely given," it is within the discretion of the court to deny leave where the pleadings are plainly lacking in merit. (*Grabel v Diamond On Duane Condominium*, 2015 N.Y. Misc. LEXIS 1935, *16-17, citing *Garcia v New York-Presbyt, Hosp.*, 114 AD3d 615, 615, 981 N.Y.S.2d 84 [1st Dept 2014]). "Punitive damages are available in a tort action where the wrongdoing is intentional or deliberate, presents circumstances of aggravation or outrage, evinces a fraudulent or evil motive, or is in such conscious disregard of the rights of another that it is deemed willful and wanton" (*Bishop v 59 W. 12th St. Condo.*, 66 AD3d 401, 402, 886 N.Y.S.2d 153 [1st Dept 2009], citing *Prozeralik v Cap. Cities Commc'ns, Inc.*, 82 NY2d 466, 479, 626 N.E.2d 34, 605 N.Y.S.2d 218 [1993]; see also *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 23, 756 N.Y.S.2d 26 [1st Dept 2003] ["Unlike a claim for negligence, to establish a claim for punitive damages, plaintiff must demonstrate that the wrong to him rose to the level of such wanton dishonesty as to imply a criminal indifference to civil obligations" [internal quotation marks and citation omitted]; *National Broadcasting Co. v Fire Craft Servs.*, 287 AD2d 408, 408-409, 731 N.Y.S.2d 722 [1st Dept 2001] ["an award of punitive damages must be premised on conduct particularly egregious in nature directed both at the plaintiff and the general public"])).

"Punitive damages, in contrast to compensatory damages, are awarded to punish a defendant for wanton and reckless or malicious acts and to protect society against similar acts" (*Rivera v City of New York*, 40 AD3d 334, 344, 836 N.Y.S.2d 108 [1st Dept 2007]; *Ross v. Louise Wise Servs., Inc.*, 8 NY3d 478, 489, 868 N.E.2d 189, 836 N.Y.S.2d 509 [2007] ["Punitive damages are not to compensate the injured party but rather to punish the tortfeasor and to deter this wrongdoer and others similarly situated from indulging in the same conduct in the future"])).

Here, plaintiffs proposed amended complaint offers only conclusory allegations without pleading the pertinent elements of a punitive damages claim. Plaintiffs allege, in speculative fashion, that “Upon information and belief, Defendant was aware that certain facilities or structures caused leaks or were very likely to be the cause of leaks in the Apartment, but they ignored those causes, and lied, ignored, or obfuscated when questioned or confronted by Plaintiffs about these causes.”; and that “Upon information and belief, the true causes of the leaks in the Apartment that were concealed by Defendant include but are not limited to, improper construction and/or waterproofing on the roof and/or roofs of the subject building, and swimming pool installed in certain penthouse apartments.” (NYSCEF Doc. No. 44, ¶¶ 12A, 12B).

Additionally, the proposed amended complaint provides, “Defendant knowingly and willfully concealed the true causes of the leaks in the Apartment, and/or the very likely causes of the leaks. Defendant did so with wonton disregard for Plaintiffs' rights to the safe and secure enjoyment of their home.”; and “Defendant knowingly and willfully delayed in or avoided making repairs to the Apartment or to the causes of leaks in the Apartment. Defendant did so with wonton disregard for Plaintiffs' rights to the safe and secure enjoyment of their home.” (NYSCEF Doc. No. 44, ¶¶ 12D, 12E).


These legal conclusions are insufficient as the proposed complaint does not allege any facts to demonstrate that defendants engaged in conduct which rose to the high level of moral culpability to support a claim for punitive damages (see *National Broadcasting Co. v Fire Craft Servs.*, 287 AD2d at 409). “Punitive damages are 'a social exemplary remedy, not a private compensatory remedy [citation omitted]” (*Macy's Inc. v Martha Stewart Living Omnimedia, Inc.*, 127 AD3d 48, 57, 6 N.Y.S.3d 7 [1st Dept 2015]).

Plaintiffs' contention that the board's conduct here cannot be known until all the facts are revealed through discovery and at trial, is unavailing as discovery has been ongoing for several years and is nearly completed. Indeed, this action has been pending since 2014 and the parties have been engaged in active discovery, but for the delay caused by the pandemic. Plaintiffs cannot propose the punitive damages claim on the hope that discovery might someday provide a basis for it (see, *Mandarin Trading Ltd. v Wildenstein*, 65 AD3d 448, 451, 884 NYS2d 47 [1st Dept 2009], *affd* 16 NY3d 173, 944 NE2d 1104, 919 NYS2d 465 [2011]).

Unlike the allegations in *Bishop v 59 W. 12th St. Condo*, where plaintiff alleged "that the condominium board withdrew its prior approval at the behest of a board member whose property may have been affected by the proposed alterations" and where "plaintiff claims that the board's action took place at a secret meeting in which the affected board member participated and where no quorum was present", here, plaintiffs proposed pleading rests on pure conjecture. (*compare, Bishop v 59 W. 12th St. Condo.*, 66 AD3d at 402).

Upon review of the proposed amended complaint, this court concludes that the conduct alleged falls short of the standard required to allege a claim for punitive damages. (*National Broadcasting Co. v Fire Craft Servs.*, 287 AD2d at 409). Accordingly, plaintiffs' motion to amend the complaint is denied and it is hereby,

ORDERED that plaintiffs' motion to amend the complaint, *nunc pro tunc*, motion sequence 001, is denied.

<u>3/25/2022</u> DATE	 WILLIAM PERRY, J.S.C.			
CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	<input type="checkbox"/> OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE