At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 20th day of April 2023.

P R E S E N T:
HON. WAVNY TOUSSAINT,
Justice.

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SARAH JAFFE and COLIN JAFFE,

Plaintiffs,

- against -

THE PARKVILLE CONDOMINIUM and NEWGENT MANAGEMENT, LLC,

Defendants.

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Index No. 515206/2019

DECISION AND ORDER

Motion Seq. #09

The following e-filed papers read herein:

	NYSCEF Doc Nos.
Notice of Motion/Order to Shower Cause/ Petition/Cross Motion and Affidavits (Affirmations)	104-121
Opposing Affidavits (Affirmations)	125-132
Reply Affidavits (Affirmations)	134, 137, 138

Upon the foregoing papers, defendants The Parkville Condominium and Newgent Management, LLC moves pursuant to CPLR 3212(b) for an order granting summary judgment dismissing the amended complaint and each and all causes of action therein, or to stay the action, compel arbitration pursuant to CPLR 7503(a), and to strike the note of issue pursuant to Uniform Civil Rules 202.21(e) (Motion Seq. 9). The plaintiffs oppose the application.

BACKGROUND

Defendant The Parkville Avenue Condominium ("Parkville" or "condominium") is a residential condominium located at 215 Parkville Avenue, Brooklyn, NY ("premises"). Defendant Newgent Management, LLC ("Newgent") was Parkville's former managing agent from March 14, 2012 to January 2020. On February 1, 2020, non-party Andrews Organization became Parkville's new managing agent. In July 2017, Sarah Jaffe purchased apartment Unit 6B with her parents ("Jaffe parents") and thereafter moved in with her husband, Colin Jaffe. Shortly after they moved in, water incursions allegedly started to appear in Unit 6B's ceiling and persisted.

PROCEDURAL HISTORY

Plaintiffs commenced this action by filing a summons and complaint on July 11, 2019. Pleadings were served upon defendant Newgent on July 26, 2019 and defendant Parkville on August 14, 2019. On January 31, 2020, plaintiffs filed an amended complaint, which include seven causes of action: (1) negligence; (2) breach of contract against defendant Parkville for breaching its Offering Plan, Declaration, and Bylaws; (3) breach of contract against defendant Newgent as it breached its contract with defendant Parkville; (4) negligent infliction of emotional distress; (5) permanent injunction directing defendants to immediately repair the conditions causing the leaks and repair the damage caused to Unit 6B; (6) trespass; and (7) conversion/civil theft. An answer to the amended complaint was filed on December 3, 2020.

On January 21, 2022, defendants filed a motion for summary judgment and to compel arbitration, which was subsequently withdrawn on May 10, 2022. On January 27,

2022, plaintiffs filed a note of issue. On August 29, 2022, defendants filed this motion. On February 15, 2023, plaintiffs filed a supplemental affirmation, which stated the case has been partially settled and entirely dismissed with respect to defendant Parkville. On March 22, 2023, the parties filed a fully executed stipulation of partial discontinuance, wherein the action was discontinued in its entirety as against defendant Parkville and discontinued only as to count three, breach of contract, as against defendant Newgent. In light of the stipulation of discontinuance, the Court will address the motion only as it relates to defendant Newgent.

Defendant Newgent's Summary Judgment Motion

Defendant Newgent moves for summary judgment seeking dismissal of plaintiffs' amended complaint and causes of actions against it. Submissions in support of the motion, include, *inter alia*, a copy of the condominium's offering plan "(Offering Plan"), a copy of the condominium's Bylaws ("Bylaws"), a copy of the condominium's Declaration ("Declaration"), a copy of a description of the property ("Property Description"), a copy of a management agreement ("Management Agreement") and an affidavit of Andrew Cottet ("Cottet").

The Offering Plan provides that in the event any unit owners fail to maintain or repair parts of the building, the managing agent has the right to perform such maintenance or repairs. The Bylaws provide the managing agent a right of access to a unit for the purposes of performing maintenance and repairs. The Declaration provides that the managing agent has an easement and right of access to each unit to repair and no such notice shall be necessary in the event of repairs or replacements immediately necessary or

required for the preservation or safety of the building. The Property description states that the owners of Units 6A and 6B are responsible for the repair and maintenance of allocated roof areas.

