Sosa v 342 E. 53 Owners, Inc.
2020 NY Slip Op 32993(U)
September 11, 2020
Supreme Court, New York County
Docket Number: 160954/2018
Judge: Kathryn E. Freed

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. KATHRYN E. FREED **PART** IAS MOTION 2EFM

Justice

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CHRISTOPHER SOSA and JACLYN SOSA,

Plaintiffs,

- v -

342 E. 53 OWNERS, INC. and PRIDE PROPERTY MANAGEMENT CORP.,

Defendants.

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INDEX NO. 160954/2018

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, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for DISMISSAL.

In this action by plaintiffs Christopher Sosa and Jaclyn Sosa (collectively "plaintiffs") seeking damages for, *inter alia*, breach of warranty of habitability, defendants 342 E. 53 Owners, Inc. ("the Co-op") and Pride Property Management Corp. ("Pride") (collectively "defendants") move, pursuant to CPLR 3211(a)(7) and Business Corporation Law ("BCL") § 626, to dismiss the complaint (Docs. 16-26). Plaintiffs oppose the motion and cross move, pursuant to CPLR 3025(b), for leave to amend their complaint (Docs. 37-42, 46-47). Defendants oppose the same (Docs. 43-45). After a review of the parties' contentions, as well as the relevant statutes and case law, the motions are decided as follows.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiffs are shareholders of the Co-op and tenants of a cooperative unit in a building owned by the Co-op and located at 342 East 53rd Street in Manhattan ("the premises") (Doc. 2 ¶

1-2). In November 2018, plaintiffs filed a summons and complaint as against the Co-op and its managing agent, Pride, asserting claims for, *inter alia*, breach of the warranty of habitability (*id.* ¶ 5, 32-56). Plaintiffs alleged, in relevant part, that Bekim Kalici ("Kalici"), the lessee of the apartment directly below their unit, had made numerous complaints about excessive noise emanating from his ceiling, which is also the sub-floor of plaintiff's apartment (*id.* ¶ 15). After retaining an architect to inspect and review the sub-floors, plaintiffs learned that interior walls were previously removed from within the premises to join two cooperative units and they asserted that the Co-op's failure to properly fasten the sub-floors during the renovation caused the sub-floors to squeak and creak over time (*id.* ¶ 23-29). Plaintiffs alleged that, had they known of the defective sub-floor, they would not have purchased the stock in the Co-op, nor would they have executed the subject lease (*id.* ¶ 20).

In the first and second causes of action, plaintiffs alleged that the Co-op's failure to repair the sub-floor constituted a breach of the lease and the implied warranty of habitability and, thus, that they were entitled to a reduction of no less than 25% of the rent paid from September 25, 2017 until all necessary repairs are made (*id.* ¶ 32-37). In their third cause of action, plaintiffs seek a judgment declaring their rights and obligations and directing the Co-op to repair the sub-floor (*id.* ¶ 38-40). In their fourth cause of action, premised on Real Property Law ("RPL") § 234, plaintiffs seek reasonable attorneys' fees and disbursements (*id.* ¶ 41-44). Lastly, in the fifth cause of action, plaintiffs asserted, derivatively on behalf of the Co-op, a claim against Pride for breach of its management duties and/or negligent performance of its contractual obligations (*id.* ¶ 45-56).[1] Plaintiffs alleged, as relevant to this cause of action, that:

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[1] In the complaint, this cause of action is referred to as the "first cause of action against [Pride]" (*id.* at 9).

> "[f]ormal notice to the [Co-op] pursuant to Business Corporation Law § 626(c) of intent to commence a derivative action against Pride in the name of the [Co-op] was not given because the [Co-op] refused the formal notice of default under the Lease . . . and mailing a letter by certified mail regarding intent to commence a derivative action would have been a useless act" (Doc. 40 ¶ 53).

In April 2019, defendants interposed an answer denying liability and asserting several affirmative defenses (Doc. 7). The Co-op also counterclaimed against plaintiffs for reimbursement of legal fees (*id.* ¶ 78-81), which plaintiffs opposed in a reply (Doc. 8).

Defendants now move, pursuant to CPLR 3211(a)(7), for dismissal of the first four causes of action as against the Co-op on the ground that, *inter alia*, plaintiffs' failure to allege that their own apartment is uninhabitable warrants dismissal of their claims premised on a breach of the warranty of habitability (Doc. 25 at 8-9). Moreover, defendants maintain that the derivative claim must also be dismissed because plaintiffs failed to make a demand on the Co-op's board of directors; they failed to plead with particularity that a demand would be futile; and they are not appropriate parties to bring a derivative claim given their hostility towards the Co-op and Pride (Doc. 25 at 9-13).

In opposition to defendants' motion to dismiss, plaintiffs only argue that, since defendants' motion was filed after the filing of an answer, it should be denied as untimely (Doc. 28 at 3-4). In a reply, defendants argue, *inter alia*, that CPLR 3211(e) allows for the filing of a motion to dismiss before issue is joined or at any subsequent time and that, given plaintiffs' failure to address the merits, the motion should be granted (Doc. 29 at 7-8).

The return date of defendants' motion was adjourned on consent until January 21, 2020 but, on January 23, 2020, plaintiffs filed a cross motion seeking leave to amend their complaint (Docs. 36-37). Annexed to their cross motion, plaintiffs submit, *inter alia*, a proposed amended complaint limiting the first three causes of action to a breach of the lease and removing all references to the

warranty of habitability (Doc. 40). Plaintiffs contend that the amendment should be granted because the substantive allegations and relief sought remain the same (Doc. 38 ¶ 9). Additionally, plaintiffs argue that they have pleaded a viable derivative claim because, as alleged in the complaint, notification to the Co-op would not have been possible as evidenced by the fact that other prior notifications sent to the Co-op at the building had been "rejected" (*id.* ¶ 13-14).

Defendants urge this Court to reject plaintiff's belated cross motion but argue that, should this Court consider it, the amendment should only be granted with respect to the third cause of action, which seeks equitable relief (Doc. 43 ¶ 3-5). However, defendants maintain that the first and second causes of action in the amended complaint are improperly pleaded because rent abatement is a remedy available only in warranty of habitability cases and the amended complaint retracted all such claims (*id.* ¶ 5). Defendants also assert that, since the proposed amendment makes no changes to the derivative claim with respect to the issue of notice, it should be dismissed for failure to comply with BCL § 626 (*id.* ¶ 6-12). No arguments are raised with respect to the fourth cause of action seeking attorneys' fees pursuant to RPL § 234.

In a reply affirmation in further support of the cross motion, plaintiffs argue that "the Court in colloquy on November 12, 2018, said that [it] would permit plaintiffs to amend their responses to the motion to dismiss for failure to state a cause of action" (Doc. 46 ¶ 6). Moreover, plaintiffs maintain that it would have been useless to ask the Co-op to sue Pride because the request could not be served on the Co-op in accordance with the notice provision and, moreover, that both defendants are represented by the same attorney, rendering a demand on counsel meaningless (Doc. 46 ¶ 15).

LEGAL CONCLUSIONS:

This Court will, in an exercise of its discretion, consider plaintiffs' cross motion since "there is no showing of prejudice, and [defendants] w[ere] able to submit reply papers on the motion" (*Serradilla v Lords Corp.,* 117 AD3d 648, 649 [1st Dept 2014]; *see Guzetti v City of NY*, 32 AD3d 234, 234 [1st Dept 2006]; *Kenvil United Corp. v Tishman Constr. Corp. of NY*, 2020 NY Slip Op 32323[U], 2020 NY Misc LEXIS, *5-6 [Sup Ct, NY County 2020). Additionally, the cross motion to amend will be considered first, "because, if granted, the amended complaint will become the operative pleading in this action and will moot the motion to dismiss the original complaint" (*Bd. of Mgrs. of Dragon Estates Condominium v Natoli,* 2018 NY Slip Op 30286[U], 2018 NY Misc LEXIS 569, *7 [Sup Ct, NY County 2018]; *see Gay v Farella,* 5 AD3d 540, 541 [2d Dept 2004]; *Zulauf v St. John's Church*, 2013 NY Slip Op 33187[U], 2013 NY Misc LEXIS 5972, *2 [Sup Ct, NY County 2013]).

Leave to amend a pleading shall be freely given absent prejudice or surprise from the delay and plaintiff need not establish the merit of his or her proposed new allegations (*see* CPLR 3025[b]). However, plaintiff must show that the "the proffered amendment is not palpably insufficient or clearly devoid of merit" (*see Miller v Cohen*, 93 AD3d 424, 425 [1st Dept 2012]; *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 AD3d 499, 500 [1st Dept 2010]). This Court finds that plaintiffs have failed to make such a showing with respect to the first, second and fifth causes of action.

As relevant here, a cause of action for breach of a lease requires the same elements of a breach of contract: (1) the formation of a contract; (2) performance by the plaintiff; (3) defendants failure to perform; and (4) resulting damages (*see Altin Realty v. S.H. Zell & Sons LLC*, 2019 NYLJ LEXIS 4393,*5 [Sup Ct, NY County 2019]). It is well-settled that implicit in every

residential lease is an implied warranty of habitability which sets forth a minimum standard to protect tenants against conditions that render the premises uninhabitable or unusable (*Kent v 534 E. 11th St.*, 80 AD3d 106, 112-113 [1st Dept 2010]). Although rent abatement is an appropriate remedy when asserting a claim based on a breach of the warranty of habitability (*see generally* CPLR 235-b; *Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 329 [1979]; *Heights 170 LLC v York*, 29 Misc 3d 138[A], 2010 NY Misc LEXIS 5729, *1-2 [App Term, 1st Dept 2010]; *VBH Luxury, Inc. v 940 Madison Assoc., LLC*, 2011 NY Slip Op 33412[U], 2011 NY Misc LEXIS 6198, *19-20 [Sup Ct, NY County 2011]), plaintiffs have failed to establish that a rent abatement is appropriate for their claims based solely on a breach of the lease (*compare Shackman v 400 E. 85th St. Realty Corp.*, 64 Misc 3d 1218[A], 2019 NY Slip Op 51198[U], 2019 NY Misc LEXIS 4092, *33-34 [Sup Ct, NY County 2019]).

With respect to the derivative claim, BCL § 626 provides the mechanism by which a shareholder may initiate a derivative action on behalf of a co-op and requires that the complaint set forth "with particularity the efforts of the plaintiff to secure the initiation of such action by the board or the reasons for not making such efforts" (*Marx v Akers*, 88 NY2d 189, 193 [1996]; *see Culligan Soft Water Co. v Clayton Dubilier & Rice, LLC*, 139 AD3d 621, 621-622 [1st Dept 2016]). "A plaintiff may satisfy this standard by alleging with particularity (1) 'that a majority of the board of directors is interested in the challenged transaction,' which may be based on self-interest in the transaction or a loss of independence because a director with no direct interest in the transaction is 'controlled' by a self-interested director, (2) 'that the board of directors did not fully inform themselves about the challenged transaction to the extent reasonably appropriate under the circumstances,' or (3) 'that the challenged transaction was so egregious on its face that it could not

have been the product of sound business judgment of the directors'" (*Walsh v Wwebnet, Inc.*, 116 AD3d 845, 847 [2d Dept 2014], quoting *Marx v Akers*, 88 NY2d at 200).

In their proposed amended complaint, plaintiffs concede that formal notice pursuant to BCL § 626 (c) was not given to the Co-op (*id.* ¶ 53). Although plaintiffs allege, *inter alia*, that notice pursuant to BCL § 626(c) would have been futile since a prior notice of default was previously mailed by certified mail to the Co-op at the building and returned as undeliverable (*id.* ¶ 130), there are no allegations, let alone with the necessary particularity, of any attempt by plaintiffs to convince the board to initiate this action as against Pride so as to support its futility allegations (*see L.A. Grika on behalf of McGraw*, 161 AD3d 450, 452 [1st Dept 2018]; *Avramides v Moussa*, 158 AD3d 499, 499 [1st Dept 2018]; *Culligan Soft Water Co. v Clayton Dubilier & Rice, LLC*, 139 AD3d 621, 622 [1st Dept 2016]). Thus, this Court grants plaintiffs' cross motion only to the extent that it seeks to amend the third cause of action seeking a declaratory judgment.

Since the proposed amended complaint fails to cure the deficiencies with respect to the first (breach of the warranty of habitability), second (breach of the warranty of habitability) and fifth (derivative claim) causes of action of the first amended complaint, that branch of the motion seeking dismissal of said claims is granted (*see Korsinsky v Winkelreid*, 143 AD3d 427, 428 [1st Dept 2016]). However, that branch of the motion seeking dismissal of the fourth cause of action seeking attorneys' fees pursuant to RPL § 234 is rendered moot by the amended complaint.

Accordingly, it is hereby:

ORDERED that plaintiffs' motion to amend the complaint is granted to the extent it seeks to amend their claims seeking a declaratory judgment (third cause of action); and it is otherwise denied; and it is further

ORDERED that defendants' motion, pursuant to CPLR 3211(a)(7) and BCL § 626, is granted to the extent that it seeks dismissal of the first and second causes of action seeking a rent abatement, as well as the derivative cause of action against Pride, and the motion is otherwise moot; and it is further

ORDERED that, 20 days after this order is uploaded to NYSCEF, plaintiffs shall serve a copy of this, with notice of entry, upon defendants; and it is further

ORDERED that, within 30 days of service of this order, with notice of entry, plaintiffs shall serve and file a newly drafted amended complaint, as limited by the preceding paragraphs and in accordance with this order; and it is further

ORDERED that the parties are to participate in a discovery conference by telephone on December 16, 2020 at 12:30 pm (the parties are to provide a dial-in number and access code for the call or are to have all parties on the line and then patch in the court at 646-386-3895); and it is further

ORDERED that, in lieu of the telephone conference, the parties may confer and enter into a discovery stipulation and then email it to the Court at ipeguero@nycourts.gov to be so-ordered by Justice Freed on or before December 16, 2020; and it is further

ORDERED that, if the parties choose the latter, the stipulation must leave blank spaces for the note of issue deadline and next compliance conference date, which will be determined by the Court; and it is further

ORDERED that this constitutes the decision and order of this Court.

9/11/2020
DATE

KATHRYN E. FREED, 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