

**Mandracchia v Renovate-Create Sourcing &  
Procurement Corp.**

2023 NY Slip Op 32615(U)

July 28, 2023

Supreme Court, New York County

Docket Number: Index No. 653953/2019

Judge: Arthur F. Engoron

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.



against both 405/63 and DEPM, and sixth cause of action, for breach of fiduciary duty against DEPM; and by granting 405/63's counterclaim for indemnification. NYSCEF Doc. No. 322.

### The MDL § 78 Cause of Action

Every multiple dwelling, including its roof or roofs, and every part thereof and the lot upon which it is situated, shall be kept in good repair. The owner shall be responsible for compliance with the provisions of this section; but *the tenant also shall be liable if a violation is caused by his own wilful act, assistance or negligence . . .*

Multiple Dwelling Law § 78 (1) (emphasis added).

MDL § 78 “was enacted to protect tenants, guests and invitees on the premises and to place liability on owners should they not keep the premises in a safe condition.” Preldakaj v Alps Realty of N.Y. Corp., 47 AD3d 511, 513 (1st Dept 2008).

The Court of Appeals has found that a party that voluntarily takes responsibility for a nondelegable duty created by MDL § 78 can be liable for the damages for which the owner could still be liable:

The owner of a multiple dwelling owes a duty to persons on its premises to maintain them in a reasonably safe condition (Multiple Dwelling Law § 78). This duty is nondelegable and a party injured by the owner's failure to fulfill it may recover from the owner even though the responsibility for maintenance has been transferred to another. As between the owner and one voluntarily undertaking responsibility for maintenance, however, the party assuming the contractual duty is liable to the owner for the damages the owner must pay.

Mas v Two Bridges Assoc. by Nat. Kinney Corp., 75 NY2d 680, 687-88 (1990).

Additionally, for shareholders to recover MDL § 78-related damages from their cooperatives arising out of a construction project, the plaintiffs must show that the alleged damages were “proximately caused by the defendant apartment corporation’s failure to maintain or repair the common elements” and also “establish that the work done was reasonably necessary to repair the premises, as opposed to enhancing the unit with better and more expensive materials.” Halkedis v Two E. End Ave. Apt. Corp., 161 AD2d 281, 282–83 (1st Dept 1990).

Thus, for Mandracchia’s MDL § 78 cause of action to survive summary judgment, Mandracchia must make out a prima facie case that unsafe conditions existed prior to the renovation, those unsafe conditions were proximately caused by the Co-op Defendants, and that the renovation was reasonably necessary to repair, not just enhance, the Apartment. Instead, Mandracchia asserts only issues created by her contractor, based on her architect’s design, arising from her decision to enhance the Apartment. There is nothing on the record to show violations prior to the renovation. Mandracchia is the only party injured by the alleged violations, and she cannot, after

the fact, shift responsibility for the shoddy work of her architect and contractors onto the Co-op Defendants.

Even if repair of the alleged MDL § 78 violations are the duty of the Co-op Defendants, by signing the Alteration Agreement, Mandracchia assumed contractual responsibility for “all work, whether or not structural, weathertightness of windows, exterior walls or roofs, waterproofing of every part of the building directly or indirectly affected by the work, and maintenance of all heating, plumbing, air conditioning and other equipment installed or altered pursuant hereto.” NYSCEF Doc. No. 147. By signing the Alteration Agreement, Mandracchia assumed a contractual liability to 405/63 for any damages created by her attempted enhancements of the Apartment, and she is therefore liable to pay 405/63 for the damages that 405/63 might owe.

### The Breach of Fiduciary Duty Cause of Action

“To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct, and (3) they suffered damages caused by that misconduct.” Burry v Madison Park Owner LLC, 84 AD3d 699, 699–700, (1st Dept 2011).

Here, Mandracchia is a shareholder of 405/63 with a proprietary lease for the Apartment and, therefore, she is correct that this Court erred in not finding that DEPM, 405/63’s property manager and agent, owed her a fiduciary duty. See Caprer v Nussbaum, 36 AD3d 176, 187 (2nd Dept 2006); Yuko Ito v Suzuki, 57 AD3d 205, 208 (1st Dept 2008) (“Owners of a fractional interest in a common entity are owed a fiduciary duty by its manager.”).

The question, then, is whether DEPM breached its fiduciary duty to Mandracchia or whether she waived that duty in signing the Alteration Agreement.

DEPM was bound to 405/63 through a management agreement (the “DEPM Agreement”) that required DEPM to, inter alia, oversee the day-to-day operations of the Co-op, process and review shareholders’ alteration requests, under certain circumstances submit those requests to 405/63’s architect or engineer for evaluation, and ensure “applicable New York City fire, health, building and other similar laws and codes relating to construction or alterations” are adhered to. NYSCEF Doc. No. 146.

According to Michael McCabe (“McCabe”), DEPM’s property manager for 405/63, when shareholders alter their units, DEPM is “not responsible for the work to be done. The alteration agreement itself makes the shareholder responsible to comply with all laws. [DEPM] review[s] their plans as submitted [to assure] that their design or their intention meets code, or laws, or whatever’s applicable.” NYSCEF Doc. No. 287. McCabe understood the DEPM Agreement to require the building’s architect to inspect the work “depending on the scope of work,” when an alteration implicates the New York City fire, health, and building codes. Id.

In the Alteration Agreement, Mandracchia clearly agreed that she would: obtain proper insurance; “assume all risks of damage to the building . . . which may result from or be attributable to the work being performed hereunder . . . this responsibility covers all work,

whether or not structural, weathertightness of windows, exterior walls or roofs, waterproofing of every part of the building directly or indirectly affected by the work”; “deliver . . . proof . . . to indicate all work has been done in accordance with all applicable laws, ordinances and Government regulations”; and indemnify the Co-op Defendants “for any damages suffered to person or property as a result of the work.” NYSCEF Doc. No. 147. The Alteration Agreement also indicates that Mandracchia understood that the Co-op Defendants “do not profess to express any opinion as to design, feasibility or evidence of the work.” Id.

Despite the clear language of the Alteration Agreement, Mandracchia argues that DEPM breached its fiduciary duty to her by, inter alia, failing to investigate when certain permits were pulled from the Department of Buildings in the name of uninvolved contractors, failing to retain files from the renovation, letting her hire unlicensed contractors, not properly enforcing parts of the NYC Administrative Code, and allegedly having “no idea what was occurring in the building.” NYSCEF Doc. No. 323.

However, by entering into the Alteration Agreement, Mandracchia clearly waived DEPM’s duties to her vis-à-vis the Apartment renovation.

Therefore, although she is correct that DEPM owed her a fiduciary duty, because Mandracchia waived those duties, DEPM did not breach its duty, and this Court correctly dismissed Mandracchia’s sixth cause of action.

The Indemnification Counterclaim

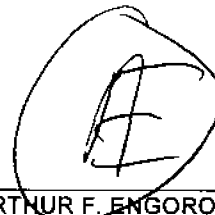
Finally, Mandracchia’s motion to reargue this Court’s granting of 405/63’s request for indemnification is moot, as that argument was contingent on this Court reversing its original determination dismissing 405/63, which did not occur.

Conclusion

Accordingly, the motion to reargue is granted, and upon reargument, the Court hereby adheres to its original determination.

7/28/2023

DATE



ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE