Oceanhousenyc, LLC v 140 W St. (NY), LLC
2021 NY Slip Op 31647(U)
May 14, 2021
Supreme Court, New York County
Docket Number: 656345/2020
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 14**

Justice

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OCEANHOUSENYC, LLC, PRASHANT LAL,

Plaintiff,

- v -

140 WEST STREET (NY), LLC, BENJAMIN SHAOUL, VERIZON NEW YORK INC.

Defendant.

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INDEX NO. 656345/2020

MOTION DATE N/A

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 123, 124, 125, 126

were read on this motion to/for DISMISS.

The motion by defendant Benjamin Shaoul ("Shaoul") to dismiss the complaint is granted in part and denied in part.

Background

Plaintiffs live in a mixed used condo building (a building with both commercial and residential units). The building used to be exclusively occupied by defendant Verizon New York Inc. ("Verizon") but now houses both Verizon (on the lower floors) and residential apartments on the upper floors.

Plaintiffs, who live on the lowest residential floor (and immediately above Verizon's top floor) claim that the noise from a certain bank of elevators (the "C" bank) makes it unbearable to live in their apartment. Plaintiffs also complain about the machine room, which they allege is excessively noisy and is located directly under their apartment. They insist there is substantial interference with the quiet use and enjoyment of their apartment. Plaintiffs contend that the noise

and vibrations violate all relevant building and noise codes. They allege that the family's two daughters cannot use their bedrooms because of the noise.

Shaoul, the principal of 140 West (the sponsor/developer of the conversion and seller of the unit) brings the instant motion to dismiss all claims against him individually, arguing that he was acting in his official capacity as principal of 140 West. Shaoul argues that he cannot be found liable, as a matter of law, for the breach of contract claim because he was not in privity with the plaintiffs. Shaoul further argues that all of the subsequent causes of action stem from the breach of contract claim, and so they must be dismissed against him individually as well.

Motion to Dismiss

"On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the [pleading] as true, accord [the proponent of the pleading] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (Leon v Martinez, 84 NY2d 83, 87-88, 614 NYS2d 972 [1994] [citations omitted]). "At the same time, however, allegations consisting of bare legal conclusions . . . are not entitled to any such consideration" (*Connaughton v Chipotle Mexican Grill, Inc.*, 29 NY3d 137, 141, 75 NE3d 1159 [2017] [citation and internal quotations omitted])

On a "motion to dismiss on the ground that the action is barred by documentary evidence, such motion may be appropriately 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 NY2d 314, 326, 746 NYS2d 858 [2002]).

First and Second Causes of Action – Breach of Contract

As an initial matter, this Court notes that the amended complaint makes allegations against the "Developer Defendants", which are identified as Shaoul, individually, and 140 West. The first cause of action alleges that Shaoul breached the agreement to provide plaintiffs with a condominium that was constructed in accordance with industry standards, including those pertaining to noise and vibration levels.

Shaoul argues that he signed the Offering Plan and Purchase Agreement on behalf of 140 West as either "president" or "sponsor" (NYSCEF Doc. Nos. 78 and 79). He argues that he did not sign in his personal capacity and cannot be held personally liable for the breach. Plaintiffs argue that Shaoul signed in his personal capacity and so is liable for the alleged breach, but the only contracts provided indicate that Shaoul signed as either "principal" or "sponsor" (*id.*).

In *Leonard v Gateway II, LLC*, the First Department dismissed breach of contract claims against all defendants except Gateway II, the corporate entity, because the other defendants were not in privity with plaintiff (68 AD3d 408, 408-409) [1st Dept 2009]). The Court held that "[t]he purchase agreements were unequivocally executed by Gaetano solely on behalf of Gateway II, and plaintiff points to no other contracts involving any other defendant" (*id.*). Gaetano was a member of Gateway II.

Accordingly, the Court finds that Shaoul was not in privity with the plaintiffs. There are no specific allegations against Shaoul in either the amended complaint or in the opposition to the instant motion against him personally. Plaintiff appears to conflate the actions of 140 West with defendant Shaoul. Shaoul cannot be held personally liable for the alleged breach of contract

between plaintiffs and 140 West. Therefore, the first and second causes of action against Shaoul are dismissed and the Court grants this branch of Shaoul's motion.

Remaining Causes of Action

"[A] corporate officer who participates in the commission of a tort may be held individually liable, *regardless of whether the officer acted on behalf of the corporation in the course of official duties* and regardless of whether the corporate veil is pierced" (*Peguero v 601 Realty Corp.*, 58 A.D.3d 556 [1st Dept 2009] [emphasis in original]).

In his motion, Shaoul argues that the remaining causes of action all stem from the breach of contract claim and, because he cannot be held liable for the breach of contract, he also cannot be held liable for the remaining causes of action. However, because a member of a limited liability corporation may be held individually liable for the torts he commits, Shaoul's blanket and generalized argument to the contrary is unpersuasive.

Third and Fourth Causes of Action – Fraud

The third and fourth causes of action allege that Shaoul made "false" or "half-true" representations to plaintiffs regarding the noise levels in the condominium (NYSCEF Doc. No. 80 at 16). Plaintiffs allege that these representations were made with the intent to deceive them into purchasing the unit, which they did, resulting in a fraud.

Plaintiffs argue that a member of a limited liability company can be held liable for fraud if he participates in the commission of said fraud. In his reply papers, Shaoul argues that the claims for fraud are duplicative of the breach of contract claim and so must be dismissed. Shaoul also argues that the claims for fraud are in violation of the Marin Act.

"The elements of a cause of action for fraud are a representation concerning a material fact, falsity of that representation, scienter, reliance and damages" (*Stuart Silver Assocs., Inc. v Baco Dev. Corp.*, 245 AD2d 96, 98, 665 NYS2d 415 [1st Dept 1997]).

"[A] fraud claim that arises from the same facts as an accompanying contract claim, seeks identical damages and does not allege a breach of any duty collateral to or independent of the parties' agreements is subject to dismissal as "redundant of the contract claim. . . Thus, where a fraud claim was supported by allegations that the defendants had misrepresented their intentions with respect to the manner in which they would perform their contractual duties, we dismissed the fraud claim as duplicative of the plaintiffs' contract claim because the fraud claim was based on the same facts that underlie the contract cause of action, was not collateral to the contract, and did not seek damages that would not be recoverable under a contract measure of damages" (*Cronos Group Ltd. v XComIP, LLC,* 156 AD3d 54, 62-63 [1st Dept 2017] [internal quotations and citations omitted]).

Shaoul's argument is that the claims for fraud are duplicative of the breach of contract claim is unpersuasive. Plaintiffs have alleged a breach of contract against the corporate defendant, and then separately alleged that Shaoul was involved in material misrepresentations to induce them to purchase the apartment. Plaintiff seeks damages from the fraud claims separate and apart from the relief sought in the breach of contract claims. Although the fraudulent claims are related to the breach of contract claims, they are not duplicative.

Martin Act

Shaoul argues that plaintiffs "no longer have the right to institute a common-law claim for fraud with respect to a cooperative or condominium offering" because it is barred by the Martin Act (NYSCEF Doc. No. 123 at 33).

"The Martin Act authorizes the Attorney General to investigate and enjoin fraudulent practices in the marketing of stocks, bonds and other securities within or from New York State ... In 1960 … the Legislature was asked to choose a legislative approach for the protection of purchasers in offerings of cooperative and condominium units. The choice was incorporated into the state's blue sky law (the Martin Act) and was a disclosure approach—full disclosure of risks and unit purchasers' self-protection by analysis of risks" (*Kerusa Co, LLC v WW10Z/515 Real Estate Ltd. Partnership*, 12 NY3d 236, 243 [2009] [internal quotations and citations omitted]).

"Although a private litigant may not pursue a common-law cause of action where the claim is predicated solely on a violation of the Martin Act or its implementing regulations and would not exist but for the statute, an injured investor may bring a common-law claim—for fraud or otherwise—that is not entirely dependent on the Martin Act for its viability. Mere overlap between the common law and the Martin Act is not enough to extinguish common-law remedies" (*Assured Guar. (UK) Ltd. v J.P. Morgan Inv. Mgt. Inc.*, 18 NY3d 341, 353 [2011]).

The First Department has recently held that "[T]he fraud cause of action is based on affirmative misrepresentations, not omissions. Therefore, the motion court correctly found that it was not barred by the Martin Act. The court also correctly found that defendants, who are principals of the sponsor, and who signed the certification in the offering plan, could be held liable" (*Board of Mgrs. of the Walton Condominium v 264 H2O Borrower, LLC*, 180 A.D.3d 622, 622 [1st Dept 2020] [internal quotations and citations omitted]).

The Court denies this branch of Shaoul's motion. His argument that the fraud claim is barred by the Martin Act is unpersuasive because the amended complaint alleges that Shaoul made affirmative representations to perpetrate the fraud, which is a permissible cause of action.

Fifth Cause of Action – Violation of Section 349 of the General Business Law

The fifth cause of action alleges that Shaoul violated General Business Law §349 by making fraudulent representations about the Offering Plan and Purchase Agreement. Shaoul argues that this claim should be dismissed because it is duplicative to the breach of contract claim.

General Business Law § 349(a) provides "[d]eceptive acts or practices in the conduct of any business, trade or commerce or in the furnishing of any service in this state are hereby declared unlawful." Subsection (h) provides "[i]n addition to the right of action granted to the attorney general pursuant to this section, any person who has been injured by reason of any violation of this section may bring an action in his own name to enjoin such unlawful act or practice, an action to recover his actual damages or fifty dollars, whichever is greater, or both such actions."

The Court denies this branch of Shaoul's motion. Similar to fraud, the alleged violation of General Business Law §349 is not duplicative of the breach of contract claim. And General Business Law § 349(h) provides for a private cause of action.

Sixth Cause of Action – Negligence

The sixth cause of action alleges that Shaoul had a "duty to exercise reasonable care in connection with the operation of the "C" bank elevators and the elevator machine room". (NYSCEF Doc. No. 80 ¶ 97).

"In order to prevail on a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." (*Pasternack v Laboratory Corp. of America Holdings*, 27 NY3d 817, 824 [2016]).

Shaoul argues that the claim must be dismissed because plaintiffs have not alleged a duty of care apart from performing the Purchase Agreement and Offering Plan. Plaintiffs argue that

Shaoul breached his duty to plaintiffs because "the operation of the "C" bank elevators violates the NYC Building Noise Codes" (NYSCEF Doc. No. 89 at 18).

The Court grants this branch of Shaoul's motion and dismisses the sixth cause of action. Plaintiffs did not allege that Shaoul was the mechanic, architect, or operator of the elevators, or that he had any individual responsibility with respect to the elevators. Plaintiffs do not explain how Shaoul, as a member of 140 West, was personally responsible for the elevators or the noise that they allegedly make. According to the contracts provided, Shaoul is the president of 140 West and sponsor of the sale and is not in control of the elevators in dispute.

Seventh and Eighth Causes of Action – Nuisance

The seventh and eighth causes of action allege that the noise from the operation of the elevators has interfered with plaintiffs' use of the apartment, thereby creating a nuisance.

"The elements of a common-law claim for a private nuisance are: (1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act. Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct" (*Berenger v 261 W. LLC*, 93 AD3d 175, 182, 940 NYS2d 4 [1st Dept 2012] [internal quotations and citation omitted]).

Shaoul argues that plaintiffs have not alleged that the sound from the elevators was intentional in origin or was controlled by the Developer Defendants. Plaintiffs again argue that Shaoul is liable for the noise that enters the apartment as a result of the elevators.

The Court grants this branch of Shaoul's motion and dismisses the seventh and eighth causes of action against him. Plaintiffs have not alleged that Shaoul intentionally caused the noise from the elevators, or that his "conduct in acting or failure to act" caused the alleged nuisance

because plaintiffs have not alleged that Shaoul was responsible for the operation of the elevator. The complaint does not allege that Shaoul did anything personally to create the nuisance.

Ninth Cause of Action – Trespass

The ninth cause of action alleges that a trespass occurred because of defendants' intentional use and operation of the "C" elevator banks, which created the noise the apartment.

"The essence of trespass to real property is injury to the right of possession, and such trespass may occur under the surface of the ground. A person need not have title to the property, but must simply have sufficient property rights to maintain an action for trespass" (*Bloomingdales, Inc. v New York City Tr. Auth.*, 13 NY3d 61, 66 [2009]).

Shaoul argues that he did not intentionally cause the entry of anything physical into the apartment. Plaintiff again argue that Shaoul is liable for the noise that enters the apartment as a result of the elevators.

The Court grants this branch of Shaoul's motion and dismisses the ninth cause of action against him. "[C]ourts have precluded trespass claims where the entry or intrusion was intangible, such as the occurrence of vibrations, shading of a plaintiff's property, or a permeating odor or vapors of gasoline Generally, intangible intrusions, such as by noise, odor, or light alone, are treated as nuisances, not trespass because they interfere with nearby property owners' use and enjoyment of their land, not with their exclusive possession of it" (*Ivory v Intl. Bus. Machines Corp.*, 116 AD3d 121, 129-30, 983 NYS2d 110 [3d Dept 2014] [internal quotations and citations omitted]).

Tenth Cause of Action – Violations of the New York City Building and Noise Codes

The tenth cause of action alleges that Shaoul violated the New York City Building and Noise Codes by virtue of the sound coming from the elevator bank.

Shaoul argues that there are no allegations that he personally violated the codes or was involved in their violation. Plaintiff again argue that Shaoul is liable for the noise that enters the apartment as a result of the elevators.

The Court grants this branch of Shaoul's motion and dismisses the tenth cause of action against Shaoul. There is nothing in the amended complaint that alleges that Shaoul was personally involved with the operation of the elevator banks or the noise that they create.

Eleventh Cause of Action – Injunctive Relief

The eleventh cause of action is for injunctive relief by enjoining the defendants from continuing to use the "C" elevator bank because of the noise. As stated above, Shaoul has no part in the operation of the elevator banks. The Court grants this branch of Shaoul's motion and dismisses the eleventh cause of action against him.

Accordingly, it is hereby

ORDERED that the first and second causes of action (breach of contract), sixth cause of action (negligence), the seventh and eighth causes of action (nuisance), the ninth cause of action (trespass) tenth cause of action (NYC Building and Noise Codes), and the eleventh cause of action (injunctive relief) are dismissed as against defendant Benjamin Shaoul and denied as to the remaining branches of the motion and he is directed to answer pursuant to the CPLR.

Already Scheduled Remote Conference: July 7, 2021 at 2 p.m.

5/14/2021
DATE

ARLENE P. BLUTH, 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