

Wood v 139 East 33rd St. Corp.

2012 NY Slip Op 30757(U)

March 23, 2012

Sup Ct, New York County

Docket Number: 602793/09

Judge: Louis B. York

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LOUISE B. YONKIN
J.S.C.
Justice

PART 2

Wood, Carol
139 East 33rd Street

INDEX NO. 602793/09
MOTION DATE 7
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, It is ordered that this motion is

**MOTION IS DENIED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION.**

FILED

MAR 27 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 3/23/12

[Signature], J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 2

-----x
CAROL WOOD,

Plaintiff,

Index No.: 602793/09

-against-

DECISION

139 EAST 33RD STREET CORP. and
DOUGLAS ELLIMAN PROPERTY MANAGEMENT,

Defendants.
-----x

LOUIS B. YORK, J.:

Plaintiff moves, pursuant to CPLR 3212, for summary judgment: (1) on her first, second, third, fifth and seventh causes of action; (2) dismissing defendants' first, second, third, fourth, fifth and sixth causes of action; (3) awarding her \$1,200,000.00, or other such sum as the court determines, on each of her first, second, third and fifth causes of action, plus \$10,600.00 per month from the time defendants caused her to stop her renovations until May 2010; and (4) awarding her legal fees on her seventh cause of action.

Defendants 139 East 33rd Street Corp. (Corp.), the owner of the premises, and Douglas Elliman Property Management (Douglas Elliman), the building's managing agent, cross-move, pursuant to CPLR 3212, for summary judgment dismissing all of plaintiff's claims and granting them summary judgment on their first, second,

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third and fourth counterclaims.

BACKGROUND

Plaintiff is the tenant-shareholder of a cooperative apartment owned by the Corp. and managed by Douglas Elliman. Plaintiff sought to renovate her apartment, and initially obtained defendants' approval after submission of her plans and specifications to Douglas Elliman and Douglas Elliman's architect. After the renovation had commenced, at some considerable expense to plaintiff, defendants stopped further construction, allegedly because the planned dropped ceiling would decrease the distance between the ceiling and the floor to less than eight feet, which would be a violation of the New York City Building Code.

This court initially granted plaintiff a preliminary injunction, enjoining defendants from interfering with the renovation of the apartment. That preliminary injunction required the renovation to adhere to the Building Code, especially with respect to the height requirements between the floor and the ceiling. Subsequently, an evidentiary hearing was held, which indicated that even though the drop ceiling only reduced the distance between the ceiling and the floor by little more than one inch, the distance was less than eight feet. However, expert testimony established that the distance between the ceiling and the floor, in its original state, was less than

[* 4]

eight feet and, consequently, it was impossible for plaintiff to adhere to the eight-foot requirement of the Building Code.

The complaint alleges seven causes of action: (1) breach of contract; (2) breach of fiduciary duty; (3) breach of the implied covenant of good faith and fair dealing; (4) declaratory judgment and injunction; (5) breach of contract/frustration of purpose; (6) Fair Housing discrimination (plaintiff is allegedly hearing impaired); and (7) attorney's fees. Motion, Ex. A.

In their amended answer, defendants assert seven counterclaims: (1) contractual indemnification; (2) attorney's fees; (3) breach of contract/alteration agreement; (4) breach of contract/lease; (5) promissory estoppel; and (6) permanent injunction. Motion, Ex. B. The cross motion only concerns the first four counterclaims, the last two still remaining as part of this litigation.

Plaintiff asserts that, during the period in which the apartment was torn up in order to perform the renovations and work was stopped by defendants, she needed a place to live and was forced to move to California to reside with her mother. Defendants stopped work on the apartment on November 8, 2008, and this court enjoined defendants from continuing the work stoppage on October 16, 2009.

According to the section 21 (a) of the proprietary lease:

The Lessee shall not, without first obtaining the written consent of the Lessor, which consent shall not

[* 5]

be unreasonably withheld, make in the apartment or building, or on any roof, terrace or balcony appurtenant thereto, any alteration, enclosure or addition or any alteration of or addition to the water, gas, or steam risers or pipes, heating or air conditioning system or units, electrical conduits, wiring or outlets, plumbing fixtures, intercommunication or alarm system, or any other installation or facility in the apartment or building. The performance by Lessee of any work in the apartment shall be in accordance with any applicable rules and regulations of the Lessor and governmental agencies having jurisdiction thereof. The Lessee shall not in any case install any appliances which will overload the existing wires or equipment in the building.

(Cross Motion, Ex. 1.)

According to the pertinent provisions of the alteration agreement entered into by the parties:

[Defendants had the right,] from time to time, if in the Corporation's judgment due to the scope of the project, to observe the work to insure that all work conforms to plans and specifications previously approved, and that no conditions have been created which ... is in violation of laws, rules, orders or regulations of any governmental agency having jurisdiction.

You, the Shareholder agree to indemnify and hold harmless the Corporation, the Corporation's architect or engineer, the Managing Agent, and other shareholders and residents of the Building against any damages suffered to persons or property as a result of the Work, whether or not caused by negligence, and for any and all liabilities arising there from [sic] or incurred in connection therewith.

You shall reimburse the Corporation, the Corporation's architect or engineer, Managing Agent, and other shareholders and residents of the Building for any losses, costs, fines, fees and expenses (including, without limitation, reasonable attorney fees and disbursements) incurred as a result of the Work.

Parquet floors are to be replaced with wood of the same thickness and of the same quality as originally installed.

. . .

All work shall be performed strictly in accordance with the approved plans and specifications. You agree that no changes of any kind to the approved plans and specifications shall be made without the written approval of the Corporation. If any work other than as described herein is performed, the Corporation reserves the right to stop all work until the situation is resolved to the Corporation's satisfaction.

(Cross Motion, Ex. 2.)

The alteration agreement also stated a start and finish date for the project.

Plaintiff contends that defendants breached the alteration agreement: (1) by causing the renovation work to stop even though the renovations were being performed in accordance with the approved plans; (2) by wilfully failing to maintain due diligence with respect to record-keeping requirements; (3) by demonstrating a breach of fiduciary duty and lack of good faith; and (4) by causing her to become homeless by stopping work on her apartment. Plaintiff states that she is not seeking summary judgment on her sixth cause of action for discrimination under the Fair Housing Law, although she maintains that she was discriminated against because of her impaired hearing.

All of plaintiff's arguments regarding her claim for summary judgment on her first, second, third, and fifth causes of action revolve around defendants' stopping her renovation work for

reasons that she asserts were baseless. Plaintiff fails to provide any argument or support for her claim for attorney's fees. The bulk of plaintiff's legal memorandum concerns why defendants' counterclaims should be dismissed.

In the portion of her memorandum of law addressing her own contractual claims, plaintiff argues that she did not breach the agreements, either materially or anticipatorily.

Plaintiff argues that she is entitled to dismissal of defendants' contractual counterclaims because defendants unilaterally stopped the work before she could complete the alterations, so there is no evidence that, when completed, the renovations would have been in breach of the alteration agreement or proprietary lease. The court notes that plaintiff provides no argument in support of requested relief for dismissal of defendants' first and second counterclaims.

In their counterclaims, defendants contend that plaintiff breached the alteration agreement by delaying the start of the renovations for more than two months after the start date appearing in the agreement, and replaced the parquet floors with cork. Defendants also maintain that plaintiff breached the proprietary lease in failing to maintain an eight-foot differential between the ceiling and the floor, by adding pocket doors, changing the location of the exhaust/ventilation system, and repartitioning of rooms for which she did not have prior

written approval.

In opposition to plaintiff's motion and in support of their cross motion, defendants state that plaintiff was informed of the reason why work was stopped and was told that she would have to submit a revised plan and specifications in order to restart the work. Further, defendants say that plaintiff was told that, if she had any issues with the stoppage, she could contact the Corp.'s board directly; however, according to defendants, plaintiff did nothing to facilitate the restarting of the renovations until almost a year later when she initiated the instant lawsuit.

Defendants contend that they never opposed plaintiff's resumption of work, provided that she adhered to her agreements to stick to the approved plans and to follow all appropriate laws. It is defendants' position that plaintiff failed to meet these two requirements.

Defendants point out that, in her argument, plaintiff does not dispute that she breached the agreements, but simply asserts that her breaches were minor breaches, whereas the alleged breaches by defendants were material. Moreover, plaintiff fails to identify a single instance in which defendants acted outside of their contractual rights. Further, although plaintiff claims that defendants engaged in aggressive physical and psychological persecution of her, she provides no evidence to support these

allegations.

Defendants say that plaintiff has failed to provide any evidence of a breach on the part of defendants and, consequently, has not met her prima facie burden of proof.

According to defendants, plaintiff's first cause of action for breach of contract alleges that defendants breached the proprietary lease by unreasonably withholding or delaying consent to her plans. Plaintiff's third cause of action, breach of the implied covenant of good faith and fair dealing, alleges the exact same wrong and, argue defendants, is duplicative of her first cause of action. Similarly, defendants say that plaintiff's fifth cause of action, breach of contract by frustration of purpose, is also based on defendants reversal of their approval of her renovation plans and is, therefore, duplicative of her first cause of action and, moreover, is legally unsound, since the doctrine of frustration of purpose requires an unforeseen event.

Defendants maintain that plaintiff's arguments regarding their alleged breach of plaintiff's covenant of quiet enjoyment was never part of the complaint and should be disregarded, being brought up for the first time in her instant motion. Defendants state that they never ousted plaintiff from her apartment, but it is plaintiff who is responsible for failing to submit a revised plan so that her work could continue.

In support of their cross motion, defendants aver that there is no question that plaintiff breached the agreements and, hence, they are entitled to summary judgment on their counterclaims for breach of the alteration agreement and proprietary lease.

As part of her renovation of the ceiling, plaintiff drilled into the ceiling, which was not part of her approved plan. This was observed by both Robert Halabov (Halabov), Douglas Elliman's accountant, and Ramsammy Subramonie (Subramonie), the building's superintendent (Cross Motion, affidavits of Halabov and Subramonie), and that this was not part of the approved plan was confirmed by Elliott Glass (Glass) a registered architect (Cross Motion, Glass Aff.). Moreover, contrary to plaintiff's position, defendants say that they did not withdraw consent by stopping the work, but merely asserted their contractual rights.

Defendants also contend that the Corp.'s decision to stop plaintiff's work is protected by the business judgment rule and, regardless, there is no evidence that the Corp. acted improperly or in any way other than the building's best interests.

Defendants argue that plaintiff's second cause of action for breach of fiduciary duty must be dismissed because the parties' relationship is a contractual one, the Corp. acted in the best interests of the cooperative at large, and the Corp. is not a fiduciary: its officers and directors are.

Defendants also aver that plaintiff's sixth cause of action,

alleging Fair Housing Law discrimination, must be dismissed because plaintiff has not pointed to a single instance of her being singled out based on her alleged disability.

Lastly, defendants state that both the proprietary lease and the alteration agreement provide for their indemnification and recovery of attorney's fees and costs.

In opposition to defendants' cross motion, plaintiff maintains that the plans are silent on the issue of inserting studs into the ceiling, one of defendants' accusations of plaintiff's breach of the alteration agreement, and, therefore, such action on the part of plaintiff cannot be construed as a breach of the agreement. Further, plaintiff asserts that "dispute abounds, moreover, as to what exactly Wood is alleged to have breached, not to mention what exactly happened." (Reply Memo, at 5.) The court notes that plaintiff fails to provide any evidence of the exact nature of the dispute with respect to her alleged breaches, but focuses on what she claims are defendants' breaches.

Plaintiff argues that defendants did not adhere to their mutual obligations under the alteration agreement by failing to act in a reasonable manner, unilaterally determining that plaintiff was in default, and failing to provide plaintiff with any notice of default and a period of time in which to cure the default.

Plaintiff further claims that defendants are not shielded by the business judgment rule because defendants' actions were unreasonable.

Plaintiff agrees with defendants that she cannot maintain a cause of action based on a breach of fiduciary duty against the Corp., but she maintains that Halabov breached such a duty while acting as the agent for the corporate principal, rendering Douglas Elliman liable for those actions. According to plaintiff, Halabov's fiduciary breaches consisted of: (1) approving cork flooring without authority to do so; (2) withholding notification to plaintiff after the work stoppage; (3) refusing to supply a written explanation to plaintiff; (4) communicating to plaintiff's contractor directly; (5) barring access to plaintiff's lawyer; (6) attempting to elicit illegal fees from plaintiff in order to allow work to continue; and (7) impeding plaintiff's attempts to implement accommodations necessitated by plaintiff's hearing impediment. Plaintiff contends that Halabov placed himself in the position of her fiduciary. As such, plaintiff says that Douglas Elliman is liable "for the unlawful and vicious acts committed by Halabov." (Reply Memo, at 18.)

Plaintiff also states that defendants violated the Fair Housing Act by not allowing her to make reasonable accommodations in her apartment to accommodate her hearing problems. Plaintiff

maintains that she suffers from an inability to hear except for elevated input levels, and states that she needs to perform renovations to the ceiling because of the high level of noise caused by the rooftop fan, located above her apartment.

Lastly, plaintiff reiterates her argument that she was constructively evicted from her apartment when defendants caused work to be stopped at a point when the unit was torn up for the renovations and uninhabitable.

In reply, defendants point to the portion of Halabov's deposition in which he avers that the renovation work performed by plaintiff prior to the work stoppage caused damage to the building and that plaintiff performed invasive chiseling, drilling or penetration to the ceiling slab. Halabov EBT, at 113-115. Further, Halabov states that plaintiff was told that she would have to submit revised plans to the board because of the work being performed on her ceiling, which she failed to do, which, claim defendants, satisfies any lack of notice alleged by plaintiff.

Defendants claim that plaintiff's frivolous actions, making several misstatements of facts and law, allow the court to award them costs and/or sanctions.

Defendants state that plaintiff has not met her burden of proof because she has failed to support any of her contentions with admissible evidence. Defendants say that plaintiff's

arguments consist of the rambling legal memoranda of her attorney and her own conclusory statements, which are unsupported by any actual facts.

Defendants point out that plaintiff was already in California for one month prior to the work stoppage and stayed there for over eighteen months thereafter, rendering her argument about constructive eviction and ouster factually implausible. Motion, Ex. C. Moreover, since plaintiff was away, she can have no personal knowledge of the conditions in her apartment during her absence, and her affidavits in support of her motion indicate that she is relying on what other persons told her.

Defendants argue that the physician's letter annexed to plaintiff's motion as proof of her disability is inadmissible hearsay, not in the form of an affirmation. Moreover, defendants state that plaintiff has failed to produce any evidence in admissible form as to her alleged disability or the condition of the operation of the rooftop fan.

Defendants further state that there is no allegation that the Corp. withheld its approval of plaintiff's renovation plans, and the alteration agreement gave them the right to stop work if the actual renovations did not comport with the plans provided for that approval. Hence, defendants say that plaintiff's allegation that they unreasonably withheld approval or unreasonably stopped work must be dismissed.

Defendants aver that plaintiff has failed to create an issue of material fact with respect to why work was stopped. It is undisputed that holes were drilled into the ceiling of plaintiff's apartment, a fact which plaintiff does not dispute, and that the approved plans state both that the new ceiling would be taped to the existing ceiling and, in accordance with the proprietary lease, would not involve any structural changes. Cross Motion, Exs. 3, 4 and 5.

Defendants contend that plaintiff's arguments, appearing for the first time in her reply memorandum, regarding Halabov's breach of fiduciary duty, must fail because plaintiff has failed to make any showing that Douglas Elliman owes her any fiduciary obligations.

Lastly, defendants claim to be entitled to reasonable attorney's fees based on the proprietary lease, which was amended on June 14, 2000, to allow the Corp. to recover such expenses. .

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to

raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

That branch of plaintiff's motion seeking summary judgment on her first cause of action for breach of contract (the proprietary lease) is denied, and defendants' cross motion seeking to dismiss plaintiff's first cause of action is granted.

The allegation in the complaint states that defendants unreasonably withheld or delayed consent to allow plaintiff to complete the renovations to her apartment.

To establish a breach of contract claim, plaintiff must prove the following elements: (1) the existence of an agreement; (2) performance by plaintiff; (3) breach by defendants; and (4) damages. *Furia v Furia*, 116 AD2d 694, 695 (2d Dept 1986).

The facts presented evidence that defendants both reasonably and expeditiously granted plaintiff consent to renovate her apartment in accordance with the plans and specifications submitted. Plaintiff, despite all of the verbiage in her memoranda of law, never disputes or contradicts the evidence that the work that was being performed was not in accordance with the submitted plans. Regardless of the ceiling height, the plans

specified that the new ceiling would be taped to the existing ceiling, and that the work would be done in accordance with the proprietary lease, which prohibited structural changes. Moreover, plaintiff further deviated from the plans by removing the wood floors and replacing them with cork, which also violates the proprietary lease.

The alteration agreement granted defendants the right to stop work if the renovations did not conform to the submitted plans, which is what they did. See *Siegler v 875 Tenant Corp.*, 2010 WL 2754072, 2010 NY Misc Lexis 3012, 2010 NY Slip Op 31645(U) (Sup Ct, NY County 2010). The decision by defendants to stop work on plaintiff's apartment because of potential structural changes to the building is well within the limits of the business judgment rule, which shields them from liability absent any evidence of lack of good faith. *Matter of Levandusky v One Fifth Avenue Apartment Corp.*, 75 NY2d 530 (1990). Further, not only has plaintiff failed to submit any evidence, aside from conclusory allegations, that defendants acted in bad faith, it was plaintiff who caused any delay in the recommencement of the work by not following defendants' request to submit new plans and waiting over eleven months to seek judicial assistance, the only act taken by plaintiff to restart the work.

This finding is in agreement with the Appellate Division's holding in *Bryant v One Beekman Place, Inc.* (73 AD3d 616 [1st

Dept 2010]), wherein the tenant shareholder of a cooperative apartment was found to have breached the proprietary lease and the approved renovation plans, which enabled the cooperative board validly to issue a stop work order without being in breach of any of its contractual obligations.

Therefore, the court finds that defendants did not breach the proprietary lease by stopping work that did not conform to the renovation plans submitted.

That branch of plaintiff's motion seeking summary judgment on her second cause of action for breach of fiduciary duty is denied and defendants' cross motion seeking to dismiss this cause of action is granted.

Plaintiff has agreed that her breach of fiduciary duty claim cannot be asserted directly against defendant corporations. *Peacock v Herald Square Loft Corp.*, 67 AD3d 442 (1st Dept 2009). For the first time, in her reply and opposition to defendants' cross claim, plaintiff asserts that Douglas Elliman can be held vicariously liable for the actions of its agent. Arguments advanced for the first time in reply papers are entitled to no consideration by a court considering the merits of a dispositive motion. *Meade v Rock-McGraw, Inc.*, 307 AD2d 156 (1st Dept 2003). In addition, aside from conclusory assertions, which are insufficient to defeat a motion for summary judgment (*Ruisi v Frank's Nursery and Crafts, Inc.*, 272 AD2d 314 [2d Dept 2000]),

plaintiff fails to present any evidence that Halabov owed her any fiduciary obligations. Further, the breach of fiduciary duty claim merely duplicates the breach of contract claim and, therefore, is appropriately dismissed. *CMMF, LLC v J.P. Morgan Investment Management, Inc.*, 78 AD3d 562 (1st Dept 2010).

Based on the foregoing, plaintiff's second cause of action is dismissed.

That branch of plaintiff's motion seeking summary judgment on her third cause of action for breach of the covenant of good faith and fair dealing is denied, and defendants' cross motion to dismiss this cause of action is granted.

"Implied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under the agreement."

Jaffe v Paramount Communications, 222 AD2d 17, 22-23 (1st Dept 1996).

However, a breach of the covenant of good faith and fair dealing is redundant of a breach of contract claim where it relies upon the same facts, which is the case in the instant matter. *Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440 (1st Dept 2009).

That branch of plaintiff's motion seeking summary judgment on her fifth cause of action for breach of contract/frustration of purpose is denied, and defendants' cross motion seeking to

dismiss this cause of action is granted.

The contract alluded to in the complaint, although not specified, is the alteration agreement. As previously discussed, that agreement granted defendants the right to stop work on the renovations if the work was not being performed in accordance with the submitted plans. There is no argument that the work was not being performed in accordance with the submitted plans, so that defendants could not have breached this agreement by asserting their contractual rights. If plaintiff did not wish defendants to have the unilateral right to make such determinations, she should have negotiated different contractual provisions, but the court can only construe contracts as written. *Greenfield v Philles Records*, 98 NY2d 562 (2002); *W. W. W. Associates v Giancontieri*, 77 NY2d 157 (1990). Moreover, the doctrine of frustration of purpose, argued by plaintiff, refers to a situation in which "an unforeseen event has occurred, which, in the context of the entire transaction, destroys the underlying reasons for performing the contract, even though performance is possible [citation omitted]." *Sage Realty Corp. v Omnicom Group Inc.*, 183 Misc 2d 574 (Sup Ct, NY County 2000). This doctrine is appropriately invoked to excuse performance of a contractual obligation and is totally inapplicable to any allegation that defendants breached the contract.

That portion of plaintiff's motion seeking summary judgment on her seventh cause of action for attorney's fees is denied, and defendants' cross motion seeking to dismiss this cause of action is granted.

Plaintiff has provided no legal justification for this claim.

That portion of defendants' cross motion seeking to dismiss plaintiff's fourth and sixth causes of action, for declaratory and injunctive relief and violation of the Fair Housing Act respectively, is granted.

The court concludes that plaintiff has failed to meet her prima facie burden of providing proof in admissible form that would entitle her to judgment as a matter of law, whereas defendants have provided such evidence to meet their burden to be entitled to the relief they seek to dismiss plaintiff's complaint. Therefore, plaintiff's motion is denied and that portion of defendants' cross motion seeking to dismiss plaintiff's complaint is granted.

That portion of defendants' cross motion seeking summary judgment on their first counterclaim for indemnification is

denied.

Contrary to defendants' assertion that the indemnification provision of the alteration agreement quoted above entitles them to have plaintiff indemnify them for all the costs of the instant litigation (Cross Motion, Ex. B), that is not what the provision provides.

Pursuant to the terms of the alteration agreement, plaintiff has only agreed to indemnify defendants for any costs and expenses arising from damages to persons or property as a result of the alterations. There is no allegation of any injury to persons, so the only applicable portion of the provision would be for damages to the building itself. The only damages alleged by defendants in their counterclaim are increased administrative and professional expenses, not damages to property, which is not recoverable as indemnification under the clear language of the alteration agreement.

That portion of defendants' cross motion seeking summary judgment on its second counterclaim for attorney's fees is granted on the issue of plaintiff's liability, since the right to seek such fees for asserting a counterclaim in any suit brought by plaintiff alleging a violation of the proprietary lease is embodied in paragraph 28 of the lease, as amended in 2000. However, the amount of the fees recoverable is to be determined at trial.

That portion of defendants' cross motion seeking summary judgment on their third and fourth counterclaims, for breach of the alteration agreement and proprietary lease respectively, is granted.

In order to maintain a cause of action for breach of contract, defendants must allege: (1) the existence of a contract; (2) their performance under the contract; (3) plaintiff's breach of that contract; and (4) damages as a result of that breach. *JP Morgan Chase v J. H. Electric of New York, Inc.*, 69 AD3d 802 (2d Dept 2010).

The plaintiff argues, in substance, that any alleged breach on her part was minor, whereas defendants' alleged breach was material. In opposition, defendants argue that the contractual provision mandating strict compliance negates any argument regarding the degree of breach. However, both parties miss the point. Whether a breach of contract is considered to be material or minor does not affect the cause of action; rather, it only goes to the remedy permitted the nonbreaching party.

"When a party materially breaches a contract, the nonbreaching party must choose between two remedies: it can elect to terminate the contract or continue it [internal quotation marks and citation omitted]." *Awards.com v Kinko's, Inc.*, 42 AD3d 178, 188 (1st Dept 2007), *affd* 14 NY3d 791 (2010). However, when the nonbreaching party elects to continue to perform, it

does not waive the right to sue for the alleged breach. *Syracuse Orthopedic Specialists, P.C. v Hootnick*, 42 AD3d 890 (4th Dept 2007). The legal remedy for a breach of contract, regardless of whether that breach be material or minor, is monetary damages designed "to place the nonbreaching party in as good a position as it would have been had the contract been performed [citation omitted]." See *Manas v VMS Associates, LLC*, 53 AD3d 451 (1st Dept 2008).

Despite her voluminous memoranda in support and in reply, plaintiff has never challenged the allegations that she breached the agreements. All of plaintiff's arguments address her contentions that defendants are the breaching parties. Therefore, since the evidence presented substantiates defendants' claims that the renovation work performed by plaintiff was not in conformity with the alteration agreement and the proprietary lease,¹ and plaintiff has provided no evidence in admissible form to the contrary, the court concludes that defendants are entitled to summary judgment on the issue of plaintiff's liability on their third and fourth causes of action for breach of contract. The measure of defendants' damages, if any, is left to the trier of fact.

¹As stated above, the issue of the height differential between the ceiling and the floor has already been determined by this court, and the breaches addressed herein concern the other breaches alleged by defendants previously noted.

CONCLUSION

The preliminary injunction was based on the expectation that plaintiff would prevail on the merits. Since plaintiff has clearly not prevailed on the merits, the preliminary injunction must be vacated. Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that the branch of defendants' cross motion seeking summary judgment dismissing the complaint is granted, and the complaint is dismissed; and it is further

ORDERED that the portion of defendants' cross motion seeking summary judgment on their first counterclaim is denied; and it is further

ORDERED that the portion of defendants' cross motion seeking summary judgment on their second, third and fourth counterclaims is granted on the issue of liability only and the issue of the amount of a judgment to be entered thereon shall be determined at the trial herein; and it is further

ORDERED that in view of the dismissal of the complaint, the preliminary injunction previously issued by the court prohibiting the defendants from interfering with the rehabilitation of her apartment is vacated; and it is further

ORDERED that the action shall continue as to defendants' second, third, fourth, fifth and sixth counterclaims.

Dated: 3/23/12

ENTER:



Louis B. York, J.S.C.

LOUIS B. YORK
J.S.C.

FILED

MAR 27 2012

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