Dogwood Residential, LLC v Stable 49, Ltd.
2016 NY Slip Op 30633(U)
April 11, 2016
Supreme Court, New York County
Docket Number: 157621/15
Judge: Kathryn E. Freed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2
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DOGWOOD RESIDENTIAL, LLC and
DAVID BLUMENFELD,

Plaintiffs,

-against-

STABLE 49, LIMITED,

Defendant.
----------X

DECISION/ORDER

Index No. 157621/15
Mot. Seq. No. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND KASSENOFF AFF. IN SUPPORT	1-2 (Exs. A-M)
BLUMENFELD AFFIDAVIT IN SUPPORT	3
MEMORANDUM OF LAW IN SUPPORT	4
DEF.'S NOT. OF CROSS MOT. AND YOUNGBERG AFF. IN SUPP.	5 (Exs. 1-10)
DEF.'S MEMO. OF LAW IN SUPP. OF CROSS MOT.	6
PLAINTIFF'S REPLY AFF.	7
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PETERSON AFF. IN SUPP. OF CROSS MOT.	9 (Ex. 11)
DEFENDANT'S REPLY MEMO. OF LAW	10

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action seeking, inter alia, a declaration that defendant Stable 49, Limited is in violation of the warranty of habitability, plaintiffs Dogwood Residential, LLC and David Blumenfeld move: a) pursuant to CPLR 3212, for summary judgment on their first cause of action; b) pursuant to CPLR 3211(b), to dismiss defendant's fifth affirmative defense; c) pursuant to CPLR 3211(a)(7), to dismiss defendant's first counterclaim to the extent it is based on plaintiff's alleged failure to make repairs to the building and/or apartment; d) pursuant to CPLR 3211(a)(4), dismissing

defendant's first counterclaim to the extent the allegations made therein are the subject of a prior proceeding between the parties; e) pursuant to CPLR 3211(a)(7), dismissing defendant's second counterclaim for declaratory relief since no justiciable controversy exists between the parties; f) pursuant to CPLR 3211(a)(7), dismissing defendant's third counterclaim for injunctive relief since no justiciable controversy exists between the parties; and g) for such other and further relief as this Court deems just and proper. Defendant cross-moves a) pursuant to CPLR 3212, for summary judgment dismissing the complaint, with prejudice, and severing and continuing all of its counterclaims; and b) for such other and further relief as this Court deems just and proper. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, this Court decides the motions as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

On April 8, 2014, plaintiff Dogwood Residential, LLC, by its Managing Member, plaintiff David Blumenfeld, entered into a proprietary lease ("the lease") with defendant Stable 49, Limited, a cooperative corporation, for apartment 4/PH at 49-51 Downing Street, New York, New York ("the apartment"). Ex. D[1]. Concomitantly with the execution of the lease, the parties executed an occupancy agreement providing that the apartment was to be occupied exclusively by Blumenfeld and his immediate family or any subtenant approved by defendant and that any violation of the agreement would be deemed a default under the provisions of the lease. Ex. E. In or about January, 2014, defendant sought written approval from Blumenfeld as to whether, if the sale were approved,

[1]Unless otherwise noted, all references are to the affidavit of plaintiffs' counsel, Jarred Kessenoff, Esq., submitted in support of plaintiffs' motion.

he would dispute that the elevator and roof were his responsibility. Ex. 4 to Youngberg Aff. In response, Blumenfeld advised defendant "I am willing to accept responsibility for the future if and when I become a member of the coop. The roof is somewhat tied to the what [sic] will be my proposed construction since correcting the current leaks will be resolved with my proposed plans, so in essence they are tied together." Id.

Paragraph 7 (c) of the lease provided, in pertinent part, as follows:

> The following description of the apartments sets forth exclusive areas which belong or are appurtenant to the respective apartments:
>
> g. [The apartment includes] the entire fourth floor, including the terrace at the north side, except the public stairwell. This unit includes a private entrance and vestibule at the west side on Downing Street. The apartment also includes a private elevator, elevator shaftway through the second and third floors, and the entire roof and all roof structures, except chimneys that service the other unit fireplaces. This unit also includes a storage space in the cellar, private garage at center of building on Downing Street, and a home office on the first floor.
>
> h. * * * The areas described above are all exclusive areas, and the [l]essees of the respective [a]partments shall have the exclusive use of and shall be solely responsible for the maintenance of such areas subject to the conditions and limitations set forth below:
>
> 1. [Defendant], its agents and the other [l]essees of the building shall have the use of these exclusive areas for the following purposes, subject to the following obligations:
>
> (a) Access for inspection, repair and maintenance purposes; to the extent that the same affect the repair and maintenance of the [b]uilding's structure (so long as the same is not necessitated, or deterioration accelerated by said [l]essees' use), which shall be the sole and only obligation of [defendant] with regard to such exclusive areas . . .

Ex. D.

Paragraph 14(a) provided that only the lessee and his or her immediate family and domestic employees could occupy the apartment without defendant's written consent. Ex. D. Additionally, guests of the lessee could not stay for more than one month without written consent. Ex. D.

Paragraph 15 required that subletting was prohibited unless approved by a resolution of defendant's directors or, if such consent were not obtained, a vote of 51% of the shareholders of the building. Ex. D.

Paragraph 21(a) of the lease required that a lessee "shall not, without first obtaining the written consent of [defendant], which consent shall not be unreasonably withheld or delayed," make any alteration to the apartment or the building. Ex. D.

After purchasing the apartment, plaintiffs hired an architect and expeditor to inspect the apartment in connection with preparing plans to renovate the premises. Blumenfeld Aff., at par. 6. The inspectors discovered, inter alia, that the apartment's private elevator had been issued violations by the Department of Buildings ("DOB"); that a two-story structure erected on the roof was improperly constructed and the weight of the structure was causing the roof's framing to sag, resulting in leaks into the apartment; and that the roof girders were undersized and posed the risk of a roof collapse. Id., at pars. 13-14, 17, 23-25; Ex. F. The apartment is vacant. Blumenfeld Aff., at par. 5.

On December 12, 2014, defendant commenced a holdover proceeding against plaintiffs, as well as Allessandro Brioschi, Matteo Garzia, Inka Colliander, Deimante Gouybite, Elina Bloomberg, and Mathilde Gourmer in the Civil Court, New York County. Ex. H. In the notice to cure, defendant alleged that plaintiffs violated paragraphs 14 and 15 of the lease by subletting to the aforementioned individuals named along with plaintiffs in the holdover proceeding. The holdover proceeding was settled and marked off the Civil Court's calendar. Kassenoff Aff. In Supp., at par. 63.

On or about December 16, 2014, plaintiffs submitted a PW 1 : Plan/Work Application ("PW 1") to the DOB seeking approval to perform work at the apartment. The description of the work to

be performed was "structural work in conjunction with the renovation of an existing duplex apartment. Reconfiguration of the mezzanine location. A new certificate of occupancy to be obtained." Ex. K. The PW 1 further noted that structural plans were submitted along with the form. The form was executed by Blumenfeld, as Trustee of Dogwood Residential LLC. A line calling for a signature by "Condo/Co-Op Board or Corporation Second Officer" was signed by Brad Blumenfeld as "Trustee." Ex. K.

On February 3, 2015, plaintiffs wrote to the DOB to advise that they had "no intention of commencing work on the property" without defendant's consent. Ex. J.

Plaintiffs commenced the instant action on or about July 10, 2015. Ex. A. As a first cause of action, they sought a declaration that defendant was in violation of the warranty of habitability. As a second cause of action, they sought an injunction directing defendant to take the steps necessary to render the apartment habitable. As a third cause of action, plaintiff's sought damages in excess of $1 million based on defendant's breach of the warranty of habitability. As a fourth cause of action, plaintiffs sought damages in excess of $500,000 for harassment based on defendant's commencement of a holdover proceeding and "consistent baseless demands and threats" pursuant to the New York City Housing Maintenance Code ("HMC"). As a fifth cause of action, plaintiffs sought damages in excess of $500,000 for breach of fiduciary duty. As a seventh cause of action (which should have been labeled the sixth), plaintiffs sought a full rent abatement due to defendant's failure to maintain the building in compliance with the certificate of occupancy ("C of O"). Plaintiffs also sought a declaration that, pursuant to Multiple Dwelling Law § 302, no further maintenance payments for the apartment were due until all conditions which did not comply with

the C of O were remedied.[2] As an eighth cause of action (which should have been labeled the seventh), plaintiffs alleged that defendant breached the lease and owed damages in excess of $500,000 due to its failure to repair the roof and elevator. Finally, as a ninth cause of action (erroneously labeled as a second seventh cause of action), plaintiffs sought attorneys' fees in excess of $50,000.

Defendant joined issue by service of its verified answer on or about August 27, 2015. Ex. B. On September 15, 2015, defendant served an amended answer denying all substantive allegations of wrongdoing and asserting as an affirmative defense, inter alia, that plaintiffs purchased the apartment "as is" without undertaking the necessary due diligence. Ex. C, at par. 114.

As a first counterclaim for breach of contract, defendant alleged that plaintiffs breached the lease by allowing unapproved occupants to live in the apartment and by violating noise provisions of the lease. Ex. C, at pars. 120-122, 147.

Defendant further alleged that, prior to purchasing the apartment, an inspection performed by plaintiffs revealed that the roof, which was part of the apartment, had issues which made it prone to leakage, that there were structural and Fire Code issues regarding air conditioning units on the roof, and there were signs of water penetration into the apartment. Ex. C, at par. 126. In addition to this inspection, alleged defendant, the prior owner of the apartment, Yoko Ono, sued defendant in 2013 alleging, inter alia, that the apartment was "in an uninhabitable state since it [was] in need of major renovations." Id., at par. 128; Ex. M, at par. 21. Nevertheless, claimed defendant, plaintiffs

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[2]Specifically, plaintiffs allege that "upon information and belief, the shareholders and proprietary lessees of the ground floor units, which include space in the basement of the [b]uilding, maintain their basement spaces in a manner [violative of the C of O]," specifically that "those units contain bedrooms which were constructed in the basement of the building" in violation of the C of O. Ex. A at pars. 50-51.

purchased the apartment from Ms. Ono "as is," acknowledging her lawsuit against defendant, which was eventually discontinued in March, 2014, in a rider to the purchase agreement. Ex. C, at pars. 127, 136; Exs. 1 and 2 to Youngberg Aff. Despite their agreement under the lease to be solely responsible for the maintenance of the elevator and roof, defendant asserted that plaintiffs have not fulfilled this responsibility and have therefore breached the lease.

Defendant further claimed that plaintiffs breached paragraph 21(a) of the lease by failing to obtain defendant's prior written consent to alter the apartment. Indeed, maintained defendant, on or about December 22, 2014, plaintiffs submitted a fraudulent application to the DOB seeking a permit to perform work on the apartment. Id., at par. 142-143[3]; Ex. K.

As a second counterclaim, defendant alleged that plaintiffs have submitted fraudulent applications to the DOB and the Landmarks Preservation Commission ("LPC") seeking permission to perform work in the apartment and a declaration that plaintiffs may not submit any applications for work to those agencies without first obtaining defendant's consent to such a permit application, as required under the lease. As a third counterclaim, defendant sought an order enjoining plaintiffs from submitting any applications to the DOB, LPC, or any other agency for work to be performed on the apartment without first obtaining the permission of defendant in the permit application. As a fourth counterclaim, defendant sought attorneys' fees in an amount no less than $50,000.

POSITIONS OF THE PARTIES:

Plaintiffs argue that they are entitled to summary judgment on their first cause of action for

[3]Defendant's allegation refers to the PW 1, which Brad Blumenfeld purported to sign as a member of defendant's board of directors.

breach of the warranty of habitability. In support of this argument, they assert that defendant admitted in its amended answer that it was aware that there were structural issues regarding the roof and problems with water penetration into the apartment but failed to address the same. Plaintiffs further assert that, since defendant had the duty to maintain the structural elements of the apartment, defendant's fifth affirmative defense, alleging that plaintiff purchased the apartment "as is," without undertaking the necessary due diligence, must be dismissed.

Plaintiffs assert that defendant's first counterclaim must be dismissed since they (plaintiffs) did not breach the lease. Plaintiffs further assert that the second and third counterclaims must be dismissed since no justiciable controversy exists between the parties.

Defendant argues that plaintiffs' complaint must be dismissed in its entirety, and that its counterclaims must be severed and continued against plaintiffs. First, defendant asserts that plaintiffs are estopped from asserting that it (defendant) is responsible for maintenance of the roof and elevator since plaintiffs agreed to maintain the same. Defendant asserts that plaintiffs' first three causes of action must be dismissed because they are based on an alleged breach of the warranty of habitability and no such breach occurred herein. Next, defendant maintains that plaintiffs' harassment claim brought pursuant to the HMC must be dismissed since plaintiffs do not fall within the class of persons intended to be protected by that code. Additionally, defendant asserts that plaintiffs' claim for breach of fiduciary duty must be dismissed since it does not owe plaintiffs such a duty.

In addition, defendant argues that plaintiffs' claim that they (plaintiffs) are entitled to a declaration that they are not required to pay any maintenance on the apartment until alleged violations relating to the C of O are remedied must be dismissed because any such alleged violations

of the C of O correspond to areas unrelated to the apartment. Defendant also asserts that plaintiffs' breach of contract claim must be dismissed since plaintiffs, not defendant, had the contractual obligation to make structural repairs to the roof and elevator of the apartment. Since plaintiffs are not entitled to recover on any of any of the foregoing claims, defendant maintains that plaintiffs are not entitled to recover on their claim for attorneys' fees.

Defendant also maintains that plaintiffs are not entitled to dismissal of its (defendant's) counterclaims. It asserts that its first counterclaim for breach of contract should not be dismissed since plaintiffs agreed to make repairs to the apartment. Defendant also argues that its first counterclaim should not be dismissed on the ground that it had commenced a holdover proceeding against plaintiffs in Civil Court. It further asserts that its second and third counterclaims, seeking a declaration and injunction, respectively, are not subject to dismissal since there is a justiciable controversy between the parties.

In support of the cross motion, Kim Youngberg, secretary of defendant's board of directors, submits an affidavit in which she states, inter alia, that, prior to purchasing the apartment, Blumenfeld did not ask defendant to make any repairs to the elevator, roof, or any part of the apartment and expressly represented in writing that, should he become a shareholder, he was "willing to accept responsibility" for the "elevator and roof." Ex. 4 to Youngberg Aff.; Youngberg Aff., at pars. 17, 21. Blumenfeld explained that "[t]he roof [was] somewhat tied to what [would] be [his] proposed construction since correcting the current leaks will be resolved with [his] proposed plans . . ." Id. Youngberg further stated that Blumenfeld has not moved into the apartment. Youngberg Aff., at par. 32. She further stated that, although defendant has asked plaintiffs to withdraw their PW 1 application to the DOB, plaintiffs have not done so. Id., at par. 43.

Also in support of the cross motion, defendant's counsel, Tracy Peterson, submits an affidavit in which she states that, on October 7, 2015, she sent plaintiffs a letter explaining that any proposed alterations to the apartment could not be made without approval by defendant's architect. Ex. 11 to Peterson Aff. Peterson's letter was accompanied by a letter from defendant's architect, dated September 22, 2015. Id. Peterson wrote in her letter that defendant had no objection, in principle, to plaintiffs' proposed alterations, but that the installation of a rooftop pool could not be permitted for reasons explained in the architect's letter and no modifications to the building which would have Local Law 11 implications would be authorized. Id. Peterson explained that, for defendant's architect to grant final approval to plaintiffs' plans, he had to review additional plans specified in his letter. Id. She also advised plaintiffs that the PW 1 they had filed with the DOB had to be withdrawn. Id.

In their reply papers, plaintiffs reiterate their argument that they are entitled to summary judgment on their warranty of habitability claim. They further assert that defendant's counterclaims must be dismissed and that defendant's cross motion must be denied.

In its reply papers, defendant reiterates its argument that the claims in the complaint must be dismissed.

LEGAL CONCLUSIONS:

Plaintiff's Motion for Summary Judgment

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law." *Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 (1st Dept 2007), citing *Winegrad v New York*

Univ. Med. Ctr., 64 NY2d 851, 853 (1985). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion." *People v Grasso*, 50 AD3d 535, 544, citing *Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 (2d Dept 1990). The function of the court is one of issue finding, not issue determination. *Ferrante v American Lung Assn.*, 90 NY2d 623, 630 (1997).

Here, this Court finds that plaintiffs failed to demonstrate their prima facie entitlement to summary judgment on their first cause of action for breach of warranty of habitability and thus their motion for summary judgment on that claim is denied.

Real Property Law § 235-b, entitled "Warranty of Habitability", states, in relevant part:

> 1. In every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented and all areas used in connection therewith in common with other tenants are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety. When any such condition has been caused by the misconduct of the tenant or lessee or persons under his direction or control, it shall not constitute a breach of such covenants and warranties.
>
> 2. Any agreement by a lessee or tenant of a dwelling waiving or modifying his rights as set forth in this section shall be void as contrary to public policy.

The foregoing section has been held to be applicable to cooperative apartments such as plaintiffs'. *See Department of Housing Preservation and Development of the City of New York v Sartor*, 109 AD2d 665 (1st Dept 1985), citing *Suarez v Rivercross Tenants' Corp.*, 107 Misc2d 135 (App Term 1st Dept 1981). However, where, as here, plaintiffs do not make a bona fide attempt to live at the premises, they cannot recover on a claim of the violation of implied warranty of habitability set forth in Real Property Law § 235-b. *See Genson v Sixty Sutton Corp.*, 74 AD3d 560

(1st Dept 2010); *Leventritt v 520 E. 86th St.*, 266 AD2d 45 (1st Dept 1999); *Halkedis v Two East End Ave. Apt. Corp.*, 161 AD2d 281 (1st Dept 1990), *lv denied* 76 NY2d 711 (1990); Scherer and Fisher, Residential Landlord-Tenant Law in New York §12:80. Plaintiffs have not moved into the apartment. Youngberg Aff., at par. 32. Indeed, Blumenfeld admitted that the apartment is vacant. Blumenfeld Aff., at par. 5.

Even assuming, arguendo, that plaintiffs resided in the apartment, they would not be entitled to summary judgment on the first cause of action since the warranty applies only to areas, unlike here, that are "within the landlord's control" *12-14 East 64th Owners Corp. v Hixon*, 130 AD3d 425, 426 (1st Dept 2015), citing *Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 327 (1979), *cert denied* 444 U.S. 992 (1979). Although paragraph 7 (c) of the lease requires defendant to make structural repairs to, inter alia, the entire roof and the elevator (Ex. D), Blumenfeld clearly represented prior to purchasing the apartment that he was "willing to accept responsibility for the [elevator and roof for the] future if and when I become a member of the coop. The roof is somewhat tied to the what [sic] will be my proposed construction since correcting the current leaks will be resolved with my proposed plans, so in essence they are tied together." Youngberg Aff., at Ex. 4. Since plaintiffs notified defendant that they (plaintiffs) would be responsible for repairs to the elevator and the roof, they are estopped from asserting that defendant is responsible for such repairs. *See Winter v Bernstein*, 149 Misc2d 1017, 1019-20 (Sup Ct New York County 1991), *affd* 177 AD2d 452 (1st Dept 1991).

Plaintiffs' attempt to divorce themselves from the foregoing representation is extremely disingenuous. First, plaintiffs dispute that they ever made such a representation. Plaintiff's Reply Aff., at par. 21. Then they maintain that they initially stated they were willing to undertake repairs

to the roof and elevator but that defendant's "steadfast refusal to approve" their plans prevented them from undertaking such work. Id., at par. 34. Plaintiffs cannot have it both ways. It is apparent that plaintiffs promised to make such repairs to the apartment. Ex. 4 to Youngberg Aff. Additionally, defendant's attorney requested that plaintiffs submit revised plans for the work to be performed in the apartment in October of 2015, and plaintiffs have yet to provide such plans. See Peterson Aff. And Ex. 11 to Peterson Aff. Since no revised plans have been submitted to defendant, plaintiffs' claim that work in the apartment has been delayed by defendant's "steadfast refusal to approve" such plans begs credulity.

Also disingenuous is plaintiffs' assertion that "[d]efendant cannot, on the one hand, disclaim responsibility for the repairs and, on the other hand, prevent [p]laintiffs from taking any steps to alleviate them." Id., at par. 35. It is rather ironic to hear this argument from plaintiffs, who made an explicit promise to undertake elevator and roof repairs and are now blaming defendant for not making them. Further, the PW 1 submitted to the DOB by plaintiffs specifically requested permission for "structural work" to be performed "in conjunction with the renovation of an existing duplex apartment." Ex. K. Since defendant clearly had no control over the elevator or the roof, the warranty of habitability did not apply to those areas. *See 12-14 East 64th Owners Corp v Hixon, supra.*

Moreover, plaintiffs cannot recover on the warranty of habitability claim because they did not notify defendant that any specific repairs were required. *See Matter of Moskowitz v Jorden*, 27 AD3d 305 (1st Dept 2006). In her affidavit, Youngberg states that, prior to the sale of the apartment, plaintiffs never requested that defendant undertake any repairs to the roof, elevator or any part of the apartment (Youngberg Aff., at par. 21), and there is no indication in the motion papers, that any such

request was ever made after the sale of the apartment. Although plaintiffs claim that defendant was on notice that certain conditions existed that required defendant's attention, this did not vitiate plaintiffs' obligations to provide notice of the same pursuant to Real Property Law § 235-b.

Plaintiff's Motion to Dismiss Defendant's Fifth Affirmative Defense

Plaintiffs seek to dismiss the fifth affirmative defense, which alleges that plaintiffs purchased the apartment "as is" and that plaintiffs additionally failed to undertake the necessary due diligence before said purchase. Ex. C at par. 114. Since, as discussed below, defendant's motion for summary judgment dismissing the complaint is granted, this branch of plaintiff's motion is denied as moot. However, it would nevertheless have been denied as having no merit.

> In moving to dismiss an affirmative defense pursuant to CPLR 3211(b), the plaintiff bears the heavy burden of showing that the defense is without merit as a matter of law (*534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541 [1st Dept 2011]). The allegations set forth in the answer must be viewed in the light most favorable to the defendant (*182 Fifth Ave. v Design Dev. Concepts*, 300 AD2d 198, 199 [1st Dept 2002]), and "the defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed" (*534 E. 11th St.*, 90 AD3d at 542). Further, the court should not dismiss a defense where there remain questions of fact requiring a trial (id.).

Granite State Ins. Co. v Transatlantic Reins. Co., 132 AD3d 479, 481 (1st Dept 2015).

Since plaintiffs failed to set forth any grounds for dismissal of the fifth affirmative defense, they have failed to establish that it is without merit as a matter of law. *534 E. 11th St.*, 90 AD3d at 541.

Plaintiffs' Motion to Dismiss Defendant's First Counterclaim

Plaintiffs move to dismiss defendants' first counterclaim pursuant to CPLR 3211(a)(7) on

the ground that it fails to state a cause of action to the extent it is based on plaintiffs' alleged failure to make necessary repairs to the apartment. They also move pursuant to CPLR 3211(a)(4) to dismiss the said counterclaim based on the fact that the allegations therein were the subject of a prior proceeding between the parties.

"On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001])." *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 55-56 (1st Dept 2013). Here, the first counterclaim alleges, inter alia, that plaintiffs breached their lease by failing to maintain the apartment and by allowing unauthorized individuals to reside at the premises. Ex. C. Thus, defendant has set forth a claim for breach of contract.

Plaintiffs' motion to dismiss the first counterclaim pursuant to CPLR 3211(a)(4) is also denied. They argue that, because defendant previously brought a holdover proceeding against plaintiffs in Civil Court and that matter was settled, and defendant received damages and attorneys' fees in that proceeding, defendant's counterclaim must be dismissed. Courts have broad discretion under CPLR 3211(a)(4) to determine whether to dismiss a claim based on the fact that an earlier action is pending between the same parties on the same cause of action. *See Whitney v Whitney*, 57 NY2d 731, 732 (1982). Here, this Court declines to dismiss defendant's counterclaim against plaintiffs since there is, at this time, no prior action pending between the parties. *See Town House Stock LLC v Coby Housing Corp.*, 36 AD3d 509 (1st Dept 2007); *Kung v Farinella*, 277 AD2d 427 (2d Dept 2000). In any event, plaintiffs concede that defendant's prior action in Civil Court arose

from the presence of allegedly unauthorized occupants in the apartment (Plaintiffs' Memo. Of Law In Supp., at 9), whereas defendant's counterclaims in this action also seek damages for breach of contract for failing to make repairs, for boring a hole 50 feet into the foundation of the building, and for declaratory and injunctive relief. Ex. C. Thus, plaintiff cannot assert that there is "another action pending between the same parties for the same cause[s] of action." CPLR 3211(a)(4). Similarly, since there is no such prior action pending, plaintiffs' argument that there is a risk of inconsistent results between the outcome of a prior action and this action is without merit.

Plaintiffs' Motion To Dismiss the Second and Third Counterclaims

As noted above, defendant's second counterclaim seeks a declaration that plaintiffs may not submit any applications to the DOB or LPC without first obtaining defendant's consent. As a third counterclaim, defendant seeks an order enjoining plaintiffs from submitting any applications to the DOB, LPC, or any other agency, for work to be performed on the apartment without first obtaining the permission of defendant to perform such work. Plaintiffs assert that these counterclaims must be dismissed since there is no justiciable controversy between the parties. However, since plaintiffs concede in their reply affirmation that "there is no dispute that a justiciable controversy exists" (Plaintiffs' Reply Aff., at par. 61), this Court declines to dismiss the same pursuant to CPLR 3211(a)(7). Further, plaintiffs' attempt to establish that there is no justiciable controversy because they agreed in writing that they will not submit any applications to DOB for work to be performed on or to the apartment without defendant's consent is disingenuous at best. Although plaintiffs represented in a letter to DOB dated February 3, 2015 that they "had no intention of commencing work" at the premises without defendant's approval (Ex. J), they have not yet withdrawn their prior

attempt to file plans which were not approved by defendant, despite the request of defendant's counsel Peterson. Peterson also requested additional construction plans from plaintiffs on October 7, 2015 and never received the same. Ex. 11 to Peterson Aff.

Defendant's Cross Motion For Summary Judgment

Defendant cross-moves for summary judgment dismissing each of plaintiffs' affirmative claims. For the following reasons, the cross motion is granted and the complaint is dismissed.

Plaintiffs' first cause of action seeks a declaration that defendant violated the implied warranty of habitability. For the reasons discussed above, including that plaintiffs did not reside at the premises and the roof and elevator were not areas within defendant's control, the breach of warranty of habitability claim is not applicable herein and this claim must be dismissed.

The second cause of action seeks an injunction directing defendant, pursuant to the HMC and the lease, to maintain and repair the roof leaks and the elevator. As discussed above, it is clear from plaintiffs' representations in its emails to defendant prior to the purchase of the apartment, and from plaintiffs' submission of a PW 1 to DOB to perform structural repairs to the apartment, that they undertook the responsibility to repair the very areas of the apartment which they now seek to hold defendant responsible for pursuant to the warranty of habitability. Ex. K and Ex. 4 to Youngberg Aff. Indeed, as noted above, plaintiffs conceded that they intended to make such repairs until such time as defendant's "steadfast refusal" prevented them from doing so. See Plaintiff's Reply Aff., at par. 34.

Plaintiffs' third cause of action seeks damages arising from defendant's breach of the implied warranty of habitability. However, since defendant did not breach the warranty of habitability, this

claim must be dismissed.

Plaintiff's fourth cause of action asserts that defendant's holdover proceeding and the demands and threats made to plaintiffs by defendant constituted harassment pursuant to the HMC. This claim must also be dismissed. Youngberg states in her affidavit that the holdover proceeding was commenced against plaintiffs because, although plaintiffs represented that two individuals would be living in the apartment, at least six lived there during 2014, creating numerous disturbances to other shareholders. Ex. H; Youngberg Aff., at Ex. 5.

> Local Law 7 of 2008 . . . protects residential tenants from harassment from building owners" (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010]; *see* Administrative Code of City of NY § 27-2004[a][48]). Subdivision d defines harassment as "commencing repeated baseless or frivolous court proceedings," and subdivision g, the catch-all provision, defines harassment as "other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet" of a tenant (*see* Administrative Code of City of NY § 27-2004[a][48][g]).

Santo v Rose Assocs., 28 Misc3d 1225(A) (Sup Ct New York County 2010).

Here, plaintiffs were not subject to repeated baseless or frivolous proceedings. The only proceeding brought against them was the holdover proceeding, which was settled. Further, even if plaintiffs were subject to any "repeated" acts, none could have constituted harassment since the plaintiffs' failure to occupy the premises (Blumenfeld Aff., at par. 5; Youngberg Aff., at par. 32) would have prevented defendant from "interfer[ing] with" or disturb[ing]" their (plaintiffs') use of the same.

Defendant is also entitled to summary judgment on plaintiffs' fifth cause of action, for breach of fiduciary duty. Since it is well settled that a cooperative corporation owes no fiduciary duty to its shareholders, this claim must be dismissed. *See Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442

(1st Dept 2009).[4]

Defendant is entitled to summary judgment on plaintiffs' seventh cause of action (which should be labeled their sixth) for a rent abatement and for a judgment declaring that plaintiffs owe no rent until defendant rectifies alleged deficiencies with the C of O. Plaintiffs allege that "upon information and belief, the shareholders and proprietary lessees of the ground floor units, which include space in the basement of the [b]uilding, maintain their basement spaces in a manner [violative of the C of O]," specifically that "those units contain bedrooms which were constructed in the basement of the building" in violation of the C of O. Ex. A at pars. 50-51. (The Court notes that neither party annexed a copy of the actual C of O). However, where, as here, " a certificate of occupancy exists and a challenged use does not conform to it, but the non-conforming use causes the tenant no injury, courts require the tenant to pay rent." *Beneficial Cap. Corp. v Richardson*, No. 92 Civ. 3785, 1995 US Dist LEXIS 7354 (SDNY 1995). Here, there is absolutely no allegation of plaintiffs being impacted or injured by the alleged violation of the C of O. Ex. A, at pars. 97-99. Additionally, a review of the lease, which specifically describes the locations of premises leased to plaintiffs, reveals that none of these areas have either an alleged violation of the C of O or are

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[4] Although plaintiffs rely on *Kleinerman v 245 E. 87 Tenants Corp.*, 105 AD3d 492 (1st Dept 2013), that case holds that a corporation does not owe a duty to its shareholders and thus supports dismissal of this claim. Despite plaintiffs' claim that defendant's board members should be individually liable for breach of a fiduciary duty, and seek permission to amend the complaint to name those individuals, they fail to mention the extremely egregious facts supporting such claims in *Kleinerman.*, In that case, the board members were allegedly complicit in a superintendent's scheme to solicit kickbacks from shareholders by stopping certain renovations in the face of certain accusations against him. That type of deceitful and intentional conduct is not present here. In addition to their failure to establish merit for an amendment of the complaint in this fashion, plaintiffs have not moved to amend the complaint by notice of motion, and thus their request is procedurally improper. See CPLR 2214.

impacted by such violation. Ex. D, at par. 7 (c).

Summary judgment should be granted to defendant on the eighth cause of action (which should be labeled the seventh) since, as established above, defendant did not breach any obligation to plaintiffs to perform repairs to the roof or elevator pursuant to the proprietary lease.

Since the foregoing claims by plaintiffs are subject to dismissal pursuant to CPLR 3212, plaintiffs' claim for attorneys' fees (mistakenly labeled as a second seventh cause of action by plaintiffs) is subject to dismissal as well.

It accordance with the foregoing, it is hereby:

ORDERED that the branch of plaintiffs' motion seeking summary judgment on their first cause of action is denied; and it is further,

ORDERED that the branch of plaintiffs' motion seeking to dismiss defendant's fifth affirmative defense is denied as moot; and it is further,

ORDERED that the branch of plaintiffs' motion seeking to dismiss defendant's first counterclaim pursuant to CPLR 3211(a)(7) is denied; and it is further,

ORDERED that the branch of plaintiffs' motion seeking to dismiss defendant's first counterclaim pursuant to CPLR 3211(a)(4) is denied; and it is further,

ORDERED that the branch of plaintiffs' motion seeking to dismiss defendant's second counterclaim pursuant to CPLR 3211(a)(7) is denied; and it is further,

ORDERED that the branch of plaintiffs' motion seeking to dismiss defendant's third counterclaim pursuant to CPLR 3211(a)(7) is denied; and it is further,

ORDERED that the motion for summary judgment by defendant Stable 49, Limited is granted, and the complaint is dismissed, with costs and reimbursements to defendant as taxed by the Clerk of the Court upon submission of an appropriate bill of costs; and it is further,

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further,

ORDERED that the counterclaims by defendant Stable 49, Limited are hereby severed and shall continue; and it is further,

ORDERED that the parties are directed to appear for a preliminary conference in Part 2, 80 Centre Street, Room 280, on May 31, 2016, at 2:30 p.m.; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: April 11, 2016

ENTER:

KATHRYN E. FREED, J.S.C.
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT