Reinhard v Connaught Tower Corp.
2011 NY Slip Op 33101(U)
November 30, 2011
Sup Ct, NY County
Docket Number: 602503/08
Judge: Judith J. Gische
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SCANNED ON 12/1/2011

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE

PART 10

Index Number : 602503/2008

REINHARD, SUSAN

vs

CONNAUGHT TOWER

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. ______

MOTION DATE ______

MOTION SEQ. NO. 006

MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to/for ______

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: [X] Yes [ ] No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED

NOV 30 2011

NEW YORK COUNTY CLERK'S OFFICE

Dated: NOV 30 2011

HON. JUDITH J. GISCHE J.S.C.

Check one: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION

Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

[ ] SUBMIT ORDER/ JUDG. [ ] SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

---X

SUSAN REINHARD,

Plaintiff,

-against-

CONNAUGHT TOWER CORPORATION and
ARTHUR S. OLICK,

Defendants.

---X

Decision and Order
Index No. 602503/08
Seq no. 006, 007

Present:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Olick n/m (3212) w/SAD affirm, ASK affid, exhs	1
Connaught n/m (3212) w/SAD, JPE, exhs	2
Pltff x/m (3212) w/GDM affirm, RB affid, exhs	3
Connaught and Olick reply w/ SAD affirm, JPF affid (2)	4
Pltff reply and further support w/GDM affirm	5
Steno minutes 10/6/11	6

FILED
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NEW YORK
COUNTY CLERK'S OFFICE

JUDITH J. GISCHE, J.:

Plaintiff Susan Reinhard (plaintiff or Reinhard), a shareholder in Connaught Tower Corporation, the cooperative corporation that owns the residential cooperative building located at 300 East 54th Street, New York, New York (the building), brings this action for damages and injunctive relief against the cooperative corporation and the president of the Board of Directors, for their failure to remediate secondhand smoke seeping into her apartment.

In motion sequence number 006, defendant Arthur S. Olick (Olick) moves, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the complaint as against him. In

motion sequence number 007, defendant Connaught Tower Corporation (the Cooperative Corporation) moves, pursuant to CPLR 3211 and 3212, for summary judgment dismissing the complaint as against it. Reinhard opposes the motions and cross-moves, pursuant to CPLR 3212, for summary judgment on her first, second, fourth, fifth, sixth, and eighth causes of action.

Issue has been joined and the note of issue was filed April 28, 2011. These motions were timely brought and summary judgment relief is available (CPLR § 3212; Brill v. City of New York, 2 N.Y.3d at 652 [2004]). Motion sequence numbers 006 and 007 are consolidated for disposition.

BACKGROUND

The following facts are undisputed unless otherwise indicated. Reinhard is the tenant-shareholder of apartment 31G in the building, which is known as Connaught Tower. Reinhard acquired her shares on August 16, 2006. Olick is also a tenant-shareholder in the building and is the president of the Board of Directors.

Reinhard claims that after she purchased her apartment and performed renovations in her apartment, she detected a strong smell of cigarette smoke that was entering into her apartment from other areas of the building. According to Reinhard, the cigarette smoke has caused her to suffer from tightness in her chest, coughing, headaches, and watering eyes. Reinhard asserts that she complained about the smoke condition to the Cooperative Corporation and its building manager, nonparty Matthew Adam Properties, Inc. (Matthew Adam). The building superintendent, Rudolph Bachraty, thereafter inspected Reinhard's apartment and suggested that Reinhard re-caulk the floor, molding and outer faceplates in her bedroom. However, according

to plaintiff, cigarette smoke continued to permeate her apartment even after this work was done. By letter dated September 4, 2007, Reinhard again reported the smoke condition to the building's property manager and superintendent. Harvey Greenberg, a vice president of Matthew Adam, inspected the apartment on September 5 and 7, 2007 with the building superintendent, and detected a "slight smell reminiscent of cigarette smoke" in the bedroom. Greenberg subsequently informed the board of his finding.

The board considered Reinhard's complaints at a meeting held on September 18, 2007. The minutes of that meeting state that:

> "Apartment 31G – The shareholder of this apartment has complained about odors in her apartment. Mr. Greenberg has visited the apartment in order to verify the odors and determine their cause and/or origin. Though Mr. Greenberg did detect the existence of faint odors, they were neither strong enough to be identified nor of a magnitude, in his opinion, to render the apartment uninhabitable"

(Minkin Affirm. in Support, Exh. K).

By letter dated September 25, 2007, Greenberg responded to Reinhard, stating that:

> "As I informed you, with your permission, I have been in your apartment on two occasions to attempt to verify the odors and to determine their cause and/or origin. Though I did detect the existence of faint odors, they were neither strong enough for me to identify nor of a magnitude, in my opinion, to render your apartment uninhabitable. Upon due consideration and recognizing that certain alterations were performed by you in the apartment, the Board of Directors sees no obligation on the part of the cooperative corporation to cause any further work to be done at the corporation's expense"

(*id.*, Exh. L). In a letter to plaintiff dated October 2, 2007, Olick stated that "[i]t does not appear that the odors of which you complain are of insufficient [sic] intensity to render your apartment uninhabitable. Moreover, the origin of the odors has not been ascertained and could be the result of alterations performed on your behalf" (*id.*, Exh. M).

Reinhard thereafter hired, at her own expense, a hygienic engineer, Ronald Bielinski, P.E., to conduct air flow testing in her apartment. Bielinski inspected the apartment on January 8, 2008, and detected a "strong" and "distinctive odor of cigars" along three walls in the bedroom. Reinhard provided a copy of Bielinski's report to the Cooperative Corporation, and requested that the building locate and seal the source of the airflow and odor seepage into her apartment. On May 27, 2008, Greenberg informed Reinhard that she could hire a contractor to determine the source of the problem. Reinhard again hired Bielinski to conduct more specific air quality tests and Richfield Enterprises, Inc. (Richfield) to make penetrations in the wall. After making cuts in the wall, Penn Baluyut of Richfield detected a bad odor that smelled "like a mixture of between cigarettes and . . . a dead mouse or whatever, but it's a mixture of that." Bielinski prepared a subsequent report dated May 30, 2008 in which he stated that there was an "air communication pathway in the interstitial wall space," and recommended cleaning inside the wall and sealing the "fugitive air pathway" from adjacent units and from the outside wall. On June 17, 2008, Reinhard forwarded Bielinski's report to the board for consideration, and informed the board and her fellow shareholders that she was holding the building responsible for all costs that she incurred relating to the air quality problem in her apartment.

By letter dated July 8, 2008, Robert J. Jacobs, a member of the Cooperative Corporation's legal committee, responded to plaintiff. Jacobs noted that the board's investigation revealed that: (1) the building's construction was typical for high-rise construction built during the mid-to-late 1970s; (2) to the best of the board's knowledge, the Cooperative Corporation did not alter the original construction to cause the condition; and (3) an air communication pathway in the

interstitial wall space is typical for the building's type of construction and is necessary for proper insulation of the building (*id.*, Exh. W). Additionally, Jacobs informed Reinhard that:

> "there are several recommendations in the Report that do not appear to be problematic, including portions of items 1 and 2 as they relate to cleaning, as well as the need to maintain a two-hour fire separation. We are, however, advised that the sheet rock covering the demising walls does in fact provide such a fireseal and was in full compliance with all applicable codes when the Building was originally constructed. We are also advised that sealing up the space to prevent air communication as proposed in the Report may very well cause moisture and other problems to your unit as well as to others in the Building, for which you will be required to assume full responsibility.
>
> In light of the foregoing, please note that the Board does not accept any responsibility for the matters complained of, and reminds you of the requirement for pre-approval of any actions that you or your designated contractors might take inside the apartment or the common walls of the Building, including the necessity of submitting a completed alteration agreement and related insurance documents for approval by the Building's Managing Agent, Mr. Greenberg"

(*id.*).

This action ensued. The complaint contains the following nine causes of action: (1) breach of the warranty of habitability; (2) breach of the lease; (3) rent abatement; (4) breach of fiduciary duty; (5) constructive eviction; (6) breach of the covenant of good faith and fair dealing; (7) injunctive relief; (8) negligence; and (9) attorney's fees. Plaintiff seeks $1,000,000 in damages on her second, fourth, fifth, sixth, and eighth causes of action, in addition to punitive and exemplary damages.

The Cooperative Corporation relies upon an affirmation from John P. Flynn, P.E., an engineer who inspected plaintiff's apartment on September 16, 2010, who states that during his inspection, there were no odors of smoke or any other unusual odors within the apartment (Flynn Affirm., ¶ 2). According to Flynn, the building's construction was typical of the time in which it

was built, was not deficient in any manner, and was not predisposed to an inordinate amount of air or smoke movement or transmission (*id.*, ¶¶ 3, 4). The Cooperative Corporation also submits an unsworn report from Flynn dated October 7, 2010 (Dodge Affirm. in Support, Exh. F).

In support of the cross motion, Reinhard submits an affidavit from Bielinski, who states, based upon his inspections of the apartment on January 8, 2008 and May 28, 2008, he discovered, by using "smoke tubes," that there is an air communication pathway in the interstitial wall space as a result of the furred out wall system (Bielinski Aff., ¶¶ 6, 9). According to Bielinski, he detected communication of fugitive air (an unintended air pathway) via a combination of the outside wall interstitial air space and the furred out wall system (*id.*). Bielinski opines that the air communication pathway is a violation of the 1968 New York City Building Code, §§ [C26-504.7] 27-345 (firestopping) and [C26-504.3] 27-341 (fire separation) (*id.*, ¶¶ 21, 23). Bielinski found evidence that previous attempts to seal the fugitive air pathway had been made; the space between the outside wall and the column was stuffed with extruded polystyrene boards at the demising wall (*id.*, ¶ 10). However, because the boards were not sealed to the wall, the column, or to each other, the boards had minimal effect on air transmission (*id.*). Bielinski further states that most of the fugitive air movement was horizontal, rather than vertical (*id.*, ¶ 11). Therefore, Bielinski recommended that the fugitive air pathways be sealed to prevent fugitive air movement from adjacent units and the outside wall (*id.*, ¶ 12). Bielinski states, within a reasonable degree of scientific certainty, that the repairs are necessary to prevent air and odor communication from fugitive air sources, and to maintain fire separation from Reinhard's unit and the adjacent unit (*id.*, ¶ 14). He notes that the cost of the repairs would be

approximately $12,000 (*id.*). Bielinski also disagrees with the board's position that sealing up the space would create moisture problems (*id.*, ¶ 24). Bielinski recommends that the interstitial wall space be partitioned into two compartments, thus allowing moisture to continue to effuse through the exterior masonry wall as it currently does (*id.*).

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (*Santiago v Filstein,* 35 AD3d 184, 185-186 [1st Dept 2006] [internal quotation marks and citation omitted]). The burden then shifts to the motion's opponent to "present evidentiary proof in admissible form sufficient to raise a genuine, triable issue of fact" (*Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 [1st Dept 2006]; *see also Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). If there is any doubt as to the existence of a triable issue of fact, summary judgment must be denied (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]).

Implied Warranty of Habitability and Constructive Eviction (First and Fifth Causes of Action)

The Cooperative Corporation argues that the first and fifth causes of action must be dismissed because plaintiff cannot establish that she abandoned the premises. To establish a constructive eviction, the tenant must prove wrongful acts by the landlord which "substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises" (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 83 [1970]). The tenant must abandon possession in order to claim a constructive eviction (*id.*). Whether a constructive eviction has

occurred is ordinarily a question of fact (*Melbourne Leasing Co. v Jack LaLanne Fitness Ctrs., Inc.*, 211 AD2d 765, 767 [2d Dept 1995]). Contrary to the Cooperative Corporation's assertion, the guest status affidavit executed by Reinhard does not disprove Reinhard's claim of abandonment (Dodge Affirm. in Support, Exh. J). In any event, Reinhard affirmatively asserts in this case that she has abandoned possession of her apartment. Reinhard testified at her deposition that she has not slept there since 2007 and only visits on occasion to check on her apartment and to collect her mail (Plaintiff EBT, at 57).

"Pursuant to Real Property Law § 235-b, every residential lease contains an implied warranty of habitability which is limited by its terms to three covenants: (1) that the premises are for 'fit for human habitation', (2) that the premises are fit for 'the uses reasonably intended by the parties', and (3) that the occupants will not be subjected to conditions that are 'dangerous, hazardous or detrimental to their life, health or safety'" (*Solow v Wellner*, 86 NY2d 582, 587-588 [1995], quoting Real Property Law § 235-b). The implied warranty of habitability "protects only against conditions that materially affect the health and safety of tenants or deficiencies that in the eyes of a *reasonable person* . . . deprive the tenant of those *essential functions* which a residence is expected to provide" (*id.* at 588 [internal quotation marks omitted]). The warranty applies to cooperative apartments (*see Granirer v Bakery, Inc.*, 54 AD3d 269, 271 [1st Dept 2008]; *Frisch v Bellmarc Mgt.*, 190 AD2d 383, 384-385 [1st Dept 1993]).

Courts have held that secondhand smoke "qualifies as a condition that invokes the protections of Real Property Law § 235-b under the proper circumstances" (*Poyck v Bryant*, 13 Misc 3d 699, 702 [Civ Ct, NY County 2006]; *see also Upper E. Lease Assoc., LLC v Cannon*, 30

Misc 3d 1213 [A], *3, 2011 NY Slip Op 50054 [U] [Dist Ct, Nassau County 2011]). "As such, it is axiomatic that secondhand smoke can be grounds for a constructive eviction" (*Poyck*, 13 Misc 3d at 702). While a "single occurrence" of smoke is insufficient, "the court must look to the operative facts to determine whether or not the secondhand smoke was so pervasive as to actually breach the implied warranty of habitability and/or cause a constructive eviction" (*id.*; *see also East End Temple v Silverman*, 199 AD2d 94 [1st Dept 1993] [one time occurrence of smoke did not amount to a substantial and material deprivation of the use and enjoyment of the premises]).

Here, Reinhard has offered evidence of more than a single occurrence of smoke within her apartment. Reinhard's hygienic engineer, Ronald Bielinski, P.E., states that he inspected the apartment on January 8, 2008, and detected a strong, distinctive odor of cigars (Bielinski Aff., ¶ 5). Penn Baluyut, the contractor who made several cuts into the walls of the apartment, testified that he smelled what he described as "not a 100 percent smell of cigarettes"; he stated it was "like a bad smell like a mixture of between cigarettes and I thought it was like a dead mouse or whatever, but it's a mixture of that" (Baluyut EBT, at 74, 102). Diana Grodnitzky, a resident of the building, testified that she smelled cigarette smoke in plaintiff's apartment on several occasions (Grodnitzky EBT, at 63, 67). In addition, Harvey Greenberg, a representative of the property manager, testified that when he inspected the apartment on September 7, 2007, he detected a very faint odor of cigars in the bedroom (Greenberg EBT, at 119-120). Reinhard claims that the secondhand smoke has caused her to suffer from tightness in her chest, coughing, headaches, and watering eyes (Plaintiff EBT, at 30-31). In view of this evidence, the court concludes that there are issues of fact as to whether the secondhand smoke within Reinhard's

apartment was so pervasive as to breach the implied warranty of habitability and cause a constructive eviction. Accordingly, neither the Cooperative Corporation nor Reinhard are entitled to summary judgment on the first and fifth causes of action.

Negligence (Eighth Cause of Action)

The Cooperative Corporation moves for summary judgment dismissing the eighth cause of action for negligence, based upon its contentions that it did not breach a duty to plaintiff, and did not cause or create the smoke or odor. For her part, Reinhard contends that the Cooperative Corporation had actual notice of the smoke condition in her apartment, and failed to take any action to remediate the condition.

Multiple Dwelling Law § 78 "imposes upon a landlord a duty to persons on its premises to maintain them in a reasonably safe condition" (*Juarez v Wavecrest Mgt. Team*, 88 NY2d 628, 643 [1996] [internal quotation marks and citation omitted]). To make out a prima facie case of negligence, the plaintiff must demonstrate that the defendant owner either created the defective condition or had actual or constructive notice of the condition (*Piacquadio v Recine Realty Corp.*, 84 NY2d 967, 969 [1994]; *Smith v Costco Wholesale Corp.*, 50 AD3d 499, 500 [1st Dept 2008]; *Alexander v New York City Tr.*, 34 AD3d 312, 313 [1st Dept 2006]).

Although the Cooperative Corporation contends that the building's construction was typical for the time in which it was built, and that air migration in a building of this type is common, the court cannot conclude, as a matter of law, that it was not negligent.

The Cooperative Corporation submits an affirmation from John P. Flynn, P.E., a licensed professional engineer who inspected Reinhard's apartment on September 16, 2010. However,

this unsworn affirmation does not constitute proof in admissible form (CPLR 2106; *see also Woodard v City of New York*, 262 AD2d 405 [2d Dept 1999] [unsworn affirmation of plaintiffs' engineering expert did not constitute competent evidence]). Nor is Flynn's unsworn report dated October 7, 2010 competent evidence (*see 101 Maiden Lane Realty Co., LLC v Tran Han Ho*, 88 AD3d 596 [1st Dept 2011]).

In any event, even if the court were to consider the Cooperative Corporation's proferred evidence, there is evidence the Cooperative Corporation had actual notice about the smoke condition including: the multiple complaints Reinhard made; the copies of Bielinski's reports Reinhard forwarded to the Cooperative Corporation; and the observations by a vice president of the property manager during an inspection apartment of a faint cigar smell (Plaintiff EBT, at 88, 90; Greenberg EBT, at 120; Minkin Affirm. in Support, Exhs. G, U). Since the Cooperative Corporation did not take any action to remedy the condition alleged, there are questions of fact as to whether the Cooperative Corporation acted reasonably under the circumstances in failing to remedy the smoke condition.[1] Ordinarily, "the very question of negligence is itself a question for jury determination" (*Ugarriza v Schmieder*, 46 NY2d 471, 474 [1979]). Furthermore, while the Cooperative Corporation argues that plaintiff cannot identify the source of the smoke or odors, "[t]here may be more than one proximate cause for an injury" (*Francis v New York City Tr. Auth.*, 295 AD2d 164 [1st Dept 2002]). Thus, the court cannot say that the Cooperative

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[1]There is also a dispute as to whether the air communication pathway violates New York City Building Code provisions relating to firestopping (Administrative Code of City of N.Y. § C26-504.7 [27-345]) and fire separations (Administrative Code of City of N.Y. § C26-504.3 [27-341]). A building code violation serves as "some evidence of negligence" (*see Elliott v City of New York*, 95 NY2d 730, 734-735 [2001]; *Hill v Cartier*, 258 AD2d 699, 701 [3d Dept 1999]).

Corporation did not cause her injuries and damages. For the same reasons, these issues of fact preclude summary judgment to Reinhard on the eighth cause of action.

Breach of the Proprietary Lease (Second Cause of Action)

To establish a breach of contract claim, the plaintiff must prove the following elements: (1) the existence of an agreement; (2) performance by the plaintiff; (3) breach by the defendant; and (4) damages (*Furia v Furia*, 116 AD2d 694, 695 [2d Dept 1986]).

Reinhard relies upon paragraph 2 of the proprietary lease, which states that "[t]he Lessor shall at its expense keep the building in good repair, including all of the apartments, the sidewalks and courts surrounding the same, and its equipment and apparatus except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof" (Minkin Affirm. in Support, Exh. B).

Paragraph 18 of the proprietary lease states, in relevant part, that:

> "the Lessee shall keep the interior of the apartment (including interior walls, floors and ceilings, but excluding windows, window panes, window frames, sashes, sills, entrance doors, frames and saddles) in good repair, . . . and shall be solely responsible for the maintenance, repair, and replacement of plumbing, gas and heating fixtures . . . , as may be in the apartment. . . . The Lessee shall be solely responsible for the maintenance, repair and replacement of all lighting and electrical fixtures, appliances, and equipment, and all meters, fuse boxes or circuit breakers and electrical wiring and conduits from the junction box at the riser into and through the Lessee's apartment" (*id.*).

The Cooperative Corporation argues, based upon these provisions, that decisions about how to maintain the building are within the discretion of the board of directors and that Reinhard was responsible for making minor repairs in her apartment. The Cooperative Corporation further contends that, in order to remedy the condition, it would have to breach its leases with other

tenants by prohibiting them from smoking in their apartments, or would have to reconstruct the entire building. Reinhard counters that the Cooperative Corporation is responsible for maintaining and repairing common areas of the building, and that she is not responsible for making necessary repairs to prevent secondhand smoke from seeping into her apartment through gaps, cracks, and holes located outside her apartment. Reinhard points out that the Cooperative Corporation has refused to make any repairs, and has threatened to hold her personally liable if she attempts to perform the repairs recommended by Bielinski.

"The fundamental, neutral precept of contract interpretation is that agreements are construed in accord with the parties' intent" (*Greenfield v Philles Records*, 98 NY2d 562, 569 [2002]). A written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms (*W.W.W. Assoc. v Giancontieri*, 77 NY2d 157, 162 [1990]).

In this case, Reinhard's hygienic engineer states that there is an "air communication pathway in the interstitial wall space," and that there is "[c]ommunication of fugitive air . . . via a combination of the outside wall interstitial air space, and the furred out wall system" (Bielinski Aff., ¶ 9). Bielinski states that he found previous attempts to seal the fugitive air pathway in the form of extruded polystyrene boards at the demising wall, and indicates that the polystyrene boards had a minimal effect on air transmission (*id.*, ¶ 10). Thus, the proprietary lease places responsibility to repair the condition within the wall on the Cooperative Corporation (*see Franklin Apt. Assoc., Inc. v Westbrook Tenants Corp.*, 43 AD3d 860, 863 [2d Dept 2007] [repair of "shower bodies" was responsibility of cooperative corporation where they could not be

accessed without opening the walls]; *cf. Machado v Clinton Hous. Dev. Co., Inc.*, 20 AD3d 307 [1st Dept 2005] [hot water valve which exploded in hand of shareholder was sole responsibility of shareholder where valve was outside the walls]). However, the record raises issues of fact as to whether the Cooperative Corporation maintained the building in "good repair" pursuant to the proprietary lease (*see Dunlop Tire Corp. v Occidental Chem. Corp.*, 177 AD2d 969 [4th Dept 1991], *lv dismissed* 79 NY2d 1040 [1992] [issue of fact as to whether assignor met its contractual obligation to keep asbestos installation in good repair]).

Given the issues of fact as to whether Reinhard was constructively evicted, Reinhard's claim that the Cooperative Corporation breached paragraph 10 of the proprietary lease, which contains a covenant of quiet enjoyment, also survives summary judgment (*see Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250 [1st Dept 2005], *lv denied* 7 NY3d 704 [2006]).

However, to the extent that Reinhard claims that the Cooperative Corporation breached paragraph 21 of the proprietary lease, the record does not support such claim. Paragraph 21 of the proprietary lease provides that no additions or alterations shall be made without first obtaining the consent of the Cooperative Corporation, which consent shall not be unreasonably withheld or delayed (Minkin Affirm. in Support, Exh. B). On June 17, 2008, Reinhard informed the Cooperative Corporation that she intended to hold the building responsible for the remediation work, and requested the building's approval to start the work recommended by Bielinski (*id.*, Exh. U). However, on July 8, 2008, the board informed Reinhard that it did not accept responsibility for the work, and reminded Reinhard that pre-approval was required for any

alteration work within her apartment or the common walls of the building (*id.*, Exh. W). Notably, the proprietary lease and shareholders manual require the submission of a completed alteration agreement and insurance documents prior to performing any alteration work (*id.*, Exhs. B, C).

In sum, summary judgment is inappropriate on the second cause of action.

Breach of the Covenant of Good Faith and Fair Dealing (Sixth Cause of Action)

"Implied in every contract is a covenant of good faith and fair dealing, which is breached when a party to a contract acts in a manner that, although not expressly forbidden by any contractual provision, would deprive the other party of the right to receive the benefits under their agreement" (*Jaffe v Paramount Communications*, 222 AD2d 17, 22-23 [1st Dept 1996] [citation omitted]). A claim for breach of the covenant of good faith and fair dealing is redundant of a breach of contract claim where it relies upon the same facts (*Logan Advisors, LLC v Patriarch Partners, LLC*, 63 AD3d 440, 443 [1st Dept 2009]). Here, Reinhard essentially claims that the Cooperative Corporation failed to keep the building in good repair and failed to fix the smoke condition in her apartment, which is also the basis for her breach of contract claim. Therefore, the sixth cause of action is dismissed.

Breach of Fiduciary Duty (Fourth Cause of Action)

With respect to the fourth cause of action, which alleges a breach of fiduciary duty by the Cooperative Corporation, it is well established that "'a corporation does not owe fiduciary duties to its members or shareholders'" (*Peacock v Herald Sq. Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009], quoting *Hyman v New York Stock Exch., Inc.*, 46 AD3d 335, 337 [1st Dept 2007]).

Accordingly, the Cooperative Corporation is entitled to summary judgment dismissing the fourth cause of action.

Individual Officer Liability

As for Olick, there is no evidence that he engaged in any wrongful conduct, sufficient to impose liability upon him for the Cooperative Corporation's actions. Individual members of the board of directors of an apartment corporation may not be sued for damages for actions taken in their corporate capacity unless there is evidence that they engaged in independent tortious conduct (*Murtha v Yonkers Child Care Assn.*, 45 NY2d 913, 915 [1978]; *Hoppe v Board of Directors of 51-78 Owners Corp.*, 49 AD3d 477 [1st Dept 2008]; *Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 10 [1st Dept 2006]; *Konrad v 136 E. 64th St. Corp.*, 246 AD2d 324, 326 [1st Dept 1998]). Contrary to Reinhard's contention, Olick's October 2, 2007 letter did not make any misrepresentation of any facts to Reinhard. The letter merely stated that "[i]t does not appear that the odors of which you complain are of insufficient [sic] intensity to render your apartment uninhabitable. Moreover, the origin of the odors has not been ascertained and could be the result of alterations performed on your behalf" (Minkin Affirm. in Support, Exh. M). Furthermore, although Reinhard contends that Olick failed to disclose that the building manager smelled an odor "reminiscent of cigarette smoke," Olick stated that the odors of which Reinhard complained were faint. Plaintiff has also failed to establish that Olick engaged in tortious conduct by sitting on the board's legal committee. Olick only testified at his deposition that he did not recall whether he was ever told that Greenberg inspected Reinhard's apartment (Olick EBT, at 37).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 006) of defendant Arthur S. Olick for summary judgment is granted and the complaint is hereby severed and dismissed as against said defendant, and the Clerk is directed to enter judgment in favor of said defendant with costs and disbursements as taxed by the Clerk; and it is further

ORDERED that the motion (sequence number 007) of defendant Connaught Tower Corporation for summary judgment is granted to the extent of dismissing the fourth cause of action (breach of fiduciary duty) and the sixth cause of action (breach of the covenant of good faith and fair dealing) as against it, and is otherwise denied; and it is further

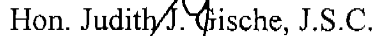
ORDERED that the cross motion of plaintiff Susan Reinhard for summary judgment is denied; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that this case is ready to be tried; plaintiff shall, within ten (10) days of this decision/order appearing on SCROLL (Supreme Court Records On-Line Line), serve a copy of this decision/ order on the Office of Trial Support so the case can be scheduled.

Dated: New York, New York
November 30, 2011

So Ordered:



Hon. Judith J. Gische, J.S.C.

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