

Barbiere v 175 W. 12th St. Condominium

2023 NY Slip Op 32560(U)

July 25, 2023

Supreme Court, New York County

Docket Number: Index No. 653461/2019

Judge: Arlene P. Bluth

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARLENE P. BLUTH PART 14

Justice

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JANET A BARBIERE, ELLIOTT M KROLL,
Plaintiff,

INDEX NO. 653461/2019

MOTION DATE 06/07/2023

MOTION SEQ. NO. 008 009

- v -

175 WEST 12TH STREET CONDOMINIUM, CRAIG RAIA,
ARLINE RUBIN, PETER BONNEY, SARAH MURRAY,
ADELE BILDERSEE, DAVID ALANI, WILLIAM WEST,
JONATHAN WEST, MARK PERLBINDER, MARK
FREYBERG, THE FREYBERG LAW GROUP, CHARLES H.
GREENTHAL MANAGEMENT

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 008) 228, 229, 230, 231,
232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252,
253, 254, 255, 256, 257, 258, 259, 260, 261, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297,
298, 299, 300, 301, 302, 303, 304, 305, 306

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 264, 265, 266, 267,
268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 307, 308, 309,
310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321

were read on this motion to/for JUDGMENT - SUMMARY.

MS 008 and 009 are consolidated for disposition. Plaintiffs' motion for partial summary
judgment on their first cause of action (relating to the security deposit), a portion of the third
cause of action, the fourth cause of action for declaratory relief, and the sixth cause of action
relating to the books and records is granted in part and denied in part and defendants'1 motion for
summary judgment dismissing the complaint is granted in part and denied in part.

1 The Court will refer to the defendants as the "Condo" in the motion as plaintiffs' claims were discontinued with
respect to the remaining defendants. Only defendant 175 West 12th Street Condominium remains.

Background

Plaintiffs bring this case arising out of a dispute with their Condo. They bought two apartments in 2014 with the intention of combining them into one apartment and allege that after they started renovations, they found that the building was in disrepair and had numerous structural issues. Plaintiffs originally sued the Condo itself, individual board members, the management company, the attorney for the Condo, and the attorney's law firm. After this motion was submitted, plaintiffs discontinued the case as against all defendants except the Condo (NYSCEF Doc. No. 322).

Plaintiffs argue that they secured approval from the Condo to remove two existing kitchens to install a single kitchen, install new electrical wiring, put in a central HVAC system, add a bathroom as well as replace all of the floors and the windows. They observe that the new apartment (which totals around 2,800 square feet) was the largest in the entire history of the Condo. Plaintiffs blame the Condo for creating delays and other issues.

For instance, plaintiffs state that the Condo insisted that the windows be replaced brick to brick, but after further investigation, this turned out to be impossible because of a space between the exterior brick façade and the interior cinderblock. According to plaintiffs, there was simply no brick to attach the windows. They insist that the Condo failed to properly maintain the building's façade, particularly with respect to Local Law 11 work and that this caused additional issues with the renovation.

Plaintiffs were required to sign an alteration agreement in 2015 (the "Alteration Agreement") in connection with this renovation. They claim they had no choice but to sign it and admit it required that the agreement required that work had to be completed within 90 days and included a \$1,000 security deposit. The Alteration Agreement provided that if the work was

not completed within 90 days after the work commenced, plaintiffs would be charged \$200 per day. Plaintiffs maintain that the Condo knew all along that the work would not be done within 90 days and would likely take at least six months. They argue that the window installation took more than three months due, in large part, to the Condo's intransigence. Plaintiffs moved into the renovated home on July 1, 2016 with only a few items remaining to be completed. In August 2016, plaintiffs claim that they received a letter that the Condo was imposing a penalty for how long the work had taken (NYSCEF Doc. No. 234). According to plaintiffs, the project was substantially complete as of September 1, 2016 (NYSCEF Doc. No. 236).

Plaintiffs' amended complaint contains fourteen causes of action that raise a plethora of complaints about the Condo ranging from concerns about the security deposit from the Alteration Agreement, the denial of a request to install a gas grill, alleged interference with the Condo board's elections and that the damages provision of the Alteration Agreement is an unenforceable penalty.

