

**Hambrecht v Morton Square Condominium Bd. of  
Mgrs.**

2020 NY Slip Op 31319(U)

May 8, 2020

Supreme Court, New York County

Docket Number: Index No. 157496/2019

Judge: James E. d'Auguste

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART IAS MOTION 55EFM

Justice

-----X

ELLIOT HAMBRECHT,
Plaintiff,

INDEX NO. 157496/2019

MOTION DATE 03/18/2020

MOTION SEQ. NO. 001

- v -

MORTON SQUARE CONDOMINIUM BOARD OF MANAGERS, MORTON SQUARE CONDOMINIUM RESIDENTIAL BOARD OF MANAGERS, JAMES BERKLEY, THE TRAVELERS COMPANIES, INC.,

DECISION ON MOTION

Defendant.

-----X

JAMES BERKLEY
Plaintiff,

Third-Party
Index No. 596001/2019

-against-

SCORDIO CONSTRUCTION INC., ORBIT PLUMBING & HEATING INC.

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 14, 15, 16, 17, 18, 19, 27, 28, 29, 43, 44, 45, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60

were read on this motion to/for DISMISS

Upon the foregoing documents, the motion is granted in part.

Plaintiff, Elliot Hambrecht, is the owner of a condominium apartment located at One Morton Square, Apartment 7GW, New York, New York 10014. Hambrecht seeks compensation for property damage allegedly caused by water leaking from Apartment 8DW, owned by defendant James Berkley (Berkley), into Hambrecht's apartment, 7GW. Specifically, Hambrecht claims that the leak caused a "mold infestation and damage to the flooring, walls and insulation." Hambrecht brings the instant action for (i) breach of contract against Morton Square Condominium Board of

Managers and Morton Square Condominium Residential Board Of Managers (collectively “Morton”), (ii) negligence against Morton, (iii) breach of contract against Berkley, (iv) negligence against Berkley, and (v) Breach of Contract against Travelers Insurance Company, the insurer for Hambrecht’s personal property damages.

Morton moves the Court pursuant to CPLR §§ 3211 (a)(1), 3211(a)(7), to dismiss the complaint and all cross-claims against them or, in the alternative, for an Order pursuant 3211(c) granting Morton summary judgment. Hambrecht and co-defendant Traveler’s Insurance have submitted opposition to the instant motion to dismiss. Defendant/third-party plaintiff, James Berkley, and third-party defendant, Orbit Plumbing & Heating Inc. also submitted partial opposition to Morton’s motion to dismiss.

In deciding a motion to dismiss pursuant to CPLR 3211(a)(7), 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. *Leon v. Martinez*, 84 N.Y.2d 83, 87 (1994) (the court must determine only whether the facts as alleged fit within any cognizable legal theory). A motion to dismiss pursuant to 3211(a)(1) may be granted “only where the documentary evidence utterly refutes plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.” *Goshen v. Mutual Life Ins. Co. of N.Y.*, 98 N.Y.2d 314, 326 (2002).

Here, Morton does not meet their burden to dismiss the breach of contract claim. In support of their motion, Morton presents documentary evidence in the form of the condominium by-laws. NYSCEF Doc. No. 18. The by-laws unambiguously require the board to obtain insurance and insure portions of the unit. Section 6.2.1 states in relevant part:

“The Condominium Board shall be required to obtain and maintain to the extent obtainable the following insurance: (a) fire insurance **with all risk extended coverage**, vandalism and malicious mischief endorsements and increased cost of construction endorsements, **insuring the entire Building (including each Unit,**

**but excluding fixtures, furniture, furnishings or other personal property not constituting a part of such Unit), together with all service machinery contained therein and covering the interests of the Condominium, each of the Boards and all Unit Owners...***Id. (emphasis added)*

Additionally, section 6.2.1(f) states that the board will obtain “water damage insurance to the extent, if any, determined by the Condominium Board.” Hambrecht asserts that each of the items of property mentioned in the complaint was an original “part of such Unit” as described in section 6.2.1 and therefore falls within the category of property for which the Board must have procured insurance coverage. *See* NYSCEF Doc. No. 1 (seeking recovery for damage to walls, insulation and flooring). Accordingly, the motion to dismiss the breach of contract claim against Morton is denied.

Morton also asks the Court to dismiss Hambrecht’s negligence claim. It is well settled that “[a] claim arising out of an alleged breach of contract . . . may not be converted into a tort action absent the violation of a legal duty independent of that created in the contract.” *Sergeants Benevolent Assn. Annuity Fund v. Renck*, 19 A.D.3d 107, 111 (1st Dept. 2005). The complaint fails to allege the breach of any duty owed by Morton independent of the duty created by the by-laws. Accordingly, Hambrecht’s negligence claim against Morton is dismissed.

Where, as here, Hambrecht has failed to assert a viable cause of action for negligence, it follows that any cross-claims that are also based in negligence, such as Berkley’s cross-claims for common law indemnification and contribution, also must fail. Accordingly, Berkley’s cross-claims for common law indemnification and contribution are dismissed.

Finally, the Court declines to convert the motion to dismiss into a motion for summary judgment under CPLR 3211(c). Numerous issues of fact remain, including the scope of insurance,

whether insurance claims were filed regarding the incident<sup>1</sup>, the cause of the incident, and the nature and extent of damages.

ORDERED, that the motion to dismiss is denied to the extent of the breach of contract claims against Morton; and it is further

ORDERED, that the motion is granted to the extent of dismissing Hambrecht’s negligence claim against Morton; and it is further

ORDERED, that the motion is granted to the extent of dismissing Berkeley’s cross-claims for common law indemnification and contribution against Morton.

This constitutes the decision and order of the court.

<u>5/8/2020</u> DATE					<u>JAMES EDWARD D'AUGUSTE, J.S.C.</u>		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED		<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION		
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	<input checked="" type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	SUBMIT ORDER		
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE

<sup>1</sup> Traveler’s claims that they are merely an excess insurer and that the condominium board was covered under a Zurich policy for the damages relating to this incident. See Traveler’s brief in opposition, NYSCEF Doc. No. 27.