SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. GERALD LEBOVITS **PART** IAS MOTION 7EFM
Justice

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INDEX NO. 157277/2016

ROBIN SIEGEL,

MOTION SEQ. NO. 003 & 004

Plaintiff,

- v -

77 BLEECKER STREET CORP., CENTURY MANAGEMENT SERVICES, INC., WILLIAM LIPSCHUTZ, JOSE IBIETATORREMENDIA, BETH GOTTLIEB, TERRI CUDE, MARJORIE GINSBURG, BRUCE AZUS, AFFILIATED ADJUSTMENT GROUP LTD.

DECISION AND ORDER

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 35, 36, 37, 38, 39, 40, 41, 42, 51, 71, 73, 76, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 99, 100

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 43, 44, 45, 46, 47, 48, 49, 50, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 72, 74, 77, 96, 98, 101, 102, 103, 104, 105

were read on this motion to/for DISMISS.

Wagner Berkow, LLP, New York (Ian J. Brandt of counsel), for plaintiff.
Nadia Ali Esq. New York, for defendants 77 Bleecker Street Corp., Century Management Services, Inc., William Lipschutz, Jose Ibietatorremendia, Beth Gottlieb, Terri Cube, Marjorie Ginsburg.
L'Abbate, Balkan, Colavita & Contini, LLP, New York (Amy M. Monahan of counsel), for defendants Affiliated Adjustment Group, Ltd., and Bruce Azus.

Motion sequences 03 and 04 are consolidated for deposition.

Defendants move, pre-answer, to dismiss plaintiff's amended complaint.

In motion 03, defendants 77 Bleecker Street Corp. (the Co-op), Century Management Services, Inc. (Century), William Lipschutz, Jose Ibietatorremendia, Beth Gottlieb, Terri Cube, and Marjorie Ginsburg (collectively the Co-op Defendants) move to dismiss the first, second, third, fourth, fifth, and eighth causes of action under CPLR 3211 (a) (1), (a) (5), and (a) (7).

In motion 04, defendants Bruce Azus and Affiliated Adjustment Group, Ltd. (Affiliated), (collectively, the Affiliated Defendants), move to dismiss the sixth and seventh causes of action.

Plaintiff is a co-op shareholder and proprietary lessee for apartment #831 in a building located at 77 Bleecker Street (the premises). Plaintiff is seeking damages from the co-op, its individual directors (Lipschutz, Ibietatorremendia, Gottlieb,Cube, and Ginsburg), the managing agent (Century), and its public adjuster (Azus and Affiliated) for losses plaintiff sustained after a sprinkler system flooded her apartment and destroyed her property. Plaintiff also alleges that leaks from a toilet in the apartment above her apartment caused additional water damage and caused mold to form.

Plaintiff's amended complaint asserts eight causes of action against various defendants.

Motion sequence 03 is granted in part and denied in part: that aspect of the motion to dismiss the first cause of action is denied. The motion to dismiss the fourth, fifth, and eighth causes of action is granted. The second cause of action is dismissed except for her claim for out-of-pocket costs. The third cause of action is dismissed except for her claim for her out-of-pocket costs for repairs and expenses.

Motion sequence 04 is granted in part and denied in part. The sixth cause of action survives. The seventh cause of action is dismissed.

I. Co-op Defendants Motion to Dismiss (motion sequence 03)

The Co-op Defendants move to dismiss the amended complaint on the basis of documentary evidence, failure to state a cause of action, collateral estoppel or res judicata or both, and payment and release.

The Co-op Defendants assert that many of the causes of action should be dismissed because plaintiff was compensated for her damages. In support of the motion, they attach an October 13, 2016, stipulation of settlement between the co-op and plaintiff. They argue that the stipulation disposes of plaintiff's causes of action. This stipulation along with other documentary evidence, according to the Co-op Defendants, demonstrate that plaintiff's complaint must be dismissed.

Also, the Co-op Defendants argue that plaintiff mischaracterizes the facts in her amended complaint. In an attorney affirmation, the Co-op defendants explain the facts. But the court will consider only the documentary evidence and any supporting affidavits in this preliminary motion to dismiss.

The Co-op Defendants argue that plaintiff has been substantially compensated for her losses, either from payment from defendants and from payment from her own insurance carrier, State Farm. According to defendants, plaintiff has received $190,000 from State Farm. (Exhibits 4, 5.)

The Co-op Defendants also argue that plaintiff's insurance policy with State Farm contains a waiver of subrogation clause and thus that the Co-op Defendants are released from any liability. (Exhibit 5.)[1]

First Cause of Action

Plaintiff's first cause of action is for negligence against the co-op and Century. Plaintiff seeks damages no less than $400,000.

The Co-op Defendants' motion to dismiss the first cause of action is denied. Res judicata is claim preclusion: "[A]s to the parties in a litigation and those in privity with them, a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action." (*Gramatan Home v Lopez*, 46 NY2d 481, 485 [1979].) The Court of Appeals has noted that "a judgment in one action is conclusive in a later one . . . when the two causes of action have such a measure of identity that a different judgment in the second would destroy or impair rights or interests established by the first." (*Schuykill Fuel Corp. v Nieberg Rlty. Corp.*, 250 NY 304, 306-307 [1929].)

Collateral estoppel is issue preclusion. To invoke collateral estoppel, two requirements must be met: (1) an identical issue was necessarily decided in the prior action and is decisive in the present action; (2) the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination. (*D'Arata v N.Y. Cent. Mut. Fire Ins. Co.*, 76 NY2d 659, 664 [1990].)

Defendants cannot claim collateral estoppel or res judicata, or both, because of an earlier settlement agreement when defendants agreed that plaintiff did not release or waive her rights to causes of action sounding in tort or contract. Based on the documentary evidence on this motion, plaintiff did not waive her rights to bring a negligence claim.

In a so-ordered stipulation of settlement dated October 13, 2016, 77 Bleecker Street Corp. and Siegel.resolved two Housing Court proceedings. The parties agreed to the following:

> "Agreement relates to the settlement of Landlord's claims for maintenance, pet fees, late fees, and the capital assessment during the Period in Question [January 2014 through and including April 2015]. These Proceedings are hereby discontinued with prejudice: (i) solely as to Landlord's claims against Tenant, during the Period in Question, for nonpayment of maintenance, dog fees, late fees, and legal fees; and (ii) solely as to Tenant's remedy for an abatement of maintenance for the Period in Question. However, nothing herein shall constitute a release or waiver of: (a) Tenant's rights and remedies for Apartment repair reimbursements or any other damages allegedly sustained, whether based on causes of

[1] The court notes that this is a sample policy from State Farm. The court will not consider the document.

> action sounding in tort or contract, including, but not limited to RPL 235-b; or (b) Landlord's defenses, offsets or counterclaims to any such claims of Tenant for Apartment repair, reimbursement or any other damages allegedly sustained, whether based upon causes of action alleging tort or breach of contract, including but not limited to RPL 235-b." (Settlement Agreement, Exhibit 2, at ¶ 6.)

Also, the parties agreed that the "[t]enant's receipt of said payment is without prejudice to Tenant seeking reimbursements and damages, in any other action or proceeding, for further out-of-pocket repair costs and expenses that she allegedly incurred for repairs made during the Period in Question in and around the Apartment." (Settlement Agreement ¶ 3.)

The settlement agreement also provided the following:

> "All of Tenant's counterclaims and affirmative defenses interposed in these Proceedings are withdrawn and/or discontinued without prejudice, and may be asserted against Landlord and/or against any other party or parties in any other action or proceeding, except that Tenant's remedy for any abatement of maintenance for the Period in Question is hereby fully resolved and satisfied by this Agreement, and Landlord shall have the right to 'any defense and/or counterclaim or offset and/or a partial accord in satisfaction in connection with the Repair Reimbursement paid to tenant under paragraph 3' of the settlement agreement." (Settlement Agreement ¶ 5).

The agreement allows plaintiff to sue the co-op for out-of-pocket repair costs and expenses to the apartment. When the terms of an agreement are clear and unambiguous, the court will not look beyond the four corners of the agreement. It will enforce the writing according to tis terms. (*W.W.W. Assocs. v Giancontieri*, 77 NY2d 157, 162 [1990].)

Second Cause of Action

In the second cause of action, plaintiff is suing for breach of the warranty of habitability against the co-op. Plaintiff seeks damages (i) for a complete abatement from January 4, 2014, through April 30, 2015, including a proportion of the maintenance she already paid; (ii) reimbursement for repairs she made to the apartment; (iii) reimbursement for out-of-pocket costs for engineers, architects, mold reports and other fees; (iv) punitive damages no less than $350,000, for the severity of the conditions in plaintiff's apartment, the board of directors' misconduct in facilitating repairs, including harassing plaintiff for using her own contractors; (v) costs, disbursements, and reasonable legal fees because she is the prevailing party according to paragraph 28 her lease and RPL 234.

The Co-op Defendant's motion to dismiss the second cause of action for breach of the warranty of habitability is granted. The measure of damages for breach of the warranty of habitability is limited to the difference between the rent reserved and the fair market rental value

during the period of the breach (*Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 329, *cert denied* 444 US 992; *Elkman v Southgate Owners Corp.*, 233 AD2d 104, 105 [1st Dept 1996].) In a Co-op, the rent reserved is the maintenance paid. (*Elkman*, 233 AD2d at 105). Loss or diminution in value of personal property as well as personal injuries and pain and suffering are not recoverable under Real Property Law § 235-b (*Couri v Westchester Country Club*, 186 AD2d 712, *lv dismissed in part and denied in part* 81 NY2d 912; *Elkman v Southgate Owners Corp.*, 233 AD2d 104, 105 [1st Dept 1996].)

The parties' agreement granted plaintiff release from "(i) all monthly maintenance charges during the Period in Question in the collective amount of $21,367.52." (Settlement Agreement ¶ 1). Plaintiff has been compensated for a warranty of habitability claim in the October 13 Settlement agreement. That portion of her second cause of action that seeks an abatement is dismissed.

Also dismissed is that aspect of the cause of action seeking punitive damages. Punitive damages may be awarded in breach of warranty of habitability cases where the landlord's actions or inactions were intentional and malicious. (*Pleasant East Assocs. v Cabrera*, 125 Misc 2d 877, 883[Civ Ct, Housing Part, NY County 1984]; *accord Century Apts. Inc. v. Yalkowsky*, 106 Misc 2d 762, 766 [Civ Ct, Housing Part, NY County 1980]; *Davis v Williams*, 92 Misc 2d 1051, 1054 [Civ Ct, Housing Part, Kings County 1977]; *see also Kipsborough Realty Corp. v. Goldbetter*, 81 Misc 2d 1054, 1060 [Civ Ct, NY County 1975]. Here, plaintiff's allegations do not assert that the Co-op's action were intentional and malicious. Plaintiff asserts that the Co-op defendants engaged in misconduct, but plaintiff's allegations do not rise to the level of intentional and malicious.

The remaining aspect of the second cause of action remains, namely, reimbursement for her out-of-pocket costs.

Any reasonable legal fees she seeks for the Housing Court cases was addressed at an attorney-fee hearing before Judge Lau in the Housing Part. At the time the parties filed this motion, the attorney fee issue was sub judice before Judge Lau.

Third Cause of Action

In the third cause of action, plaintiff is suing for breach of the proprietary lease against the co-op.

The third cause of action is dismissed in part.

That aspect of plaintiff's third cause of action seeking a complete abatement for the same period covered under the parties' agreement is dismissed. The agreement resolved this issue.

The remaining aspects of the third cause of action survive, namely, her out-of-pocket costs for repairs and expenses for repairs made in and around the apartment.

All other aspects of the third cause of action are dismissed.

Fourth Cause of Action

In the fourth cause of action, plaintiff is suing for breach of the fiduciary duty against the individual directors, Lipschutz, Ibietatorremendia, Gottlieb, Cude, and Ginsburg.

This cause of action is dismissed. The court will not substitute its judgment for that of the board of directors of the Co-op board. (*Elkman*, 233 AD2d at 105, citing *Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990] ["[The business judgment rule prohibits judicial inquiry into actions of corporate directors 'taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes.' So long as the corporation's directors have not breached their fiduciary obligation to the corporation, 'the exercise of [their powers] for the common and general interests of the corporation may not be questioned, although the results show that what they did was unwise or inexpedient.'" [internal citations omitted].)

Plaintiff asserts that Lipschutz's apartment was damaged from the same flood, but that Lipschutz received a full abatement whereas the Co-op commenced two proceedings against plaintiff. Plaintiff asserts that the remaining directors knew about this. To the extent that plaintiff complains that she did not receive a full abatement under her settlement agreement, that issue was resolved in the parties' agreement. Plaintiff's damages were covered by the October 13 agreement even if plaintiff might not have received a full abatement.

Fifth Cause of Action

In the fifth cause of action, plaintiff is suing for private nuisance against the co-op and Century. Plaintiff seeks no less than $400,000 in damages.

A plaintiff has a claim for private nuisance if another's conduct is a legal cause of the invasion of the interest in the private use and enjoyment of land and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities." (*Copart Indus, Inc. v Consol. Edison Co. of N.Y., Inc.*, 41 NY2d 564, 569 [1977].) Private nuisance "where the wrongful invasion of the use and enjoyment of another's land is . . . distinguished from trespass which involves the invasion of a person's interest in the exclusive possession of land." (*Id.* at 570.)

But "not every annoyance will constitute a nuisance. Nuisance imports a continuous invasion of rights—'a pattern of continuity or recurrence of objectionable conduct.'" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003].

Plaintiff does not assert that the Co-op defendants engaged in a pattern of continuity or recurrent of objectionable conduct.

Plaintiff's fifth cause of action is dismissed.

Eighth Cause of Action

In the eighth cause of action, plaintiff sues for constructive eviction against the co-op. Plaintiff seeks damages no less than $400,000.

Any constructive-eviction claim was covered by the parties' October 13 agreement.

In any event a constructive-eviction claim may only be asserted defensively. (*Elkman*, 233 AD2d at 105, citing *Minjak Co. v Randolph*, 140 AD2d 245, 248 [1st Dept 1988].)

Plaintiff's eight cause of action is dismissed.

Remaining arguments

The Co-op defendant assert that plaintiff has been compensated for her losses from her insurance carrier or the Co-op's carrier, namely over $120,000. Plaintiff provides a letter from her then-counsel in Housing Court asserting that plaintiff received $119,952.39, but to be made whole plaintiff seeks compensation of $491,070.63. (Exhibit 13.) The court cannot tell from the documents submitted at this preliminary pre-disclosure phase and given the court's dismissal of some of plaintiff's claims, what losses remain. Defendants' motion on the basis of payment is denied.

Any separate claim that plaintiff asserts for punitive damages, as explained above, is dismissed.

II. Affiliated Defendants' Motion to Dismiss Under CPLR 3211 (motion sequence 04)

Sixth Cause of Action

In the sixth cause of action, plaintiff is suing for tortious interference with a contract against Azus, the adjuster, and Affiliated. Plaintiff is seeking damages for no less than $400,000.

Affiliated Defendants' CPLR 3211 (a) (7) motion to dismiss the sixth cause of action for tortious interference with a contract is denied. To state a cause of action for tortious interference with a contract, plaintiff must allege that the contract would not have been breached but for the defendant's conduct. (*AREP Fifty-Seven, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 402 [1st Dept 2014]; *Burrowes v Combs*, 25 AD3d 370, 373 [1st Dept 2006].)

Plaintiff claims that the Affiliated Defendants interfered with the co-op's obligations under the Proprietary Lease to repair her apartment. She alleges that but for the Affiliated Defendants' conduct, the co-op would have performed its obligations and duties owed to plaintiff under the proprietary lease. (Amended Complaint ¶ 85.)

The Affiliated Defendants' motion to dismiss the sixth cause of action is denied.

Seventh Cause of Action

In the seventh cause of action, plaintiff is suing for negligence against the Affiliated Defendants.

Affiliated Defendants' CPLR 3211 (a) (7) motion to dismiss the seventh cause of action for negligence pursuant to CPLR 3211 (a) (1), based upon documentary evidence, is granted. Plaintiff has failed to plead that the Affiliated Defendants owed her a duty. Only the co-op retained the Affiliated Defendants. Plaintiff's amended complaint demonstrates that the Affiliated Defendants had no duty to plaintiff: "Azus and Affiliated had a professional obligation to charge fees and expenses only to the party or parties whom they were in prvity and not to solicit fees or other compensation from contracting parties, such as Plaintiff." (Amended Complaint ¶ 91.) Therefore, Affiliated Defendants' motion to dismiss the seventh cause of action is granted.

Accordingly, it is hereby

ORDERED that defendants 77 Bleecker Street Corp., Century Management Services, Inc., William Lipschutz, Jose Ibietatorremendia, Beth Gottlieb, Terri Cube, and Marjorie Ginsburg's motion to dismiss (seq. no. 03) is denied in part and granted in part: that aspect of the motion to dismiss the first cause of action is denied. The motion to dismiss the fourth, fifth, and eighth causes of action is granted; these causes of action are dismissed. The second cause of action is dismissed except for plaintiff's claim for out-of-pocket costs. The third cause of action is dismissed except for plaintiff's claim for her out-of-pocket costs for repairs and expenses.

ORDERED that defendants Bruce Azus and Affiliated Adjustment Group, Ltd.'s motion (seq. no. 04) is granted in part and denied in part. The sixth cause of action survives. The seventh cause of action is dismissed.

ORDERED that defendants have 20 days from service of this decision and order to file their answers; and it is further

ORDERED that defendants must serve a copy of this decision and order on the County Clerk's Office, which is directed to enter judgment accordingly; and it is further

ORDERED that the parties appear for a preliminary conference on February 6, 2019, at 11:00 a.m., in Part 7, room 345, at 60 Centre Street.

10/4/2018
DATE

GERALD LEBOVITS, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE