

Irizarry v Balton LLC

2023 NY Slip Op 31284(U)

April 21, 2023

Supreme Court, New York County

Docket Number: Index No. 155520/2017

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

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RAFAELA IRIZARRY,

Plaintiff,

- v -

THE BALTON LLC, BTL WINES & SPIRITS, THE BOARD
OF MANAGERS OF THE BALTON CONDOMINIUM,
KRISTIN N. MILLER, SAMANTHA ANDERES

Defendant.

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INDEX NO. 155520/2017

MOTION DATE 04/19/2023

MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124

were read on this motion to/for DISMISSAL.

BACKGROUND

Plaintiff alleges that she sustained severe personal injuries on April 21, 2017 as a result of tripping and falling on a defective sidewalk located at 340 Saint Nicholas Avenue, New York.

Plaintiff commenced an action against The Balton LLC (“Balton LLC”) and BTL Wines & Spirits (“BTL”). The action against BTL was subsequently discontinued.

On July 15, 2022, Balton LLC filed a motion for summary judgment pursuant to CPLR §3212, arguing it did not owe a duty of care to plaintiff as a commercial unit owner, insofar as it was not the owner of the property adjacent to the sidewalk, nor did it have a duty to maintain the sidewalk.

On August 16, 2022, plaintiff cross-moved for leave to serve an amended complaint to add The Board of Managers of The Balton Condominium (the “Board”), and the President and/or

Treasurer, and to compel the Balton LLC to provide the names of same, and further alleged triable issues of fact remained as to ownership.

On November 28, 2022, this Court granted Balton LLC and plaintiff's motions. The Court held that "The Board of Managers of The Balton Condominium was required to maintain and repair the Common Elements of The Balton Condominium, including the sidewalk adjacent to the condominium where plaintiff alleges the accident took place." (Def. Exhibit F, 11/28/22 Order). Therefore, since the Balton LLC was only an individual unit owner, the lawsuit was dismissed as to Balton LLC.

The Court granted plaintiff leave to amend her complaint premised on the relation back doctrine, finding that defendants and Balton LLC were united in interest. Specifically, the Court held "the condominium declaration establishes that there are two-unit owners represented by the Board, one of which is [Balton LLC], the summons and complaint were delivered to an employee at the Subject Building, and in its answer, [Balton LLC] admitted ownership of the premises and the defenses asserted in [Balton LLC's] answer are all defenses which would be applicable to the Board." The Court further noted that, "the fact that defendant makes arguments on behalf of the Board in opposing the proposed amendment is further evidence that the parties are united in interest."

Defendants now move to dismiss the claim on the grounds the action is time barred. Their motion is denied for the reasons stated in the Court's prior order allowing the amended complaint and finding it timely.

Defendants also fail to establish their entitlement to dismissal pursuant to CPLR §§§ 3211(a)(1), 3211(a)(5) and 3211(a)(7).

“Where, as here, a defendant moves pursuant to CPLR §3211(a)(1) to dismiss an action asserting the existence of a defense founded upon documentary evidence, the documentary evidence ‘must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff’s claim.’” *Berger v. Temple Beth-El of Great Neck*, 303 AD2d 346, 347 (2d Dept. 2003) (citation and internal quotation marks omitted).

In determining a CPLR §3211(a)(7) motion to dismiss, “the sole criterion 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 a motion for dismissal will fail.” *Wilner v. Allstate Ins. Co.*, 71 AD3d 155, 159 (2d Dept. 2010) (quoting, *Guggenheimer v. Ginzburg*, 43 NY2d 268 (1977), and *Pacific Carlton Dev. Corp. v. 752 Pac., LLC*, 62 AD3d 677, 679 [2d Dept. 2009]). “On a motion made pursuant to CPLR 3211(a)(7), the burden never shifts to the nonmoving party to rebut a defense asserted by the moving party” *Sokol v. Leader*, 74 AD3d 1180, 1181 (2d Dept. 2010).

Additionally, “[o]n a CPLR 3211 motion to dismiss, the court will ‘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’” (*Nonnon v. City of New York*, 9 NY3d 825, 827 [2007], quoting, *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Grassi & Co., CPAS, P.C. v. Honka*, 180 AD3d 564, 564-565 [1st Dept. 2020]).

With respect to CPLR §§ 3211(a)(1) and 3211(a)(7), defendants fail to attach any documentary evidence or point to any claims in the pleadings which either resolve all issues of fact disposing of plaintiff’s claim, or that plaintiff failed to state or cause of action.

While defendants have moved to dismiss pursuant to CPLR §3211(a)(1), based on documentary evidence, they failed to present any documentary evidence that they did not own, control, occupy, or make special use, of sidewalk nor did they establish they did not affirmatively create the defective condition thereon.

Defendants fail to establish that plaintiff failed to state a cause of action in the complaint. Challenging the substantive merits of plaintiff's complaint is not the function of a motion to dismiss. *Engelman v. Rofe*, 194 AD3d 26, 33-34 (1st Dept. 2021). Moreover, the Declaration and By-Laws, establish The Board is responsible for the maintenance and repair of the sidewalk adjacent to the building, as this Court has previously held.

Lastly, Anderes and Miller are not being personally named and therefore the business judgment rule is inapplicable. Rather, plaintiff named Miller and Anderes only in their representative capacity as required by General Associations Law § 13.

General Associations Law §13 provides in relevant part:

An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally.

“In keeping with the vesting of exclusive control of a condominium's common elements in the board of managers, it is well established that a claim arising from the condition or operation of the common elements...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).”

Thus, when a lawsuit is brought against a condominium, the applicable statute, Gen. Ass. Law §13, requires the named party to be the president and/or treasurer of the board of managers

of the condominium. *Terranova v. 10 & 40 Shore Blvd. Condominium*, 2017 NY Slip Op 30516(U).

The personal assets of Miller and Anderes are not subject to a judgment rendered against The Board and therefore the business judgment rule does not apply. *Safe Haven Props. LLC v. Madison Green Condominium*, 183 AD3d 460 (1st Dept. 2020).

To the extent defendants claim the Board of Mangers has not been served with the amended complaint, service upon the individual members, Miller and Anderes is sufficient. Indeed, just as a plaintiff who wishes to raise claims against an association must bring an action against the association's president or treasurer in that officer's representative capacity, by the same token, the plaintiff must serve the association's president or treasurer (or their functional equivalents within the association). (*Gillardi v. Country Village Heights Condominium*, 461 NYS2d 972 [Sup Ct, Queens County 1983]; *League of Mut. Taxi Owners, Inc. v. United Constr. Workers*, 90 NYS2d 288, 288-289 [Sup Ct, Bronx County 1949]; accord *L & L Assoc. Holding Corp. v. Charity United Baptist Church*, 935 NYS2d 450 [Dist Ct, Nassau County 2011]).

Plaintiff has served both Miller and Anderes in their representative capacities, thereby serving The Board. Moreover, defendants have filed the instant motion on behalf of The Board, and Miller and Anderes. Clearly, the “Board” is represented, aware of plaintiff’s claim and can responded accordingly.

Finally, the Court finds no basis from the papers submitted to afford movant relief pursuant to CPLR §3211(c).

WHEREFORE it is hereby:

ORDERED that the motion is denied in its entirety; and it is further

ORDERED that, within 20 days from entry of this order, plaintiff 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 defendants submit an answer within 10 days of service of notice of entry of this order; and it is further

ORDERED that the parties appear for a virtual status conference on May 22, 2023, at 10:30 am to determine what further discovery, if any, is necessary in this action; 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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4/21/2023
DATE

SABRINA KRAUS, J.S.C.

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APPLICATION:

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