York Towers v Braha
2013 NY Slip Op 31220(U)
June 6, 2013
Sup Ct, New York County
Docket Number: 156709/12
Judge: Eileen A. Rakower
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. EILEEN A. RAKOWER Justice

PART 15

Index Number : 156709/2012
YORK TOWERS
vs
BRAHA, JANA
Sequence Number : 001
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ No(s). 1, 2, 3
Answering Affidavits — Exhibits _____ No(s). 4, 5, 6
Replying Affidavits _____ No(s). 7

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

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

Dated: 6/6/13

HON. EILEEN A. RAKOWER, J.S.C.

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: PART 15

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YORK TOWERS,

Plaintiff,

- against -

JANA BRAHA and JACK BRAHA

Defendants.

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Index No.
156709/12

DECISION and ORDER

Mot. Seq. 001

HON. EILEEN A. RAKOWER, J.S.C.

In this action, Plaintiff York Towers, Inc. ("Plaintiff") seeks a permanent injunction enjoining defendants Jana Braha and Jack Braha (collectively, "Defendants"), shareholders and the proprietary lessees of the Apartment 19B ("the Apartment") located in premises known as 501 East 79th Street, New York, NY ("the Building"), from denying Plaintiff access to the Apartment to undertake mold remediation, and for money damages to the building as a result of the delay in completing the work and for the cost of that work.

Plaintiff now moves for partial summary judgment on its first cause of action seeking a permanent injunction directing Defendants to grant Plaintiff, and its agents, employees and contractors access to the Apartment to perform complete mold abatement and such repairs and restoration as Plaintiff's professionals deem necessary and required. Plaintiff state that the issue of who bear the cost of such work will be determined later, either by trial or subsequent summary judgment motion following discovery.

In support of its motion, Plaintiff submits the affidavit of Phyllis Ferber, Plaintiff's President, which annexes, among other documents, copies of the Proprietary Lease, Acceptance of Assignment and Assumption of Lease dated October 6, 2005, and the Guaranty of Lease, dated October 6, 2005.

As set forth in Ferber's Affidavit, on or about October 1, 2004, Defendants performed renovations to the Apartment, which included the installation of exterior

light fixtures. In connection with the work, Defendants executed an alteration agreement, dated October 1, 2004, which provides:

> [Defendants] shall be responsible for any damage to any or other adverse effect upon the Apartment or the Building (including the structure, shell, systems, equipment, fixtures, and finishes of the Building) caused by or resulting from the Work, regardless of when such damage or adverse effect becomes apparent.

Plaintiff further alleges that "either Defendants or the prior tenant installed custom windows and terrace doors" and that "[t]hese custom fixtures are the responsibility of the current proprietary lessee who assumed such responsibility under the proprietary lease."

Plaintiff alleges that during August 2011, as a result of rains, "the Apartment suffered water leaks through improperly installed light fixtures, and through the non-standard windows and doors. Some of the water that entered the Building remained in gaps between the Building's exterior walls and the Apartment's interior walls."

Plaintiff retained the services of RRE Engineering, P.C., to assess the damage, and Robert Erickson, P.E., issued a report, dated September 16, 2011, indicating that water entered the Apartment through the exterior light fixtures and through the terrace windows and doors, and recommended certain repairs be done. On or about October 14, 2011, Plaintiff contracted with Titan Restoration to perform some of the repair work.

Plaintiff also engaged the services of Industrial Hygiene Consultants ("IHC"), an environmental consulting firm, to examine the Apartment and test it for possible mold contamination. A lab report from testing conducted by IHC showed the presence of stachybotrys and other fungal spores in the south bedroom of the Apartment. IHC recommended the Plaintiff engage a mold remediation company to assist with the repair and restoration of the Apartment.

Plaintiff thereafter engaged the services of Pinnacle Environmental Corporation ("Pinnacle"), which reported that all four bedrooms in the Apartment showed varying signs of water damage on the sheetrock, walls and wood floors. Pinnacle also noted "signs of suspect mold within the wall cavities, on interior side of sheetrock, and on the paper covering of the fiberglass pipe insulation." Pinnacle estimated the work would require 5 to 7 days to complete, but required complete vacatur of the Apartment.

Ferber alleges that after consideration, in the exercise of its business judgment, the Board of Directors agreed to follow the recommendations of its professionals, and accepted Pinnacle's proposal on October 14, 2011. At the same time, Plaintiff requested that Defendants provide access to the unit, and Defendants refused to provide access, requesting that the work be done in piecemeal. Plaintiff states that it again notified Defendants that Pinnacle was prepared to perform the mold remediation and requested that they vacate the Apartment on December 20, 2011 and January 10, 2012, but Defendants refuse to allow the remediation work to proceed.

Plaintiff states that on March 27, 2012, IHC returned to the Apartment to perform additional mold testing to confirm the existence of mold in the Apartment and to finalize the scope of remediation work required in the Apartment. IHC's report of this examination, dated March 29, 2012, confirms "the extensive mold growth" in the Apartment.

On April 9, 2012, Pinnacle provided an updated scope of work to perform the additional abatement recommended by IHC. A copy of Pinnacle's updated proposal was provided to Defendants. Defendants requested that Plaintiff permit them to perform the mold remediation in the Apartment by a contractor other than Pinnacle, Plaintiff agreed, a proposal from Maxons Restoration, Inc. was accepted by Plaintiff, but Defendants refused to proceed unless Plaintiff agreed to pay for all of the restoration and repair work. Plaintiff alleges that they continued to try to work with Defendants, but in the end, Defendants refused to perform all of the abatement work required by IHC and would only allow Plaintiff to enter the Apartment to perform the abatement in the riser columns. Plaintiff thereafter contacted IHC, which stated that contrary to Defendants' contentions, the mold growing under the floors and in the fan coils required remediation. Plaintiffs thereafter commenced this litigation.

Defendants oppose. In opposition, Defendants submit the affidavit of Jana Braha. Defendants contend that "there are material issues of act fact as to the cause of the mold, the scope of the mold infiltration, whether York or defendants are responsible for the presence of the mold, and whether York or defendants should pay for the mold removal, repairs and renovations." As for the cause of the mold, Defendants contend that the mold has been caused by water damage from Plaintiff's failure to maintain the exterior walls of the Building and maintain the pipes that carry water through the Building, and was not caused by Defendants, and therefore Defendants should not be responsible for the cost of the repairs.

Furthermore, Defendants submit the affidavit of Robert Leighton, a Certified Industrial Hygienist and Certified Safety Professional, which states that on September 10, 2012, he visited the Apartment and conducted a visual inspection of surfaces for

visible mold-like staining and/or water damage, and disagrees with the extent of the mold in the Apartment as characterized by Plaintiff.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. *(Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]). (*Edison Stone Corp. v. 42nd Street Development Corp.*,145 A.D.2d 249, 251-252 [1st Dept. 1989]).

Article II, Section 4 of Plaintiff's by-laws, empowers Plaintiff's Board of Directors to hold meetings in order to vote on Plaintiff business. Article V, Section 1, of the by-laws empowers the Board to adopt a proprietary lease.

Article I of the Proprietary Lease provides that:

> The Lessor shall keep in good repair the foundations, sidewalks, gardens, walls, (except interior walls of apartments), supports . . ., exterior of window frames and sash, . . . and all pipes for carrying water, gas or steam through the building ..., except those portions of any of the foregoing which it is the duty of the Lessee to maintain and keep in good repair as provided in paragraph Seventh of Article II hereof . . ., it being agreed that the Lessee shall give the Lessor prompt notice of any accident or defect . . .; and all such repairs required to be made by the Lessor shall be at the expense of the Lessor, unless the same shall have been rendered necessary by the act or neglect or carelessness of the Lessee . . .

Article II, paragraph Seventh, of the Proprietary Lease provides:

> Seventh: The Lessee shall keep the interior of the apartment in good repair, and the Lessor shall not be held answerable for any repairs in or to the same, and in case of the refusal or neglect of the Lessee, during ten days after notice in writing from the Lessor, to make such repairs or to restore the apartment to good condition, such repairs or restoration may be made by the Lessor, which shall have the right, by its officers or authorized agents, to enter the apartment for that purpose, and to collect the cost of such repairs or restoration as

additional rent for the apartment . . .

Article II, paragraph Twelfth, of the Proprietary Lease provides:

> Twelfth: The Lessor and its agents shall be permitted to visit and examine the apartment at any reasonable hour of the day, and the workmen may enter at any time, when authorized by the Lessor or the Lessor's agents, to make or facilitate repairs in any part of the building and to remove such portion of the walls, floors and ceilings of the apartment as may be required for the purpose of making such repairs, but the Lessor shall thereafter restore the apartment to its proper and usual condition at Lessor's expenses if such repairs are a part of the regular operation and maintenance of the building, or at Lessee's expenses if caused by the act or omission of Lessee...

Furthermore, it is well settled that the decisions of co-op boards are protected by the business judgment rule. (see *Levandusky v. One Fifth Avenue Apartment Corp.*, 75 NY2d 530[1990]). "T]he business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith." (*40 West 67th Street Corp. v. Pullman*, 100 NY2d 147, 153 [2003]). The board is presumed to act in good faith, and plaintiff bears the burden of showing a that the co-op board breached its fiduciary duty. (see *Jones v. Surrey Co-op Apartments, Inc.*, 263 AD2d 33[1st Dept. 1999]). Without such a showing, judicial inquiry into the actions of the co-op board is prohibited, even though the results may show that what the co-op did was "unwise or inexpedient." (*Id.* at 36). *See Konrad v. 136 East 64th Street Corp.*, 254 A.D. 2d 110, 110 [1st Dept 1998] ("Defendants' decisions concerning the manner and extent of repairs and renovations to the building were within the scope of their authority under the by-laws and proprietary lease of the cooperative, and were therefore shielded from judicial review by the business judgment rule, plaintiff having failed to substantiate her claims of fraudulent misrepresentations and other breaches of fiduciary duties.")

Here,Plaintiff's by-laws and the Proprietary Lease empower Plaintiff to have access to Plaintiff's apartment to make such repairs as it deems necessary. As demonstrated in Ferber's affidavit and the accompanying exhibits, after review of reports of IHC and Pinnacle, Plaintiff's board of directors determined that it is necessary to conduct full mold remediation in the Apartment. Defendants, in violation of their lease, have failed to allow Plaintiff to make the necessary repairs, and have presented no triable issues as to Plaintiff's right to access the Apartment and make the repairs. As such, Plaintiff has demonstrated prima facie entitlement of

summary judgment on its first cause of action to the extent that Plaintiff is entitled to an injunction barring Defendants from denying access to the Apartment or otherwise interfering with the mold remediation and restoration work that Plaintiff's professionals deem necessary and required.

Wherefore, it is hereby,

ORDERED that plaintiff York Towers, Inc.'s motion for partial summary judgment on its first cause of action is granted; and it is further

ORDERED that defendants Jana Braha and Jack Braha are directed to grant Plaintiff, its agents, employees and contractors, access to Apartment 19B to perform complete mold abatement and such repairs and restorations of the Apartment as Plaintiff deems reasonable and necessary after providing notice in accordance with the terms of the Proprietary Lease.

This constitutes the decision and order of the court. All other relief requested is denied.

Dated: 6/6/13

EILEEN A. RAKOWER, J.S.C.