Lowenthal v Macintyre Bldg. Corp.
2017 NY Slip Op 32649(U)
December 20, 2017
Supreme Court, New York County
Docket Number: 160730/2016
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 32

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LAUREN LOWENTHAL,

Plaintiff,

Index No. 160730/2016
Motion Seq: 001

-against-

THE MACINTYRE BUILDING CORPORATION and THE BOARD OF DIRECTORS OF THE MACINTYRE BUILDING CORPORATION

Defendants.

DECISION & ORDER
ARLENE P. BLUTH, JSC

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The motion by defendants to dismiss is granted in part and denied in part. The cross-motion to amend the complaint is denied.

Background

This dispute centers on claims by plaintiff, a shareholder at defendant's building, that she has not had sufficient heat in her co-op apartment since she started living in her apartment in 1986.[1] Plaintiff contends that her apartment has not had properly functioning radiators and that she has been exposed to unsanitary conditions. Plaintiff alleges that she has been forced to seek alternative places to live to deal with these issues. It is undisputed that defendants installed new radiators in plaintiff's apartment in 2011. Plaintiff complains that these radiators did not work.

[1]The Court observes that plaintiff offers different dates for when she started living at the premises. The complaint states that plaintiff moved into the apartment in March 1985, plaintiff's affidavit asserts she purchased the apartment in May 1986 and the Proprietary Lease is dated March 11, 1986.

Defendants insist that this lawsuit it simply a tactic to allow plaintiff to avoid paying her monthly maintenance fees.

Defendants move to dismiss plaintiff's six causes of action: breach of fiduciary duty, breach of contract, negligence in departing from good and accepted standards of management and practice, negligence, nuisance arising out of the loss of use and enjoyment of property and nuisance asserting property damage. Defendants insist that it is plaintiff's responsibility to maintain her radiators and that they have no contractual obligation to oversee this type of appliance.

Discussion

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). "In assessing a motion under CPLR 3211(a)(7), however, a 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.* [internal quotations and citations omitted]).

Breach of Fiduciary Duty

"To state a claim for breach of fiduciary duty, plaintiffs must allege that (1) defendant owed them a fiduciary duty, (2) defendant committed misconduct and (3) they suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 924 NYS2d 77 [1st Dept 2011] [citations omitted]). "It is black letter law that a corporation does not owe

fiduciary duties to its members or shareholders" (*Stalker v Stewart Tenants Corp.*, 93 AD2d 550, 552, 940 NYS2d 600 [1st Dept 2012]).

Defendants claim that they owe no duty to plaintiff in her individual capacity as a co-op unit owner. Defendants further contend that plaintiff failed to allege facts required to support a shareholder derivative claim: plaintiff did not allege the existence of any demands she made on the Board to act or that she did not make any demands because it would have been futile.

Plaintiff contends that she is simply asserting a breach of fiduciary duty based on defendants' failure to follow its corporate documents, which require defendants to properly maintain and repair heat in the building. Plaintiff insists that she has not alleged a shareholder derivative action and is, instead, arguing that defendants failed to take action on her individual unit.

Plaintiff has failed to state a cause of action for breach of a fiduciary duty. Defendants have a fiduciary duty to act in the best interest of all of its shareholders and plaintiff's complaint does not establish that defendant owed a duty to plaintiff in her individual capacity as a unit owner. The complaint and plaintiff's affidavit contend that defendants simply ignored her repeated requests to fix the heat in her apartment. That does not show that defendants had a fiduciary duty to maintain the heat in plaintiff's unit. And, to the extent that plaintiff seeks to assert a shareholder derivative action (although plaintiff insists that she has not alleged such a claim), that cause of action fails as well. Plaintiff's claims are individualized to defendants' purported failure to act in her own apartment– she does not insist that she is bringing a claim on behalf of all shareholders of the building.

Accordingly, the claim for breach of fiduciary duty is severed and dismissed.

Breach of Contract, Warranty of Habitability and Quiet Enjoyment

Plaintiff claims that defendants are liable for breach of contract based, in part, upon the implied warranty of habitability and the covenant of quiet enjoyment. Defendants argue that plaintiff has the responsibility to maintain and replace furnishings under the Proprietary Lease. Defendants claim that plaintiff cannot allege a breach of the implied warranty of habitability because plaintiff has lived in the apartment since 1986, rendering any claim that she could not live there meritless. Defendants also claim that plaintiff cannot meet the elements of a breach of the covenant of quiet enjoyment.

Plaintiff insists that she has properly pled this cause of action because she was forced, at times, to vacate her apartment due to the lack of heat. Plaintiff insists that defendants are responsible for providing heat in the building.

The Court finds that plaintiff has stated a cause of action for breach of contract based upon the Proprietary Lease. The lease states that the building "shall provide the Unit with a proper and sufficient supply of cold water and heat" (NYSCEF Doc. No. 16, ¶ 3). Although defendants claim that plaintiff is responsible for maintaining the radiators in her apartment, they admit to replacing the radiators in her apartment in 2011. And plaintiff insists that defendants own the radiators in her apartment and that she was instructed not to touch the radiators by building employees (NYSCEF Doc. No. 28 at 6). Discovery may reveal that defendants had no contractual obligation to provide plaintiff with radiators, but the Court cannot dismiss this cause of action at the pleadings stage.

The Court observes that to the extent that plaintiff alleges a breach of the implied warranty of habitability, that claim also remains. At the motion to dismiss stage, the Court must

take plaintiff's claims as true and she alleges that she did not have heat from March 1985 until February 2016 (NYSCEF Doc. No. 1, ¶ 9). She also claims that "I have been forced to live away from my home for long periods of time from in or about 2009 to 2011, and in the spring of 2013, as well as many years prior thereto. I have also been forced to live in one room of my apartment when I had no heat, and there was no heat supplied there either" (NYSCEF Doc. No. 28 at 8).

At this stage, these allegations support a claim that the apartment was at some point(s) uninhabitable. She also claims that providing heat was under the landlord's control. If none of her radiators worked for over thirty years, which the Court must assume at this stage, then plaintiff has set forth the elements of a claim for breach of the warranty of habitability: that the landlord was obligated to but failed to provide heat and the extensiveness of that failure resulted in the premises being unfit for human habitation.

To the extent that plaintiff attempted to plead breach of the covenant of quiet enjoyment, that claim is severed and dismissed because she has not sufficiently pleaded an ouster or abandonment of the premises (*see Reade v Reva Holding Corp.*, 30 AD3d 229, 237, 818 NYS2d 9 [1st Dept 2006] [internal quotations and citation omitted]).

Negligence

Plaintiff's claims based on negligence are severed and dismissed as duplicative of her breach of contract claim (*see Board of Managers of Soho North 267 West 124th St. Condominium v NW 124 LLC*, 116 AD3d 506, 507, 984 NYS2d 17 [1st Dept 2014]). The allegations giving rise to these allegations arise out of the same conduct supporting the breach of contract claim– defendants' purported failure to provide sufficient heat under the Proprietary Lease.

Nuisance

"[E]lements of a common-law claim for a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failing to act" (*Berenger v 261 West LLC*, 93 AD3d 175, 182, 940 NYS2d 4 [1st Dept 2012] [internal quotations and citation omitted]).

Defendants claim that plaintiff cannot state causes of action for nuisance because she has not alleged facts to show that defendants' conduct was intentional. Defendants insist that in order to show that their conduct was intentional, plaintiff would have to make the absurd contention that defendants intentionally withheld heat or caused the water damage. Plaintiff claims that the intentional action is failing to act after receiving complaints from plaintiff.

The Court finds that plaintiff has stated cognizable causes of action for nuisance. Plaintiff alleges that defendants' created the nuisance because they were responsible for providing heat and the radiators and it was intentional because she told them the heat was insufficient and they did nothing for many years. The fact that defendants installed radiators in 2011 does not eliminate these causes of action because plaintiff complains that these new radiators did not work properly.

Plaintiff's Cross-Motion to Amend

CPLR 3025(b) requires a party seeking to amend a pleading to attach a proposed amended pleading "clearly showing the changes or additions to be made to the pleading." Here, although plaintiff attaches a proposed amended complaint, she did not utilize any tools (such as

redlining) to clearly identify the changes to the new complaint. Therefore, this Court must deny plaintiff's cross-motion to amend.

In plaintiff's original complaint, plaintiff asserted 6 causes of action and did not include headings for these claims. In support of her cross-motion to amend, plaintiff attaches a proposed amended complaint with 7 causes of action and headings for each claim. The purpose of showing the changes in an amended complaint is to make it obvious for the Court, and for opposing parties, to identify new (or deleted) allegations and causes of action. Plaintiff did not do that here.

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted only to the extent that the allegations predicated on the breach of a fiduciary duty, breach of the covenant of quiet enjoyment and negligence are severed and dismissed and defendants are directed to answer pursuant to the CPLR; and it is further

ORDERED that the cross-motion to amend is denied.

The claims based on a breach of the Proprietary Lease, warranty of habitability and nuisance remain. The parties are directed to appear for a preliminary conference on March 27, 2018 at 2:15 p.m.

This is the Decision and Order of the Court.

Dated: December 20, 2017
New York, New York

ARLENE P. BLUTH, JSC