SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

----------x

HOWARD M. FAVER and DOREEN D. HAN-FAVER,

Plaintiffs,

Index No. 150368/12

-against-

DECISION/ORDER

12 EAST 97th STREET OWNERS, INC.,

Defendant.

----------x

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Affirmations in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs Howard M. Faver and Doreen D. Han-Faver commenced the instant action against defendant 12 East 97th Street Owners, Inc. ("12 East") seeking to recover damages arising out of defendant's alleged failure to provide an adequate supply of cold and hot water to their apartment. Plaintiffs now move pursuant to Civil Practice Law and Rules ("CPLR") § 3025(b) for leave to amend their complaint to (1) add the Board of Directors of 12 East 97th Street Owners, Inc. (the "Board") as a defendant in the action; (2) assert three new causes of action; and (3) replead plaintiffs' previously dismissed cause of action for attorney's fees and costs. For the reasons set forth below, plaintiffs' motion is granted in part and denied in part.

The relevant facts are as follows. The instant action arises out of a dispute between

plaintiffs, the shareholders and proprietary lessees of Apartment 8D (the "subject apartment") in the cooperative building located at 12 East 97th Street, New York, New York (the "Building"), and defendant 12 East, the fee owner of the Building and the lessor under the proprietary leases in the Building, including plaintiffs' lease (the "Lease"). Specifically, plaintiffs allege that they purchased the subject apartment in April 2005 and that since that time, they have experienced persistent problems with the lack of hot and cold water and insufficient hot water pressure in the subject apartment. Plaintiffs further allege that from 2005 through 2009, they reported such problems to the Building's superintendent and staff but that they were unable to correct the problem. Rather, plaintiffs allege that the Building's staff blamed the problem on faulty shower equipment in the subject apartment, which was installed by plaintiffs when they renovated the subject apartment after it was purchased.

In January 2010, 12 East retained a plumbing contractor to investigate the problem and after conducting a thorough review of the Building's hot water system, he concluded "that a systematic or local pressure drop is causing the problem" and recommended certain procedures to correct such problem. However, plaintiffs allege that 12 East failed to implement the plumbing contractor's recommendations and that they continued to experience and report to the Building's staff and managing agent problems with the hot water throughout 2010 and 2011. Thus, plaintiffs retained their own engineer who determined that certain problems existed with the Building's hot water system. Plaintiffs allege that 12 East continued to deny that there was any problem and at the March 2011 annual meeting of the Building's shareholders, the shareholders were advised that plaintiffs were the only residents who had complained of such problems. However, plaintiffs allege that in March and April 2011, they communicated with

other Building residents who informed them that they also experienced similar problems with hot water in their apartments.

Plaintiffs allege that in early 2011, 12 East set out to terminate their Lease, sell the subject apartment and evict them from the Building, based on fabricated allegations that plaintiffs had engaged in "objectionable conduct" due to their complaints about the hot water issues and their request for documentation from the Building. Specifically, 12 East sent plaintiffs a letter in May 2011 stating that if the plaintiffs continued to engage in such "objectionable conduct," the Board intended to call a Special Meeting to determine whether plaintiffs' conduct made their occupancy in the Building "undesirable" and if there was an affirmative two-thirds vote of the Board, plaintiffs' Lease would be terminated. The letter stated that plaintiffs' activities, which included "repeated redundant requests to examine the books and records of the Corporation" and "unsubstantiated requests for investigations and repairs to the Building's plumbing system" are considered harassing and that such activities "are designed to impede the operation of the Co-op and - as such - is deemed...to constitute objectionable conduct."

Based on the above allegations, plaintiffs commenced the instant action in February 2012 against 12 East seeking (1) an order directing defendant to turn over all of its books and records pertinent to the problems plaintiffs were experiencing with the Building's hot water system; (2) damages pursuant to Real Property Law § 235-b based on a breach of the warranty of habitability; and (3) attorney's fees. In or around June 2012, 12 East installed a booster pump to increase the water pressure with respect to the delivery of hot water throughout the entire Building. However, plaintiffs allege that residual problems with the supply of hot water in the subject apartment persisted through the fall of 2013.

In or around April 2012, 12 East filed a pre-answer motion to dismiss the complaint's first cause of action for the injunction in its entirety, the complaint's third causes of action for attorney's fees in its entirety and any portion of the second cause of action for breach of the warranty of habitability to the extent said claim is time-barred by the applicable six year statute of limitations. In a decision dated September 18, 2012, this court dismissed the first and third causes of action in their entirety and with respect to the second cause of action, dismissed any claims that may have accrued six years prior to the commencement of the action in February 2012, based on statute of limitations grounds. In October 2013, 12 East served its answer and thereafter, the parties exchanged discovery and conducted party depositions. At the most recent compliance conference in October 2014, party discovery was completed and the court gave plaintiffs thirty days to file non-party subpoenas and extended their time to file the Note of Issue until the end of January 2015.

Plaintiffs now move for an Order granting them leave to amend their complaint to add the Board as a party defendant, assert three new causes of action and replead the previously dismissed cause of action for attorney's fees and costs.

Pursuant to CPLR 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit. On a motion for leave to amend, [the party] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or devoid of merit." *MBIA Ins. Corp. v. Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted). Further, "[m]ere lateness is not a barrier to the amendment. It must be lateness coupled with significant prejudice

to the other side, the very elements of the laches doctrine." *Edenwald Contracting Co. v. City of New York*, 60 N.Y.2d 957, 959 (1983).

As an initial matter, that portion of plaintiffs' motion which seeks to amend their complaint to add the Board as a party defendant in the instant action and assert a cause of action against the Board for breach of fiduciary duty is denied as such proposed amendments are patently devoid of merit. Plaintiff seeks to add the Board as a party defendant only to assert one cause of action against it for breach of fiduciary duty based on the Board's alleged unlawful threat to "Pullmanize" plaintiffs, or more specifically, to terminate their Lease and evict them from the subject apartment based on their complaints about the plumbing issues in the Building and requests to be provided with access to certain information and documents. To state a claim for breach of fiduciary duty, a plaintiff must allege (1) the existence of a fiduciary relationship; (2) misconduct by the defendant; and (3) damages that were directly caused by the defendant's misconduct. *See Kurtzman v. Bergstol*, 40 A.D.3d 588 (2d Dept 2007). Here, while plaintiffs plead the existence of a fiduciary relationship, plaintiffs have not pled misconduct by the defendant or damages that were directly caused by the defendant's misconduct. Plaintiffs allege that the misconduct by the Board consists of the letter sent by the Board warning them that actions to terminate their Lease might be taken at some future date based on plaintiffs' "objectionable conduct" and that their damages are that they are living in fear that their Lease will be terminated. However, such allegations are insufficient to state a claim for breach of fiduciary duty as such letter does not constitute "misconduct" and, in any event, plaintiffs' fear that the Lease may be terminated at some point in the future does not constitute damages. Indeed, it is undisputed that no actions to terminate plaintiffs' Lease have yet been taken by

defendant so any claim for breach of fiduciary duty based on those grounds is premature.

Additionally, that portion of plaintiffs' motion which seeks to amend their complaint to add a cause of action against 12 East for a declaratory judgment is denied as it is patently devoid of merit. Specifically, plaintiffs seek to add a claim against 12 East for a declaration that plaintiffs did not engage in any "objectionable conduct" warranting the termination of their Lease and the sale of the subject apartment. It is well-settled that "[t]he Supreme Court 'may render a declaratory judgment having the effect of a final judgment as to the rights and other legal relations of the parties to a justiciable controversy whether or not further relief is or could be claimed." *Matter of Enlarged City School District of Middletown v. City of Middletown*, 96 A.D.3d 840, 841 (2d Dept 2012)(*citing* CPLR § 3001). "In order to be amenable to declaratory relief, '[t]he dispute must be real, definite, substantial, and sufficiently matured so as to be ripe for judicial determination.'" *Matter of Enlarged City School District of Middletown*, 96 A.D.3d at 841 (*citing Waterways Dev. Corp. v. Lavalle*, 28 A.D.3d 539, 540 (2d Dept 2006)). "The request for a declaratory judgment is premature 'if the future event is beyond the control of the parties and may never occur.'" *Matter of Enlarged City School District of Middletown*, 96 A.D.3d at 841 (*citing New York Pub. Interest Research Group v. Carey*, 42 N.Y.2d 527, 531 (1977)). Indeed, "[t]he threat of a hypothetical, contingent, or remote prejudice to a party does not represent a justiciable controversy." *Matter of Enlarged City School District of Middletown*, 96 A.D.3d at 842.

Here, plaintiffs' motion for leave to amend their complaint to add a claim against 12 East for a declaratory judgment that they did not engage in any "objectionable conduct" warranting the termination of their Lease and the sale of the subject apartment is denied as said claim is

premature. It is undisputed that 12 East has not taken any action to terminate plaintiffs' Lease or sell the subject apartment. In fact, 12 East has stated that it has no "present intention" of going forward with its threat to terminate the Lease. The fact that 12 East may seek to terminate the Lease and evict the plaintiffs at some point in the future is insufficient to sustain a claim for declaratory relief as such threat is merely hypothetical and remote and thus, does not present a justiciable controversy at this time.

That portion of plaintiffs' motion which seeks to amend their complaint to replead their previously dismissed cause of action seeking attorney's fees and costs is denied as such claim is patently devoid of merit. Plaintiffs seek to replead their claim for attorney's fees and costs based on the express attorney's fees provision in the Lease. However, "it is axiomatic that New York does not recognize a request for attorneys fees as an independent, separately-styled cause of action." *Parcside Equity, LLC v. Freedman*, 2009 WL 9159789 (Sup. Ct. N.Y. County 2009); *see also Pier 59 Studios L.P. v. Chelsea Piers L.P.*, 27 A.D.3d 217 (1st Dept 2006)("Plaintiff may not maintain a separate cause of action for attorneys' fees, which are only recoverable as an element of contract damages if a breach of the sublease is proven.") Indeed, "any award of damages in the form of attorneys fees and costs would be, at best, an element of a substantive claim, and part of any relief requested in the 'wherefore clause.'" *Parcside Equity, LLC*, 2009 WL 9159789. Thus, to the extent plaintiffs seek attorneys fees and costs based on its cause of action for breach of the Lease, they may seek said damages as part of their substantive claim or request said damages in the wherefore clause of the amended complaint.

However, that portion of plaintiffs' motion which seeks to amend their complaint to add a cause of action against 12 East for breach of the Lease is granted as such claim is not palpably

insufficient or patently devoid of merit. To sufficiently state a claim for breach of a proprietary lease, plaintiff must allege (1) the existence of a lease or agreement; (2) performance by plaintiff; (3) breach of the lease or agreement by the defendant; and (4) damages. *See Harris v. Seward Park Housing Corp.*, 79 A.D.3d 425 (1st Dept 2010). Here, the proposed amended complaint alleges the existence of the Lease, that plaintiffs performed all of their obligations under the Lease, including paying all monthly maintenance charges to 12 East, that 12 East breached the Lease by failing to provide an adequate supply of hot and cold water to the subject apartment and damages based on the alleged breach. Further, the proposed amended complaint sets forth the provisions of the Lease which state that 12 East is obligated "at its expense [to] keep in good repair all of the building, including all of the apartments" and that 12 East "shall maintain and manage the building as a first-class apartment building...and shall provide the apartment with a proper and sufficient supply of hot and cold water."

Defendant's assertion that plaintiffs should not be permitted to amend their complaint to add a cause of action for breach of the Lease on the ground that plaintiffs have failed to establish the merits of said claim is without merit. It is well-settled that a plaintiff seeking to amend his complaint need not establish the merits of the proposed amendment but must only establish that the amendment is not entirely devoid of merit. *See MBIA Ins. Corp.*, 74 A.D.3d at 499-500.

Further, defendant's assertion that plaintiffs should not be permitted to amend their complaint to add a cause of action for breach of the Lease on the ground that said claim is duplicative of plaintiffs' cause of action alleging breach of the warranty of habitability pursuant to RPL § 235-b is without merit. Although both causes of action are based on the same facts, plaintiffs may seek different damages under a cause of action for breach of the Lease than they

may seek for a violation of the RPL and thus, it is not duplicative.

Finally, defendant's assertion that plaintiffs should not be permitted to amend their complaint to add a cause of action for breach of the Lease on the ground that it would be prejudiced by such amendment is also without merit. Specifically, defendant asserts that it would be prejudiced based on plaintiffs' delay in filing the instant motion to amend. However, mere delay, without more, is insufficient to establish prejudice. *See Kocourek v. Booz Allen Hamilton, Inc.*, 85 A.D.3d 502 (1st Dept 2011). Indeed, "[p]rejudice requires 'some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position.'" *Id.* at 504 (*citing Cherebin v. Empress Ambulance Serv., Inc.*, 43 A.D.3d 364, 365 (1st Dept 2007)). Here, defendant has not established that it would be hindered in the preparation of its case or that it would be prevented from taking some measure in support of his position if this court were to permit plaintiffs to amend their complaint to add a claim against defendant for breach of the Lease. The new cause of action is based on similar, if not identical, facts to plaintiffs' claim for breach of the warranty of habitability and thus, there is no element of surprise resulting from allowing the amendment of the complaint.

Accordingly, it is hereby

ORDERED that plaintiffs are granted leave to serve an amended complaint upon defendant within twenty days in accordance with this decision. This constitutes the decision and order of the court.

Dated: 12/19/14

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.