

Carmichael v Hillview Owners Corp.
2022 NY Slip Op 33187(U)
September 22, 2022
Supreme Court, New York County
Docket Number: Index No. 152936/2021
Judge: Mary V. Rosado
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. MARY V. ROSADO
Justice

PART 33

NORA CARMICHAEL,
Plaintiff,

INDEX NO. 152936/2021

MOTION DATE 09/07/2021

MOTION SEQ. NO. 002

- v -

HILLVIEW OWNERS CORP., MIDBORO MANAGEMENT,
LLC, JOHN BLAHNIK, TERRI THRASH, ELITE H.
RENOVATION, LLC, BUILDINWOOD LLC,
Defendant.

**DECISION + ORDER ON
MOTION**

Third-Party
Index No. 595432/2021

HILLVIEW OWNERS CORP., MIDBORO MANAGEMENT,
LLC, TERRI THRASH
Plaintiff,

-against-

BUILDINWOOD LLC
Defendant.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 38, 39, 40, 41, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57 were read on this motion to/for DISMISS

Upon the foregoing documents, Defendant John Blahnik's ("Blahnik") motion to dismiss is granted and Plaintiff Nora Carmichael's ("Plaintiff") cross motion seeking leave to serve a second amended complaint is granted in part.

I. Factual and Procedural Background

Plaintiff brings this action due to the construction work that took place during consolidation of two units owned by Blahnik in their cooperative building. Plaintiff filed its initial Complaint on March 24, 2021 (NYSCEF Doc. 1). Basically, Plaintiff alleges a variety of causes of action due to

purported damages she suffered from the construction. Blahnik filed a motion to dismiss (NYSCEF Doc. 10). In response, Plaintiff filed an Amended Complaint (NYSCEF Doc. 29). In her Amended Complaint, Plaintiff alleges various causes of action, including (1) breach of contract; (2) breach of fiduciary duty; (3) private nuisance; (4) constructive eviction; (5) intentional infliction of emotional distress; (6) negligence infliction of emotional distress, and (7) personal injury due to negligent spread of asbestos and mold (*id.*) Blahnik withdrew his original motion to dismiss in lieu of Plaintiff's Amended Complaint (NYSCEF Doc. 32).

However, in response to Plaintiff's Amended Complaint, Blahnik filed another motion to dismiss (NYSCEF Doc. 38). Blahnik argues that the breach of contract, breach of fiduciary duty, constructive eviction, intentional infliction of emotional distress, negligent infliction of emotional distress, and punitive damages claims must all be dismissed as to him (*id.*). Blahnik asserts that these causes of action must be dismissed because they are barred by the documentary evidence or fail to state a claim (*id.*) Plaintiff opposed Blahnik's motion and cross moved seeking leave to file a second amended complaint (NYSCEF Doc. 47).

Plaintiff is a shareholder of the cooperative apartment building located at 345 West 145th Street, New York, New York 10031 (the "building") (NYSCEF Doc. 29 at ¶ 2). Plaintiff lives in Unit 12B2 ("Plaintiff's Unit") (*id.*). Defendant Hillview Owners Corp. (the "Board") is the board responsible for the building (*id.* at ¶ 4). Defendant Midboro Management, LLC (the "Property Manager") was hired by the Board to manage the building (*id.* at ¶ 8). Blahnik is also a shareholder and owns units 14B2 and 14B3 (*id.* at ¶ 12). Defendant Terri Thrash ("Thrash") is the chief executive officer and president of the Board (*id.* at ¶ 17).

Sometime in October 2020, Blahnik hired Defendant Elite H. Renovation, LLC (“Elite”) and Defendant Buildinwood LLC (“Buildinwood”) to consolidate units 14B2 and 14B3 into a single unit (*id.* at ¶¶ 21, 23).

Discussion

A. Blahnik’s Motion to Dismiss

i. Standard

When reviewing a pre-answer motion to dismiss for failure to state a claim, the Court must give the Plaintiff the benefit of all favorable inferences which may be drawn from the pleadings and determines only whether the alleged facts fit within any cognizable legal theory (*Sassi v Mobile Life Support Services, Inc.*, 37 NY3d 236, 239 [2021]). All factual allegations must be accepted as true (*Allianz Underwriters Ins. Co. v Landmark Ins. Co.*, 13 AD3d 172, 174 [1st Dept 2004]). Conclusory allegations or claims consisting of bare legal conclusions with no factual specificity are insufficient to survive a motion to dismiss (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *Barnes v Hodge*, 118 AD3d 633, 633-634 [1st Dept 2014]). A motion to dismiss for failure to state a claim will be granted if the factual allegations do not allow for an enforceable right of recovery (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 142 [2017]).

A motion to dismiss based on documentary evidence pursuant to CPLR § 3211(a)(1) is appropriately granted only when the documentary evidence utterly refutes the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314 [2002]). The documentary evidence must be unambiguous, of undisputed authenticity, and its contents must be essentially undeniable (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019]). A court may not dismiss a complaint

based on documentary evidence unless the factual allegations are definitively contradicted by the evidence (*Leon v Martinez*, 84 NY2d 83, 88 [1994]).

ii. Breach of Contract

Blahnik argues that the breach of contract claim against him must be dismissed because there is no allegation that Blahnik and Plaintiff entered into a contract (NYSCEF Doc. 41). In response, Plaintiff argues that dismissal would be inappropriate since Plaintiff is alleging that Plaintiff is a third-party beneficiary of the contracts entered into between Blahnik and the Board. However, Plaintiff never actually alleges in her Amended Complaint she is a third-party beneficiary to any contract entered between Blahnik and the Board. Moreover, precedent is clear that where nothing in a proprietary lease expressly indicates that an individual shareholder is intended to be a third-party beneficiary, there will be no cause of action against another individual shareholder for breach of contract (*see O'Hara v Board of Directors of Park Avenue and Seventy-Seventh Street Corporation*, 206 AD3d 476 [1st Dept 2022]; *see also Ran v Weiner*, 170 AD3d 425, 425-426 [1st Dept 2019] [where lease provides "The Lessor shall not be responsible to the Lessee for the nonobservance or violation of house rules by any other lessee or person" a plaintiff is not a third party beneficiary of a defendant's lease with defendant cooperative corporation"]).

Here, there is no indication in either the proprietary lease or house rules that Plaintiff is a third-party beneficiary of any agreement between Blahnik and the Board, nor has Plaintiff alleged so in her Amended Complaint. Moreover, the proprietary lease has the same language as that analyzed in *Ran v Weiner*. Therefore, the first cause of action for breach of contract is dismissed.

iii. Breach of Fiduciary Duty

Blahnik also argues the breach of fiduciary duty claim must be dismissed as to him because the Amended Complaint fails to allege with particularity the existence of a fiduciary relationship

between Plaintiff and Blahnik. As a preliminary matter, CPLR 3016(b) requires allegations of a breach of a fiduciary duty to be pled with particularity (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 700 [1st Dept 2011]). To state a claim for breach of a fiduciary duty, Plaintiff must allege that (1) a defendant owed plaintiff a fiduciary duty, (2) a defendant committed misconduct, and (3) Plaintiff suffered damages caused by that misconduct (*Mohinani v Charney*, 173 NYs3d 1, 2 [2022]).

The Court finds that Plaintiff has not properly alleged that Blahnik owed Plaintiff a fiduciary duty. A “fiduciary” in the context of multi-unit dwelling management is one who transacts business or who handles money or property, not for her own benefit, but for the benefit of another, and as to whom she stands in a relation implying and necessitating great confidence and trust on one hand and a high degree of good faith on the other (*Caprer v Nussbaum*, 36 AD3d 176 [2d Dept 2006]). New York has only recognized fiduciary duties between shareholders in certain limited contexts (*O’Neill v Warburg, Pincus & Co.*, 39 AD3d 281 [1st Dept 2007] [a minority shareholder in a close corporation is owed a fiduciary duty by the majority shareholders]). Here, it is not alleged that Blahnik handled or managed any money or property of Plaintiff’s for Plaintiff’s benefit, so it cannot be said that Blahnik owed her a fiduciary duty. Moreover, while it is alleged that Blahnik owns more shares in the cooperative since he owns two units, it is not alleged that Blahnik owns enough shares to make him a majority shareholder who owes a fiduciary duty to minority shareholders. Nor is it alleged that Plaintiff is a minority shareholder. Plaintiff has also cited no persuasive and binding authority in support of its assertion that Blahnik owed her a fiduciary duty in opposition to this motion to dismiss.

While Plaintiff asserts for the first time in opposition papers that she is making an aiding and abetting claim against Blahnik for the breach of fiduciary duty, the Court will not consider

these allegations as they are improperly raised in an opposition brief. The motion to dismiss is based on the pleadings, and a claim for breach of fiduciary duty requires particularized pleadings pursuant to CPLR 3016(b). As Plaintiff has not pleaded aiding and abetting in its Amended Complaint, Plaintiff's argument in opposition cannot save her second cause of action from Blahnik's motion to dismiss.

iv. Constructive Eviction

Blahnik argues that Plaintiff's constructive eviction must fail because Blahnik is not Plaintiff's landlord and therefore he does not owe Plaintiff a covenant of quiet enjoyment or a warranty of habitability. Plaintiff alleges constructive eviction under Real Property Law 235-b. Constructive eviction under Real Property Law 235-b exists where a wrongful act by a landlord deprives a tenant of the beneficial enjoyment or actual possession of the demised premises (*7001 East 71st Street, LLC Millennium Health Services*, 138 AD3d 573 [1st Dept 2016]). As Blahnik is neither a landlord nor a party to a lease with Plaintiff, there is no constructive eviction claim which may be maintained against him.

v. Intentional infliction of emotional distress

To survive a motion to dismiss, a claim for intentional infliction of emotional distress must set forth extreme and outrageous conduct which intentionally or recklessly causes severe emotional distress (*Richards v Security Resources*, 187 AD3d 452 [1st Dept 2020]). In order to plead a claim for intentional infliction of emotional distress, the alleged "acts or omissions must be so extreme in degree and outrageous in character as to exceed all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community" (*Stella v County of Nassau*, 71 AD3d 573, 574 [1st Dept 2010] [holding that allegations of illegal eviction, ransacking possession, and videotaping eviction did not constitute intentional infliction of emotional

distress)). The required elements of intentional infliction of emotional distress are “rigorous and difficult to satisfy.” (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 122 [1993]).

Here, Plaintiff alleges that the sound and vibrations coming from the construction on Blahnik’s units and the alleged infiltration of asbestos and mold through her air conditioning satisfies the extreme and outrageous conduct element of intentional infliction of emotional distress. However, this Court, being bound by precedent, does not find that alleged conduct to be of the time leading to a claim for intentional infliction of emotional distress (*Seymour v Hovnanian*, 207 AD3d 420 [1st Dept 2022] [holding that neighbors’ conduct during renovation project which damages homeowners’ townhouse did not amount to intentional infliction of emotional distress as neighbors’ conduct was not so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency in a civilized community]). As such, this claim against Blahnik must be dismissed.

vi. Negligent infliction of emotional distress

Like intentional infliction of emotional distress, extreme and outrageous conduct is also an essential element of a cause of action for negligent infliction of emotional distress (*Xenias v Roosevelt Hospital*, 180 AD3d 588, 589 [1st Dept 2020]). Whether requisite outrageousness has been alleged is an issue of law for the courts (*id.*). As discussed in the preceding section, the conduct alleged by Plaintiff is not so outrageous and so extreme to exceed all possible bounds of human decency. Moreover, as Plaintiff’s claims for private nuisance and personal injury due to the negligent spread of asbestos and mold still stand, her cause of action seeking damages for negligent infliction of emotional distress is duplicative.

vii. Punitive Damages

As pronounced by the Court of Appeals, to survive a motion to dismiss, a plaintiff's claim for punitive damages must not only demonstrate egregious tortious conduct by which she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally and was activated by evil or reprehensible motives (*Rocanova v Equitable Life Assur. Soc. of U.S.*, 83 NY2d 603 [1994]). Here, Plaintiff admits in the allegations that Blahnik got approval from the Board prior to beginning construction. Therefore, the Court does not find there has been tortious conduct alleged that was activated by evil or reprehensible motives and directed at the public to warrant punitive damages. Moreover, as the punitive damages claim is embedded in the breach of fiduciary duty cause of action, and this cause of action has been dismissed as to Blahnik, the punitive damages claim must by necessity also be dismissed.

B. Plaintiff's Cross-Motion for Leave to Amend the Complaint

Leave to amend pleadings is freely granted in the absence of prejudice if the proposed amendment is not palpably insufficient as a matter of law (*Mashinsky v Drescher*, 188 AD3d 465 [1st Dept 2020]). A party opposing a motion to amend must demonstrate that it would be substantially prejudiced by the amendment, or that the amendments are patently devoid of merit (*Greenburgh Eleven Union Free School Dist. V National Union Fire Ins. Co.*, 298 AD2d 180, 181 [1st Dept 2002]).

Plaintiff devotes one paragraph in support of its cross motion seeking leave to amend her complaint for a second time (NYSCEF Doc. 48). Specifically, Plaintiff states if granted leave, it would allege Blahnik breached the house rules and proprietary lease and that he aided and abetted a breach of the other defendants' fiduciary duties (*id.*). Plaintiff has not proffered any further

proposed amendments in support of its motion seeking leave to serve a Second Amended Complaint.

Plaintiff has provided in support of its cross motion the proprietary lease and house rules (NYSCEF Docs. 49-50). Based on these documents, precedent, and the Court's analysis in Section II(A)(i), any amendment related to breach of the house rules and proprietary lease would be palpably insufficient as a matter of law. Nowhere in any of those documents is it indicated that Plaintiff is a third-party beneficiary who can hold Blahnik accountable for breaches under those documents. Therefore, Plaintiff is not granted leave to amend its breach of contract cause of action.

Plaintiff also seeks leave to amend its cause of action for breach of a fiduciary duty to allege that Blahnik aided and abetted the other defendants' alleged breach of a fiduciary duty to Plaintiff. Leave to amend is to be liberally granted unless the proposed amendment is patently devoid of merit or if a defendant shows it will be substantially prejudiced by the amendment. Even if Blahnik does not owe Plaintiff a fiduciary duty, "the participation of an individual...in a corporation's tort is sufficient to give rise to individual liability" – even absent any 'tort independent of the tort committed by the corporation itself'" (*Board of Managers of Alfred Condominium v Miller*, 202 AD3d 467, 468 [1st Dept 2022] quoting *Fletcher v Dakota, Inc.*, 99 AD3d 43, 47-49 [1st Dept 2012]). Therefore, the proposed amendment is not patently devoid of merit. Moreover, Blahnik will not be substantially prejudiced, as he has not even served an Answer and his motion to dismiss does not seek to eliminate all of Plaintiff's claims against him. Plaintiff is granted leave to amend its cause of action for breach of a fiduciary duty to allege that Blahnik aided and abetted the breach of fiduciary duties owed to Plaintiff.

Accordingly, it is hereby,

ORDERED that Plaintiff's First, Second, Fourth, Fifth, and Sixth causes of action against Defendant Blahnik are dismissed; and it is further

ORDERED that Plaintiff's claim for punitive damages against Defendant Blahnik is dismissed; and it is further

ORDERED that Plaintiff is granted leave to serve a Second Amended Complaint to allege that Blahnik aided and abetted the breach of fiduciary duties owed to Plaintiff; and it is further

ORDERED that Plaintiff is to serve its Second Amended Complaint on all parties within thirty (30) days of entry of this order; and it is further

ORDERED that all Defendants are to serve a responsive pleading to Plaintiff's Second Amended Complaint within 20 days from the date of said service.

This constitutes the decision and order of the Court.

<u>9/22/2022</u> DATE					<u>Mary V Rosado</u> HON. MARY V. ROSADO, J.S.C.			
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	