Mandracchia v Renovate-Create Sourcing & Procurement Corp.
2023 NY Slip Op 30483(U)
February 9, 2023
Supreme Court, New York County
Docket Number: Index No. 653953/2019
Judge: Arthur F. Engoron
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARTHUR F. ENGORON** **PART** **37**

Justice

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MARTINE MANDRACCHIA,

Plaintiff,

- v -

RENOVATE-CREATE SOURCING AND PROCUREMENT CORP., ALAN FRIEDBERG, IMAGEN ARCHITECTURE LLC, CUTSOGEORGE TOOMAN & ALLEN ARCHITECTS PC, DOUGLAS ELLIMAN REALTY LLC, DOUG ELLIMAN PROPERTY MANAGEMENT, 405/63 OWNERS' CORP, JOHN AND JANE DOES 1-10,

Defendants.

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INDEX NO. 653953/2019

MOTION DATE 08/10/2022, 08/29/2022, 09/06/2022

MOTION SEQ. NO. 007 008 009

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 007) 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 187, 188, 191, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 300, 303, 306, 312

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 008) 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 189, 192, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 298, 301, 304, 307, 309

were read on this motion for SUMMARY JUDGMENT.

The following e-filed documents, listed by NYSCEF document number (Motion 009) 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 190, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 299, 302, 305, 308, 310, 311, 313

were read on this motion for SUMMARY JUDGMENT.

To paraphrase Leo Tolstoy: all successful apartment renovations are alike; each unsuccessful apartment renovation is unsuccessful in its own way. The instant action arises from the latter sort of apartment renovation.

Background

In 2013 plaintiff, Martine Mandracchia, decided she wanted to "gut renovate" her apartment, Penthouse E (the "Apartment") in the building located at 405 E. 63rd Street, New York, New York, a cooperative apartment corporation (the "Co-op"). NYSCEF Doc. No. 15. In pursuit of

her goal, on June 25, 2013, plaintiff signed proposal P00140 (the "Imagen Contract") with defendant Imagen Architecture, LLC ("Imagen") to develop renovation plans. NYSCEF Doc. No. 164.

The Imagen Contract states the intention of Imagen and its principal, non-party architect Raul G. Mederos ("Mederos"), to "work closely with [plaintiff] towards achieving [her] project objectives" including consultations, developing schematic designs, creating bidding and construction documents, and, notably, during the "construction phase," the "observation of construction in the field, the monitoring of the project construction schedule … [this] phase shall include three field visits." NYSCEF Doc. No. 164. However, inter alia, the Imagen Contract also states that the architect "will not be required to make *exhaustive* or *continuous* on-site inspections to check quality or quantity of the work." Id. (emphasis added).

On August 4, 2013, plaintiff submitted an Alteration Agreement (the "Alteration Agreement") to the Co-op and its property manager, defendants 405/63 Owners Corp. ("405/63") and Doug Elliman Property Management ("DEPM"), seeking their approval for the plan Imagen had developed. NYSCEF Doc. No. 147. DEPM and defendant Douglas Elliman Realty LLC ("Douglas Elliman Realty") are affiliates of non-party Douglas Elliman, Inc.

The Alteration Agreement describes the procedure for construction work within the Apartment and required that plaintiff submit, inter alia, a scope of the work to be done, proof of insurance, licenses for any plumbers and electricians, and an escrow deposit. Id. It also includes an acknowledgment "that by granting consent to work, [the Co-op] do[es] not profess to express any opinion as to design, feasibility or evidence of the work" and includes an indemnification clause as well as an annexed page titled "Indemnification" which indemnifies 405/63 and DEPM "from any damages or liabilities arising from the alterations in Apartment PHE." Id.

As part of its approval process, DEPM gave Imagen's plans to 405/63's architect, defendant Cutsogeorge Tooman & Allen Architects, P.C. ("CTA"), for a feasibility review in the context of the integrity of the Co-op's building structure and envelope. NYSCEF Doc. Nos. 184, 185. In a letter dated August 23, 2013, CTA provided numerous comments on Imagen's plan and ultimately did not recommend that 405/63's Board of Directors allow plaintiff to proceed. NYSCEF Doc. No. 28.

In a letter dated January 30, 2015, and after revisions by Imagen, CTA recommended that 405/63 approve plaintiff's plans. NYSCEF Doc. No. 28. CTA also approved two further revised plans in letters dated May 1, 2015, and July 16, 2016. Id.

Meanwhile, plaintiff searched for a general contractor and, in or about November 2015, hired defendant Renovate-Create Sourcing and Procurement Corp. ("Renovate-Create") and its principal, defendant Alan Friedberg ("Friedberg," collectively with Renovate-Create, "Contractor Defendants"). NYSCEF Doc. No. 15 ¶ 26. Plaintiff alleges she hired the Contractor Defendants based on the recommendation of a Co-op board member, non-party Michael Weinberg. NYSCEF Doc. No. 15 ¶ 14, 25. In an affidavit, Mr. Weinberg says any claim he recommended Friedberg is "an outright falsehood." NYSCEF Doc. No. 142.

On or about January 11, 2016, a TR-1: Technical Report Statement of Responsibility ("TR-1") was filed with the New York City Department of Buildings (the "DOB") in which, inter alia, Imagen's Mederos "enlisted" himself to perform a self-certified final inspection pursuant to Directive 14 of 1975 by initialing and dating the relevant check box. NYSCEF Doc. Nos. 166, 208. In the same document Mederos affirmed that he would:

> make final inspection of the construction work, including those inspections during its progress necessary to my certification upon final inspection that all work substantially conforms to approved construction documents … Upon completion of the work and within 30 days of my final inspection, I will file a certification attesting to the fact that all work was performed and completed in accordance with the approved construction documents, laws and rules …

NYSCEF Doc. No. 208.

On November 15, 2017, Mederos visited the Apartment to perform a final inspection pursuant to Directive 14, which he videotaped. NYSCEF Doc. No. 166; Greener Affirmation, Exhibit 9. Mederos does not recall another inspection of the Apartment. NYSCEF Doc. No. 166.

On or about May 31, 2018, a new TR-1 was filed with the DOB in which Mederos asserted the final Directive 14 inspection was complete. NYSCEF Doc. No. 225. The same day PW7: Certificate of Occupancy / Letter of Completion Folder Review Request forms were filed with the DOB for the Apartment by Mederos and non-party R Consulting. NYSCEF Doc. No. 228.

In a letter generated on June 4, 2018, the DOB informed Mederos that the work related to the Apartment was completed and signed off in the DOB's Building Information System specifically "[b]ecause this job was filed as Directive 14 … a registered professional engineer or registered architect, who certified that he/she inspected the work approved on this application and that it complies with the applicable laws, rules and regulations." NYSCEF Doc. No. 55.

Procedural History

On July 10, 2019, plaintiff commenced the instant action, seeking to recover monetary damages as a result of the allegedly substandard renovation done to the Apartment. NYSCEF Doc. No. 1. On October 17, 2019, plaintiff filed an Amended Complaint, alleging causes of action for: (1) breach of contract as against Friedberg and Renovate-Create; (2) breach of the implied covenant of good faith and fair dealing as against Friedberg and Renovate-Create; (3) negligence as against Friedberg and Renovate-Create; (4) violation of Multiple Dwelling Law ("MDL") § 78 as against DEPM, 405/63, and CTA; (5) negligence as against CTA; (6) breach of fiduciary duty as against DEPM, 405/63, and CTA; (7) breach of contract as against Imagen; and (8) negligence as against Imagen. NYSCEF Doc. No. 15.

In a Decision and Order dated June 26, 2020, pursuant to CPLR 3211, this Court dismissed the fourth and sixth causes of action as against CTA. NYSCEF Doc. No. 50.

In a Decision and Order dated February 9, 2021, pursuant to CPLR 3211, this Court dismissed the complaint as against Imagen in its entirety. NYSCEF Doc. No. 71.

In a Decision and Order dated May 18, 2021, this Court, upon reargument, restored plaintiff's eighth cause of action, for negligence, as against Imagen. NYSCEF Doc. No. 95.

On August 2, 2022, DEPM, Douglas Elliman Reality, and 405/63 moved, pursuant to CPLR 3212, for summary judgment: dismissing the fourth and sixth causes of action; granting 405/63's second counterclaim and dismissing plaintiff's affirmative defenses to the same; and dismissing the complaint in its entirely as to Douglas Elliman Reality. NYSCEF Doc. No. 140. They also moved the Court to schedule a hearing for attorneys' fees, costs and disbursements. Id.

On August 11, 2022, Imagen moved, pursuant to CPLR 3212, for summary judgment dismissing all claims and crossclaims against it. NYSCEF Doc. No. 156.

Also on August 11, 2022, CTA moved, pursuant to CPLR 3212, for summary judgment dismissing the remaining cause of action against it, for professional negligence. NYSCEF Doc. No. 172.

On October 20, 2022, plaintiff cross-moved, pursuant to CPLR 3212, for summary judgment against Imagen. NYSCEF Doc. No. 194.

Discussion

In order to obtain summary judgment, the "movant must establish its defense or cause of action sufficiently to warrant a court's directing judgment in its favor as a matter of law. The party opposing the motion, on the other hand, must produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which the opposing claim rests. '[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient' for this purpose." Gilbert Frank Corp. v Fed. Ins. Co., 70 NY2d 966, 967 (1988) (internal citations omitted).

Douglas Elliman Realty

Defendant Douglas Elliman Realty moves to have the complaint dismissed against it in the entirety as it has no involvement with the operation or management of the Co-op, is a distinct entity from DEPM, and because the Amended Complaint fails to state any cause of action against it. NYSCEF Doc. Nos. 142 and 143.

Thus, as no causes of action are alleged against it, and without opposition, the complaint should be dismissed against Douglas Elliman Realty in its entirety.

Multiple Dwelling Law § 78

DEPM and 405/63 (collectively, the "Co-op Defendants") move for summary judgment dismissing plaintiff's fourth cause of action, for violation of MDL § 78.

Pursuant to MDL § 78, the owner of a multiple dwelling owes a nondelegable "duty to persons on its premises to maintain them in a reasonably safe condition" and is liable to anyone injured "even though the responsibility for maintenance has been transferred to another." See Mas v Two Bridges Assoc., 75 NY2d 680, 687–688 (1990). However, "[e]ven if the statutory duty could be said to have been imposed for the benefit of one in [plaintiff's] position, [plaintiff] might waive same." Emigrant Indus. Sav. Bank v One Hundred Eight W. Forty Ninth St. Corp., 255 AD 570, 576 (1st Dept 1938), aff'd, 280 NY 791 (1939).

Here, plaintiff alleges that the Co-op Defendants were "in violation of their non delegable duty under MDL § 78" by taking "no steps to correct or amend the defects nor to direct the contractor Friedberg to correct the violations to bring the unit into conformance with the code," and are therefore liable for the cost of repairs.

Co-op Defendants argue that: none of its representatives inspected the work on Apartment "before, during, or after the Project;" MDL § 78 imports joint liability on them only if HPD had issued any violations due to conditions in the Apartment, which it did not; plaintiff's proprietary lease (the "Lease," NYSCEF Doc. No. 145) is clear that it is her duty to keep the interior of the Apartment in "good repair;" and, further, that nothing in the Lease, nor any other document, imports responsibility for plaintiff's renovation on the Co-op Defendants.

In reply plaintiff argues that the Co-op Defendants were: in control of the unit as their approval was required for the renovation; implicated by the lease because of an exception for work done on "windows, windowpanes, window frames, sashes, sills, entrance and terrace doors, frames and saddles" because part of the renovation included turning a kitchen window into a terrace door; had notice of the conditions in the apartment because a CTA representative inspected the new door on multiple occasions; and were ultimately negligent in allowing unsafe conditions in the apartment to persist and taking no steps to correct them.

The Co-op Defendants are correct, however, that in signing the Lease and Alteration Agreement plaintiff waived whatever statutory duty MDL § 78 might have imposed on the Co-op Defendants, particularly as no related violations arising from the work were issued. Maintaining the interior of the Apartment in "good repair" is the duty of plaintiff, and all of the issues in the instant action arise out of the work plaintiff's contractors did or did not do to the interior.

Thus, plaintiff's fourth cause of action, for breach of MDL § 78 as against the Co-op Defendants, should be dismissed.

Fiduciary Duty

The Co-op Defendants move for summary judgment dismissing plaintiff's sixth cause of action, for breach of fiduciary duty.

Plaintiff alleges that the Co-op Defendants have a fiduciary duty to its shareholders "to maintain the safety of the building, and the health and safety of the tenants living there," and breached that duty to plaintiff, as a cooperative shareholder, by failing to notify her that Friedberg and

Renovate-Create were not licensed contractors in New York and, also, by "approv[ing] and sign[ing] off on the job for the DOB."

The Co-op Defendants argue in response that: plaintiff has sued the wrong party by suing 405/63 rather than its Board; even if the right entity had been sued it was plaintiff's responsibility to research the contractor she hired to work on her apartment; the Co-op has a long-standing policy of not requiring general contractors working in the building to be duly licensed (only requiring that of plumbers and electricians); neither DEPM or 405/63 ever assumed any responsibility to ensure the work done by plaintiff's contractors; and that any final "signing off on the job" was done by plaintiff's architect, Imagen.

The Co-Op Defendants are correct, plaintiff's allegations of breach of fiduciary duty should have been directed at 405/63's Board of Directors and thus should be dismissed. Hyman v New York Stock Exch., Inc., 46 AD3d 335, 337 (1st Dept 2007) ("[I]t is well settled that a corporation does not owe fiduciary duties to its members or shareholders."), citing Kavanaugh v Kavanaugh Knitting Co., 226 NY 185, 194 (1919). The cause of action against DEPM should also be dismissed, as it owes no fiduciary duty to any of 405/63's individual shareholders.

However, even if plaintiff *had* sued the 405/63 Board of Directors, the same result would have been reached, as nothing on the record shows the Co-op Defendants ever required that only licensed general contractors work in the building, had any duty to "warn" plaintiff that Friedberg's license had expired in 2015, or that it "signed off" on the renovation with the DOB.

Thus, plaintiff's sixth cause of action, for breach of fiduciary duty as against the Co-op Defendants, should be dismissed.

Indemnification and Attorneys' Fees

The Co-op Defendants two counterclaims seek (1) attorneys' fees and (2) indemnification from any damages or liabilities arising from the Apartment renovation.

In support of their second counterclaim the Co-op Defendants cite the indemnification clause in the Alteration Agreement (promising "to reimburse … for any expenses [including, without limitation, attorneys' fees and disbursements] incurred as a result of such work.") and the separate, annexed, indemnification agreement (indemnifying 405/63 and DEPM "from any damages or liabilities arising from the alterations in Apartment PHE").

Plaintiff argues in reply that: the Alteration Agreement and its indemnification clause were not signed by defendants and is therefore unenforceable; the separate indemnification agreement, which only required plaintiff's signature, was a part of the Alteration Agreement and therefore is not valid; and, in any event, the indemnification agreements only cover third-party negligence and not the Co-op Defendant's own negligence, which is what plaintiff alleges in her fourth and sixth causes of action.

Here, as the Co-op Defendants are not liable for breach of either MDL § 78 or fiduciary duty to plaintiff, *supra*, and as plaintiff signed the "indemnification" page annex to the Alteration

Agreement that did not have a space for another party's signature, the Co-op Defendant's second counterclaim for indemnification should be granted.

Further, as no causes of action remain against the Co-op Defendants, and as they are indemnified by plaintiff, their first crossclaim, for attorneys' fees, should be scheduled for an inquest.

CTA Negligence

CTA moves for summary judgment dismissing plaintiff's fifth cause of action, for negligence.

Plaintiff alleges that because she could not renovate her apartment without CTA approval to the 405/63 Board, and because CTA was "intimately involved in reviewing" those plans, and because CTA was obligated to (and did) inspect the work to ensure compliance, and because it "signed off on the job as being finished," CTA acted negligently.

In opposition, CTA argues that it does not owe plaintiff any duty, as there is no privity between them, nor is there the functional equivalent of privity, as there is no contract between CTA and any of the parties responsible for plaintiff's renovation.

Plaintiff in response argues that nothing has changed since this Court found, in its Decision and Order dated June 26, 2020, that a lack of privity here does not preclude a negligence claim against CTA, as there are still triable issues of fact as to CTA's level of control of the renovation. Plaintiff also argues that CTA negligently failed to use due care in ensuring that the renovation plans submitted by Imagen for its approval were code complaint, and cites the affidavit of Lazar Kesic, a registered architect in New York, who asserts that CTA "should not have allowed the building plans to be filed as numerous issues in the plans were not complian with DOB Codes." NYSCEF Doc. No. 34

In reply CTA reiterates that it owned no duty to CTA and, further, that because plaintiff is seeking damages for economic loss only, and is *not* claiming property damage, this cause of action sounding in tort should be dismissed. To show a lack of privity, CTA compares plaintiff's relationship with Imagen, and points to plaintiff's own admissions that CTA was 405/63's architect for compliance review as it related to the architectural integrity of the building only, that CTA only billed 405/63 for its work, and that plaintiff never spoke with CTA about the project. NYSCEF Doc. No. 183, 184.

Here, because there was no privity between plaintiff and CTA, as plaintiff was clearly not the intended beneficiary of CTA's relationship with 405/63, and because CTA's reviews of Imagen's plans were for the purpose of ensuring the integrity of the Co-op only (while code compliance was the purview of the Architect of Record, Mederos of Imagen), and because CTA's inspections of the Apartment were directly related to, and only involved, the replacement of a window with a door (entirely in its purview of monitoring the integrity of the Co-op's envelope and waterproofing), CTA's motion for summary judgment dismissing plaintiff's fifth cause of action should be granted. Further, even if the foregoing were not true, plaintiff's cause of action for negligence seeking only economic loss would necessarily require dismissal. 7 World Trade Co. v Westinghouse Elec. Corp., 256 AD2d 263, 264 (1st Dept 1998) ("Because

plaintiffs allege losses of only an economic nature … plaintiffs were not entitled to maintain an action for negligence and strict liability in the absence of allegations of bodily injury or damage to property.")

Therefore, plaintiff's fifth cause of action, for negligence, should be dismissed.

Imagen Negligence

Imagen moves for summary judgment dismissing plaintiff's eighth cause of action, for negligence.

Plaintiff alleges that Imagen and Mederos had a duty of care, which they breached, to her both as professional architects and as the self-designated Directive 14 architect responsible for self-certifying after a final inspection.

Imagen now argues for dismissal because: the damages to the Apartment alleged in the complaint were caused by the Contractor Defendants and not Imagen; the Imagen Contract says Imagen was not hired to perform contractor supervision; and because an affidavit of registered architect Anthony DiProperzio (NYSCEF Doc. No. 169) "establishes that the damages allegedly incurred to the Apartment are a result of workmanship-related issues."

In reply, plaintiff argues that: Imagen has failed to show there are no material triable issues of facts in the case; Imagen and Mederos, as the Architect of Record and the Directive 14 signatory, had a statutory obligation to inspect the Apartment; Imagen and Mederos not only failed to live up to their statutory obligations, but also misled the Court about them; and because the affidavit of registered architect Lazar Kesic states that Imagen's failure to inspect was a proximate cause of plaintiff's damages.

As the parties' voluminous papering and dueling architect affidavits make clear, material triable issues of fact remain as to Imagen and Mederos' obligations, pursuant to both the Imagen Contract and the TR-1, to inspect the Apartment, and whether they were a proximate cause of plaintiff's alleged damages.

Therefore, the motion of Imagen and the cross-motion of plaintiff for summary judgment on the eighth cause of action, for negligence, should be denied.

The Court has considered the parties' other arguments and finds them to be unavailing and/or non-dispositive.

Conclusion

Therefore, it is hereby ordered that: the motion of defendants Doug Elliman Property Management, Douglas Elliman Realty, LLC, and 405/63 Owners Corp. for summary judgment is granted; the motion of defendant Cutsogeorge Tooman & Allen Architects, P.C., for summary judgment is granted; and the motion of defendant Imagen Architecture, LLC, and cross-motion of plaintiff Martine Mandracchia for summary judgment is denied. Accordingly, the Clerk is

hereby ordered to enter judgment: dismissing the complaint in its entirety as against Douglas Elliman Realty, LLC; dismissing the fourth and sixth causes of action against Doug Elliman Property Management and 405/63 Owners Corp.; and dismissing the fifth cause of action against Cutsogeorge Tooman & Allen Architects, P.C..

It is further ordered that 405/63 Owners Corp.'s first counterclaim, for attorneys' fees, is hereby severed, and it may obtain an inquest into said fees by presenting the Clerk with a Note of Issue with Notice of Inquest, a copy of this Decision and Order, and any necessary fees. Defendant must file such Note of Issue within 30 days from the date of this Decision and Order, and failure to do so timely shall result in automatic disposal of this action. Defendant is further directed, within 15 days of filing the Note of Issue, to contact the Part 37 Clerk at 646-386-3222 to schedule the inquest date.

2/9/2023
DATE

ARTHUR F. ENGORON, 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