Board of Mgs. of Renaissance E. Condominium v Benyaminov
2017 NY Slip Op 30360(U)
February 23, 2017
Supreme Court, New York County
Docket Number: 150708/2013
Judge: Jennifer G. Schecter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 57

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THE BOARD OF MANAGERS OF RENAISSANCE EAST CONDOMINIUM, suing on behalf of the unit owners,

Plaintiff,

Index No. 150708/2013

DECISION AND ORDER

-against-

DANIEL BENYAMINOV and LUCY BENYAMINOV,

Defendants,

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JENNIFER G. SCHECTER, J.:

Pursuant to CPLR 3212, plaintiff The Board of Managers of Renaissance East Condominium (Renaissance East) moves for summary judgment dismissal of the counterclaims asserted by defendants Daniel Benyaminov and Lucy Benyaminov, which seek recovery for breach of contract, breach of fiduciary duty and unjust enrichment as well as an accounting. The motion is granted and the counterclaims are dismissed.

Background

On December 15, 2003, defendants, who have always sublet the apartment, purchased Unit 5E (Unit) at 319 East 105th Street in Manhattan (Building) (Affirmation in Opposition [Opp] at ¶ 9). Shortly thereafter, construction began on a lot adjacent to the Building. In May 2004, as a result of the neighboring excavation and construction, the Unit was damaged (Opp at ¶ 14, Ex G). Other units on the Building's E line sustained damage as well.

Mr. Benyaminov reported the damage to Max Management--the Building's managing agent at the time. Max Management told

Mr. Benyaminov that it was in contact "with the Building's insurance company regarding damage to the building, including [the] Unit" (Benyaminov Aff at ¶ 12).

Years later, in May 2010, Renaissance East informed defendants that they were in arrears. Mr. Benyaminov asked for records showing how the outstanding amount had been calculated. He also stated:

> "Several years ago Renaissance Condominium received a sum of money for damage to our apartment from the building next door. We have at several meetings asked for the settlement records and have received nothing. We fixed our apartment ourselves. The outside was never taken care of" (Opp, Ex C [emphasis added]).

In response, the Building's managing agent, H.S.C. Management Corp., which had replaced Max Management, provided a list of unpaid charges associated with the Unit. It further explained:

> "The Board of Managers . . . advised . . . that you never submitted any claims for damages to your unit. If there was damage to your unit which you believe is a condo responsibility, please submit documentation to the board for review" (*id.* [emphasis added]).

It is undisputed that defendants never submitted any documentation in response to the 2010 letter.

In 2013, Renaissance East commenced this action against defendants based on their failure to pay monthly common charges, special assessments and late fees, which had amounted to over $47,000 (Affirmation in Support [Supp], Ex A at ¶¶ 7-

8). Defendants answered and asserted four counterclaims all of which relate to the damage that the Unit sustained almost a decade earlier. The counterclaims, in short, are based on Renaissance East's receipt of compensation for damage to the Building in connection with the neighboring construction and its failure to disclose the details of the amount received and how it was allotted as well as the failure to give defendants any part of those funds.

Alexander Bossy, President of Renaissance East, swears that Renaissance East "received no proceeds from the settlement of any insurance claim arising out of water damage to defendants' unit and other units in the building" (Opp, Ex A at ¶ 6). At his deposition, Bossy testified that the board hired someone and paid $80,000 to repair damages caused by the neighboring construction (Supp, Ex C at 55-56). He explained, under oath, that the board obtained reimbursement for the money outlaid for repairs from KAO Associates (*id.* at 56).

Analysis

Summary Judgment is a drastic remedy that should not be granted if there is any doubt as to the existence of material triable issues(*see Glick & Dolleck v Tri-Pac Export Corp*, 22 NY2d 439, 441 [1968] [denial of summary judgment appropriate where an issue is "arguable"]; *Sosa v 46th Street Develop. LLC*, 101 AD3d 490, 493 [1st Dept 2012]). The burden is on the

movant to make a *prima facie* showing of entitlement to judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any disputed material facts. Once the movant has made this showing, the burden then shifts to the opponent to establish, through competent evidence, that there is a material issue of fact that warrants a trial (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]).

Breach of Contract

Defendants' first counterclaim seeks recovery for breach of contract. Defendants allege that Renaissance East "is under an obligation to remit to [them] any and all sums received from any insurance claims relating to defendants' unit . . . [and despite the representations of the plaintiff] that the insurance proceeds would be apportioned among the units that were damaged and for which claims were submitted and paid by the insurance carrier, no sums have been remitted to defendants" (Supp, Ex B at ¶¶ 20-21).

Plaintiff established that there were no insurance claims or insurance proceeds related to damage to the Unit or other units caused by the neighboring construction. In response, defendants shift gears from what was asserted in their counterclaim and assert that the breach of contract is based on breach of the bylaws in that Bossy "wilfully misled"

defendants and concealed pertinent information about money due and owing to them (Opp at ¶ 53). The breach-of-contract claim is also predicated on the board's alleged failure to keep detailed records, meeting minutes and books of account (*id.* at ¶ 54). Discovery is over and, in response to plaintiff's showing, there is no evidence whatsoever that any money was improperly withheld from defendants in breach of any agreement, including the bylaws. Nor is there any authority entitling defendants to collect damages from plaintiff for the breaches of the bylaws that they assert. The first counterclaim is thus dismissed.

Accounting

Defendants plead, in their 2013 counterclaim, that plaintiff has never accounted to them "the amount or location of the settlement funds obtained as part of their settlement with the neighboring building for damages caused to the 'E-line' of apartments" and demand an accounting (Supp, Ex B at ¶¶ 25-26). Renaissance East, however, has searched for any responsive documents, which date back many years, and swears that it has none (Reply, Ex B at ¶¶ 4-6). There is no evidence, moreover, nor even an allegation that any documents were destroyed in response to the counterclaims, which were asserted for the first time almost a decade after the alleged damage (*cf.* Opp at ¶ 44 [explaining that 2010 was "years after

plaintiff received its settlement"]). Summary judgment is therefore granted in favor of plaintiff on defendants' cause of action for an accounting.

Breach of Fiduciary Duty and Unjust Enrichment

In their third counterclaim, defendants allege that Renaissance East breached its fiduciary duty by "failing to remit amounts due and owing . . . after having been duly demanded to do so" and by "failing to fulfill their responsibilities in good faith with regard to Defendants" (Supp, Ex B at ¶¶ 30-31). In their fourth counterclaim, defendants seek recovery for unjust enrichment based on Renaissance East's receipt of "settlement funds from the neighboring building, and failing to remit the amount due and owing to defendants" (*id.* at ¶ 34).

In response to Renaissance East's showing that it repaired damages and was reimbursed for those repairs, defendants have supplied no evidence to the contrary to raise any triable issue.* In fact, in May 2010--years before the counterclaim was interposed--Renaissance East asked for documentation related to defendants' damages after defendants represented that they had fixed their apartment themselves so

*For example, there is no evidence from any other damaged E-line unit owner that it received compensation from plaintiff despite failing to provide documentation of damages.

that it could conduct a review. Defendants never responded. If defendants wanted compensation for the damages they sustained or to have repairs made at plaintiff's cost, of course, defendants should have submitted proof to Renaissance East in response to its 2010 inquiry regardless of defendants' lack of knowledge of any "settlement" or the former managing agent's statement years earlier that contact with the Building's insurance company had been made (*see* Opp at ¶ 44). Renaissance East, consistent with its fiduciary duty, asked for proof of defendants' alleged damages in 2010 and no proof was supplied.

To date, there is no proof of costs related to the repairs that the Benyaminovs actually made to the Unit (Opp, Ex C ["We fixed our apartment ourselves"]) and an estimate of what repairs would cost, which was prepared by Mr. Benyaminov, was only provided after this action was commenced.

On this record, there is no question of fact as to whether Renaissance East breached its fiduciary duty or was unjustly enriched at defendants' expense. Even assuming that money was paid to other unit holders (and there is zero evidence that it was), nothing entitled defendants to any reimbursement or other compensation from funds that plaintiff received.

Conclusion

Defendants urge that summary judgment must be denied because "we still do not know what the settlement amount was, when the settlement occurred, which units received compensation from the settlement, or any other relevant details" and there are "questions of fact regarding (a) the actual damage to defendants' Unit, (b) the damage to the Building, (c) the impact of the neighboring construction, (d) plaintiff's intentional misrepresentations and other bad-faith conduct, (e) plaintiff's settlement . . . (f) the existence of any records concerning its settlement . . . and (g) how the proceeds received by the board were actually distributed or used" (Benyaminov Aff at ¶¶ 18, 37).

Because Renaissance East's evidence of lack of misrepresentation and lack of bad faith is unrefuted and because the answers to all of the other questions that defendants raise are immaterial--for example, regardless of whether the Unit was actually damaged in 2004, there has been no showing that defendants can recover on their counterclaims--plaintiff is entitled to judgment on defendants' counterclaims.

Accordingly it is ORDERED that plaintiff's motion for summary judgment dismissal of defendants' counterclaims is granted and the Clerk is directed to enter judgment dismissing the counterclaims. This is the decision and order of the court.

Dated: February 23, 2017

HON. JENNIFER G. SCHECTER