Kurland v Agresti
2012 NY Slip Op 33447(U)
June 22, 2012
Supreme Court, New York County
Docket Number: 114095/2011
Judge: Anil C. Singh

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ANIL C. SINGH SUPREME COURT JUSTICE Justice

PART 61

SAMANTHA KURLAWY

-v-

MARC AGRESTI, et al.

INDEX NO. 114095/2011

MOTION DATE

MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). _____

Answering Affidavits — Exhibits _____ No(s). _____

Replying Affidavits _____ No(s). _____

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed order.

DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION / ORDER

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

Dated: 6/22/12

HON. ANIL C. SINGH, J.S.C.
SUPREME COURT JUSTICE

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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SAMANTHA KURLAND,

Plaintiff,

-against-

PAUL AGRESTI, THE BOARD OF DIRECTORS OF CAST IRON CORP, and CAST IRON CORP,

Defendants.

DECISION AND ORDER

Index No. 114095/11

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HON. ANIL C. SINGH, J.:

Defendants The Board of Directors of Cast Iron Corp. (the Board) and Cast Iron Corp. (Cast Iron) move, pursuant to CPLR 3211 (a) (5) and (7), for an order dismissing the complaint and the cross claims alleged by co-defendant Paul Agresti. Cast Iron is the owner and manager of the co-operative building (Building) located at 67 East 11th Street in Manhattan. The Board is the elected board of directors of the co-operative. Plaintiff and Agresti own the shares appurtenant to, respectively, apartment 302 and apartment 303 in the Building.

The complaint alleges three causes of action against Agresti and the following six causes of action against the Board and Cast Iron: (4) breach of contract; (5) breach of the statutory warranty of habitability (*see* Real Property Law § 235-b); (6) breach of fiduciary duty; (7) a request for injunctive relief; (8) a request for a declaratory judgment; and (9) a demand for attorney's fees, pursuant to Real Property Law (RPL) § 234. Similarly, Agresti's cross claims allege: (1) breach of contract; (2) breach of fiduciary duty; (3) breach of the warranty of habitability; (4) a

request for injunctive relief; (5) a request for a declaratory judgment; and (6) a demand for attorney's fees.

The situation giving rise to this action began in 2002, when the previous owner of the shares appurtenant to apartment 302, nonparty Douglas Gaccione, undertook a renovation of his apartment which included, insofar as is relevant here, the demolition of a spiral staircase leading to the apartment's loft, and its replacement with a new floor-to-ceiling staircase (the Staircase) that was affixed to, or immediately adjacent to, the demising wall between apartments 202 and 203. Agresti alleges that the renovation was overseen by the building superintendent, nonparty Miguel Garcia, who supplied workers for the project, and that, once the Staircase was completed, anyone walking on it would cause the demising wall to vibrate noisily. Agresti also alleges that the problem became worse after plaintiff moved in, in December 2005. The complaint alleges on information and belief that the installation of the Staircase, in 2002, was performed according to specifications approved by the Board, and that, upon completion, the Staircase was inspected and approved by a person employed for that purpose by the Board. The complaint alleges, in sum, that, immediately after plaintiff purchased her apartment, Agresti undertook a campaign of harassment against plaintiff, banging on her wall, playing his television set at extremely high volume, and shouting obscenities at her through her bedroom wall, and that, when she attempted to sell her apartment in 2009, and again in 2011, Agresti repeatedly sabotaged the attempt, for example, by

overturning the furniture on his terrace and covering the terrace with empty beer bottles, to the extent that the realtor whom plaintiff had engaged had to cancel a scheduled open house. Plaintiff also alleges that, on three occasions, she sought to have the problem posed by the Staircase remedied at her expense. In February 2011, plaintiff moved to Florida. Her apartment, on which she continues to pay maintenance, remains unsold.

As the moving defendants repeatedly emphasize, their motion to dismiss the complaint depends largely upon their contention that, because the Staircase, which they call "Kurland's Staircase," is not part of the common elements of the building, and is situated entirely within plaintiff's apartment, they are not responsible for the problems that have been caused by its construction. Indeed, that is their sole argument for dismissing the seventh and eighth causes of action. Paragraph 2 of the standard proprietary lease for apartments in the Building provides that:

> [t]he Lessor [Cast Iron] shall at its expense keep in good repair all of the building *including all of the apartments* ... 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.

Fraenkel Affirm., Exh. C, at 166 (emphasis added). Paragraph 18 of the proprietary lease provides, insofar as movants rely upon it, that:

> The Lessee shall be responsible for maintaining and repairing the improvements affixed to any roof area, terrace balcony or yard which is appurtenant to Lessee's apartment and for Lessee's exclusive or substantially exclusive use and shall be responsible for any damage caused to such areas, the building or any other apartment by such improvements... .

Id. at 174. While it is undisputed that the Staircase is for the exclusive use of plaintiff and her guests, it is equally undisputed that the Staircase is not "affixed to any roof area, terrace balcony or yard which is appurtenant to [plaintiff's] apartment."

The court notes that paragraph 18 also provides that "[t]he Lessee shall keep the interior of the apartment (including interior walls, floors and ceilings ...) in good repair ... ." However, consultants and engineers' reports attached to plaintiff's affidavit, and quoted in the complaint, indicate that the cause of the noise and vibration associated with the Staircase may well be located outside the inner perimeter of plaintiff's apartment, and Agresti alleges that an engineer who examined the demising wall in 2002 recommended that the wall be strengthened by, at least, doubling the number of internal studs. The phrase, "the interior of the apartment," in paragraph 18, hardly includes the design and construction of the demising walls that separate two apartments.

Accordingly, the moving defendants have not established that the Staircase is "expressly stated to be the responsibility of the lessee," in paragraph 18 of the proprietary lease, and that, therefore, it is not the responsibility of Cast Iron, pursuant to paragraph 2, to keep plaintiff's apartment and a staircase, without which the loft space would be unusable, "in good repair."

Movants' specific arguments are that the breach of contract and breach of fiduciary duty claims are time-barred, and that the breach of fiduciary duty, breach of warranty of habitability, injunction, and declaratory judgment claims fail to state a claim.

This case was commenced on December 15, 2011, with the filing of the summons and complaint. The exact date in December 2005 when plaintiff purchased her apartment is not in the record, but that is irrelevant to the disposition of the instant motion, because plaintiff alleges a continuing wrong on the part of the Board and Cast Iron, and accordingly, a new cause of action for breach of contract and breach of fiduciary duty arose each day that they failed to remedy the problems caused by the construction of the Staircase. *See Knobel v Shaw* , 90 AD3d 493 (1st Dept 2011); *Kaymakcian v Board of Mgrs. of Charles House Condominium*, 49 AD3d 407 (1st Dept 2008) (continuing failure to fulfill duty to repair constitutes a continuing wrong). Accordingly, neither the claim alleging breach of contract, which is governed by the six-year limitations period set forth in CPLR 213 (2), nor plaintiff's claim for breach of fiduciary duty, which is governed by a three-year limitations period, because the complaint primarily seeks money damages (*Knobel v Shaw*, 90 AD3d 493, *supra*), is untimely.

The moving defendants draw no legal distinction between themselves. However, plaintiff's proprietary lease constitutes a contract between her and Cast Iron. Plaintiff has not shown any contract between her and the Board. Accordingly, the breach of contract claim must be dismissed, as against the Board. While the moving defendants cite *Black v 22321 Owners Corp.* (31 Misc 3d 1204 [A], 2011 Slip Op 50487[U] [Sup Ct, NY County 2011]) for the proposition that the managing agent of a co-operative, does not owe a fiduciary duty to the individual tenants of the building, the

Appellate Division, First Department has held that "[o]wners of a fractional interest in a common entity are owed a fiduciary duty by its manager." *Yuko Ito v Suzuki*, 57 AD3d 205, 208 (1st Dept 2008). Accordingly, the claim alleging breach of fiduciary duty is viable both as against Cast Iron, the manager of the co-operative, and as against the Board, which assuredly has fiduciary duties to each tenant. *See e.g. Wirth v Chambers-Greenwich Tenants Corp.*, 87 AD3d 470 (1st Dept 2011).

Citing *Halkedis v Two E. End Ave. Apt. Corp.* (161 AD2d 281 [1st Dept 1990]), the moving defendants argue that, as a matter of law, plaintiff cannot prevail on her breach of the warranty of habitability claim, because she vacated her apartment in February 2011. In *Halkedis*, the plaintiff had never lived in the apartment. *See also Frisch v Bellmarc Mgt.*, 190 AD2d 383 (1st Dept 1993). However, a tenant who has resided in an apartment, but then moves out, may recover damages for breach of the warranty of habitability for the period that he or she was in residence. *Leventritt v 520 E. 86th St.*, 266 AD2d 45 (1st Dept 1999).

The court notes that most of the factual allegations that explicitly underpin plaintiff's causes of action for breach of contract, breach of fiduciary duty, and breach of the warranty of habitability, as well as the stated grounds for the injunction that she requests are that, despite having been repeatedly asked to do so, neither Cast Iron, nor the Board, required Agresti to comply with various house rules and portions of Agresti's proprietary lease that plaintiff alleges him to have repeatedly violated.

Plaintiff has not alleged, and there appear to be no grounds upon which she could do so, that she is a third-party beneficiary of Agresti's proprietary lease. As for the house rules, paragraph 13 of the proprietary lease provides that, while a violation of the house rules constitutes a default under the lease, "[t]he Lessor shall not be responsible to the Lessee for the nonobservance or violation of House Rules by any other lessee or person." Fraenkel Affirm., Exh C, at 169.

However, the complaint also alleges that, by failing to enforce the provisions of Agresti's proprietary lease and the house rules against Agresti, Cast Iron and the Board have denied plaintiff the quiet enjoyment of her apartment, in violation of paragraph 10 of her proprietary lease, and that, "[t]o the extent the perceived noise/vibration condition may be related ... to the [Staircase]," it is the responsibility of Cast Iron and the Board to cure that condition. Fraenkel Affirm., Exh. A, at 13. Accordingly, the complaint adequately alleges a basis for the fourth through the sixth, and the eighth, causes of action.

The moving defendants do not contend that the ninth cause of action (for attorney's fees) must be dismissed, if either the breach of contract claim; or that alleging breach of the warranty of habitability, survives. Neither of those claims is being dismissed. Accordingly, the ninth cause of action will not be dismissed.

However, plaintiff's request for injunctive relief (the seventh cause of action) is being dismissed, because it seeks to

compel Cast Iron and the Board to require Agresti to comply with his own proprietary lease, and with various house rules. Plaintiff has failed to allege any irremediable harm that is likely to befall her absent injunctive relief. Indeed, plaintiff's claims against Agresti, which include a claim for common-law nuisance, and her substantive claims against the moving defendants, seek to have her made whole for her inability to sell her apartment.

In their reply memorandum of law, moving defendants argue that the complaint is barred by the business judgment doctrine. The business judgment doctrine is inapplicable to a claim alleging the breach of a proprietary lease. *King v 870 Riverside Dr. Hous. Dev. Fund Corp.*, 74 AD3d 494 (1st Dept 2010); *Dinicu v Groff Studios Corp.*, 257 AD2d 218 (1st Dept 1999). It is, perforce, also inapplicable to a claim alleging a breach of the covenant of habitability, because that covenant is deemed a part of every lease for residential premises. RPL § 325-b. While the business judgment rule may ultimately provide a defense against plaintiff's cause of action alleging a breach of fiduciary duty, the moving defendants' blanket invocation of the rule, without any discussion of its applicability to specific allegations in the complaint, and its basis in a repetition that the Staircase is plaintiff's property and her responsibility, is not grounds for dismissing that cause of action at this time.

Agresti's cross claims allege a continuing failure, on the part of Cast Iron and the Board, to remedy the cause of the noisy vibration of his wall. Accordingly, his cross claims are no more

time-barred than the complaint is. The first three cross claims, to wit, breach of contract, breach of fiduciary duty, and breach of the statutory warranty of habitability, mirror the similar causes of action in the complaint in that they are predicated on an alleged failure to enforce against plaintiff her proprietary lease and various house rules. Like the similar causes of action in the complaint, the first three counterclaims are viable, based upon the factual allegations that the moving defendants failed to remedy the cause of the noise and vibration in Agresti's apartment.

Agresti's fourth cross claim seeks an injunction barring Cast Iron and the Board from approving "any sale or lease of [plaintiff's] apartment unless and until this lawsuit is fully adjudicated." Inasmuch as Cast Iron and the Board are, presumably, indifferent as to whether plaintiff sells her apartment, this claim is no more than an indirect attempt to force plaintiff to undertake whatever structural work may be required to abate the noise and vibration in Agresti's apartment. Even were this a proper use of the injunctive power, and it is not, Agresti has not alleged that plaintiff can lawfully undertake such work.

The fifth cross claim is for a judgment declaring who, as between plaintiff and the moving defendants, is obligated to remedy the cause of the noisy vibration of Agresti's wall. A declaratory judgment is available only where there is "`a real [...] dispute [...] between parties with an existing jural relationship.'" *Pearl Sec. LLC v Knight Equity Mkts. L.P.*, 34 AD3d 389, 390-391 (1st Dept 2006), quoting *Kyle v Kyle*, 111 AD2d 537, 538 (3d Dept 1985). Here,

Agresti is not a party to the dispute the resolution of which he seeks. Indeed, he expressly disclaims any interest in the outcome of that dispute. Accordingly, the fifth cross claim is being dismissed.

Accordingly, it is hereby

ORDERED that the motion to dismiss is granted to the extent that the claim for breach of contract in the complaint and the cross claim for breach of contract are dismissed, as against defendant The Board of Directors of Cast Iron Corp., and the seventh cause of action in the complaint and the fourth and fifth cross claims are dismissed, and the motion is otherwise denied.

Dated: 6/22/12

ENTER:

Anil C. Singh