

**Bent v Cirone**

2025 NY Slip Op 32536(U)

June 27, 2025

Supreme Court, New York County

Docket Number: Index No. 654827/2023

Judge: Lori S. Sattler

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 02M

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BRUCE R BENT,

Plaintiff,

- v -

ANTHONY CIRONE, MICHAEL DANSKY, LEE KEMPLER,  
LINDSAY WEBER SIANO, THE 99 JANE STREET  
CONDOMINIUM BY AND THROUGH ITS CONDOMINIUM  
BOARD AND RESIDENTIAL BOARD

Defendant.

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INDEX NO. 654827/2023

MOTION DATE 03/15/2024

MOTION SEQ. NO. 003

**DECISION + ORDER ON  
MOTION**

HON. LORI S. SATTLER:

The following e-filed documents, listed by NYSCEF document number (Motion 003) 20, 21, 22, 23, 24, 25, 36, 37, 38, 43, 44, 45

were read on this motion to/for DISMISS.

Defendants Anthony Cirone, Michael Dansky, Lee Kempler, and Lindsay Weber Siano (“Individual Defendants”) together with the 99 Jane Street Condominium (“Condominium”) by and through its Condominium Board and Residential Board (“Board”) move to dismiss the action against the Individual Defendants entirely and dismiss the first, second, fourth, fifth, sixth, eighth, ninth, and tenth causes of action of the Amended Complaint against the Board. Plaintiff Bruce R Bent (“Plaintiff”) opposes this motion.

This action arises out of a disagreement between Plaintiff and the Board as to the management of the residential section of the Condominium. Plaintiff and his family live in Unit 11AB (“Unit”), which is owned solely by his wife. Just prior to commencement of the action, Plaintiff and his wife executed an agreement in which she “irrevocably sold, conveyed, transferred and assigned” to Plaintiff all of her “ownership, right, title and interest in and to the litigation claims” against Defendants (Amended Complaint at ¶ 4; NYSCEF Doc. No. 45, Assignment). The Individual

Defendants are members of the Board responsible for managing the residential section of the Condominium (Amended Complaint at ¶5).

According to Plaintiff, in June 2021, he objected to the Board's proposed plans to conduct capital improvements of the building costing approximately \$3,000,000 (Amended Complaint at ¶¶ 8, 10-15). Plaintiff contends the Board's treatment of him, as alleged in the Amended Complaint, was in retaliation for his objections (Amended Complaint at ¶¶ 2, 33).

Plaintiff alleges that Defendants purposefully created unsafe and unhealthy living conditions for him and his family by (i) not fixing the roof, causing water damage and mold in the Unit (Amended Complaint at ¶¶ 35-37), (ii) not fixing the air conditioning in the common hallway leading to the Unit, which resulted in the air blowing into the hallway exceeding 90 degrees (Amended Complaint at ¶ 34), and (iii) not fixing the rooftop ventilation fans creating excessive noise in violation of the NYC Noise Code and Building Code (Amended Complaint at ¶¶ 26-27). Plaintiff further alleges that his family has been denied paid-for services, such as routine maintenance work in the Unit, without prior approval of the Board, although he does not identify any denied services (Amended Complaint at ¶ 33). Plaintiff also claims that within the Unit, he smells sewage odors, but he does not specify how this would be a result of Defendants' action or omission (Amended Complaint at ¶ 42). According to Plaintiff, Defendants were aware of the leakage, noise from the ventilation fans, and the issues with air conditioning (Amended Complaint at ¶¶ 26, 34, 35). Plaintiff further asserts that Defendants intentionally spread false and malicious communications about Plaintiff in notices distributed to unit owners, among others, through the Condominium's official, building-wide communication system, impacting his participation in the Residential Board elections (Amended Complaint at ¶¶ 16-18, 28-31).

Plaintiff commenced this action on September 29, 2023, and amended the Complaint on December 22, 2023. Of the ten causes of action, eight are brought individually and two are brought

derivatively on behalf of all Condominium's unit owners. Against the Board, Plaintiff alleges causes of action for private nuisance, trespass, breach of contract, negligence, and demand for record inspection. Against the Individual Defendants, Plaintiff alleges causes of action for private nuisance, trespass, gross negligence, breach of fiduciary duty, and demand for record inspection. In addition, Plaintiff seeks a permanent injunction enjoining all Defendants from continuing to infringe on Plaintiff's legal and contractual rights, as well as compelling them to restore full services to Plaintiff and his wife. Derivatively, Plaintiffs assert causes of action against the Individual Defendants for breach of fiduciary duty and bad faith misappropriation of funds. Plaintiff also seeks disgorgement of the Individual Defendants' alleged unlawful gains and their reimbursement to the Condominium, as well as a declaratory judgement barring them from seeking from the Condominium indemnification for their liability or advancement for their legal fees resulting from Plaintiff's action, as well as holding the Individual Defendants jointly and severally liable for any past, present, and future injury to the Condominium resulting from the actions alleged in the Amended Complaint.

Defendants move to dismiss all causes of action pursuant to CPLR 3211(a)(1), (3), and (7), except for those against the Board for breach of contract and for a permanent injunction. In support of their motion to dismiss, Defendants argue that Plaintiff failed to sufficiently show any wrongdoing of the Individual Defendants that would be separate from their action as Board Members, and, in any event, under the Condominium's By-Laws, the Individual Defendants are exempt from liability. They further argue that the first, second, fourth, fifth, and sixth causes of action are duplicative of the breach of contract claims, and that Plaintiff fails to demonstrate that he has standing to bring his claims for record inspection and the derivative actions.

When considering a motion to dismiss for failure to state a cause of action under CPLR 3211(a)(7), "the allegations in the complaint are to be afforded liberal construction, and the facts alleged therein are to be accepted as true, according a plaintiff the benefit of every possible favorable

inference and determining only whether the facts alleged fit within any cognizable legal theory” (*M&E 73-75 LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). However, “conclusory allegations – claims consisting of bare legal conclusions with no factual specificity – are insufficient to survive a motion to dismiss” (*Godfrey v Spano*, 13 NY3d 358, 374 [2009], citing *Caniglia v Chicago Tribune-N.Y. News Syndicate*, 204 AD2d 233, 233-234 [1st Dept 1994]).

A plaintiff cannot bring claims collectively against multiple defendants without specifying the precise tortious conduct charged to a particular defendant (*Aetna Cas. & Sur. Co. v Merchants Mut. Ins. Co.*, 84 AD2d 736 [1st Dept 1981]). The Amended Complaint does not specify any individual conduct each Individual Defendant purportedly has undertaken that would result in private nuisance, trespass, gross negligence or breach of fiduciary duty, warranting any damages or permanent injunction sought by Plaintiff. Even if Plaintiff had been sufficiently specific, the Individual Defendants’ conduct is protected under the business judgment rule. “[T]he business judgment rule protects individual board members from being held liable for decisions, such as those concerning the manner and extent of repairs, that were within the scope of their authority” (*Berenger v 261 W. LLC*, 93 AD3d 175, 184 [1st Dept 2012]). Plaintiff’s causes of action against the Individual Defendants are rooted in the Board’s decision not to perform repairs in the Condominium as requested by Plaintiff. This conduct is subject to the business judgment rule. As such, the Individual Defendants cannot be held liable under the causes of actions based in tort brought by Plaintiff.

Furthermore, Plaintiff, as a non-unit owner, lacks standing to bring derivative claims against the Individual Defendants on behalf of all Condominium unit owners, as “[a] derivative action proceeds not on the basis of any individual right, but as an assertion of the interest of the entity by one or more of its owners” (see *Bd. of Mgrs. of the 28 Cliff St. Condominium v Maguire*, 191 AD3d 25, 33 [1st Dept 2020]), citing *Caprer v Nussbaum*, 36 AD3d 176, 186 [2d Dept 2006]). Accordingly, the branch of Defendants’ motion to dismiss the first, second, fifth, sixth, ninth and tenth cause action

as against the Individual Defendants is granted. The seventh cause of action, seeking a permanent injunction against Defendants, is based on the tort claims, therefore, the branch of Defendants' motion to dismiss that cause of action as against the Individual Defendants is also granted.

Defendants also seek dismissal of the tort causes of action against the Board for private nuisance, trespass, and negligence pursuant to CPLR 3211(a)(7) as duplicative of the breach of contract claim. When pursuing claims for breach of contract and tort for the same conduct, a party must show that the conduct constitutes both a breach of a contractual obligation and a breach of a duty independent and distinct from the contract (*At Last Sportswear, Inc. v Byron*, 226 AD3d 551, 551 [1st Dept 2024], citing *Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 389 [1987]). However, “[m]erely charging a breach of a 'duty of due care,' employing language familiar to tort law, does not, without more, transform a simple breach of contract into a tort claim” (*Clark-Fitzpatrick*, 70 NY2d at 390). At the same time, a plaintiff may bring trespass and nuisance claims independent of breach of contract, when alleging “intentional and recurring misconduct in permitting the leaks and noise to continue” (*Berenger*, 93 AD3d at 181).

As part of Plaintiff's negligence cause of action, he alleges that “[t]he Board, through their inaction as above, have failed to behave with the same level of care or attention that a reasonable person or party would provide under the same circumstances.” (Amended Complaint at ¶ 66). These allegations alone fail to address any distinct elements of a negligence claim or to distinguish the alleged negligence from the contractual claim. As a result, the fourth cause of action is duplicative of the breach of contract and must be dismissed.

As to the first cause of action for private nuisance, Defendants' motion is granted as to claims regarding improper noise levels of the rooftop ventilation fans and denied as to claims with respect to water intrusion and high temperatures in the hallway leading to the Unit. The claim pertaining to private nuisance caused by noisy rooftop ventilation fans is duplicative of the cause of action for

breach of the Condominium's By-Laws. The By-Laws provide that "[n]o nuisance shall be allowed in the Residential section" and "[a]ll valid laws, zoning ordinances and regulations . . . shall be complied with at the full expense of the respective Unit Owner or the board, whoever shall have the obligation to maintain or repair such part of the Property." (By-Laws at §6.16). Plaintiff explicitly relies upon this language in alleging breach of contract cause of action pertaining to the noise nuisance.

However, claims regarding water and other intrusion into the Unit is not duplicative. Plaintiff sufficiently pleads the elements of the common-law private nuisance claims, which include "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Berenger*, 93 AD3d at 182, quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977]). Plaintiff describes an interference with the use of the Unit through water intrusion, lasting more than a year, as well as high temperatures in the hallway leading to the Unit, and the inaction of the Board despite notice. Plaintiff's allegations are sufficient at this stage to plead a cause of action and, therefore, Defendants' motion to dismiss the nuisance cause of action is denied to this extent.

Similarly, Defendants' motion seeking dismissal of the second cause of action for trespass is denied. Plaintiff alleges that water intrusion persisted despite the Board having notice and maintains that water will continue to enter the Unit unless the roof leak is repaired. Trespass is an "invasion of a person's right to exclusive possession of his land," which "includes the entry of a substance onto land," resulting from an "intent to perform the act that produces the unlawful invasion," including when the resulting trespass will be an inevitable and known consequence of the tortfeasor's conduct (*Berenger*, 93 AD3d at 181-182). The By-Laws do not provide an explicit basis to address trespass.

As such, the trespass cause of action is not duplicative of the contractual claim.

In the eighth cause of action, Plaintiff seeks to enforce the right to inspect the Condominium's records under Real Property Law § 339-w, as an assignee of the Unit owner's rights. Under Real Property Law § 339-w, records, including receipts and expenditures arising from the operation of a property, and the vouchers authorizing the payments shall be available for examination by the unit owners at convenient hours of weekdays. The plain language of the statute grants this inspection right only to condominium unit owners, thus precluding a finding that this right can be transferred. Accordingly, this branch of Defendants' motion seeking dismissal of the eighth cause of action is granted.

As an alternative, Plaintiff moves for leave to replead under CPLR 3025(b) but does not specify the contents of the intended amended pleading. Pursuant to CPLR 3025(b), any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading. (see *Triumph Enters. Corp. v Webster Auto Repair & Serv. Ctr. Inc.*, 216 AD3d 444, 445 [1st Dept 2023]). Therefore, the motion is denied.

Accordingly, it is hereby:

ORDERED that Defendant's motion is denied as to the second, fifth, and sixth causes of action as against the 99 Jane Street Condominium by and through its Condominium Board and Residential Board; and it is further

ORDERED that Defendant's motion is granted in part as to the first cause of action as against the 99 Jane Street Condominium by and through its Condominium Board and Residential Board to the extent it refers to private nuisance caused by excessive noise created by rooftop ventilation fans, and the first cause of action to the extent referring to private nuisance caused by excessive noise created by rooftop ventilation fans is dismissed; and it is further

ORDERED that Defendant’s motion is granted as to the fourth and eighth causes of action as against the 99 Jane Street Condominium by and through its Condominium Board and Residential Board, and the fourth and eighth causes of action are dismissed; and it is further

ORDERED that the Defendant’s motion is granted as to all causes of action as against Anthony Cirone, Michael Dansky, Lee Kempler, and Lindsay Weber Siano, and the case is dismissed as against them; and it is further

ORDERED that the remaining parties shall appear for a Preliminary Conference on July 15, 2025, at 9:30 a.m. in person at 60 Centre Street, Room 212.

All other relief sought is denied. This constitutes the Decision and Order of the Court.

06/27/2025  
DATE

  
LORI S. SATTLER, J.S.C.

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