The Management Agreement was executed between the defendants on March 14, 2012. Newgent's duties include "making necessary repairs and the performance of any and all necessary work for the benefit of the property." The Cottet affidavit provides that he is the president of Parkville's Board, and he along with treasurer Mario Dubovichi ("Dubovichi") treated management of the building like a part time job. Mr. Cottet states the B line suffered a series of water leaks under plaintiffs' unit and an "[i]nvestigation later revealed that the cause was the HVAC unit servicing plaintiff 6B's Unit." According to the Cottet affidavit, Mr. Dubovichi tested each HVAC unit and removed the fuse from Unit 6B to stop the water and curtail the damage. It further provides that "Newgent was not involved at all in this process" even though it was the one who advised plaintiff Sarah Jaffe that the fuse had been left for them in a closet in the common areas.

The Parties' Contentions

Newgent contends that plaintiff Colin Jaffe is not an owner of Unit 6B. Moreover, plaintiffs failed to name the other owners of Unit 6B, Clement A. McCarthy, and Elizabeth McCarthy ("Jaffe parents") as necessary parties to the action, as they also own Unit 6B, and their joint tenancy will be affected by the outcome of the matter. Newgent also asserts that pursuant to the Offering Plan plaintiffs failed to name the owners of Unit 6A as defendants, and since the roof is partially owned by them, they are also responsible for the

roof's repair and maintenance pursuant to the Bylaws. They therefore are affected by the outcome of this action.

Turning to plaintiffs' causes of actions, Newgent contends that the first cause of action for negligence failed to allege the person(s) who acted or neglected to have done anything as against any individual or state the elements of the cause of the action. Moreover, Newgent held itself out as an agent for a disclosed principal (the Board) and was not in exclusive control of the building. Therefore, it is not liable to plaintiffs for nonfeasance, but only for affirmative acts of negligence. Newgent contends that the fourth cause of action is meritless, as there were no specific pleadings for damages for plaintiffs' negligent infliction of emotional distress, and there was no affirmative act or omission alleged against Newgent that would permit it to be a defendant to the tort. Newgent contends the fifth cause of action is moot, as the solution to the roof leak is a roof repair already undertaken by the plaintiffs. Moreover, pursuant to the Offering Plan, the plaintiffs and the owners of Unit 6A are responsible for the repair and maintenance of the portion of the roof that is at issue. Newgent refutes plaintiffs' sixth and seventh causes of actions and argue there is no factual allegation against it. Moreover, it is protected by the same immunity as the Board since it is carrying out the Board's will. Further, the plaintiffs have not credibly pled that Newgent acted beyond the scope of its capacity as a managing agent or committed any independent tortious acts.

Newgent also contends that the note of issue, which was filed on January 27, 2022, should be dismissed as a nullity, as it was filed pending a prior application for the foregoing

summary judgment relief. In addition, Newgent argues the parties have not exchanged materials disclosed during depositions.

Plaintiffs' Opposition

Plaintiffs, in support of their opposition to Newgent's motion for summary judgment, submits *inter alia*, Sarah Jaffe's affidavit and Mr. Cottet's deposition testimony. In the affidavit, Sarah Jaffee contends Greene Roofing made several repairs and inspections in the fall of 2018 due to re-occurring leaks in plaintiffs' unit. Jaffe further provides that on January 25, 2019, plaintiffs advised Newgent both verbally and in writing that the issues with the leaks continue but to no avail. In March 2019, Newgent allegedly inspected the conditions in plaintiffs' unit, cut and opened two large holes in the ceiling, and replaced a portion of a pipe two months later. The leaks persisted, and Newgent allegedly failed to repair the extensive ceiling damage they caused.

The affidavit further provides that on May 7, 2019, plaintiffs had an expert examine and inspect the roof and provide a written report ("expert report"). In August 2019, Newgent allegedly trespassed into the unit and allegedly stole a part of plaintiffs' air conditioning ("AC") unit, thereby rendering it inoperable. After learning about the AC unit, plaintiff Sarah Jaffe confronted Newgent, specifically Abdullah Fersen ("Fersen"), who is the owner of Newgent. She was informed where the part was located and had it reinstalled.

As to missing parties, Sarah Jaffe further states she does not have any good faith basis to make any claim against the owners in Unit 6A. Moreover, plaintiffs argue, the Jaffe parents were not subjected to the alleged negligence, nor do they seek monetary damages. She submits that the portions of the apartment and the roof, which is under

plaintiffs' control were fixed, and that the relief plaintiffs now seek is an injunction for repair of the common areas in the building.

At deposition, Mr. Cottet admitted he does not have personal knowledge about the alleged trespass and stolen AC unit situation from August 2019, and only found out about it through Mr. Dubovichi. He stated that the Condominium did not "engage anybody to inspect the roof to determine what the problems are or were," from 2018 to October 19, 2021. He admits that the roof drain is a common element. When asked about weep holes and coverage under the offering plan, Mr. Cottet admits that the description language in the offering plan is up for interpretation, as it is not specific. While on the topic of interpretations, he agreed that "any element in the building which is for the service or for the benefit of multiple unit owners is not something that is owned by the unit owners but is a common element." He further stated that there was a section of the roof that was leaking, which was privately owned by Units 6A and 6B.

Plaintiffs argue that Newgent's motion is not a proper motion to renew or to reargue and refutes the argument that the note of issue should be dismissed as a nullity. According to plaintiffs, since Newgent filed a motion for summary judgment on January 21, 2022, plaintiffs understood that discovery was complete and filed a note of issue on January 27, 2022. After it was filed, Newgent made no complaint or objection to the note of issue filing or made a motion to vacate it. Plaintiffs contends that Newgent's motion is a second attempt to move for summary judgment after the first was withdrawn on May 10, 2022, and this one is fatally defective. Plaintiffs argue the 60-day deadline for making a new motion for summary judgment post note of issue, had long passed when Newgent filed this motion.

Plaintiffs also argues that pursuant to Court Rule 202.8-g, although the motion contains a statement of facts, it is defective because it contains bald, unsupported statements with no citation to evidence, and therefore the motion should be denied.

Plaintiffs refutes Newgent's contention that it is plaintiffs' responsibility as unit owners to keep and maintain the roof at issue. Specifically, plaintiffs argues the leak in the living room from the roof drain, the leak in the second bedroom closet from the air vents on the roof, and the leak in the guest closet from the cold-water supply line for the hot water heaters on the roof are all common areas which plaintiffs do not own, they do not have the right or ability to fix the whole roof, and are Newgent's duty and responsibility to keep and maintain.

Plaintiffs next argues there are triable issues of fact. First, plaintiffs reject Newgent's contention that plaintiffs failed to name the Jaffe parents and the owners of Unit 6A as a necessary party. They argue motions relating to failure to join a necessary party are typically done at the beginning of the case. Thus, the instant request is untimely. Moreover, Newgent failed to subpoena, seek any discovery from, or bring a third-party action against these alleged necessary parties. Second, plaintiffs argue, Newgent's contention regarding necessary parties' conflicts with Mr. Cottet's deposition testimony, as he testified that the only missing necessary party is the roofing company, Greene Roofing.

Turning to the first cause of action, plaintiffs argue Newgent failed to assert the business judgment rule as an affirmative defense in its answer. Additionally, Newgent's exhibits, including Ovide Hercules' invoices and estimate for ceiling repairs; Green

Roofing's contract with Parkville dated May 25, 2016 and invoice dated June 28, 2016; a letter to Newgent from the Alan Daly, the Vice President of Green Roofing, dated March 22, 2019; and letters to Alan Daly from Parkville's counsel dated March 27, 2019 and April 1, 2019, in support of its motion were allegedly subject to discovery but were never produced. Therefore, the plaintiffs request the Court disregard these documents in their entirety. Next, the plaintiffs rebut Newgent's contentions and argue that the elements of negligence were established in their amended complaint and Sarah Jaffe's affidavit. Further, the plaintiffs assert Mr. Fersen implicated theft by Newgent, by notifying her where the missing fuse to the AC unit was. As to the fifth cause of action, the plaintiffs reiterate that the areas of the roof are common areas that are solely controlled by Newgent, which is their obligation to repair. As for the sixth and seventh causes of action, the plaintiffs argue that Mr. Cottet's affidavit is inadmissible hearsay, as he admits in his affidavit that he has no personal knowledge of Newgent's alleged trespass on plaintiffs' property and the stolen AC unit.

Discussion

The Court notes that Newgent did not file the motion within the requisite 120 days specified by CPLR 3212(a); did not promptly seek an extension and failed to articulate any reason for its delay of approximately three-to-four months in moving for summary judgment (*Ragoonanan v 43-25 Hunter, LLC*, 2023 WL 2506345, at *1 [2d Dep't 2023]). Therefore, absent a satisfactory explanation for the untimeliness, constituting good cause for the delay, Newgent's motion must be denied without consideration of the merits (*Brill v. City of New York*, 2 NY3d 648, 652 (2004).

If the Court were to consider the application on its merits it would, in any event, deny it. In essence, the application is the same as motion seq. 2 and seq. 4, which was also to dismiss the complaint or compel arbitration and was subsequently denied by order dated January 19, 2021. As a preliminary matter, Newgent's statement of material facts does not conform with 22 NYCRR 202.8-g, as it does not contain corresponding citations to evidence for each fact. It is noted that a "[failure] to comply with . . . provisions of the CPLR are not necessarily fatal to the consideration of the [motion] at issue" and may be excused under CPLR 2001 (*Disarli v TEFAF NY, LLC*, 2022 WL 72755, *1 [Sup Ct, Kings County 2022]). Therefore, the Court exercises its discretion, pursuant to CPLR 2001, to disregard Newgent's defective statement of material facts in its motion papers.

"CPLR 1001 'limit[s] the scope of indispensable parties to those cases and only those cases where the determination of the court will adversely affect the rights of nonparties'" (*Blatt v. Johar*, 177 AD3d 634, 635 [2019][internal citations omitted]). "[A] court may, at any stage of a case and on its own motion, determine whether there has been a failure to join necessary parties" (*A&F Scaccia Realty Corp. v New York City Dep't of Env't Prot.*, 200 AD3d 875, 877 [2d Dep't 2021]). Necessary parties are "[p]ersons who ought to be parties if complete relief is to be accorded between the persons who are parties to the action or who might be inequitably affected by a judgment in the action shall be made plaintiffs or defendants" (NY CPLR 1001 (McKinney)). It is undisputed that the Jaffe parents are owners of Unit 6B and the owners of Unit 6A share the roof in question. However, Newgent "failed to demonstrate that the alleged necessary party needed to be a party if complete relief was to be accorded between the parties or that the alleged necessary

would be inequitably affected by a judgment in this action if it were not joined" (*Rimberg v Horowitz*, 206 AD3d 832, 834 [2d Dep't 2022]).

Although it is undisputed that there is no contract between Newgent and the plaintiffs, Newgent failed to show there are no triable issues of fact as to the remaining causes of actions (*Andris v 1376 Forest Realty, LLC*, 213 AD3d 924, 925 [2d Dep't 2023]). Notably, Mr. Cottett's affidavit and deposition testimony conflicts with Sarah Jaffe's affidavit as to whether Newgent inspected the roof in Unit 6B in March 2019. Mr. Cottet also admitted in his deposition testimony that he does not have any personal knowledge regarding the alleged trespass and the stolen AC unit, and there is no affidavit from Mr. Dubovichi. Mr. Cottet merely recounted what Mr. Dubovichi had told him, and therefore, the Cottett affidavit submitted in support of the motion has no probative value and constituted inadmissible hearsay (*Santos v ACA Waste Servs., Inc.*, 103 AD3d 788, 789 [2d Dep't 2013]).

Further, the submitted supporting documents does not mention whether the roof drain, air vents, and cold-water supply in the roof are common areas. As Mr. Cottet stated in his deposition testimony, the offering plan is not specific, and the obligation could be based on interpretation. Based on the foregoing, the Court is unable to ascertain whether it is the plaintiffs' or the Newgent's obligation to repair the alleged common areas of the roof.

The Court has considered the parties' remaining contentions and finds them to be without merit. All relief not specifically granted herein has been considered and is denied.

Accordingly, it is hereby

ORDERED that defendant Newgent's motion for summary judgement (Motion Seq. 09) is denied.

This constitutes the decision and order of the court.

ENTER

J.S.C.

Hon. Wavny Toussaint
J.S.C.