Lorne v 50 Madison Ave. Condominium
2017 NY Slip Op 30773(U)
April 17, 2017
Supreme Court, New York County
Docket Number: 653136/15
Judge: Ellen M. Coin

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63

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LUDMILA LORNE,

Index No. 653136/15

Plaintiff,

- against -

50 MADISON AVENUE CONDOMINIUM, BOARD OF MANAGERS OF 50 MADISON AVENUE CONDOMINIUM, DAVID M. KERSHNER, BRENT JOHNSTON, KENNETH M. RAISLER, DAVID MOFFITT, GREGORY HAYE, MICHAEL H. SOUTER, ERNESTO KHOUDARI, DIANE C. BRANDT, ROBERT FRIEDMAN, SAMSON MANAGEMENT LLC, and MARIN MANAGEMENT CORP.,

Defendant.

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HON. ELLEN M. COIN, J.:

Motion Sequence Numbers 002 and 003 are consolidated for disposition.

Defendants 50 Madison Avenue Condominium (the "Condominium"), Board of Managers of 50 Madison Avenue Condominium (the "Board"), Brent Johnston, Kenneth M. Raisler, David Moffitt, Michael H. Souter, Ernesto Khoudari, Diane C. Brandt, and Robert Friedman (the "individual Board members")(collectively, Condominium Board defendants)(Motion Sequence No. 002), and defendant Marin Management Corp. ("Marin")(Motion Sequence No. 003), move, pursuant to CPLR 3211(a)(1), (5), and (7), to dismiss the Complaint. The Condominium Board defendants and individual Board members also seek to impose costs, sanctions, reasonable costs, and attorneys' fees on plaintiff, Ludmilla Lorne.

Plaintiff opposes the motions and cross-moves, pursuant to pursuant to 22 NYCRR 130-1.1, for sanctions against defendants and their attorneys. Plaintiff also seeks to recover attorneys' fees.

BACKGROUND

This action is the latest in a dispute between the parties over alleged structural defects in the concrete substrate slab beneath the floor of the condominium unit on the seventh floor of the Condominium building, located at 50 Madison Avenue, New York, New York (the "subject unit"). Plaintiff and her husband, Simon Lorne, own the subject unit. The individual Board members are current or former members of the Board.

Defendant Samson Management LLC ("Samson" or "Sponsor") is the sponsor for the Condominium, and Marin is the managing agent. Defendants Gregory Haye and David M. Kershner are former Sponsor-nominated members of the Board.

The Complaint includes the following factual allegations. Plaintiff and her husband purchased the subject unit from the Sponsor for $3,075,000 in 2005. They received property tax exemptions under the City of New York's 421-a tax exemption program, which provides temporary partial tax exemptions for qualifying new multiple dwellings.

Plaintiff claims that her relationship with defendants soured after she declined a request to pay a portion of the property tax abatement for the benefit of other unit owners.

Plaintiff also asserts that defendants ignored repeated requests to repair and maintain cracked concrete substrate slab in the floor of the subject unit. Plaintiff further maintains that she and her husband have been barred from living in the subject unit for almost seven years, while continuing to pay millions of dollars for the unit.

In 2007, plaintiff and her husband commenced an action, *Lorne v 50 Madison Avenue LLC* (32 Misc 3d 1226[A][Sup Ct, NY County 2011]) against the Condominium Board defendants over construction defects in the floor of the subject unit. In that action, the plaintiffs claimed that the concrete substrate slab under the hardwood floors in the subject unit were not properly leveled and flattened, resulting in numerous loose floorboards and warping in some areas; that the Sponsor defendants acknowledged that the floors in the unit had been improperly installed and undertook to replace the floors; that after several unsuccessful attempts by the Sponsor defendants to correct the problem, the plaintiffs decided to undertake the repairs themselves; that the Condominium Board defendants demanded that the plaintiffs sign a standard alteration/installation agreement before commencing work; that the plaintiffs proposed changes to the agreement so that it would reflect, among other things, that the proposed work was not alterations but the completion of flooring in accordance with the original plan; and that the Condominium Board defendants demanded that the plaintiffs pay an

unreasonable amount to retain counsel to review the plaintiffs' proposed changes to the standard agreement. The pleadings alleged causes of action for breach of contract, fraud, breach of warranty, breach of implied warranty, violation of General Business Law §§349 and 350, negligence, breach of fiduciary duty, and declaratory judgment.

By order, entered December 26, 2008, the Court (Goodman, J.), among other things, denied the defendants' motion for summary judgment dismissing the plaintiffs' claims for breach of fiduciary duty, and granted the plaintiffs' cross-motion for leave to serve an amended complaint adding 50 Madison Avenue Condominium as a defendant and a cause of action for a judgment declaring which party is responsible for the repairing the defective floor (*id.*).

The Appellate Division reversed, granting the defendants' motion for summary judgment and denying the plaintiffs' cross-motion for leave to amend (*Lorne v 50 Madison Ave LLC*, 65 AD3d 879 [1st Dept 2009]). The Court stated, in part:

> "[C]ontrary to the court's reading of it, section S-4.1 [of the Condominium offering plan] specifically provides that each unit owner 'must obtain the written Reasonable Approval of the Condominium Board before undertaking any extraordinary or *structural Repairs. The Board may condition its approval on [the unit owner's] compliance with the same requirements that apply to Unit Alterations* (see subsection S-5.1 below)' (emphasis added). Section B-8 of the condominium offering plan ('Glossary') includes the concrete slab or substrate

> underlying the floors in its definition of 'Structural Components', and plaintiffs in their brief 'do not question that the floor slab problem, and indeed, the entire floor installation, is a construction defect.' Section P-3.8 of the offering plan provides that it is the sponsor's obligation to correct construction defects."

(*id.* at 881). The Court also stated:

> Plaintiffs admit that after the sponsor failed to install the hardwood flooring in their unit properly they 'took over the installation of the floors.' They retained an engineer, who advised them that the concrete substrate was uneven. They allege, in conclusory fashion, that the Board refused either to make the necessary repairs or to permit them to do so. However, that allegation is based on the Board president's statement that the Board was not going to involve itself in plaintiffs' dispute with the sponsors and that statement was made in response to plaintiffs' May 24, 2007 letter, entitled 'Construction Defect Correction Notice,' notifying the Board that they intended to start reinstalling the floors within 10 days. Plaintiffs sent the letter after a copy of the Board's standard alteration agreement had been forwarded to their attorney"

(*id.*). In addressing the plaintiffs' claim for breach of fiduciary duty against the Board, the Court stated:

> Despite the Board's assertion that it was acting to further a legitimate interest of the condominium because alterations of structural components of a building have the potential of endangering or adversely affecting other unit owners, the motion court found that a question of fact was raised by plaintiffs' allegations that the floors were not fixed, that they themselves sought to fix them, that they obtained liability insurance to cover the work, and that consent was

> improperly withheld. However, it was not unreasonable for the Board to require plaintiffs to adhere to the same rules that apply to all other unit owners wishing to make structural repairs. Plaintiffs' opposition was insufficient to raise a question of fact as to the Board's good faith or whether it was acting within the scope of its authority and in furtherance of a legitimate purpose, and defendants-appellants' motion for summary judgment should have been granted as against the Board"

(*id.*). With respect to the claim against David Moffitt, individually, the court stated:

> "As to plaintiffs' cause of action for breach of fiduciary duty against David Moffitt, which is based on their claim that, as a result of a dispute over a tax abatement issue, he threatened at a July 10, 2007 meeting of the unit owners to 'make it very difficult' for them to ever have their floors installed, it is undisputed that the Board actions that are the subject of plaintiffs' complaints of breach of fiduciary duty all predate Moffitt's election to the Board in mid-July of 2007. Thus, the cause of action should also have been dismissed"

(*id.*). Furthermore, as to the plaintiffs' cross-motion to amend the complaint, the court stated, "since the pertinent parts of the condominium offering plan are clear and unambiguous, plaintiffs' cross motion to amend the complaint to add the condominium as a party and to assert a cause of action for a declaratory judgment should have been denied" (*id.*).

On December 3, 2008, the New York City Department of Buildings (the "DOB") issued a violation against the Condominium

Board defendants for failing to maintain the concrete substrate supporting the subject unit, finding cracks throughout the seventh floor slab, and ordering the Condominium Board defendants to make all necessary repairs (Violation, Not of Cross Mot [002], Exh 5).

In April 2009, the New York City Environmental Control Board (the "ECB") issued a violation against the Condominium Board defendants for, among other things, failing to repair cracks found throughout the concrete floor slab in subject unit, and ordered defendants to repair or replace the concrete substrate supporting the unit (*see* Not of Cross Mot, Exh 9).

On June 26, 2009, the Condominium Board defendants filed with the DOB a Certificate of Correction pertaining to the ECB's April 2009 violation (Not of Cross Mot 002, Exh 6). The DOB then issued a Certificate of Correction Approval (Not of Cross Mot 002, Exh 6).

At a hearing held on October 22, 2009, the ECB determined that Condominium Board defendants failed to maintain and repair the cracked concrete substrate in the subject unit (Order, Not of Cross Mot, Exh 10, 12).

Thereafter, plaintiff decided to attempt to use her own efforts to repair the floor. Plaintiff hired an engineer to inspect and report on the condition of the concrete substrate slab. The engineer reported, in essence, that the concrete

substrate slab was deteriorating rapidly, and needed to be repaired.

Plaintiff commenced this action, claiming substantial damages based of defendants' failure to maintain and repair the concrete substrate slab in the subject unit. The first cause of action in the Complaint alleges that the Condominium Board defendants breached the terms of the Condominium's Offering Plan, Declaration, and Bylaws by failing to maintain and repair the concrete substrate slab. The second cause of action alleges that Samson and Marin breached the terms of their management agreements by failing to maintain and repair the concrete substrate slab supporting the floor in the subject unit, and seeks attorneys' fees from Samson, pursuant to the Samson management agreement. In the third cause of action, plaintiff alleges that the Condominium Board defendants breached a fiduciary duty by failing to undertake the necessary repairs to the concrete substrate slab in the subject unit. The fourth cause of action alleges that Samson and Marin aided and abetted the breach of fiduciary duty by failing to maintain and repair the concrete substrate slab. In the fifth cause of action, plaintiff seeks a judicial declaration that she has the right to inspect and copy the books and records of the Condominium and the Board.

Defendants seek to dismiss the Complaint, and plaintiff cross-moves for sanctions.

DISCUSSION

It is well established that on a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction (*see* CPLR § 3026; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The Court must accept the facts alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine whether the facts as alleged fit within any cognizable legal theory (*Leon v Martinez*, *supra*).

Under CPLR 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law" (*id.*). In asserting a motion under CPLR 3211(a)(7), however, the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*id.*, quoting *Guggenheimer v Ginsburg*, 43 NY2d 268, 275 [1977]).

The Complaint in this action alleges claims for breach of the Condominium offering plan and management agreement, breach of fiduciary duty, aiding and abetting breach of fiduciary duty, and a declaratory judgment based on alleged structural defects in the concrete substrate slab beneath the floor of the subject unit. The gravamen of the Complaint is that liability for repairing and maintaining the floor in the subject unit rests with defendants. Plaintiff maintains that certain provisions of the Condominium's

By-Laws and offering plan require that defendants repair the floor in the subject unit.

Defendants urge that the Complaint must be dismissed, based, among other things, on the doctrine of res judicata, since the allegations in the Complaint essentially mirror those alleged by the plaintiffs in *Lorne v 50 Madison Ave LLC* (65 AD3d 879 [1st Dept 2009]).

Plaintiff asserts that the prior action concerns only claims against the Sponsor of the Condominium for defective design and construction, whereas this action concerns claims against the Condominium Board defendants and Marin regarding the concrete substrate slab, including defendants' failure to properly install and maintain the flooring.

The doctrine of res judicata bars a party from litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter (*Matter of Hunter*, 4 NY3d 260, 269-270 [2005]). Here, the Court is not persuaded by plaintiff's assertion that the two actions are entirely different and unrelated. Rather, the Court finds undeniable identity of the parties and allegations in this action and the prior action commenced by plaintiff and her husband.

As to the parties, the prior action was commenced by plaintiff and her husband as owners of the subject unit. The submissions indicate that the couple still own the unit, and no

reason is apparent or explanation offered for the commencement of this action by plaintiff alone.

Furthermore, both actions involve claims against the Condominium, the Board, the individual defendants, the sponsor, and managing agent. Although Marin was not named in the prior action, the issue of whether the Board or sponsor, from which liability on the part of Marin would flow, was before the Court.

It is also undeniable that the two actions involve the same subject matter, namely, defects in the concrete substrate slab beneath the floor in the subject unit. Plaintiff's efforts to distinguish between the specific complaints regarding the slab in the two actions are unavailing. The assertion that the prior action alleged construction defects, and that complaints about cracks in the slab and the failure to maintain could not have been adjudicated in the prior action because they did not exist, is countered by statements in the DOB and ECB violations.

The decision on appeal in the prior action makes clear that plaintiff had ample opportunity to adjudicate the claims asserted in this action. The court noted that the plaintiffs hired an engineer, who advised them about the condition of the slab, and that the plaintiffs proposed numerous changes to the alteration agreement in order to fix the flooring.

Concerns for judicial economy and efficiency should serve to disallow plaintiff from advancing different theories based on the same factual allegations in different judicial proceedings, and

warrant dismissal of this action in favor of the prior action.

The request for sanctions is denied (22 NYCRR 130-1.1).

Accordingly, it is

ORDERED that the motions to dismiss the Complaint are granted, and the Complaint is dismissed as against defendants 50 Madison Avenue Condominium, Board of Managers of 50 Madison Avenue Condominium, Brent Johnston, Kenneth M. Raisler, David Moffitt, Michael H. Souter, Ernesto Khoudari, Diane C. Brandt, Robert Friedman and Marin Management Corp., with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that the motion and cross-motion for sanctions are denied; and it is further

ORDERED that counsel for the moving parties shall serve a copy of this order with notice of entry upon the County Clerk and the Clerk of the Trial Support Office, who are directed to mark the court's records to reflect the change in the caption herein.

Dated: April 17, 2017

ENTER:

Ellen M. Coin, A.J.S.C.