Fernholz v Hart
2014 NY Slip Op 31928(U)
July 23, 2014
Supreme Court, New York County
Docket Number: 106980/11
Judge: Arthur F. Engoron
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[1] SCANNED ON 7/25/2014

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Hon. Arthur F. Engoron PART 37
Justice

MAURICIO FERNHOLZ and CARLA ARELLANO,

Plaintiff,

- v -

CRAIG HART, et al.,

Defendants.

106980/11

INDEX NO. ~~106980/11~~
MOTION DATE 5/13/14
MOTION SEQ. NO. 004

DECISION AND ORDER

The following papers, numbered 1 to 6, were read on this motion for summary judgment by defendant Board of Managers of the Washington Irving Condominium, and cross-motion by co-defendants Hart and Barber dismissing plaintiffs' claims for punitive damages and attorney's fees.

FILED
JUL 25 2014
COUNTY CLERK'S OFFICE
NEW YORK

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Moving Papers (the Board)	1
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Plaintiffs Mauricio Fernholz and Carla Arellano claim common law nuisance, nuisance per se, and trespass against the defendant Board of Managers of the Washington Irving Condominium ("the Board") and co-defendants Hart and Barber ("co-defendants"). The Board cross-claimed against co-defendants for indemnification and contribution. Co-defendants cross-claimed against the Board for negligence, breach of warranty of habitability, and breach of contract. The Board now moves for summary judgment against plaintiffs and co-defendants. Co-defendants cross-move for summary judgment dismissing plaintiffs' punitive damages and attorney's fees claims. Upon the foregoing papers, the Board's motion for summary judgment is denied in part and granted in part, and co-defendants' cross-motion for summary judgment is granted.

Statement of Facts

In April 2004, before plaintiffs Fernholz and Arellano and co-defendants Hart and Barber moved into the subject building, the Washington Irving Condominium, located at 203 W. 112th St., New York, New York, Ms. Gail Koff, the then-owner of unit 6W, submitted an application to the Condominium to remove a wall in the unit. The Board denied that application but Ms. Koff removed the wall anyway. Once the Board found out about the renovation, it required Ms. Koff to hire a civil engineer to assess the impact of removing the wall and fined her $1,500. Ultimately, the Board did not require Ms. Koff to reinstall the wall.

In 2007, plaintiffs moved into Unit 5W. A few months later, co-defendants moved into Unit 6W. Plaintiffs contend that immediately after co-defendants moved in, plaintiffs began hearing "bone-chilling noise and vibration emanating from [co-defendants'] apartment." (Fernholz Affidavit

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
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¶14.) On or about October 5, 2008, Fernholz was elected to sit on the Board. In the spring of 2010, plaintiffs engaged Alan Fierstein of Acoustilog, Inc. ("Acoustilog") to measure the noise and vibration. Mr. Fierstein produced reports in 2010 and 2012 and decided that the "removal of the walls" in Unit 6W created a "large booming drum effect" and was the cause of the noise in Unit 5W. (Fernholz Aff. in Opp. Exhs. 1-4) In July 2010, Fernholz resigned from his position as a Board Member. Plaintiffs also then engaged Mr. Ivan Mrakovic from Rand Engineering ("Rand") to perform an evaluation of unit 6W. In November 2010, Mr. Mrakovic concluded that "several interior floor-to-ceiling walls" in 6W had been illegally removed. (Fernholz Aff. in Opp. Exh. 8). "Per the Condominium Board's records, these walls were load-bearing and structural in nature." (Fernholz Aff. in Opp. Mrakovic Exh. 8). Co-defendants hired Tom Kyatt from Cerami Associates to also test the noise situation. Kyatt concluded that the removal of the walls did not cause the "bass booming problem." (Fernholz Aff. in Opp. Exh. 4.)

In April 2011, the New York City Department of Buildings ("DOB") issued co-defendants a violation for the removal of a wall without a permit. (Fernholz Aff. in Opp. Exh. 10). According to DOB, the wall violation was "resolved" in December 2011, though it is unclear how the resolution was obtained. (Moving Exh. I). In February, 2012, DOB issued a noise violation against the Building for apartment 6W, which appears to be unresolved. (Fernholz Aff. in Opp. Exh. 11). In 2011, the Board retained the services of an architect who inspected Unit 6W and reported that the building's structure was intact and that the removal of the subject wall was not the cause of the noise or vibrations. The Board asked for plaintiffs' permission to send a "neutral" acoustical engineer, supposedly Rick Kramer of Rick Kramer Architects, P.C., to evaluate the noise level in plaintiffs' apartment, but plaintiffs refused. Plaintiffs allege that the Board acted in bad faith, as Mr. Kramer was anything but "neutral."

In June 2011, plaintiffs commenced this action. The Board now moves for summary judgment dismissing plaintiffs' claims, arguing that 1) it is immune from liability pursuant to the "Business Judgment Rule"; 2) that plaintiffs fail to make a prima facie case of nuisance, nuisance per se, and trespass; and that 3) plaintiffs' claims are barred by the doctrine of unclean hands. The Board also moves for summary judgment dismissing co-defendants cross-claims on the ground that defendants fail to raise a triable issue of fact against the Board for negligence, breach of warranty of habitability, and breach of contract. The Board also seeks summary judgment on its cross-claims against co-defendants for indemnification and contribution. Plaintiffs and co-defendants oppose the Board's motion for various reasons. Additionally, co-defendants move for summary judgment dismissing plaintiffs' claims for punitive damages and attorney's fees.

Discussion

The Business Judgment Rule

The Board argues that the Business Judgment rule insulates its actions from review, leaving no triable issues of fact as to the Board acting improperly or in bad faith. Plaintiffs and co-defendants oppose, citing their noise complaints. Plaintiffs also argue that the Board breached its duty to act in good faith by allowing the Board's expert to assist co-defendants with issues

concerning the litigation, and that the Board's president, Sheryl Douglas, received the pocket doors from Unit 6W when the wall was removed. Additionally, co-defendants argue that the Board acted in bad faith by permitting the sale of the units to plaintiffs and co-defendants despite knowing that the wall in Unit 6W was illegally removed and, also, did not disclose this during closings.

The business judgment rule was created to protect a board's business decisions made in good faith from "indiscriminate attack." 19A NY Jur 2d Condominiums, Etc. § 166; see also Levandusky v One Fifth Ave. Apt. Corp., 75 NY2d 530, 554 (1990). "To trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith." 40 W. 67th St. Corp. v Pullman, 100 NY2d 147, 155, (2003). Here, material questions of fact exist, including whether or not the Board acted in furtherance of the corporate purpose and in good faith when it did not require the reinstallation of the removed wall in 6W. Given that there are material questions of fact as to whether the Board can be shielded by the business judgment rule, the Board's motion for summary judgment is denied as to this affirmative defense.

Nuisance/Nuisance per se/Trespass

The Board further argues that plaintiffs fail to make a prima facie showing of nuisance, nuisance per se and trespass. Plaintiffs argue that the noise emanating from 6W is illegally loud, has interfered with their enjoyment of their apartment, has been intentional, has been unreasonable, has caused them emotional distress, and has diminished the value of their apartment. Plaintiffs maintain that they have made a prima facie showing of nuisance, nuisance per se and trespass. The elements of a private nuisance are: (1) interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, and (5) caused by another's conduct in acting or failure to act. Copart Indus., Inc. v Consolidated Edison Co. of New York, Inc., 41 NY2d 564, 570 (1977). Nuisance per se is a nuisance based on an act which is unlawful, even if performed with due care. 58 Am Jur 2d Nuisances § 12; State v Fermenta ASC Corp., 238 AD2d 400, 403 (2nd Dept. 1997). Moreover, while a noise complaint can be a nuisance or a nuisance per se, it is not a trespass. 75 Am Jur 2d Trespass § 27. "It is not a trespass to project light, noise, or vibrations across or onto the land of another because there is no occupancy of space even for a brief period." Celebrity Studios, Inc. v Civetta Excavating Inc., 72 Misc2d 1077, 1086 (Sup Ct, NY County 1973). Here, material questions of fact exist, including whether the removal of the wall from Unit 6W is causing the excessive noise and whether the noise violation on the building has been removed. However, the alleged noise violation may be a nuisance or a nuisance per se but not a trespass. Thus, only the claim sounding in trespass is hereby dismissed.

Doctrine of Unclean Hands

The Board further argues that plaintiffs' claims are barred by the doctrine of unclean hands because Fernholz was a member of the condominium board and could have addressed any issues

regarding the reinstallation of the wall in Unit 6W. Plaintiffs maintain that it would have been inappropriate for Fernholz to use his position with the Board to act in a self-interested manner and further his personal agenda. Moreover, Fernholz resigned from the Board before the action was initiated. The doctrine of unclean hands is applicable only when the party seeking to invoke it was injured by the alleged wrongful conduct. 55 NY Jur 2d Equity § 112; National Distillers & Chem. Corp. v Seyopp Corp., 17 NY2d 12, 15-16 (1966). See also MBIA Ins. Corp. v Patriarch Partners VIII, LLC, 842 F Supp 2d 682 (SDNY 2012). The Board does not provide any evidence that it suffered any injury due to Fernholz having been a member thereof. Thus, its affirmative defense of unclean hands is dismissed.

Negligence as to Co-defendants

The Board also moves to dismiss co-defendants' cross-claims for negligence, arguing that co-defendants did not prove that the Board owed co-defendants a duty of due care, that the Board breached that duty and that the breach caused the co-defendants damages. Co-defendants maintain that there is an issue of fact as to whether the Board acted in bad faith by permitting the sale of the units to plaintiffs and co-defendants despite notice of an existing building Code violation. The Board members have a fiduciary duty to the Condominium and its unit owners. Kaung v Board of Mgrs. of Biltmore Towers Condo. Assn., 22 Misc3d 854, 873 (Sup Ct, Westchester County 2010). There remains a question of fact as to whether the Board acted in bad faith toward co-defendants and whether the Board did not follow the by-laws in dealing with the removal of the wall in Unit 6W. Therefore, the Board's motion to dismiss co-defendants' claim of negligence is also denied.

Breach of Warranty of Habitability

The Board argues that co-defendants are unable to sustain a cause of action for breach of the warranty of habitability because the warranty does not apply to an individual unit within a condominium. Condominium owners lack a landlord-tenant relationship and, therefore, cannot assert a breach of the warranty of habitability against a board of managers. Edge Mgt. Consulting, Inc. v Blank, 25 AD3d 364, 367 (1st Dept. 2006); Matter of Abbady, 216 AD2d 115 (1st Dept. 1995). Thus, the Board's motion for summary judgment dismissing co-defendants' breach of warranty of habitability claim is granted.

Breach of Contract

The Board claims that co-defendants' cause of action for breach of contract fails because co-defendants do not identify any contract or triable issues of fact to support such a claim. However, a condominium's by-laws constitute a contract with the unit owners. Katz v Board of Mgrs., 25 Misc3d 1238(A) (Sup Ct, NY County 2009) (citing Lesal Assoc. v Board of Mgrs. of Downing Ct. Condominium, 309 AD2d 594 (1st Dept. 2003). An issue of fact exists as to whether the Board failed to follow the by-laws by not requiring the reinstallation of the wall in Unit 6W, and thus the Board's motion for summary judgment dismissing co-defendants' claim for breach of contract is denied.

Indemnification and Contribution

The Board argues that it is entitled to summary judgment on its cross-claims against co-defendants for indemnification and contribution because any damages sustained by plaintiffs for noise emanating from Unit 6W are caused by the co-defendants. Although the noise may be caused by the conduct of the co-defendants, there remains an issue of fact as to whether the Board handling the removal of the wall in Unit 6W and in addressing the noise complaint contributed, or escalated, plaintiffs' alleged damages. Thus, summary judgment on the Board's claim for indemnification and contribution is denied.

Co-defendants' cross-motion for summary judgment

Co-defendants move for summary judgment dismissing plaintiffs' claims for punitive damages and attorney's fees. Co-defendants argue that plaintiffs' claim for punitive damages should be dismissed as a matter of law because "there is no evidence demonstrating criminal, evil, reprehensible, wanton or even intentional conduct by the [co]-defendants to justify plaintiffs' punitive damages claims." (Aff. in Support of Cross-Motion for Summary Judgment ¶15). Punitive damages are reasonable only if the defendant's conduct was "quasi-criminal," "utterly reckless," "malicious," or "gross, wanton or willful." 14 NYPrac, New York Law of Torts § 4:17; Maitrejean v Levon Props. Corp., 87 AD2d 605 (2nd Dept. 1982). Co-defendants argue that plaintiffs' claim for attorney's fees should also be dismissed because attorney's fees are not collectible unless "an award is authorized by agreement between the parties or by statute or court rule." See, A.G. Ship Maint. Corp. v Lezak, 69 NY2d 1, 2 (1986). Plaintiffs here have not demonstrated that co-defendants' conduct is quasi-criminal or malicious and have not provided an agreement, statute or court rule that entitles them to attorney's fees. Therefore, co-defendants' cross-motion for summary judgment dismissing plaintiffs' claims for punitive damages and attorney's fees, as against co-defendants, is hereby granted.

Conclusion

For the reasons stated herein, the Board's request for summary judgment dismissing plaintiffs' nuisance, nuisance per se, and trespass causes of action is denied, except as to trespass. Additionally, the Board's request for summary judgment is denied as to co-defendants' negligence and breach of contract causes of action, but granted as to the cause of action for breach of the warranty of habitability. Finally, co-defendants' cross-motion for summary judgment dismissing plaintiffs' claims for punitive damages and attorney's fees against co-defendants is hereby granted. The clerk shall enter judgment accordingly.

Dated: July 23, 2014

Arthur F. Engoron, *J.S.C.*

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