

Solomon v 715-723 Sixth Ave. Owners Corp.

2023 NY Slip Op 30715(U)

March 9, 2023

Supreme Court, New York County

Docket Number: Index No. 160751/2015

Judge: Sabrina Kraus

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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. SABRINA KRAUS **PART** **57TR**

Justice

-----X

DIANE SOLOMON, VICTORIA MEZZICH,

Plaintiff,

INDEX NO. 160751/2015

MOTION DATE 03/06/2023

MOTION SEQ. NO. 008

- v -

715-723 SIXTH AVENUE OWNERS CORP., ROOP
METHARAMANI, DAVID CARLOS, JOAN DZIEKANSKI,
MELISSA GREEN, LYDIA BELL, E&M BRONX
ASSOCIATES LLC, 101 WEST OWNER I, LLC, 715-723
SIXTH AVENUE REALTY LLC, SIREN MANAGEMENT
CORP.

**DECISION + ORDER ON
MOTION**

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 008) 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328

were read on this motion to/for PRECLUDE.

BACKGROUND

This action is scheduled for a bench trial before this Court next month. Based on prior orders, there are three remaining substantive causes of action before the Court. They are breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and intentional misrepresentation. Plaintiffs also seek punitive damages and attorneys' fees.

PENDING MOTION

Defendants have made an *in limine* motion seeking an order precluding plaintiffs from introducing evidence of emotional distress, back pain/injury or other physical ailments, supposed misrepresentations made to non-parties, and attorney fees and/or expenses.

On March 3, 2023, the motion was submitted and the Court reserved decision. For the reasons stated below, the motion is granted in part.

DISCUSSION

Evidence of Emotional Distress Shall be Excluded

Plaintiffs are precluded from introducing any evidence of emotional distress because the claim for negligent infliction of emotional distress was dismissed and such damages are not available under any of the three remaining legal claims [*see eg Hoheb v. Pathology Associates of Albany, P.C.*, 146 A.D.2d 919, 920-21 (3d Dep't 1989); *Scivoli v. Levit*, 846 N.Y.S.2d 235, 236 (2d Dep't 2007); *Williams v. Mann*, 143 A.D.3d 813, (2d Dep't 2016)].

Plaintiffs argue that evidence of defendants' alleged conduct in engaging in scare tactics is relevant to plaintiffs' claims; and that evidence of plaintiffs' alleged emotional vulnerability or physical infirmity is relevant to liability and punitive damages. Plaintiffs will still be entitled to submit relevant evidence on these issues, but any evidence of emotional distress plaintiffs claim to have suffered as a result of defendants' conduct shall be excluded.

Evidence Of Physical Ailments Shall Be Excluded

During her deposition, Victoria Mezzich (Mezzich) acknowledged that she suffers from degenerative disc disease and stenosis. However, she also alleged claimed that she believes these conditions were caused by stress related to defendants' conduct.

Plaintiffs are precluded from introducing any such evidence because they cannot establish that any physical ailments were proximately caused by the alleged breach of fiduciary duty or misrepresentation. Here, the only evidence is Mezzich's own subjective, lay opinion.

“To establish a *prima facie* case on the issue of causation, a plaintiff must show that the defendant's act was a substantial cause of the events which produced the injury.” (*Mack v.*

Altman Stage Lighting Co. Inc., 98 A.D.2d 468, 470, citing *Derdiarian v. Felix Contracting Corp.*, 51 N.Y.2d 308, 315; *Nallan v. Helmsley-Spear, Inc.*, 50 N.Y.2d 507, 520; *Sewar v. Gagliardi Brothers Service*, 69 A.D.2d 281, 289, aff'd 51 N.Y.2d 752. Restatement, Torts 2d, § 431; 1 N.Y. PJI 2:70).

Competent expert medical testimony would be required to causally connect plaintiffs' alleged injuries to defendants' alleged conduct (*Brown v County of Albany* 271 AD2d 819).

Given there is no such evidence in this action, defendants' motion to preclude evidence of physical ailments as damages is granted.¹

Alleged Fraudulent Statements and Omissions Made to All Shareholders Are Potentially Relevant to Plaintiffs' Claims and Evidence of Same Shall Not be Excluded

The disputed issues of fact between the parties encompass defendants' alleged statements and omissions to any or all of the shareholders, not only plaintiffs. Defendants' alleged attempts to deceive other shareholders are relevant to refute defendants' denials of their misrepresentations and omissions to plaintiffs and to the reasonableness of plaintiffs' reliance.

Additionally, the evidence is relevant to plaintiffs' claims for punitive damages and whether defendants engaged in conduct having a high degree of moral culpability and a conscious disregard of the rights of others [*Sieger v Zak*, 74 AD3d 1319, 1319-1320 (2d Dept 2010)].

Based on the foregoing, defendants' motion to preclude this evidence is denied.

¹ Defendants cite *Aller v City of New York* 2008 NY Slip Op 33162(U) for the proposition that plaintiff's own testimony is insufficient, however the court notes that holding was modified by the Appellate Division (72 Ad2d 563) which held in that case that the lower court erred in finding plaintiff's testimony too speculative.

***Evidence of Attorneys Fees & Expenses Shall be held in Abeyance
Pending the Outcome of the Trial on the Substantive Causes of Action***

In the State of New York, the general rule is that attorneys' fees "are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Gotham Partners, L.P. v High River Ltd. Partnership*, 76 A.D.3d 203 (1st Dept. 2010); *see also Braithwaite v 409 Edgecombe Ave. HDFC*, 294 A.D.2d 233 (1st Dept. 2002).

Initially, the court notes that defendants' notice of motion does not seek dismissal of the cause of action for attorneys' fees, but only preclusion of evidence as to same. In any event, both parties and the court agree that attorney's fees could be relevant to an award of punitive damages if plaintiffs establish an entitlement thereto.

Therefore, no evidence as to attorneys' fees will be received in the trial itself. In the event that at trial plaintiffs establish a right to punitive damages, a post-trial hearing on those damages encompassing any claim for attorneys' fees would be held.

WHEREFORE it is hereby

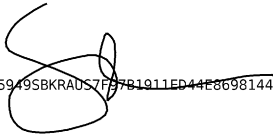
ORDERED that defendants' *in limine* motion is granted to the extent set forth above; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk 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); and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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3/9/2023
DATE

SABRINA KRAUS, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
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"/>
			<input type="checkbox"/>	DENIED	OTHER
					REFERENCE