Pu v Board of Mgrs. of Trafalgar House Condominium
2021 NY Slip Op 32577(U)
December 6, 2021
Supreme Court, New York County
Docket Number: Index No. 161594/2018
Judge: James E. d'Auguste
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION E55FM
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RICHARD PU,
Plaintiff,

Index No.: 161594/2018
Mot. Seq. No. 04

-against-

DECISION AND ORDER

BOARD OF MANAGERS OF TRAFALGAR HOUSE CONDOMINIUM, and AKAM LIVING SERVICES, INC.,

Defendants.
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HON. JAMES EDWARD. D'AUGUSTE, J.:

The following e-filed documents, listed by NYSCEF document numbers (Motion 004) 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 90, 91, 92, 93. 94, 95, 96, 97, 98, 99, 100, 101, and 102, were read on this motion for summary judgment.

Upon the foregoing documents, it is hereby ordered that the above motion is granted.

This is an action by a condominium unit owner, plaintiff Richard Pu, for water damage to his unit's floorboards caused by a leaking kitchen radiator on October 16, 2019. Both defendants, Board of Managers of Trafalgar House Condominium and Akam Living Services, Inc. now move for summary judgment dismissing the First Amended Complaint.

The motion is granted. First, plaintiff has failed to rebut defendants' showing that his unit did not sustain any damages. In support of their motion, defendants have submitted the affidavit of registered architect, Charles J. Schaffer (NYSCEF Doc. No. 87), who inspected plaintiff's apartment on December 9, 2019 and found no damage to the floors. He avers that his measurements reflected that there were no differences between the areas of the floor identified by plaintiff to be affected by water and those identified as not affected (*id.*, ¶¶ 10-17). He found no observable differences in the flatness or vertical offsets between the floorboards, nor any difference

in the gaps between the pieces of parquet flooring (*id.*, ¶ 19).

Plaintiff has not countered plaintiffs' showing with an expert's or appraiser's report (NYSCEF Doc. No. 78 [Verified Bill of Particulars] ¶¶ 26-27). His proof consists solely of his testimony that the floor was initially warped, wavy and spongy (NYSCEF Doc. No. 76 [Pl's Deposition Transcript] 42:4-44:6) , and that a representative of the building's managing agent confirmed the warping by feeling it when he swiped the side of his foot against the tile (*id.*, ¶ 39:25-40:9). However, he conceded that the floor eventually flattened out so that there was no need for a repair, and that his only concern was that there was a possibility that it might warp again on a humid day, something that had not yet occurred (id., 44:7-13). Plaintiff concedes that he does not have any receipts, purchase orders, bills of lading, copies of cancelled checks, paid receipts, repair or maintenance records relating to his alleged damages (NYSCEF Doc. No. 77 [Demand for Verified Bill of Particulars], ¶ 25; NYSCEF Doc. No. 78, ¶ 25). He also did not ever have the radiator repaired or inspected (NYSCEF Doc. No. 76, 16:19-17:6).

Additionally, by stipulation dated July 2, 2020, plaintiff withdrew any claim for lost wages, lost revenue, lost business income, business interruption loss, or any other type of economic loss related to the operation of his law practice or loss of personal income (NYSCEF Doc. No. 79, ¶ 1). He further agreed that he would be precluded from offering any evidence of the diminution of value of his premises other than his own testimony, subject to defendants' right to challenge the admissibility of such testimony (*id.*, ¶¶ 3-4). In this connection, plaintiff contends in his affidavit that "I manage real estate in Manhattan, and am therefore qualified to opine on the diminution of the value of my condo . . . [i]n my opinion, as a result of the foregoing facts, the value of my condominium would be reduced by $250,000" (NYSCEF Doc. No. 90, ¶¶ 13-14). At his deposition, however, plaintiff stated that "I don't do real estate work" and that his estimate was

based solely on his "general understanding about real estate values" (NYSCEF Doc. No. 76, 13:19-20; 86:4-9). His only other testimony relevant to damages was that he spent the better part of the day searching the internet for replacement floor tiles, but could only find non-matching styles which would be a "terrible eyesore" (NYSCEF Doc. No. 90, ¶¶ 8-9).

Apart from failing to establish that there was any discernable physical damage to his floor, plaintiff's self-serving estimate of his pecuniary loss is insufficient to meet his burden to establish damages. "An estimate is no more than a guess as to the cost of repairs and, as such, damages cannot be awarded on the basis of such conjecture or guesswork." *Murphy v Lichtenberg-Robbins Buick*, 102 Misc2d 358, 359 (App Term, 2d Dept 1978). A plaintiff must proffer "evidence of competent expert testimony or by proper proof that the necessary repairs have been made and paid for." *Id.* While oral testimony of damages may be acceptable where the witness has knowledge of the *actual* costs, *Najjar Indus., Inc. v City of New York*, 87 AD2d 329, 332 (1st Dept1982), *aff'd sub nom. Najjar Indus., Inc. v. City of New York (Greenpoint Incinerator)*, 68 NY2d 943 (1986), plaintiff has not incurred any costs to date. Rather, he is seeking compensation for a speculative loss in a hypothetical future sale due to his unit's alleged, unsubstantiated diminution in value. Such damages are not recoverable. *See Shah v 20 E. 64th St., LLC*, 198 AD3d 23 (1st Dept 2021); *RSB Bedford Assoc. LLC v Ricky's Williamsburg, Inc.*, 112 AD3d 526 (1st Dept 2013); *Fresh Del Monte Produce N.V. v Eastbrook Caribe A.V.V.*, 40 AD3d 415 (1st Dept 2007).

In view of plaintiff's clear failure to establish any damages, the remaining issues do not merit extended discussion. Nonetheless, defendants have also established through the affidavit of a second expert, Edward S. Cankosyan, a professional mechanical engineer (NYSCEF Doc. No. 86), that defendants' conduct did not cause the flooding. Specifically, he avers that there was no issue relating to the boiler or the building's piping or risers which caused or contributed to the

failure of plaintiff s in-unit kitchen radiator (*id.*, ¶ 11). In this connection, he notes that an earlier reported leak in the building's A-line heating riser could not have contributed to the flooding from plaintiff's radiator, which was serviced by the C-line riser (*id.*, ¶¶ 9-10).

In opposition, plaintiff has again declined to counter with his own expert, but instead relies on his own bare "inference" that the failure of his radiator was triggered by the building switching over from cooling to heating because the two events occurred close in time (NYSCEF Doc. No. 90, 34:8-18). He further invokes a January 2019 report by a non-party architectural firm, Howard Zimmerman Architects, P.C. (NYSCEF Doc. No. 96), which was retained by defendants to inspect the building and make recommendations. That report concluded that there was an "alarming" building-wide deterioration of the pipes which created the potential for "catastrophic leaks" (*id.*, p. 21). However, putting aside the hearsay nature of the report, its findings are irrelevant to what caused the leak from plaintiff's radiator. Plaintiff has not proffered any competent evidence that the flooding was caused by the C-line riser or any other pipe, and the report does not specifically identify any defect in the pipes leading to plaintiff's radiator.

Finally, plaintiff's claims for breach of contract and breach of fiduciary duty fail in the absence of any proof of damages or causation. To the extent that the contract claim is based upon defendants' breach of their alleged obligations under the condominium's offering plan and by-laws to make prompt repairs to plaintiff's radiator and floors, it is also deficient. The offering plan assigns the cost of all structural and non-structural repairs and maintenance within each unit to that unit's owner, and the radiator is contained entirely within plaintiff's unit (NYSCEF Doc. No. 85, p. 63). Similarly, the by-laws impose no duty upon defendants with respect to floor coverings installed by an individual unit owner (*id.*, Ex. 1, Article V, Section 3).

Accordingly, it is

ORDERED that defendants' motion for summary judgment is granted, and the complaint is dismissed in its entirety, without costs and disbursements; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

12/6/2021
DATE

JAMES D'AUGUSTE, J.S.C.

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