| **Anastasiadou v Gomes** |
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| 2019 NY Slip Op 31281(U) |
| May 6, 2019 |
| Supreme Court, New York County |
| Docket Number: 155821/2016 |
| Judge: William Franc Perry |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. W. FRANC PERRY** **PART** **IAS MOTION 23EFM**

***Justice***

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ALKMINI ANASTASIADOU,

Plaintiff,

- v -

GEORGE GOMES, MARY MOORE, 131 EAST 81ST STREET OWNERS CORP., NEW BEDFORD MANAGEMENT CORP., BANKERS STANDARD INSURANCE COMPANY

Defendant.

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**INDEX NO.** 155821/2016

**MOTION DATE** April 25, 2019

**MOTION SEQ. NO.** 001

**DECISION AND ORDER**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 33, 115, 121, 122, 129, 130

were read on this motion to/for VACATE - DECISION/ORDER/JUDGMENT/AWARD.

In this action, plaintiff is seeking to recover for property damage resulting from two floods in the apartment above hers causing water to leak into her apartment, in February 2015 and 2016. New Bedford has moved to dismiss the complaint for failure to state a claim.[1] Plaintiff opposes the motion.

Plaintiff is the proprietary lessee of an apartment on the tenth floor of a building located at 131 East 81st Street, Manhattan ("building"). Defendants Gomes and Moore are alleged to be the exclusive occupants of an apartment on the eleventh floor of the building. Defendant 131 East 81st Street Owners Corp. (the "cooperative") is the proprietary lessor of the building, and defendant New Bedford Management Corp. ("New Bedford") is the managing agent employed

[1] Defendant New Bedford's motion also sought an order pursuant to CPLR 5015(a), to vacate a default judgment, however, that aspect of the motion has been resolved pursuant to a stipulation So Ordered by the court on January 29, 2019. (NYSCEF Doc. No. 113).

by the cooperative to manage the building pursuant to a management agreement. (NYSCEF Doc. Nos. 1, 24 and 25).

It is alleged that on or about February 14, 2015 the Gomes and Moore apartment flooded, and caused substantial water leakage and damage to plaintiff's apartment. This first flood caused plaintiff to delay her moving into the apartment until May 2015, as she was required to make repairs and renovate the walls, ceilings and floors within her apartment. Thereafter, on February 12, 2016 there was a second flood in the Gomes and Moore apartment causing additional damage to plaintiff's apartment. In her affidavit, plaintiff claims that the "water flow was great, damaging my apartment's walls, floors, fixtures, furniture and personal items." (NYSCEF Doc. No. 29, ¶ 4).

In opposition to New Bedford's motion to dismiss the fourth and fifth causes of action, plaintiff states that the cause of the 2016 flood "has been determined to be a burst pipe in the upstairs apartment's heating and air conditioner unit". (NYSCEF Doc. No. 29, ¶ 5). In her supplemental affirmation plaintiff submits a letter dated February 16, 2016 from Fred Smith Plumbing and Heating Co. to New Bedford, which she contends confirms that the plumber who was retained by New Bedford to inspect the Gomes and Moore apartment to locate and repair the cause of the leak, found "the heating unit had frozen and split causing a leak." (NYSCEF Doc. No. 109).

In seeking dismissal of the complaint, New Bedford maintains that it owes no duty to the plaintiff as Article 18(a) of the Proprietary Lease provides that the individual unit owners, not the cooperative are solely responsible for the maintenance, repair and replacement of heating fixtures and wall air conditioners. (NYSCEF Doc. No. 26). Accordingly, defendant seeks dismissal of the fourth cause of action alleging negligence against New Bedford for the property

damage incurred by plaintiff. With respect to the fifth cause of action, New Bedford maintains that plaintiff is not a party to the management agreement between the cooperative and New Bedford and can claim no benefit therefrom and further, the agreement provides that New Bedford was hired to manage and maintain the building, not the individual units.

In opposition, plaintiff contends that she is a third-party beneficiary to the management agreement between defendant New Bedford and defendant cooperative, which agreement sets forth New Bedford's obligations in an emergency. Specifically, plaintiff relies on the second clause of the management agreement, subsection (b) which distinguishes between ordinary repairs and emergency repairs, noting that the agreement plainly provides that emergency repairs are "those immediately necessary for the preservation or safety of the Owner-Shareholders, or other persons, or required to avoid the suspension of any necessary service in the Building" and that such emergency repairs may be made by New Bedford. (NYSCEF Doc. No. 25). As such, plaintiff contends that she is a third-party beneficiary of the management agreement.

With respect to her negligence claim, plaintiff alleges that New Bedford failed to repair the building's exterior brick wall and its insulation surrounding the eleventh-floor apartment's air conditioning unit, after the first flood allegedly damaged plaintiff's apartment in February 2015, and that this negligence and failure to repair the exterior after the winter of 2015, caused the air conditioner coils to freeze and burst in February 2016. (NYSCEF Doc. No. 121, ¶3).

**STANDARD OF REVIEW/ANALYSIS**

It is well established that "[o]n a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction" (*Leon v Martinez*, 84 NY2d 83, 87 [1994], citing CPLR 3026). Under CPLR §3211 (a) (7), a party may move for dismissal of one or more causes of action on the ground that the pleading fails to state a cause of action. On such a motion, the court

is concerned with whether the plaintiff has a cause of action and not whether he has properly stated one. (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633,636 [1976]). The court will liberally construe the pleadings in plaintiff's favor, accept the facts as true, and determine whether the facts alleged fit within any cognizable theory. See (*Cron v. Hargro Fabrics*, 9l N.Y.2d 362, 366 [1998]).

Plaintiff has asserted two causes of action against New Bedford, seeking to recover damages sustained to her property as a result of New Bedford's alleged negligence in failing to make repairs to the building's exterior wall and insulation after the 2015 flood and in relying on New Bedford to prevent floods in the building and maintain the building in good repair, as a third-party beneficiary of the agreement between New Bedford and the cooperative.

It is well established that contractual obligations impose a duty only in favor of the promisee and intended third-party beneficiaries" (*253 E. 62nd St., LLC v Moluka Enters.*, LLC, 151 AD3d 489, 490, 56 NYS3d 314 [1st Dept 2017]). "A party asserting rights as a third-party beneficiary must establish (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for his benefit and (3) that the benefit to him is sufficiently immediate, rather than incidental, to indicate the assumption by the contracting parties of a duty to compensate him if the benefit is lost" (*State of Cal. Pub. Employees' Retirement Sys. v Shearman & Sterling,* 95 NY2d 427, 434-435, 741 NE2d 101, 718 NYS2d 256 [2000] [internal quotation marks omitted]).

"[T]he identity of a third-party beneficiary need not be set forth in the contract or, for that matter, even be known as of the time of its execution, . . . the intention which controls in determining whether a stranger to a contract qualifies as an intended third-party beneficiary is that of the promisee, . . . and . . . where . . . a genuine issue exists as to the parties' intention to

benefit another, a triable issue of fact is presented which is not appropriate for summary disposition" (*MK W. St. Co. v Meridien Hotels*, 184 AD2d 312, 313, 584 NYS2d 310 [1st Dept 1992] [citations omitted]).

Here, plaintiff argues that she has sufficiently alleged facts to establish her status as a third-party beneficiary under the terms of the management agreement between defendant New Bedford and the cooperative when an emergency occurs that causes damage to individual units. In opposition, New Bedford argues that the management agreement provides that New Bedford was hired to manage and to maintain the building, not individual units. This argument however, made without the benefit of discovery, does not address the issue raised here, specifically, the scope and extent of New Bedford's control over the property and its duty to keep the property in good repair, in the face of an emergency, such as the floods in the Gomes and Moore apartment that caused damage to plaintiff's apartment. Moreover, plaintiff has provided proof that New Bedford did retain the services of a plumber to inspect the cause of the second flood, thereby raising further issues of fact relative to the extent and scope of New Bedford's duty to make repairs in response to an emergency condition. (NYSCEF Doc. No. 109).

As such, viewing the allegations in a light most favorable to plaintiff, the record presents issues of fact as to the scope and extent of New Bedford's control over the building and its duty of care to plaintiff in response to the emergency caused by the floods in the Gomes and Moore apartment in February 2015 and 2016. Despite New Bedford's contention that it owed no duty to plaintiff, the management agreement between New Bedford and the cooperative could be construed as giving New Bedford complete authority to make emergency repairs without regard to cost, when those repairs are "immediately necessary for the preservation or safety" of the

shareholders or others and "to avoid the suspension of any necessary service in the Building". (NYSCEF Doc. No. 25).

Plaintiff alleges that New Bedford failed to repair breaches in the building's exterior brick and its insulation after the first flood in February 2015 and that this negligence failed to prevent the second flood that occurred in February 2016. (NYSCEF Doc. No. 1, ¶¶ 33-36). Moreover, based on the parties' submissions, discovery is necessary to determine the nature of New Bedford's involvement in directing and coordinating the repairs to the building following the floods, and to determine whether the property management agreement supports a duty owed to plaintiff who is alleged to have sustained property damage as a result of New Bedford's alleged negligence. (NYSCEF Doc. No. 31). These factual issues must be resolved through discovery and require denial of New Bedford's motion to dismiss. (see *Tushaj v Elm Mgt. Assoc.*, 293 AD2d 44, 48, 740 NYS2d 40 [2002]; see *Palka v Servicemaster Mgt. Servs. Corp.*, 83 NY2d 579, 634 NE2d 189, 611 NYS2d 817 [1994]).

Accordingly, it is hereby,

ORDERED that the motion to dismiss is denied; and it is further

ORDERED that counsel are directed to appear for a preliminary conference in Room 307, 80 Centre Street, on June 11, 2019, at 9:30 AM.

5/6/2019
DATE

W. FRANC PERRY, J.S.C.

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

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