MS008

First Cause of Action

Plaintiffs seek summary judgment on their first cause of action, which seeks the return of the security deposit. The Alteration Agreement provides, in part that:

"The Owner agrees that the Condominium may use, apply or retain the whole or any part of the security so deposited and the interest earned thereon, if any, to the extent required for the payment of any sums due to the Condominium under this Agreement. . . . if the Owner shall comply with all of the terms and conditions of this Agreement, the security deposit and interest or remaining balance thereof, if any, shall be returned to the Owner after completion of the Work. The Condominium's release of the security deposit shall not constitute acceptance of the Work by the Condominium or a waiver of any of the Condominium's rights under this Agreement" (NYSCEF Doc. No. 233, ¶ 15).

However, the cover letter attaching the Alteration Agreement states that “A refundable \$1,000.00 security deposit made payable to 175 West 12th Street Condominium, which will be returned to you provided that no damage is sustained in public areas (hallways, elevator, etc.), as per Section 1(b)” (*id.* at 2).

The Court grants this branch of plaintiffs’ motion and orders the return of the \$1,000 security deposit to plaintiffs. Although the Condo argues that the Alteration Agreement contains broader language about when the security deposit has to be returned, the fact is that the Condo’s management company specifically represented that the security deposit would be returned if there was no damage to public areas. And that specific representation governs over the Condo’s general claim that plaintiffs did not comply with a term of the agreement (by not paying the damages for exceeding the 90-day work timeline). “A guiding legal principle of contract interpretation, *generalia specialibus non derogant*, holds that specific provisions control over general provisions when an issue may be governed by either” (*Rosen's Cafe, LLC v 51st Madison Gourmet Corp.*, 2013 WL11230470 [Sup Ct, NY County 2013]).

Here, there is no dispute that there was no damage to public areas and that the Condo only withheld the security deposit because plaintiffs refuse to pay the aforementioned damages allegedly due because they took longer than ninety days to finish the renovation. The Condo did not raise a sufficient reason for why this Court should ignore the representation from management. It merely asserted that this purportedly non-binding letter should have no effect and that the Court should ignore it. Of course, that makes little sense as the Condo seeks to enforce the terms of the Alteration Agreement (which was attached to the subject letter). And, critically, the Condo did not point to a merger clause in the Alteration Agreement that could compel the Court to ignore the management company’s security deposit representation. That

representation constitutes a specific promise and plaintiffs are therefore entitled to the return of the \$1,000 security deposit.

Review of Books and Records

The Court grants the branches of the plaintiffs' motion to the extent that they seek access to the books and records of the Condo, but only with respect to the contact information for unit owners.

“The unit owners of a Condominium collectively own the common elements thereof and are responsible for the common expenses. Thus, the rationale that existed for a shareholder to examine a corporation's books and records at common law applies equally to a unit owner vis-à-vis a Condominium” (*Pomerance v McGrath*, 104 AD3d 440, 441, 961 NYS2d 83 [1st Dept 2013]).

The Condo did not adequately oppose this branch of plaintiffs' motion. It claims that these causes of action are time barred because plaintiffs asked for this information prior to February 2019 and insists that plaintiffs were told in June 2019 that they could come to the management office to inspect records. But the Condo did not point to any specific determinations made by the Condo that could commence a limitations period for the denial of this request. Nor did the Condo properly cite a basis upon which plaintiffs, unit owners at the Condo, should be barred from seeing such information. In other words, that plaintiffs may have asked for this information at a prior date does not foreclose their right to seek this information again in this action.

Therefore, the Condo must turn over the contact information for the building's unit owners. As plaintiffs point out, many of the residents of the buildings are renters and they are

entitled to such information as it relates to elections for the Condo board (*see id.* at 442 [noting that unit owner contact information should be provided to a requesting unit owner in connection with Condo elections]).

The Court observes that while plaintiffs are undoubtedly entitled to the information relating to the Local Law 11 work, plaintiffs admitted in their memorandum of law filed under MS009 that they received these records (NYSCEF Doc. No. 307 at 13).

The Court recognizes that the parties devoted substantial time arguing about whether the Condo provided plaintiffs with this requested information at some point. The Court declines to wade into recreating what information may, or may not, have been provided in the past. The Court simply finds that plaintiffs are entitled to this information as unit owners. This decision is not, however, an advisory opinion about what requests plaintiffs may think to demand in the future.

Liquidated Damages Claims

The Court denies the branches of the motion (contained in the third and fourth causes of action and elsewhere) that relate to relief about the purported liquidated damages. A central part of this dispute is the Alteration Agreement's imposition of penalties if the renovation work was not completed within 90 days. The Court denies, in its entirety, all branches of plaintiffs' motion that seek relief as a matter of law on the ground that these are improper penalties.

The Alteration Agreement provided that:

“The Owner shall cause the Work (other than decorative work such as painting, wallpapering and carpeting) to be completed on or before the date (the "Required Completion Date") which is ninety (90) days (excluding weekends and holidays) after the commencement of the Work. If the Work (other than decorative work as aforesaid) shall not be completed on or before the Required Completion Date, the Owner shall pay to the Condominium, as liquidated damages on account of late completion, the sum of Two Hundred Dollars (\$200.00) per day (excluding weekends and holidays) until the Work is completed. The determination of whether

the Work is completed shall be made by the Condominium, and the Condominium's determination shall be conclusive” (NYSCEF Doc. No. 233, ¶ 7[d]).

“A liquidated damages provision has its basis in the principle of just compensation for loss. Liquidated damages that constitute a penalty, however, violate public policy, and are unenforceable.” (*Trustees of Columbia Univ. in the City of N.Y. v D’Agostino Supermarkets, Inc.*, 36 NY3d 60, 75, 138 NYS3d 498 [2020]). “[T]he party seeking to avoid payment of liquidated damages, has the burden of establishing that the damages for breach of the surrender agreement were disproportionate to the foreseeable losses and in fact, a penalty,” (*id.*).

“A contractual provision fixing damages in the event of breach will be sustained if the amount liquidated bears a reasonable proportion to the probable loss and the amount of actual loss is incapable or difficult of precise estimation. If, however, the amount fixed is plainly or grossly disproportionate to the probable loss, the provision calls for a penalty and will not be enforced” (*Truck Rent-A-Center, Inc. v Puritan Farms 2nd, Inc.*, 41 NY2d 420, 425, 393 NYS2d 365 [1977]). “In the absence of any countervailing public policy concerns, freedom of contract prevails in an arm's length transaction between sophisticated parties” (*Seymour v Hovnanian*, 211 AD3d 549, 553-54, 180 NYS3d 33 [1st Dept 2022] [discussing liquidated damages provisions]).

The fact is that plaintiffs are sophisticated attorneys and they signed an agreement which contained a clear liquidated damages provision. Plaintiffs did not cite a sufficient reason for why this Court should throw out this contractual language. Assertions that they had to sign the agreement in order to do the renovation is not a compelling reason for the Court to rewrite the parties’ agreement. They did not, for instance, contend that they signed this Alteration Agreement under duress. Plaintiffs could have decided not to go forward with the renovation or they could have tried to negotiate a completion date giving them more than 90 days for the

renovation. Moreover, plaintiffs are clearly well versed in seeking relief in the courts; if they could not negotiate a longer date (such as by paying an extra fee to the Condo), then they could have commenced an action at the time – or at any time they felt the delay was being caused by the Condo. Instead, plaintiffs signed the agreement and completed the renovation in longer than 90 days. It was not until after the Condo attempted to enforce this unambiguous provision that plaintiffs contested its enforceability. Arguing that the Condo and board members must have known that the work would take longer than 90 days is not a reason to waive away an essential provision of the agreement that let plaintiffs do their desired renovations. After all, plaintiffs got their desired benefit from this bargain (the Alteration Agreement)—a combined and newly renovated apartment.

The Court observes that the type of damages at issue here—stemming from a lengthy renovation in a large Condo building with many units—are not readily calculable. And the amount— \$200 per day—is not so exorbitant that it implicates concerns about it shocking the conscience and constituting a penalty. This was, undoubtedly, a massive renovation and the Condo was entitled to bargain for a provision to encourage plaintiffs to complete the project quickly in order to minimize the inconvenience to the residents of endless construction. That board members may have testified that the 90-day deadline was unrealistic for a renovation of this scope is not a basis to modify the Alteration Agreement years after the renovation was completed.

And, as the Condo points out, arguments about the statute of limitations have no applicability on this motion as the Condo did not move to recover these fees; instead, plaintiffs seek relief to declare that the Condo may not demand these amounts.

Plaintiffs' attempt to argue that the bylaws do not permit the Condo from levying these fines is without merit. The bylaws specifically permit the Condo "to execute an agreement, in form and substance satisfactory to the Condominium Board, setting forth the terms and conditions under which such alteration, addition, improvement, or repair may be made" (NYSCEF Doc. No. 235, ¶ 5.2[A]). Plaintiffs' strained reading that the Condo was somehow prohibited from imposing fines is not supported under any fair reading of the bylaws. The undisputed facts are that plaintiffs and the Condo entered into an Alteration Agreement and plaintiffs demand that this Court invalidate a portion of that agreement that they dislike despite the fact that they admit they signed and understood the terms of this agreement.

MS009

The Condo moves for summary judgment in this motion to dismiss all fourteen of plaintiffs' causes of action.

While the Condo details why each of the causes of action should be dismissed, plaintiffs do not address many of the Condo's arguments. Rather, plaintiffs make broader arguments that there were no corporate determinations (such as votes by the Condo's board with a quorum) and that the Condo failed to submit factual affidavits or other admissible evidence. Plaintiffs also make procedural arguments about why the Condo is prohibited from moving for summary judgment based solely on the pleadings.

Of course, the Condo did, in fact, submit an affidavit from the president of the Condo's board, as well as deposition transcripts, and the affidavit of Larry Joseph (an architect opining

about the Local Law 11 work). Therefore, the Court is unable to summarily reject the Condo's moving papers as procedurally improper.

The only substantive portions that plaintiffs reference are the gas grill issue and the liquidated damages provision in the Alteration Agreement. Although other issues are referenced in passing, plaintiff did not substantively oppose other issues.

As with many of plaintiffs' claims, plaintiffs seek relief related to the denial of their request to install a gas grill under multiple causes of action. They claim that the denial of this request constitutes breach of contract (third cause of action), a breach of the covenant of good faith and fair dealing (seventh cause of action) and constructive fraud (eleventh cause of action) and want declaratory relief about this issue (fifth cause of action). And many of these causes of action reference other, unrelated events (*see e.g.*, NYSCEF Doc. No. 270 at 51-52).

The Court dismisses the claims about the gas grill as the Condo clearly denied the request on January 28, 2017 (NYSCEF Doc. No. 272). The bylaws provided that the Condo board has 30 days to respond and the amended complaint alleges that the Condo received the request for the gas grill on January 3, 2017. That makes the denial timely and plaintiffs did not raise an issue of fact as to why the Court should disturb the Condo's denial. That plaintiffs do not like this decision is not a basis to permit them to install the grill.

And, with respect to the liquidated damages provision, the Court dismisses those claims (which are spread out among many, many causes of action) for the reasons described in motion sequence 008. Plaintiffs' claims are largely based on practicality—that the 90-day timeline was not reasonable given the scope of the renovation project. But that was not reflected in the Alteration Agreement. Plaintiffs cannot avoid the terms of that agreement because of a provision they may have missed, mistakenly thought the Condo would not enforce, thought would not be

applicable, or figured they would just get their renovation done and fight about the penalties later. It is not this Court's role to modify agreements after the key events have occurred. And that is precisely what plaintiffs ask this Court to do—to sustain their complaints about a contractual provision raised only after the renovation was nearly done and only when the Condo attempted to enforce the parties' agreement.

To the extent that any causes of action remain after plaintiffs agreed to discontinue claims against all defendants except for the Condo, the Court observes that plaintiff did not offer opposition to the claims to dismiss the second, ninth, tenth and eleventh causes of action on the grounds that they are duplicative.

The seventh cause of action for injunctive relief regarding the 2019 election is dismissed as moot as there were subsequent elections.

With respect to the fourteenth cause of action relating to Local Law 11 work, the Condo points out that plaintiffs were provided with such information and plaintiffs did not address this cause of action in their opposition. That claim is therefore also severed and dismissed.

Plaintiffs also did not oppose the Condo's argument that there was no breach of contract (arguments raised in the sixth and seventh causes of action).

The Condo also pointed out that plaintiffs did not sufficiently oppose the argument that plaintiffs appear to bring improper derivative claims (in the fourth and sixth causes of action) on behalf of all unit owners.

In this Court's view, there are no remaining claims on this record and the case is therefore marked disposed.

Accordingly, it is hereby

ORDERED that plaintiffs’ motion for partial summary judgment is granted only to the extent that they are entitled to the return of their \$1,000 security deposit and to the current contact information for the building’s unit owners and the Condo shall provide such information on or before August 15, 2023 and denied with respect to the remaining requests for relief; and it is further

ORDERED that the defendants’ motion for summary judgment dismiss plaintiffs’ amended complaint is granted (except for the two items mentioned in the above paragraph); and it is further

ORDERED that the Clerk is directed to enter judgment in favor of plaintiffs and against defendant 175 WEST 12TH STREET CONDOMINIUM (the only remaining defendant) in the amount of \$1,000 plus interest from September 1, 2016 without costs or disbursements upon presentation of proper papers therefor.

7/25/2023
DATE


ARLENE P. BLUTH, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input checked="" type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE