

Etkin v Sherwood Residential Mgt. LLC
2022 NY Slip Op 31728(U)
May 25, 2022
Supreme Court, New York County
Docket Number: Index No. 655734/2021
Judge: Barry R. Ostrager
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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. BARRY R. OSTRAGER PART IAS MOTION 61EFM

Justice

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WILLIAM ETKIN, personally, and derivatively on behalf of the 500 West 21st Street Condominium,

Plaintiff,

- v -

SHERWOOD RESIDENTIAL MANAGEMENT LLC and THE BOARD OF MANAGERS OF THE 500 WEST 21ST STREET CONDOMINIUM,

Defendants,

- and -

THE 500 WEST 21ST STREET CONDOMINIUM,

Nominal Defendant.

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HON. BARRY R. OSTRAGER

The Court held oral argument on May 25, 2022, via Microsoft Teams on the pre-answer motion to dismiss plaintiff’s complaint by defendants Sherwood Residential Management LLC (“Sherwood”) and The Board of Managers of the 500 West 21st Street Condominium (“the Board”). For the reasons stated on the transcript of proceedings of May 25, 2022, and as further elaborated here, the motion is granted in part.

Plaintiff William Etkin is the owner of a unit at the 500 West 21st Street Condominium. Plaintiff alleges that beginning in late 2015, not long after purchasing his condominium unit, he noticed a significant smoke condition in his unit and on his floor, which was allegedly emanating from the fireplace in a Penthouse unit of the building. Plaintiff also alleges that, beginning in March 2021, concrete mortar and water has been raining down from the terrace above plaintiff’s unit, causing damage to plaintiff’s terrace. Plaintiff alleges that he has repeatedly notified the

Board and Sherwood, the Condo's Managing Agent, of these issues and that defendants have refused or failed to address them. Plaintiff claims these issues are the Board's responsibility under the Condominium By-Laws and Sherwood's responsibility under the Management Agreement entered into between the defendants. Plaintiff further alleges financial improprieties by the defendants, who have allegedly permitted various expenses to be borne by Condo unit owners when they were the responsibility of other parties.

Under CPLR § 3211(a)(7), this Court is tasked with determining whether, after affording the pleadings a liberal construction and accepting the allegations in the Complaint as true, "the facts as alleged fit within any cognizable legal theory ... Under CPLR § 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" *Leon v. Martinez*, 84 N.Y.2d 83, 87-88 (1994) (citations omitted).

The motion to dismiss the first cause of action for derivative breach of contract against Sherwood is denied. Plaintiff has sufficiently alleged the elements of breach of contract, and dismissal at this pre-answer motion to dismiss stage would be premature.

The motion to dismiss the 3rd cause of action for derivative breach of contract against the Board is denied. This claim is not refuted by the documentary evidence advanced by defendants. Defendants rely on the Novick affidavit (NYSCEF Doc. No. 13), but affidavits are not considered documentary evidence for the purposes of CPLR § 3211(a)(1). *See Shah v. Mitra*, 171 A.D.3d 971, 973 (2d Dept. 2019). The Declaration, Offering Plan, and Medley contract also do not refute plaintiff's claim because there are questions of fact as to the severity of the complained-of conditions, as well as to whom the responsibility belongs to repair the complained-of conditions.

The motion to dismiss the second and fourth derivative causes of action for breach of fiduciary duty against Sherwood and the Board, respectively, is granted as duplicative of the breach of contract causes of action. Plaintiff has failed to allege a duty owed to plaintiff that is independent of the Board or Sherwood's contractual duties. *See William Kaufman Org., Ltd. V. Graham & James LLP*, 269 A.D.2d 171, 173 (1st Dept. 2000).

The motion to dismiss the fifth cause of action for nuisance against the Board is denied. The elements of 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 failing to act. *Chelsea 18 Partners, LP v. Sheck Yee Mak*, 90 A.D.3d 38 (1st Dept. 2011). The elements of nuisance are sufficiently alleged as to both the terrace issue and the fireplace issue. There are issues as to whether the interference was substantial, intentional, or unreasonable, but these are questions of fact that are premature to rule upon on a pre-answer motion to dismiss. *See Domen Holding Co. v. Aranovich*, 1 N.Y.3d 117, 125 (2003). Further, the documentary evidence does not irrefutably preclude this claim as a matter of law for the reasons addressed above. Plaintiff does not lack standing for this individual claim because there is a question of fact as to whether a "Residential Limited Common Element" under the Offering Plan is distinguishable from other "common elements" such as hallways.

To the extent the fifth cause of action for nuisance is alleged against Sherwood, the claim is dismissed. A managing agent cannot be liable in tort for any allegation of nonfeasance with a plaintiff who is a third party to the management agreement. *Caldwell v. Two Columbus Ave. Condominium*, 92 A.D. 3d 441, 442 (1st Dept. 2012). Plaintiff only alleges nonfeasance by alleging that Sherwood allowed the smoke infiltration/terrace issues to persist.

The sixth cause of action for constructive eviction is dismissed. Constructive eviction exists “where there is a wrongful act by the Landlord which deprives the Tenant of the beneficial enjoyment/actual possession of the demised premises.” *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 82 (1970). Plaintiff has not alleged a landlord/tenant relationship. The cases cited by plaintiff purporting to show that a constructive eviction claim may be brought by the owner of real property all involved co-op ownership, where the plaintiffs owned shares in the corporation and a proprietary lease in the unit. In all events, it is undisputed that plaintiff is occupying his unit.

The seventh and eighth causes of action for negligence and gross negligence are dismissed as duplicative of the breach of contract claim. These causes of action were based on the same allegations as the breach of contract claims and plaintiff does not identify a legal duty independent of defendants’ contractual duties that would support a claim for negligence or gross negligence. *See Clark-Fitzpatrick, Inc. v. Long Island R.R. Co.*, 70 N.Y.2d 382, 389 (1987).

Accordingly, it is hereby

ORDERED that the motion to dismiss by defendants is denied as to Counts 1, 3, granted as to Count 5 with respect to defendant Sherwood only, and granted as to Counts 2, 4, 6, 7, and 8, and those claims are severed and dismissed; and it is further

ORDERED that defendants shall answer the remaining claims within 20 days of the date of this decision and order; and it is further

ORDERED that all counsel shall appear on July 26, 2022 at 10:30 a.m. for a preliminary conference. The parties are directed to submit a dial-in number for the conference no later than July 8, 2022. To that end, the parties are directed to meet and confer to agree upon the terms of a Preliminary Conference Order using the form available on the Part 61 website with a Note of

Issue deadline no later than 22 months from the date of this Order, and e-file it with a request to so Order by July 8, 2022. If the proposed Preliminary Conference Order is acceptable to the Court, it will be So Ordered and no appearance will be necessary on July 26, 2022.

Dated: May 25, 2022


BARRY R. OSTRAGER, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input checked="" type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE