

Durso v Hudson N. Mgt. LLC

2013 NY Slip Op 34123(U)

September 10, 2013

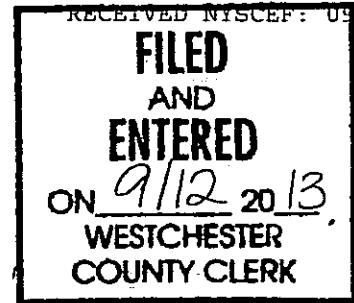
Supreme Court, Westchester County

Docket Number: 60125/2012

Judge: Sam D. Walker

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This opinion is uncorrected and not selected for official publication.



To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
WESTCHESTER COUNTY
PRESENT: HON. SAM D. WALKER, J.S.C.

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MICHAEL DURSO,

Plaintiff,

Index No. 60125/2012

-against-

DECISION AND ORDER
SEQ. 1

HUDSON NORTH MANAGEMENT LLC,
RONALD A. SHER, GLEN MANOR
APARTMENTS CORP., DENNIS RADESICH,
DOREEN BERTONE, DANIEL PROPPER,
ROBERT E. BIAGI and CHRISTINE CASSARA,
Defendants.

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The following papers were reviewed on Defendant Ronald Sher's motion seeking an order dismissing the Plaintiff's claims brought against Defendant Sher individually and Defendants Hudson North Management LLC, Glen Manor Apartments Corp and the Co Operative Board Members cross claims against Sher:

PAPERS

NUMBERED

Notice of Motion/Affirmation/Exhibit A- B	1-3
Memorandum in Support	4
Affidavit in Opposition	5
Reply Memorandum in Further Support	6
Affirmation in Opposition	7

Based on the foregoing papers the motion is DENIED.

This action was commenced in the Supreme Court of the State of New York,

Westchester County, by summons with notice filed on June 26, 2012 . The complaint was filed on November 5, 2012. In the complaint, the Plaintiff alleges Defendants are liable to him for commission of torts, breach of contract and breach of a lease against a cooperative corporation, its building manager, the board of the cooperative corporation, and the attorney for the cooperative corporation. The underlying events are multiple and repeated events of flooding of several apartment units and common areas of the apartment building, that Plaintiff alleges were occasioned by negligence and mismanagement, as well as affirmative, unlawful conduct in performing illegal work in violation of statutes and regulations without proper permits.

The Plaintiff, in his own personal capacity and derivatively sues the Defendant property manager, Hudson North Management LLC for negligence and intentional wrongdoing. In his individual capacity and derivatively on behalf of the cooperative corporation, Glen Manor Apartments Corp. of which Plaintiff is a shareholder, he sues Hudson North Management for negligence, breach of contract and unlawful conduct. In his own capacity Plaintiff sues the cooperative, for negligence and breach of contract and breach of lease and unlawful conduct. The Plaintiff also sues derivatively, on behalf of the cooperative, the individual board members (Dennis Radesich, Doreen Bertone, Daniel Propper Robert Biagi and Christine Cassara) for breach of fiduciary duty. Plaintiff's causes of action against the movant, Ronald A. Sher are for malpractice, error, omissions, negligence, breach of contract and violations of General Business Law §§ 349 and 350.

Defendant Sher states that the allegations by Plaintiff individually against Sher for negligence and violations of General Business Law §§ 349 and 350 fail to state causes of action as a matter of law. He states that Plaintiff's allegations do not arise from the requisite

"consumer oriented" acts, practices or advertisements as required under those statutes. The motion to dismiss also alleges that the allegations by Plaintiff derivatively on behalf of the cooperative for legal malpractice against Sher must also fail as a matter of law, arguing that Plaintiff lacks standing to interpose a derivative cause of action because the thrust of his complaint actually seeks vindication of his personal rights as an individual and not as a shareholder on behalf the cooperative.

DISCUSSION

Under CPLR 3211(a)(7), initially "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law...". *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268, 275 (1977). On a motion to dismiss for failure to state a cause of action, the court must view the challenged pleading in the light most favorable to the non-moving party, and determine whether the facts as alleged fit within any cognizable legal theory. This analysis applies equally to allegations contained in counterclaims and cross claims. *Brevtman v Olinville Realty, LLC*, 54 AD3d 703 (2nd Dept. 2008). See, also, *EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, (2005); *Leon v Martinez*, 84 NY2d 83 (1994). Thus, a motion to dismiss pursuant to CPLR 3211 (a) (7) will not succeed if, taking all facts alleged as true and according them every possible inference favorable to the nonmoving party, the complaint or counterclaims state in some recognizable form any cause of action known to law (see *Leon v Martinez*, supra; *Fisher v DiPietro*, 54 AD3d 892 (2nd Dept 2008); *Shava B. Pac., LLC v Wilson. Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, (2nd Dept. 2006).

The Plaintiff's first cause of action individually against "defendants jointly and severally" for "negligence, gross negligence, and willful/wanton/malicious acts" states a valid cause of action. The complaint contains significant factual allegations against Sher, that accuse him of intentional falsehood, deceit and acts of malfeasance, other than the legal malpractice cause of action. An individual may assert a negligence claim against an attorney in the absence of an attorney client relationship. Privity is not required to assert a claim based on fraud or intentional misconduct (see *Velazquez v. Decaudin*, 49 A.D.3d 712 (2nd Dept. 2008).

With respect to Plaintiff's the cause of action that alleges Defendant Sher violated General Business Law § 349, it is necessary to allege that the act or practice complained of was "consumer oriented", that the act or practice was misleading in a material way, and that the plaintiff suffered injury as a result of the deceptive act or practice. *Stutman v. Chemical Bank*, 95 N.Y.2d 24 (2000); *Ural v. Encompass Ins. Co. of America*, 97 A.D.3d 562 (2nd Dept. 2012). Similarly, to state a cause of action for a violation of General Business Law §350 Plaintiff must allege that an advertisement had an impact on "consumers at large", was deceptive or misleading in a material way, and resulted in injury. *Andre Strishak & Associates, P.C. v. Hewlett Packard Co.*, 300 A.D.2d 608 (2nd Dept. 2002). The Complaint alleges that Defendant Sher orchestrated a conspiracy to perform illegal work on several occasions, improperly applying for and obtaining City of New Rochelle Building Department permits that potentially placed the lives of cooperative residents and others, in peril. Defendant Sher is further alleged to have assisted in the publication of false documents, sent by mail to all the tenants and to prospective purchasers of shares of the cooperative, making this also part of the public record by virtue of GBL 352. Plaintiff argues that Sher is

responsible for these communications, and therefore he falsely advertised to the shareholders and to the co-op buying public that the apartments were safe and well-managed, when in fact, they were not. Viewing the challenged pleading in the light most favorable to Plaintiff, the causes of action alleging violation of GBL 349 and 350 are sufficiently plead.

With respect to Plaintiff's ability to assert a derivative claim on behalf of the cooperative, the law is clear. The Business Corporation Law expressly authorizes a shareholder derivative action. N.Y. Bus. Corp. Law § 626. The action is permitted to a holder of shares in the corporation "at the time of the transaction of which he complains." *Caprer v. Nussbaum* 36 A.D.3d 176 (2nd Dept. 2006) citing *Fe Bland v. Two Trees Mgt. Co.*, 66 N.Y.2d 556, 567 (1985). The complaint in this action adequately sets forth Plaintiff's efforts prior to bringing this action to make demand upon the board to bring about a resolution of the issues complained of and Sher's involvement in the refusal to reach an accommodation or settlement. N.Y. Bus. Corp. Law § 626(c)

Defendant Sher argues that the cross claims asserted by co-defendants, Hudson North, Glen Manor Corp. and the individual Board members are insufficiently plead. Sher's arguments premised upon case law applicable to third party complaints fail. Hudson's cross-claims are proper and properly alleged, as same are predicated upon the Plaintiff's complaint and Plaintiff's factual allegations against Sher. (See, *Phillips v. Trommel Construction*, 101 A.D.3d 1097 [2nd Dept. 2012]). Additionally, dismissal of Hudson's cross claims against Sher at this juncture would be premature, as the complaint establishes that Sher has particular knowledge and involvement with respect to the instant matter, which are exclusively within in his control. It is necessary to conduct and complete discovery to fully

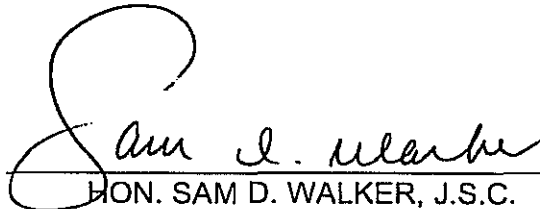
investigate the issues raised in the complaint and for the affected parties to properly defend the instant matter. *Gruenfeld v. City of New Rochelle* 72 A.D.3d 1025 (2nd Dept. 2010); *Aurora Loan Services, LLC v. LaMattina & Associates, Inc.* 59 A.D.3d 578 (2nd Dept. 2009).

On account of the foregoing, Defendant Sher's motion seeking to dismiss the complaint and defendant Hudson's cross claims is DENIED. The Plaintiff's application against the Hudson Defendants, is not considered herein as Plaintiff has failed to file a notice of motion or cross-motion requesting the relief of this Court, in violation of CPLR 2214. Furthermore, this Court is not persuaded by Plaintiff's argument that because Hudson North's insurance carrier assigned only one law firm to represent the corporation, the individual board members, as well as Hudson North, that such defense of the Board members and the Corporation constitutes an admission of liability. It is apparent that the entities have related interests and acted in furtherance of the same goals. There is no inherent conflict for them to be represented by the same firm. In the absence of a demonstrated conflict of interest, a party's selection of counsel should not be interfered with. *Schmidt v. Magnetic Head Corporation*, 97 A.D.2d 151(2nd Dept. 1983). Plaintiff's argument that there is an inherent conflict unless there is a judgment that both the board members and Hudson North are negligent, is similarly misplaced and unsupported.

All parties shall appear for a Preliminary Conference in Courtroom 800, on October 28, 2013 at 9:30 a.m.

The foregoing shall constitute the decision and order of the Court.

Dated: White Plains, New York
September 10, 2013


HON. SAM D. WALKER, J.S.C.