Red Apple Child Dev. Ctr. v Board of Mgrs. of Honto 88 Condominiums
2015 NY Slip Op 31250(U)
July 17, 2015
Supreme Court, New York County
Docket Number: 160185/14
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 12

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RED APPLE CHILD DEVELOPMENT CENTER,

Plaintiff,

-against-

BOARD OF MANAGERS OF HONTO 88 CONDOMINIUMS, CANDY XIA, NEW GOLDEN AGE REALTY, and "JOHN DOE" being a fictitious name for an individual or entity responsible for the repair and maintenance of the heating and cooling systems situated in the general common elements of a building located at 25 Market Street, New York, New York,

Defendants.

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Index No. 160185/14

Motion seq. no. 001

DECISION AND ORDER

BARBARA JAFFE, J.:

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For defendants:
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By notice of motion, defendants move pursuant to CPLR 3211(a)(1) and (7) for an order dismissing the complaint against them. Plaintiff opposes.

I. PERTINENT FACTS

In January 1998, plaintiff acquired 22 units in the basement and ground floor of a Manhattan condominium, managed by defendants New Golden Age Realty and Candy Xia. (NYSCEF 9, 33). Since 1998, plaintiff operates a child-care facility and kindergarten school in these units. (NYSCEF 1, 7).

Pursuant to the condominium's declaration and bylaws, the Board is responsible for "[a]ll

maintenance, repairs and replacements to the General Common Elements as defined in the Declaration . . ." and for keeping the common elements "in first-class condition, order and repair." General common elements include "the steam room, cooling tower room, water meter room, [and] electric room" and "installations outside the Units for services such as steam, gas, power, light," as well as "all apparatus and installations existing for common use, such as the heating/cooling systems." (NYSCEF 37).

The bylaws obligate plaintiff to "equip [its] Units with [their] own air conditioning units with a heating coil to provide heat as required," and to equip its units, at its sole cost and expense, "with condenser water form [sic] a central system for future connection to air-conditioning equipment." (*Id.*).

On August 27, 2008, New York City Department of Buildings served the subject building with a notice of violation for failing to have the building's cooling tower serviced since 2005. (NYSCEF 30).

By decision and order dated January 22, 2012, issued in a separate action, a judgment of foreclosure was entered against plaintiff based on unpaid condominium common charges, late fees, and other assessments; a referee was appointed to determine the amount of damages. (*Bd. of Mgrs. of Honto 88 Condominium v Red Apple Child Dev. Ctr.*, Sup Ct, NY Country, Jan. 22, 2012, James, J., index No. 603197/08).

In the meantime, commencing in June 2009, and continuing through April 2014, the building's cooling system failed to provide sufficient cooled water to the air conditioners in plaintiff's units. And from December 2009, and continuing to April 2014, water and steam leaked from steam pipes from the building's heating system and released steam, water and acrid

particles into plaintiff's units. The particles caused damage to the walls, ceiling, and floors of the units, leading to the development of mold. Between December 2009 and February 2014, plaintiff notified defendants of these conditions. (NYSCEF 1, 7).

On February 17, 2014, the New York City Fire Department responded to a report of a steam and water leak at the subject building, observing that steam was "causing damage to [the] classroom wall," and notified the building's maintenance staff. (NYSCEF 24). On April 25, 2014, New York City Department of Buildings served the subject building with another notice of violation, citing various irregularities with the building's condensate cooling tank. (NYSCEF 31).

In July 2014, plaintiff sent written notice to defendants requesting the inspection and repair of the cooling system. (*Id.*). Sometime thereafter, defendants repaired the leaking steam pipes. (NYSCEF 18).

On October 10, 2014, plaintiff commenced this action alleging negligence, breach of contract, and private nuisance. It also seeks a declaration that defendants are required to maintain and repair the cooling system pursuant to the condominium bylaws, and an injunction directing them to do so. (NYSCEF 1).

Defendants filed the instant motion in lieu of an answer. (NYSCEF 3). In opposition, plaintiff submits the affidavits of three experts who inspected the heating and cooling systems, once in July 2014, and twice in February 2015. (NYSCEF 19-21).

II. DEFENDANTS' MOTION TO DISMISS

A. Applicable law

1. Motion to dismiss standard

Pursuant to CPLR 3211(a)(7), a party may move at any time for an order dismissing a cause of action asserted against it on the ground that the pleading fails to state a cause of action. In deciding the motion, the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-moving party the benefit of every possible favorable inference. (*Nonnon v City of New York*, 9 NY3d 825 [2007]; *Leon v Martinez*, 84 NY2d 83, 87 [1994]). The court need only determine whether the alleged facts fit within any cognizable legal theory. (*Id.*; *Siegmund Strauss, Inc. v E. 149th Realty Corp.*, 104 AD3d 401 [1st Dept 2013]). The standard is whether the pleading states a cause of action, not whether the proponent has a cause of action. (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *Sokol v Leader*, 74 AD3d 1180, 1180–1181 [2d Dept 2010]).

On a motion to dismiss based on documentary evidence (CPLR 3211[a][1]), a dismissal is appropriate only if the documentary evidence submitted conclusively establishes, as a matter of law, a viable defense to the asserted claims. (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). To qualify as documentary evidence, the evidence must be "unambiguous, authentic, and undeniable" (*Attias v Costiera*, 120 AD3d 1281, 1292 [2d Dept 2014]), and may include documents reflecting out-of-court transactions, such as contracts. (*Fontanetta v John Doe 1*, 73 AD3d 78, 84 [2d Dept 2010]). However, affidavits are not documentary evidence within the meaning of CPLR 3211(a)(1) (*Clarke v Laidlaw Transit, Inc.*, 125 AD3d 920, 921 [2d Dept

2015]), although the plaintiff may rely on affidavits to remedy defects in the complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]).

2. Business judgment rule

The business judgment rule "prohibits judicial inquiry into the actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purpose," and applies to the actions of condominium boards of managers. (*Matter of Levandusky v One 5th Ave. Apartment Corp.*, 75 NY2d 530, 538, 546 [1990]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 48 [1st Dept 2012]).

Absent bad faith, self-dealing, or other wilful misconduct, the business judgment rule shields the imperfect decisions of the board of managers. (*Jones v Surrey Cooperative Apts, Inc.*, 263 AD2d 33, 36 [1st Dept 1999]; *Bd. of Mgrs. of Fairways at N. Hills Condominium v Fairway at N. Hills*, 193 AD2d 322, 326 [2d Dept 1993]). Liability stemming from a breach of contract is not so shielded. (*Anderson v Nottingham Vil. Homeowner's Assn., Inc.*, 37 AD3d 1195, 1197 [4th Dept 2007]; *Dinicu v Groff Studios Corp.*, 257 AD2d 218, 222-223 [1st Dept 1999]).

B. Negligence (first cause of action)

1. Contentions

Defendants assert that plaintiff's negligence claim should be dismissed because it fails to include any allegation that defendants breached their duty of care. They claim that the Board owes a fiduciary duty to the unit owners to perform their duties in good faith and with reasonable care, and that the duty was satisfied by its routine servicing of the air conditioning and heating units, which they support with commercial invoices of the companies they hired during the period in question. Moreover, defendants assert that the court is precluded under the business

judgment rule from examining their actions, and that here, it properly acted within the scope of its authority in hiring New Golden Age and Xia to manage operations of the condominium, who in turn hired service companies to provide regular maintenance to the cooling and heating systems. (NYSCEF 4).

By affidavit, Xia claims that the service companies confirmed that the air conditioning and heating systems were in working order, that claims for repair or maintenance were immediately addressed, and no other unit owner in the condominium has complained about its water or water pressure. (NYSCEF 5).

Defendants claim that plaintiff's decision to convert the 22 commercial units into an illegal school and child-care facility proximately caused its own injuries, as it built out the premises too close to the building's heating system, especially considering the regular maintenance and repairs. (NYSCEF 4).

In response, plaintiff claims that defendants' annexed documents evidencing regular repairs and maintenance are unsworn and of dubious authenticity, as its expert attests that the building's cooling tower has been in a state of disrepair from 2012 to 2014 despite records showing it had been inspected in 2013 and 2014. In any event, plaintiff notes that the documents contain no evidence that the heating system's steam piping was regularly inspected, maintained, and repaired, which it claims caused the steam and water leak and resulting damage to their units, or that the heating and cooling systems were kept in "first-class" condition. (NYSCEF 18). Plaintiff's expert opines that, based on his observation in February 2014, the steam piping had not been inspected, maintained, or repaired for at least several years, leading to severe corrosion and deterioration. (NYSCEF 19).

Plaintiff claims that after notifying Xia in October or November 2013 of the leaking steam pipes, defendants took three months to take action, and that upon information and belief, similar complaints were filed with defendants about the heating system over the years. It disputes that defendants ever ordered inspections or repairs of the heating system. (NYSCEF 18).

According to plaintiff, as a condition of their purchase of the 22 units, the condominium sponsor was to undertake the necessary construction to covert the units into a day care facility, obtain a temporary certificate of occupancy, and install the air conditioning system. Thus, the conversion was authorized at or around the time of the purchase. (*Id.*).

Defendants reiterate their contentions and note that plaintiff's reliance on fact witnesses in its opposition papers does not establish the elements of its claim, and that the naming of "John Doe" as a party constitutes an admission that defendants do not perform any actual repairs themselves, and to the extent the independent contractors they hired were negligent, defendants are not liable. Even assuming the truth of plaintiff's allegations, defendants assert that its negligence claim is precluded as a matter of law under the business judgment rule, absent any allegation that defendants acted outside the scope of their authority or in bad faith. (NYSCEF 35).

2. Analysis

To state a cause of action for negligence, a plaintiff must establish the existence of a duty on defendant's part, breach of that duty, and damages. (*Greenberg, Trager & Herbst, LLP v HSBC Bank USA*, 17 NY3d 565, 576 [2011]).

Defendants concede that the condominium bylaws impose on them a general duty to inspect, maintain, and repair the common elements of the condominium, including the air

conditioning and heating systems. They offer some documentation from the period of 2008 to 2014 that purportedly evidences that the air conditioning and heating systems were regularly maintained during that time, and argue that the business judgment rule shields their decisions to hire the service companies therein referenced. While the documents on which defendants rely evidence regular inspection and maintenance of the heating system from September 2008 to October 2011, documents covering the period after 2011 either do not indicate that the heating system was serviced or are unclear.

To the extent defendants offer documentary evidence pursuant to CPLR 3211(a)(1) to conclusively establish that they did not breach their duty owed to plaintiff, the documents fall short, as plaintiff alleges that the heating system was in a state of disrepair and causing damage to their units from December 2009 until April 2014, and the documents fail to account for a gap in over two years. Consequently, the documentary evidence offered by defendants does not conclusively dispose of plaintiff's claim. (*Seé Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 756-757 [2d Dept 2009] [provisions of lease agreement did not resolve all factual issues as to whether defendant failed to repair defective conditions of premises]). In any event, where, as here, the authenticity of the documents is disputed, dismissal pursuant to CPLR 3211(a)(1) is inappropriate. (*See Parekh v Cain*, 96 AD3d 812, 815 [2d Dept 2012] [dismissal pursuant to CPLR 3211(a)(1) unwarranted where "there are disputed issues relating to (the document's) authenticity]; *Sobel v Ansanelli*, 98 AD3d 1020, 1022 [2d Dept 2012] [submitted invoices of charged legal fees were of "disputed authenticity" and thus not considered documentary evidence within the meaning of CPLR 3211(a)(1)]).

However, absent any allegation by plaintiff that the Board acted in bad faith or engaged in

self-dealing, the Board's actions are shielded from review by the business judgment rule. (*See Domingo v C True Bldg. Corp.*, 246 AD2d 337, 337 [1st Dept 1998] [plaintiff did not allege facts showing defendant board of managers had acted in bad faith to preclude application of business judgment rule]). Accordingly, the Board's decisions regarding the extent and manner of repairs and maintenance, if unwise, are protected by the business judgment rule, and plaintiff fails to state a cause of action for negligence as to the Board. (*See Berenger v 261 W. LLC*, 93 AD3d 175, 184-185 [1st Dept 2012] [decisions regarding repair and remediation of building's cooling tower protected by business judgment rule]; *see also Jacobs v Grant*, 127 AD3d 924, 925 [2d Dept 2015] [defendants protected by business judgment rule in face of allegations of negligence, conversion, and unjust enrichment]; *Grontas v Kent N. Assoc. LLC,* 2012 NY Slip Op 32478[U] *3-4, 11 [Sup Ct, NY County 2012] [claim of negligence based on board of managers' failure to adequately repair water leaks precluded under business judgment rule]).

And, as it is undisputed that New Golden Age and Xia were agents of the Board and plaintiff does not allege that they individually acted in a negligent manner or engaged in other wrongdoing, they cannot be held liable to plaintiff for nonfeasance. (*See Petlon v 77 Park Ave. Condominium*, 38 AD3d 1, 11 [1st Dept 2006], *overruled on other grounds* 99 AD3d 43 [1st Dept 2012] [managing agent could not be held liable for failing to make handicap accommodations in condominium as "plaintiffs have not pleaded or shown circumstances that would demonstrate either that the managing agent owed (plaintiff) a duty or that it was affirmatively negligent"]). In any event, New Golden Age and Xia, as agents of the Board, are also protected under the business judgment rule. (*See DeGall v 201 W. 21st St. Tenants Corp.*, 251 AD2d 238, 238-239 [1st Dept 1998] [upholding dismissal of action against cooperative and its managing agent as their

actions were protected by business judgment rule]).

To the extent defendants allege that plaintiff's actions were the proximate cause of its own injuries, such a defense is not proper on a CPLR 3211 motion. (CPLR 3211[a][5]; CPLR 3018[b]; *see generally* Siegel, NY Prac § 263 at 445 [fraud and comparative negligence "almost invariably involve issues of fact that make them inappropriate for the matter-of-law treatment that CPLR 3211(a) contemplates"]).

C. Breach of contract (second cause of action)

Defendants assert that the condominium's bylaws provide that plaintiff is responsible for providing its own air conditioning to its units, and contrary to plaintiff's contention, the air conditioning and heating system are in working order in satisfaction of their contractual obligations. (NYSCEF 4).

Plaintiff contends that the bylaws require defendants to maintain the condominium's common elements in "first class-condition, order and repair" and that the heating system and cooling systems are part of the common elements. It thus alleges that defendants breached the bylaws by failing to maintain these systems properly, and by failing to provide sufficient water pressure to the cooling system, or air conditioning units. (NYSCEF 18)

The elements of a cause of action for breach of contract are: 1) the existence of a contract between the plaintiff and the defendant, 2) the plaintiff's performance thereunder, 3) the defendant's breach of the contract, and 4) damages. (*US Bank NA v Lieberman,* 98 AD3d 422, 423 [1st Dept 2012]). The plaintiff's allegations must also reference the provision or provisions of the contract allegedly breached. (*Canzona v Atanasio*, 118 AD3d 837, 839 [2d Dept 2014]).

The provision of the bylaws obligating plaintiff to provide its own air conditioning units

does not negate defendants' duty to maintain the cooling system, including the provision of proper water pressure and cooled water. (*See Trask v Tremper Prop. Assn., Inc.*, 122 AD3d 1206, 1207 [3d Dept 2014] [bylaw provision that defendant submitted, that "all members . . . are granted access to the water front and swimming area" did not resolve, as a matter of law, plaintiff's claim that defendant violated its riparian rights to warrant dismissal under CPLR 3211(a)(1)] [internal quotation marks omitted]). Even assuming, *arguendo*, that the provision on which defendants rely results in an ambiguity in the bylaws, which defendants do not contend, dismissal pursuant to CPLR 3211(a)(1) is nonetheless inappropriate. (*See Sirius XM Radio Inc. v XL Speciality Ins. Co.*, 117 AD3d 652, 652 [1st Dept 2014] [defendant not entitled to dismissal founded on documentary evidence as ambiguity in submitted contract presented a triable issue]; *Cerand v Burstein*, 72 AD3d 1262, 1266 [3d Dept 2010] [same]).

For the same reasons set forth above, the incomplete and unclear maintenance and repair records submitted by defendants are also insufficient to dispose of, as a matter of law, plaintiff's breach of contract claim.

Nor are defendants protected by the business judgment rule where, as here, plaintiff's allegations sound in breach of contract. (*See Anderson*, 37 AD3d at 1197 [business judgment rule inapplicable as defense to plaintiff's breach of contract claim]; *Dinicu*, 257 AD2d at 222-223 [plaintiff could maintain breach of contract claim against corporation despite its invoking business judgment rule]).

C. Private nuisance (fourth cause of action)

Defendants argue that plaintiff's nuisance claim fails absent any allegation that defendants' alleged interference with the use and enjoyment of plaintiff's property was

intentional or that defendants knew that plaintiff's alleged injuries would result from their actions. Defendants also observe, without dispute from plaintiff, that plaintiff has previously unsuccessfully brought private nuisance claims against them (NYSCEF 4), and that it has not shown that their school's operations were affected by the alleged interference (NYSCEF 35).

The elements of a private nuisance claim are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." (*Copart Indus., Inc. v Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564, 570 [1977]; *Berenger v 261 W. LLC*, 93 AD3d 175, 182 [1st Dept 2012]). The tort of private nuisance implies "a continuous invasion of rights–a pattern of continuity or recurrence of objectionable conduct." (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003]; *Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41 [1st Dept 2011]).

In its complaint, plaintiff alleges that it continually notified defendants of the deteriorating conditions of the heating system, fruitlessly sought inspection and repair of the cooling unit, and that for several months in 2013 and 2014, it was unable to use and enjoy a portion of its units. Even affording plaintiff's pleadings a liberal construction, these allegations do not warrant an inference that the conditions that allegedly interfered with its use and enjoyment of its property were intentionally created by defendants. (*See Roundabout Theatre Co., Inc. v Tishman Realty & Constr. Co., Inc.*, 302 AD2d 272, 272-273 [1st Dept 2003] [plaintiff's nuisance claim based on street closure due to collapse of construction elevator tower could not be sustained absent claim that defendants' conduct intentional]; *see also Caldwell v Two Columbus Ave. Condo.*, 2010 NY Slip Op 33213[U] *21, 26 [Sup Ct, NY County 2010],

affd as mod 92 AD3d 441 [2012] [plaintiff's nuisance claim premised on water infiltration into its unit and defendants' inadequate attempts to remedy fail absent allegations that defendants acted intentionally]; *cf. Zimmerman v Carmack*, 292 AD2d 601, 602 [2d Dept 2002] [plaintiff stated cause of action for nuisance by alleging that defendants had repeatedly left their home with stereo playing loudly and intentionally allowed dog waste and garbage, including diapers and rotting food, to accumulate immediately adjacent to plaintiff's property]).

D. Declaratory and injunctive relief (third and fifth causes of action)

Defendants deny that there exists a justiciable controversy warranting declaratory relief as they sufficiently address and deal with issues concerning the heating and cooling systems as they arise. They also argue that an injunction is improper as there is a remedy at law for the damages sought. In any event, they contend that plaintiff fails to establish its substantive causes of action on which injunctive relief is based. (NYSCEF 4).

Plaintiff does not address these arguments, except to the extent of restating its contentions regarding its substantive claims. (NYSCEF 18). Defendants reiterate their contentions in reply. (NYSCEF 35).

Pursuant to CPLR 3001, the 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." A justiciable controversy requires a real dispute between adverse parties with a stake in the outcome of the dispute. (*Long Is. Lighting Co. v Allianz Underwriters Ins. Co.*, 35 AD3d 253, 253 [1st Dept 2006]). If the dispute is moot, there no longer exists a justiciable controversy (*Big Four LLC v Bond St. Lofts Condo.*, 94 AD3d 401, 403 [1st Dept 2012], *lv denied* 19 NY3d 808), and any judgment necessarily becomes advisory (*Premier Restorations of*

New York Corp. v New York State Dep't of Motor Vehicles, 127 AD3d 1049, 1049 [2d Dept 2015]). Declaratory relief may be denied if adequate alternative remedies are available through another cause of action. (*Matter of Morgenthau v Erlbaum*, 59 NY2d 143, 148 [1983]; *JMF Consulting Grp. II, Inc. v Beverage Mktg. USA, Inc.*, 97 AD3d 540, 542 [2d Dept 2012], *lv denied* 19 NY3d 816).

The relief sought by plaintiff, a declaration that defendants "are required to repair[] and maintain the cooling system," is nothing other than a declaration of the parties' rights and obligations under the bylaws. Having sufficiently advanced a cause of action in breach of contract, it has no need for declaratory relief. (*See Singer Asset Fin. Co., LLC v Melvin*, 33 AD3d 355, 358 [1st Dept 2006] [declaratory relief denied to plaintiff where breach of contract action available]; *Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 53-54 [1st Dept 1988] [declaration of plaintiffs' rights under contract unnecessary in light of breach of contract claim]).

A party may seek a preliminary injunction if it demonstrates the likelihood of success, a danger of irreparable injury, and that the balance of equities is in its favor. (*Jones v Park Front Apts., LLC*, 73 AD3d 612, 612 [1st Dept 2010]). To state a claim for a permanent injunction, on the other hand, the plaintiff must allege a violation of a right presently or imminently occurring, that there is no adequate remedy at law, that irreparable injury will result absent the injunction, and that balancing the equities favors it. (*Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]). A permanent injunction is a remedy that depends on the merits of the substantive claims asserted by plaintiff." (*Corsello v Verizon New York, Inc.*, 77 AD3d 344, 368 [2d Dept 2010], *mod on other grounds* 18 NY3d 777 [2012]).

In its complaint, plaintiff alleges that since 2009, defendants have left the cooling system in a state of disrepair in violation of the bylaws, that defendants continue to disregard its demands to inspect and repair it, that it continues to suffer irreparable damage as long as defendants fail to remediate, and that there is no adequate remedy at law. As plaintiff alleges the essential elements of injunctive relief, and having sufficiently pleaded breach of contract on which its request for equitable relief is so based (*see Corsello*, 77 AD3d at 368 ["Since a cause of action has been stated under (GBL § 349[h]), the Supreme Court correctly declined to dismiss the cause of action for injunctive relief . . . ."]), it sufficiently states a claim for injunctive relief.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the following extent: the first cause of action (negligence), third cause of action (declaratory judgment), and fourth cause of action (nuisance) are dismissed; it is further

ORDERED, that defendants are directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED, that counsel are directed to appear for a preliminary conference in Room 279, 80 Centre Street, on August 12 2015, at 2:15 PM.

ENTER:

Barbara Jaffe, JSC

DATED: July 17, 2015
New York, New York