

**Manna Amsterdam Ave. LLC. v West 73rd Tenants Corp.**

2019 NY Slip Op 33690(U)

December 20, 2019

Supreme Court, New York County

Docket Number: 157764/2017

Judge: Melissa A. Crane

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

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MANNA AMSTERDAM AVENUE LLC.,

Plaintiff,

Index No. 157764/2017

-against-

DECISION & ORDER

WEST 73<sup>RD</sup> TENANTS CORP., FIRSTSERVICE RESIDENTAL  
NEW YORK, INC, COPPER SQUARE REALTY, INC,  
KATHLEEN MURPHY, VICTORIA BRUNI, STAN METELIS,  
ANN CLARKE, ALEKA MAZARAHIS, DANNY BEN ARI,  
KEN BORLAND,

Mot. Seq. 003

Defendants.  
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The following e-filed documents, listed by NYSCEF document number (Motion Seq. 003) 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112 were read on this motion for summary judgment.

MELISSA A. CRANE, J.:

In this action plaintiff seeks damages by property and loss of business. Defendants, Copper Square Realty Inc. (“Copper Square”), and Kathleen Murphy, Victoria Bruni, Stan Metelis, Ann Clarke, Aleka Mazarahis, Danny Ben Ari and Ken Borland (the “Board Members”) move under CPLR 3211(a)(7) to dismiss the complaint. Plaintiff opposes, and defendants file further affirmation in support of the motion to dismiss.

**BACKGROUND**

Plaintiff operated a café/restaurant within defendant West 73<sup>rd</sup> Tenants Corp’s premises located at 279 Amsterdam Avenue, New York, New York (the “Premises”). On January 8, 2015, a fire occurred at the plaintiff’s restaurant and damaged it. According to plaintiff’s complaint, at the time of the fire, the Premises had fire suppression devices, including a sprinkler system. A New York City Fire Department incident report determined that the sprinkler system had been

turned off manually. (NYSCEF Doc. No. 95). As a result of the fire, plaintiff's restaurant was closed to the public from January 8, 2015, to February 12, 2015.

### The Action

On August 30, 2017, plaintiff commenced this action by filing a summons and complaint against multiple defendants to recover property and loss of business damages that allegedly occurred as a result of the fire. Plaintiff brought this action against WEST 73<sup>RD</sup> TENANTS CORP, the managing company FIRST SERVICE RESIDENTAL NEW YORK, INC, COPPER SQUARE REALTY INC (as per defendants' motion to dismiss, FIRSTSERVICE RESIDENTAL NEW YORK, INC, was formally known as COPPER SQUARE REALTY INC) and the Board Members. Plaintiff alleges that defendants: *"turned off or otherwise disabled the fire suppression devices including the sprinkler system at the Premises prior to the Fire and had not reactivated the Fire suppression devices including the sprinkler system prior or at the time of the Fire"* (see paragraph 81 of plaintiff's verified complaint [NYSCEF Doc. No. 1]).

The complaint asserts five causes of action: negligence, private nuisance, gross negligence, breach of contract and promissory estoppel. For each of the underlying causes of action, plaintiff seeks monetary relief in the amount of five million dollars (\$5,000,000).

### Defendants' Motion, Plaintiff's Opposition and Defendants' Further Affirmation

By motion dated April 4, 2019, defendants sought an order dismissing the complaint as against COPPER SQUARE REALTY INC, as prior to the commencement of this action, on June 17, 2013, COPPER SQUARE REALTY INC's name was changed to FIRST SERVICE RESIDENTAL NEW YORK, INC, that was already a defendant in this action.

The Board Members argue that in order to survive a motion to dismiss, the complaint must contain allegations that defendants acted tortiously other than within the scope of their

authority as board members of the cooperative and that the business judgment rule protects their actions.

In opposition, Plaintiff argues that the Board Members have personally, either by intentional or gross negligent conduct, deactivated the fire suppression system at the premises. In addition, plaintiff argues that the business judgment rule applies to board members of cooperative dwellings, only when the plaintiff is subjected to the cooperative's by-laws, not when the plaintiff is a commercial non-member tenant of the cooperative.

In their affirmation in further support of the motion to dismiss, the Board Members take issue with the complaint's global claim for damages against the board of WEST 73<sup>RD</sup> TENANTS CORP. The Board Members argue that plaintiff must establish each individual board member's tortious conduct outside of the role as a board member.

### DISCUSSION

#### CPLR 3211(a)(7)

On a motion to dismiss under CPLR 3211(a)(7), the pleadings are to be afforded a liberal construction, the facts as alleged in the complaint are presumed to be true, and all reasonable inferences must be drawn in favor of plaintiffs (*EBC I, Inc. v. Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005)). Dismissal is proper only when it appears conclusively that plaintiff has no cause of action (*Rovello v. Orofino Realty Co.*, 40 N.Y.2d 633, 636 [1976]), but the plaintiff must provide more than bare assertions of legal conclusions and a formulaic recitation of the elements of a cause of action (*O'Donnell, Fox & Gartner, P.C. v. R-2000 Corp.*, 198 A.D.2d 154 (1st Dept 1993)).

#### Allegation of a Tortious Act on Behalf of the Board Members

The Board Members argue that they are entitled for relief, as the complaint does not assert a specific tortious act, but rather makes general allegations about the Board Members'

participation in the disabling off the sprinkler system. To that extent, both parties agree on the controlling law, but disagree as to whether the plaintiff's complaint includes sufficient allegations about tortious conduct on behalf of the Board Members.

"An individual acting solely in his capacity as agent of his corporate principal, without any showing of exclusively independent control of operations, cannot be held individually liable for alleged corporate wrongdoing" (Mendez v. City of New York 259 A.D.2d 441 (App. Div. 1<sup>st</sup> Dept), see also Chambers v Tilden Towers Hous. Co. Section II, Inc., 2019 NY Slip Op 08001). "Where there is no evidence of independently tortious conduct on the part of [an] individual defendant, and nothing in the record raises a triable dispute that [such defendant] acted at all times within the scope of [his or her] employment, [such an] individual [is] entitled to summary dismissal of the action" Mendez v City of New York, 259 AD2d 441, 442, 687 N.Y.S2s 346 [1999]; see also Murtha v Yonkers Child Care Assn., 45 NY2d 913, 915, 383 N.E.2d 865, 411 N.Y.S.2d 219 [1978]; Urbacj, Kahn & Werlin, P.C. v 250/PAS Assoc. 176 AD2d 151, 152, 574 N.Y.S.2d 36 [1991]. Additionally, individuals cannot be held liable for corporate wrongdoing when acting in their capacity as agents of the corporation, absent a showing of exclusive control of the corporation (Board of Mgrs. of Fifteen Madison Sq. N. Condominium v Madison Park Owner LLC, 2013 N.Y. Misc. LEXIS 4188). In order to sustain a complaint against a corporate officer independently, the complaint must allege an affirmative tort (see Board of Managers of South Star v. WSA Equities, LLC 146 A.D.3d 405, (1<sup>st</sup> Dep't 2016), Peguero v. 601 Realty Corp., 58 AD3d 556, 559, 873 NYS2d 17 [1<sup>st</sup> Dept 2009]. See also Capax Discovery, Inc. v. AEP RSD Investors, LLC 285 F.Supp.3d 579, 590 WDNY (2018)).

At this early stage, plaintiff's allegations are sufficient to withstand this motion to dismiss. Plaintiff alleges that defendants "*turned off or otherwise disabled the fire suppression*

*devices including the sprinkler system at the Premises prior to the Fire and had not reactivated the Fire suppression devices including the sprinkler system prior or at the time of the Fire*” (see paragraph 81 of plaintiff’s verified complaint [NYSCEF Doc. No. 1]). Although Plaintiff does not specify which board members disabled the sprinkler, discovery is not complete. Future discovery may reveal whether the system was in fact disabled on purpose and who disabled it. Accordingly, the court denies that part of the motion to dismiss the negligence claim against the various Board Members individually.

The Board Members also argue that the complaint should be dismissed based on the business judgment rule. “[P]re-discovery dismissal of pleadings in the name of the business judgment rule is inappropriate where those pleadings suggest that the directors did not act in good faith” (See *Ackerman v. 305 E. 40th Owners Corp.*, 189 A.D.2d 665, 667 (1st Dept 1993)). Thus, dismissing the action at this point, where discovery has barely begun, is inappropriate.

Defendant Copper Square moves to dismiss. Defendant Copper Square was the managing company of the Premises at the time of the Fire, but changed its name to FIRSTSERVICE RESIDENTIAL NEW YORK, INC which is already a named defendant in this action. Copper Square provides a copy of the Certificate of Amendment of the Certificate of Incorporation from the New York Secretary of State, dated June 17, 2013 [NYSCEF Doc. No. 83]. This document demonstrates that Copper Square’s name was in fact changed to FirstService Residential New York Inc. Accordingly, the motion is granted.

Accordingly, it is

ORDERED that defendants Board Members motion to dismiss is denied; and it is further

ORDERED that defendant Copper Square motion to dismiss is granted; and it is further

ORDERED that the parties shall appear at a conference on January 6, 2020 at 10 AM, at  
71 Thomas Street, IAS Part 15, Courtroom 304.

This constitutes the Decision and Order of the Court.

Dated: December ~~17~~, 2019

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MELISSA A. CRANE, J.S.C.

**HON. MELISSA A. CRANE**  
J.S.C.