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| Brown v 287 LES JV LLC |
| 2022 NY Slip Op 32756(U) |
| August 16, 2022 |
| Supreme Court, New York County |
| Docket Number: Index No. 152386/2022 |
| Judge: Lisa S. Headley |
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. LISA HEADLEY PART 28M

Justice

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TICE BROWN, SARAH KATZ,
Plaintiff,

INDEX NO. 152386/2022

MOTION DATE N/A

MOTION SEQ. NO. 001

- v -

287 LES JV LLC, 287 LES JV REPRESENTATIVE
LLC, VINCI US REAL ESTATE GP LLC, VINCI PARTNERS
USA LLC, VINCI US REAL ESTATE SUB-FUND I, L.P., 287
E HOUSTON LLC, ANDRES HOGG, JOSE TORNAGHI
GRABOWSKY, FRANCISCO ANDRAGNES

DECISION + ORDER ON
MOTION

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 20, 21, 22, 23, 24,
25, 26, 27, 28, 29, 33, 34, 35, 36, 37

were read on this motion to/for DISMISS

Tice Patrick Brown and Sarah Hobart Katz (hereinafter "plaintiffs" or "counterclaim
defendants") filed the instant motion, pursuant to CPLR §§3211(a)(1), (a)(7) & (a)(g) and CPLR
§3016(a), to dismiss defendant 287 LES JV LLC's ("defendant 287 LES") first, second and third
counterclaims asserted in its Answer. Defendant 287 LES filed opposition. Plaintiffs filed a reply.

I. Background

On February 25, 2021, plaintiffs purchased a condominium located at 287 East Houston Street,
New York, New York from defendant 287 LES. In August 2021, plaintiffs allege, inter alia, that the
defendant delivered the unit with constructive defects and breached numerous provisions in the offering
plan, condominium declaration, and purchase agreement. Plaintiffs allege that after numerous requests
for repairs, they were forced to resort to self-help, and to fix the defects in the roof on their own. As a
result, on October 29, 2021, plaintiffs filed a lawsuit against defendant 287 LES for fraud and
misconduct in the construction, marketing, sale, management, and operation of the condominium.
Plaintiffs contend, inter alia, that defendant 287 LES has control of the condominium's board of
managers and attempted to thwart the discovery of the true extent of the defective construction.

Subsequently on November 3, 2021, defendant 287 LES filed its own complaint against the
plaintiff in New York County Supreme Court, and alleged three counterclaims, one for breach of
contract, one for defamation, and the last counterclaim for frivolous conduct. In the first counterclaim,
defendant 287 LES alleges that plaintiffs violated the condominium's by-laws, and the board and its
agents are entitled to access the plaintiffs' roof area, and that the board was entitled to \$50,000 in legal
fees. In the second counterclaim, defendant 287 LES alleges that plaintiffs made false statements that
were circulated to all of the unit owners in the condo with actual malice and with the intent of defaming
defendant. Defendant 287 LES contends that the defamatory statements are not privileged pursuant to
the Anti-SLAPP statute since plaintiffs' letter with the alleged defamatory statements was circulated

privately, and was not made in a public forum or in the interest of the public. In the third counterclaim for frivolous conduct, defendant 287 LES alleges that plaintiffs are engaging in unnecessary litigation to harass defendant and waste its resources.

II. Plaintiffs' Motion to Dismiss

Plaintiffs filed the instant motion to dismiss the defendant's counterclaims. First, plaintiffs allege the breach of contract counterclaim should be dismissed because defendant 287 LES' material breach discharged plaintiffs from future obligations under the breached contract. Plaintiffs contend defendant 287 LES was the first party to materially breach the parties' contract by breaching their terms under the terms of the purchase agreement and offering plan to design and construct the building in compliance with the Building Code of the City of New York and all other applicable codes, rules, regulations, and requirements in accordance with the offering plans and specifications. Plaintiffs also assert that defendant breached by failing to correct or repair the material defects caused by improper workmanship, construction practices, or the use of materials at variance with the architect's report

Second, plaintiffs allege the defamation counterclaim should be dismissed because plaintiffs' speech is protected by common interest privilege and the New York's Anti-SLAPP statute. Plaintiffs argue that the assertion that plaintiffs have made "numerous false statements regarding defendant, including by alleging that defendant negligently constructed the condo" is frivolous because the claim is not pled with particularity and the statements are privileged opinions and entirely true. Plaintiffs reference *CPLR §3016(a)*, which requires defendant 287 LES to identify the exact wording of the statements at issue; to whom the statements were made; and the manner in which they were made. Plaintiffs argue that the alleged defamatory statements express non-actionable opinions and verifiably true facts. Plaintiffs also argue that defendant 287 LES' claim was conclusory and insufficient under New York's recently amended Anti-SLAPP law. Under the New York Anti-SLAPP law:

- (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
- (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition, "is subject to a motion to dismiss."

Civil Rights Law §§70-a & 76-a (2020), CPLR §3211(g)

Third, plaintiffs allege that the "frivolous conduct" claim is not a valid cause of action under New York law and thus, the claim should be dismissed. Plaintiffs argue that defendants' counterclaim for frivolous conduct fails as a matter of law because it is well settled that New York does not recognize an independent cause of action for the imposition of sanctions under either *CPLR §8303-a* or Rules of the Chief Administrator of the Courts. Additionally, plaintiffs assert that their claims in this action are based on defendant's negligent construction of a building that was falsely advertised to be the "best of its class," and are not claims that are without merit in law.

III. Defendant's Opposition to the Motion to Dismiss

In opposition, defendant 287 LES argues that the Court should deny plaintiffs' motion in its entirety because defendant's counterclaims are meritorious. Defendant alleges, *inter alia*, it has a valid cause of action for breach of contract because there is a written contract, namely the purchase agreement and the by-laws, which was breached by plaintiffs for "refusing to grant defendant access to repair alleged leaks." Defendant also alleges that there were damages resulting from plaintiffs' breach. Further, defendant argues that the second counterclaim for defamation should not be dismissed because the defendant identified the date, the exact words used, and the specific recipients of the defamatory notice. (See, NYSCEF document #23). Defendant contends that the plaintiffs are not protected under

the Anti-SLAPP statute because the plaintiffs knew the alleged defamatory statements were untrue, and the plaintiffs made such statements with actual malice. Defendant also argues that plaintiffs incorrectly identified their statements as taking place in a public forum and concerning an issue of public interest. Defendant argues that plaintiffs' claims are frivolous and intended to harass defendant and waste its resources in endless litigation. Further, defendant references to *CPLR §8303-a*, which states that "a court may grant sanctions against a party if it finds such claims to be completely without merit in law or undertaken to harass a defendant." *See, CPLR §8303-a*.

In reply, plaintiffs argue that the defendants' opposition was filed untimely, but in the event that the Court allow defendant's opposition, they should allow plaintiffs' supplemental reply. Plaintiffs argue, *inter alia*, that defendant materially breached the relevant contracts first, and the defendant's attempt to get a declaratory judgment that plaintiffs breached these contracts was already denied in the "access action." Additionally, plaintiffs state that defendant has selected four words or phrases from a letter that plaintiff Brown circulated to his fellow unit owners in advance of a home owners' association election meeting without providing factual support of how plaintiff Brown acted with actual malice. Plaintiffs also allege that defendant has not met its burden to plead facts in its counterclaims that could establish "falsity." Further, plaintiffs assert that the New York Anti-SLAPP statute applies because the board of managers are empowered to take collective action, including incurring collective expenses, on behalf of everyone in the building. Thus, plaintiffs argue a letter sent by plaintiff Brown advocating for his fellow unit owners to vote against a proposed amendment is a matter of public interest.

IV. Discussion

"[W]hen deciding a motion to dismiss a complaint pursuant to *CPLR §3211*, the court is required to afford the pleading 'a liberal construction.' It must accept the facts alleged in the complaint as true, accord [the] plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." *New York Racing Ass'n v. Nassau Regional Off-Track Betting Corp.*, 29 Misc. 3d 539, 545 (Sup. Ct. 2010). Additionally, "when deciding a motion to dismiss made pursuant to *CPLR §3211(a)(7)*, the court must determine whether the pleader has a cognizable cause of action, not whether it has been properly plead." *Sutphin Mgt. Corp. v. Rep 755 Real Estate, LLC*, 20 Misc. 3d 1135(A) (Sup. Ct. 2008), *order aff'd and remanded*, 73 A.D. 3d 738 (2d Dep't 2010). Dismissal of a claim is appropriate if the claim is made up of " [a]llegations that consist of bare legal conclusions or factual claims that are flatly contradicted by documentary evidence or are inherently incredible." *Napoli v. Bern*, 60 Misc. 3d 1221(A) (Sup. Ct. 2018), *aff'd sub nom., Napoli v New York Post*, 175 A.D. 3d 433 (1st Dep't 2019).

This Court finds that defendant's counterclaim for breach of contract is viable, as there is a dispute of fact between the parties. In plaintiffs' motion papers, plaintiffs allege that "after numerous requests for repairs, constant excuses, and little to no progress in fixing the problems, PHB owners were forced to resort to self-help to fix the defects in the roof." In defendant's opposition papers, and to the contrary, the defendant alleges that "plaintiffs breached the purchase agreement by refusing to grant defendant access to repair alleged leaks." Although there is no documentary or persuasive evidence to prove plaintiffs did not refuse to grant defendant access to repair alleged leaks, the Court must accord defendant the benefit of every possible favorable inference. While this Court is not determining that defendant's breach of contract claim would prevail, the Court must recognize defendant's claim as cognizable, and thus, the counterclaim for breach of contract must not be dismissed.

This Court finds the amendment to *Section 76-1 of the Civil Rights Law* applies. The amendment broadly widens the "ambit of law to include matters of 'public interest', which is to be broadly construed as anything other than a "purely private matter." *Sackler v. Am. Broadcasting Companies*,

Inc., 71 Misc. 3d 693, 697 (Sup. Ct. 2021). As such, the letter sent by plaintiff Brown to other unit owners to inform them of a proposed amendment that may harm them before a home owner's election is a public interest matter.

Furthermore, this Court finds defendant's counterclaim for defamation must be dismissed as defendant did not state a cause of action for defamation or meet the heightened pleading standard as per New York's Anti-SLAPP statute. The amended Anti-SLAPP statute imposes a heightened pleading standard which shifts the traditional burden for a motion to dismiss to the pleader of the motion. *CPLR §3211 (g)*. A plaintiff is now required to establish by "clear and convincing evidence" that there is a substantial basis in fact and law for its claim. As defendant is the plaintiff in this counterclaim, they had a burden to establish by "clear and convincing evidence" that plaintiffs' conduct was defamatory in nature. Here, the defendant contends plaintiff Brown's letter to fellow unit owners included defamatory statements, however, the defendant failed to provide specific evidence that plaintiff had actual malice and stated untrue claims about defendant. Defendant fails to state with specificity what is defamatory in plaintiff Brown's letter. The defendant merely states a conclusion, and that certain words in the letter were defamatory in nature. Therefore, the defendant failed to meet the heightened pleading standard required pursuant to the newly-amended Anti-SLAPP statute, which requires specific evidence provided by defendant that plaintiffs' statements were untrue and that plaintiffs acted with actual malice or had knowledge their statements about defendant were untrue.

This Court also finds defendant's counterclaim for frivolous conduct must be dismissed. According to the *CPLR §8303-a*:

(a) if in an action to recover damages for personal injury, injury to property or wrongful death, or an action brought by the individual who committed a crime against the victim of the crime, and such action or claim is commenced or continued by a plaintiff or a counterclaim, defense or cross claim is commenced or continued by a defendant and is found, at any time during the proceedings or upon judgment, to be frivolous by the court, the court shall award to the successful party costs and reasonable attorney's fees not exceeding ten thousand dollars.

(b) The costs and fees awarded under subdivision (a) of this section shall be assessed either against the party bringing the action, claim, cross claim, defense or counterclaim or against the attorney for such party, or against both, as may be determined by the court, based upon the circumstances of the case. Such costs and fees shall be in addition to any other judgment awarded to the successful party.

(c) In order to find the action, claim, counterclaim, defense or cross claim to be frivolous under subdivision (a) of this section, the court must find one or more of the following: (i) the action, claim, counterclaim, defense or cross claim was commenced, used or continued in bad faith, solely to delay or prolong the resolution of the litigation or to harass or maliciously injure another; (ii) the action, claim, counterclaim, defense or cross claim was commenced or continued in bad faith without any reasonable basis in law or fact and could not be supported by a good faith argument for an extension, modification or reversal of existing law. If the action, claim, counterclaim, defense or cross claim was promptly discontinued when the party or the attorney learned or should have learned that the action, claim, counterclaim, defense or cross claim lacked such a reasonable basis, the

court may find that the party or the attorney did not act in bad faith.
See, CPLR §8303-a

In the case at bar, there is no evidence that demonstrates that the plaintiffs had bad faith in commencing this action, and there is no evidence that demonstrates that the plaintiffs filed this motion as a way to delay or to prolong the resolution of litigation. Thus, this Court finds the plaintiffs' claims were neither frivolous nor malicious, and the plaintiff's motion to dismiss the defendant's counterclaim alleging frivolous conduct must be granted.

Accordingly, it is

ORDERED that plaintiffs' (counterclaim defendants) motion to dismiss the defendant's first counterclaim for breach of contract is denied; and it is further

ORDERED that plaintiff's motion to dismiss the defendant's second counterclaim for defamation is granted; and it is further


ORDERED that plaintiff's motion to dismiss the defendant's third counterclaim for frivolous conduct is granted; and it is further

ORDERED that any requested relief sought not expressly addressed herein has nonetheless been considered; and it is further

ORDERED that within 30 days of entry, plaintiffs shall serve a copy of this Decision/Order upon all defendants with notice of entry.

This constitutes the Decision and Order of the Court.

8/16/2022
DATE


LISA HEADLEY, J.S.C.

CHECK ONE:

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| <input type="checkbox"/> | CASE DISPOSED | |
| <input type="checkbox"/> | GRANTED | <input type="checkbox"/> DENIED |
| <input type="checkbox"/> | SETTLE ORDER | |
| <input type="checkbox"/> | INCLUDES TRANSFER/REASSIGN | |

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| <input checked="" type="checkbox"/> | NON-FINAL DISPOSITION | |
| <input checked="" type="checkbox"/> | GRANTED IN PART | <input type="checkbox"/> OTHER |
| <input type="checkbox"/> | SUBMIT ORDER | |
| <input type="checkbox"/> | FIDUCIARY APPOINTMENT | <input type="checkbox"/> REFERENCE |

APPLICATION:

CHECK IF APPROPRIATE: