

**Popescu v Board of Mgrs. of the Belaire  
Condominium**

2024 NY Slip Op 33152(U)

September 5, 2024

Supreme Court, New York County

Docket Number: Index No. 652120/2023

Judge: Louis L. Nock

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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. LOUIS L. NOCK **PART** **38M**

*Justice*

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CORALIA POPESCU,  
Plaintiff,

- v -

THE BOARD OF MANAGERS OF THE BELAIRE  
CONDOMINIUM, and FIRSTSERVICE RESIDENTIAL NEW  
YORK, INC.,  
Defendants.

**INDEX NO.** 652120/2023

**MOTION DATE** 07/07/2023

**MOTION SEQ. NO.** 001

**DECISION + ORDER ON  
MOTION**

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The following e-filed documents, listed by NYSCEF document numbers (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23

were read on this motion to DISMISS.

LOUIS L. NOCK, J.S.C.

Upon the foregoing documents, defendants’ motion to dismiss the complaint is granted in part and denied in part, in accordance with the following memorandum decision.

**Background<sup>1</sup>**

Plaintiff owns an interest in the Belaire Condominium related to Unit # 31AG (the “Unit”) as trustee of the Coralia Popescu and Dora Popescu Trusts. Defendant Board of Managers of the Belaire Condominium (the “Board”) manages the Condominium. The By-Laws of the Condominium provide, as relevant to this action, that, the Board “may contract or effect any other transaction with any Board member, any Unit Owner, or any affiliate of any of them, without, except in cases of bad faith or willful misconduct, incurring any liability for self-dealing” (By-Laws, NYSCEF Doc. No. 9, § 2.13). The Board or the managing agent’s rights to enter any individual unit are limited to “making inspections of, or for the purpose of removing

<sup>1</sup> Unless otherwise stated, the following facts are taken from the complaint and presumed true only for the purpose of deciding the motion.

violations . . . or for the purpose of curing defaults [under the By-Laws] or under the Declaration or Rules and Regulations by such Unit Owner” or correcting one of several specified defects or conditions within the unit (*id.*, § 6.17)

Defendant FirstService Residential New York, Inc. (“FirstService”), is the managing agent for the Board pursuant to a management agreement dated November 5, 2020 (management agreement, NYSCEF Doc. No. 8). As relevant to this action, the management agreement provides that:

Nothing expressed or referred to in this Agreement will be construed to give any person other than the Parties to this Agreement any legal or equitable right, remedy, or claim under, or with respect to, this Agreement or any provision of this Agreement. This Agreement and all of its provisions and conditions are for the sole and exclusive benefit of the Parties to this Agreement and their respective successors and assigns. The Parties expressly agree that they do not intend there to be, and there in fact are not and there shall not be, any third-party beneficiaries of this Agreement.

(*Id.*, § 17.) In addition, the management agreement provides that FirstService shall not be liable to the Board for “any injury, loss or damage to person or property unless arising out of or caused, directly or indirectly, in part or in whole” by FirstService’s “willful misconduct or negligence” or “breach of [the management agreement]” (*id.*, § 8 [a] [i]). Similarly, FirstService agreed to indemnify and hold harmless the Board and various other parties, including the unit owners, “from all Losses incurred by any of them . . . to the extent resulting from [FirstService’s] Fault as finally adjudicated by a court of competent jurisdiction” (*id.*, § 8 [b]).

Plaintiff asserts that during the COVID-19 pandemic, specifically from November 2019 through the filing of the complaint, she and her late husband were residing in Arizona, and the Unit was unoccupied. Only plaintiff and the Condominium had keys for the Unit, and no one else was authorized to reside in the Unit. On May 13, 2022, plaintiff notified the Board that she

had authorized her realtor to enter the Unit and prepare it to be shown to prospective tenants. The Board gave the realtor the Condominium's keys to enter the apartment. Upon entering the apartment, the realtor noticed furniture not belonging to plaintiff, fingerprints on the walls, and damage to the window blinds. Plaintiff attempted to contract FirstService's predecessor as managing agent and the building superintendent, only to find that FirstService was now the managing agent, and the superintendent was on vacation. Plaintiff then contacted the New York Police Department ("NYPD") and reported a trespass at her apartment, but when the NYPD arrived at the building, they were denied access. Further communications with FirstService did not yield any information, and plaintiff alleges that "nobody wanted to explain how it was possible that somebody had entered and used the Unit" (complaint, NYSCEF Doc. No. 1, ¶ 22). Plaintiff also learned that there were "alarming fluctuations" in the electricity bills for the Unit over a period of several months, and several unidentified charges were listed on her monthly common charges bill (*id.*, ¶¶ 27-28). In June 2022, plaintiff discovered that there was a lien on the Unit and a foreclosure action had been commenced against her. Attempts to find out more information about the case from the Condominium's attorneys went unanswered.

Plaintiff commenced this action for breach of contract, negligence, and trespass. Plaintiff alleges four causes of action: breach of the By-Laws and related contracts against the Board, trespass against the Board and FirstService, breach of the management agreement against FirstService, and negligence against both defendants. Defendants now move to dismiss the complaint in its entirety.

### **Standard of Review**

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994]). "[The court] accept[s] the facts as

alleged in the complaint as true, accord[ing] plaintiff the benefit of every possible favorable inference, and determin[ing] only whether the facts as alleged fit within any cognizable legal theory” (*id.* at 87-88). Ambiguous allegations must be resolved in plaintiff’s favor (*JF Capital Advisors, LLC v Lightstone Group, LLC*, 25 NY3d 759, 764 [2015]). “The motion must be denied if from the pleadings’ four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law” (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). “[W]here ... the allegations consist of bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, they are not entitled to such consideration” (*Ullmann v Norma Kamali, Inc.*, 207 AD2d 691, 692 [1st Dept 1994]).

### **Discussion**

As an initial matter, defendants argue that plaintiff has sued the wrong party, as the Board cannot be sued as an entity. They rely on General Associations Law § 13, which states that “[a]n 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 . . . .” Thus, where a Board of Managers remains an unincorporated association rather than incorporating, it cannot be sued as a body (CPLR 1025; *Merkos L’Inyonei Chinuch v Congregation Lubavitch, Inc.*, 82 Misc 3d 29, 32 [App Term, 2d, 11th, and 13th Dist 2024]; *Makhnevich v Board of Mgrs. of 2900 Ocean Condominium*, 72 Misc 3d 1208(A) [Sup Ct 2021], *affd* 217 AD3d 630 [1st Dept 2023]). Plaintiff does not meaningfully dispute this. However, contrary to defendants’ argument, dismissal is not the proper remedy (CPLR 1001 [b]; *Montalvo v Bakery and Confectionery Workers Intern. Union of Am. Local No. 3, AFL-CIO*, 137 AD2d 506, 508 [2d Dept 1988])

[“Furthermore, although the plaintiff has . . . failed to name either the defendant's president or treasurer, in his or her representative capacity, as a party to this action, as is required by General Associations Law § 13, this error is not jurisdictional and can be corrected”). Defendants’ argument in favor of dismissal rather than allowing plaintiff to amend and substitute the Board’s President or Treasurer is that the complaint fails to state a cause of action, which as set forth below, is not the case.

*Breach of Contract (First and Third Causes of Action)*

In the first cause of action for breach of contract against the Board, plaintiff alleges that the Board breached the By-Laws of the condominium by, effectively, allowing someone else to use her Unit while she was in Arizona, either to live in or as storage, and allowing said person or persons to use the keys held by the Board. While she does not allege specific sections of the By-Laws that the Board violated in the complaint, in opposition to the motion she references Section 2.13, which prohibits self-dealing by the Board, and Section 6.17, which limits the Board’s ability to access the Unit and requires advance notice to plaintiff. Thus, plaintiff sufficiently alleges a cause of action for breach of contract against the Board (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] [“The elements of such a claim include the existence of a contract, the plaintiff’s performance thereunder, the defendant’s breach thereof, and resulting damages”). Defendants’ arguments raise challenges to the factual allegations of the complaint, which cannot be resolved on a motion to dismiss (*Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]). Moreover, the documentary evidence submitted by defendants does not “utterly refute[] plaintiff’s factual allegations and conclusively establish[] a defense to the asserted claims as a matter of law” (*Amsterdam Hosp. Group, LLC v Marshall-Alan Assoc., Inc.*, 120 AD3d 431, 433 [1st Dept 2014] [internal quotation marks and citations omitted]). The

electricity bills provide a possible but not conclusive explanation for the discrepancy in plaintiff's bills, and the affidavit of Janine Cebollero, FirstService's Senior Property Manager, may not be considered documentary evidence (*e.g. Serao v Bench-Serao*, 149 AD3d 645, 646 [1st Dept 2017]).

The third cause of action for breach of contract against FirstService, however, is subject to dismissal. Plaintiff alleges that FirstService breached the management agreement between the Board and FirstService, to which she is not a party. Generally, only the parties to a contract have standing to sue for its breach (*Parker & Waichman v Napoli*, 29 AD3d 396, 399 [1st Dept 2006]). Plaintiff argues that she is a third-party beneficiary of the management agreement, but the management agreement specifically provides that there are no third-party beneficiaries created thereby (management agreement, NYSCEF Doc. No. 8, § 17). Where the contract "explicitly negates any intent to permit its enforcement by third parties such as plaintiff[.]" any cause of action based on that contract brought by a third-party must be dismissed (*Mendel v Henry Phipps Plaza W., Inc.*, 6 NY3d 783, 786-87 [2006]).

#### *Trespass (Second Cause of Action)*

To state a cause of action for trespass, a plaintiff must allege "an intentional entry onto the land of another without justification or permission or a refusal to leave after permission has been granted but thereafter withdrawn" (*Wlody v Birch Family Services, Inc.*, 210 AD3d 1036, 1037 [2d Dept 2022]). "[A] defendant need not physically enter plaintiff's land or airspace, but need only have caused the intrusion thereon by either a third person or an object" (*Kanayama v Kesy, LLC*, 219 AD3d 1222, 1223-24 [1st Dept 2023]).

Here, plaintiff alleges that defendants allowed someone to reside in or store property in plaintiff's unit without justification or permission, stating a claim for trespass. Defendants argue

that the claim is duplicative of the claim for breach of contract; but “[a] tort claim is not duplicative of a contract claim if it arises out of the violation of a legal duty that springs from circumstances extraneous to, and not constituting elements of, the contract, although it may be connected with and dependent upon the contract” (*Community Counseling & Mediation Services v Chera*, 78 AD3d 554 [1st Dept 2010]). The Board’s potential duty to plaintiff under the By-Laws is separate from their duty in tort owed to plaintiff as a landowner (*id.*). The cases cited by defendants are not to the contrary, as there the plaintiff failed to allege a duty independent of the contract (*Regini v Board of Mgrs. of Loft Space Condominium*, 107 AD3d 496, 497 [1st Dept 2013] [“Plaintiff’s negligence claim should be dismissed as duplicative of his contract claim, since he does not posit any source of duty other than SDS’s alleged management agreement with the Board”]; *Wildenstein v 5H & Co, Inc.*, 97 AD3d 488, 491 [1st Dept 2012] [“The alleged ‘extra-contractual’ services upon which plaintiff bases her negligence claim duplicate the allegations concerning breach of contract”]). Additionally, as the breach of contract claim against FirstService has been dismissed, the Trespass claim is not duplicative of anything vis-à-vis FirstService.

Defendants also argue that FirstService is the agent of a disclosed principal, i.e., the Board, and therefore cannot be liable to plaintiff under these circumstances. As is well-settled, however, an agent may be liable for its own independent conduct (*e.g. Haygood v Prince Holdings 2012 LLC*, 186 AD3d 1157, 1159 [1st Dept 2020]). Plaintiff alleges that both defendants were involved in allowing access to her apartment.

*Negligence (Fourth Cause of Action)*

In order to prevail on a negligence claim, “a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting

therefrom” (*Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]). Here, plaintiff alleges that defendants had a duty not to enter her Unit expect in exigent circumstances, or to permit others to use the Unit without her knowledge or consent. Defendants knew, or should have known, that her Unit was being misused in this manner, and have refused to communicate with her about it, causing her distress and anxiety over and above the damage to the Unit. These allegations are sufficient to state a cause of action for negligence. For the reasons set forth above in relation to the cause of action for trespass, this claim is neither duplicative of the breach of contract claim, nor barred against FirstService as the managing agent.

Accordingly, it is hereby

ORDERED that defendants’ motion to dismiss is granted in part, to the extent that the third cause of action is dismissed; and it is further

ORDERED that plaintiff shall file and serve an amended complaint substituting the president or treasurer of the Board as a defendant in that capacity within 30 days of the date hereof.

This constitutes the decision and order of the court.

ENTER:



<u>9/5/2024</u> DATE					<u>LOUIS L. NOCK, J.S.C.</u>
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	DENIED	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>
			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
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