

<b>O'Connell v ABC Realty</b>
2006 NY Slip Op 30852(U)
January 25, 2006
Supreme Court, New York County
Docket Number: 109567/04
Judge: Barbara R. Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 12

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BARBARA O'CONNELL, THOMAS R. CARUSO,  
and MICHAEL CARUSO, an Infant by his  
Mother and Natural Guardian,

DECISION/ORDER

Plaintiffs,

Index No. 109567/04  
Motion Seq. No. 001

-against-

ABC REALTY and ESPLANADE CONDOMINIUM  
ASSOCIATION,

Defendants.

**FILED**  
JAN 30 2006  
NEW YORK  
COUNTY CLERK'S OFFICE

-----X  
BARBARA R. KAPNICK, J.:

In this action, plaintiffs seek to recover damages for personal injuries allegedly sustained by plaintiff Barbara O'Connell and her son, infant plaintiff Michael Caruso, as well as for property damage, arising from exposure to "toxic mold" and other toxic substances inside of their condominium unit at The Esplanade located at 1200 Warburton Avenue, Yonkers, New York.<sup>1</sup>

Defendant Esplanade Condominium Association ("Esplanade") now moves for an order: (i) dismissing plaintiffs' complaint on the grounds that it fails to state a cause of action against it and that Esplanade has a defense based upon documentary evidence;<sup>2</sup> or,

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<sup>1</sup> Plaintiff Thomas Caruso, who is Barbara O'Connell's husband, does not claim to have sustained any personal injury, but has asserted a claim for loss of consortium.

<sup>2</sup> Defendant Esplanade also initially moved to dismiss all cross-claims asserted against it. However, counsel for defendant has now withdrawn all cross-claims previously asserted by Esplanade in its Answer against ABC Realty.

in the alternative, (ii) granting defendant Esplanade a default judgment on its counterclaims against plaintiffs for contribution and indemnification. Co-defendant ABC Management Corp. d/b/a ABC Realty, represented by the same counsel, "cross-moves" for an order dismissing plaintiffs' fifth, seventh, and eighth causes of action as against it on the grounds that the complaint fails to state a cause of action as against ABC Realty, and that ABC has a defense based upon documentary evidence.

Plaintiffs oppose the motion and "cross-motion" and cross-move for an order: (i) granting them leave to amend their complaint; (ii) dismissing defendant's counterclaims; or, in the alternative, (iii) vacating plaintiffs' default thereon.

Defendant Esplanade argues that plaintiffs' complaint fails to state a cause of action against it because:

(a) the complaint fails to comply with General Associations Law § 13 which provides, in relevant part, that

[a]n action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally";

and

(b) the complaint alleges elements of intentional tort, including fraud, and negligence claims in the same purported causes of action.<sup>3</sup>

Plaintiffs, however, have cross-moved for leave to amend their complaint in order to name the President of the Board of Managers of the Esplanade as an individual defendant, to plead that defendant Esplanade is an unincorporated business association, rather than a corporation, and to re-allege claims sounding in negligence only.<sup>4</sup>

That portion of plaintiffs' cross-motion seeking leave to amend the complaint is granted, since leave to amend a pleading is to "be freely given upon such terms as may be just" (CPLR § 3025[b]), and since the failure to name either the defendant's President or Treasurer as a party to this action in his or her representative capacity, as required by General Associations Law § 13, has been held to be a defect which is not jurisdictional in

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<sup>3</sup> Defendant correctly notes that an intentional tort may not be asserted absent a showing that the entire membership of the association authorized in advance, or subsequently ratified, the alleged tort. See, Martin v. Curran, 303 N.Y. 276 (1951); Saleme v. Toussaint, A.D.2d, 2006 WL 59769 (1st Dep't). In contrast, there is no requirement that the complaint allege that the individual members of the association authorized or ratified alleged unintentional (i.e., negligent) acts. See, Piniewski v. Panepinto, 267 A.D.2d 1087 (4th Dep't 1999); Torres v. Lacey, 3 A.D.2d 998 (1st Dep't 1957), rearg. denied, 4 A.D.2d 831 (1st Dep't 1957).

<sup>4</sup> The proposed amended complaint does not seek to replead either plaintiffs' fifth cause of action for constructive eviction or seventh cause of action for fraudulent misrepresentation, or to reassert a claim for punitive damages.

nature but which is subject to correction (see, Montalvo v. Bakery and Confectionery Workers International Union of America Local No. 3, AFL-CIO, 137 A.D.2d 506 [2nd Dep't 1988]).

However, the Amended Complaint, in the form annexed to plaintiffs' cross-motion, now improperly seeks to sue the Association's President in his individual, not just his representative capacity, which is in error. (See, Thomann v. Flynn, 251 A.D. 325 [2nd Dep't 1937] , which held that an action pursuant to General Associations Law § 13 against the President of an Association does not subject him to personal liability).

In addition, paragraph 9 of the proposed Amended Complaint which alleges that "any intentional acts of the defendants ... were authorized, approved or ratified by all members of the Esplanade Board" must be stricken, since plaintiffs concede that there are no allegations supporting a claim for intentional tort.

Accordingly, plaintiffs are directed to serve an Amended Complaint which shall not name the President of the Association in his individual capacity and shall omit the allegations contained in paragraph 9. Defendants' motion and cross-motion to dismiss the complaint are otherwise denied.

Defendant Esplanade moves, in the alternative, for a default judgment on its counterclaims against plaintiffs for contribution

and common law and contractual indemnification on the ground that plaintiffs have failed to timely serve a reply to said counterclaims.

Plaintiffs cross-move to dismiss defendant Esplanade's counterclaims on the ground that they merely set forth affirmative defenses and do not constitute independent viable counterclaims.

However, claims for contribution and indemnification may properly be asserted as counterclaims. See, e.g., Munoz v. Mael Equities, 286 A.D.2d 213 (1st Dep't 2001); Cantave v. Peterson, 266 A.D.2d 492 (2nd Dep't 1999).

Accordingly, that portion of plaintiffs' cross-motion seeking to dismiss defendant Esplanade's counterclaims is denied.

That portion of plaintiffs' cross-motion seeking to vacate their default is, however, granted since it appears that the failure to reply to said counterclaims was inadvertent and that defendants have not been prejudiced by the slight delay.

Plaintiffs shall serve a new Amended Complaint in accordance with the rulings made herein within 30 days of entry of this order.

Defendants shall serve answers to the Amended Complaint within 20 days of said service.

Plaintiffs shall serve their reply to defendants' counterclaims, if any, within 20 days thereafter.

A preliminary conference shall be held in IA Part 12, 60 Centre Street, Room 341 on April 26, 2006 at 9:30 a.m.

This constitutes the decision and order of this Court.

Date: January 25 2006

  
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Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**

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