

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: LOUIS B. YORK
J.S.C. ^{Justice}

PART 2

Grubin, Sharon

INDEX NO. 115404-2010

- v -

Gotham Condominium

MOTION DATE _____

MOTION SEQ. NO. 1

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

**MOTION IS DECIDED IN ACCORDANCE
WITH ACCOMPANYING MEMORANDUM DECISION**

FILED

DEC 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/21/11

Lby
LOUIS B. YORK J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

-----X
SHARON E. GRUBIN and DEBORAH LANS,

Plaintiffs,

Index No. 115404/10

-against-

**THE GOTHAM CONDOMINIUM, JEANNE BACK,
MICHAEL BRUCK, THOMAS BURKE, ANDREW
HAHN, BERNARD KURY, JAMES PALADINO,
ALEXANDER RUBIN, MICHAEL SCHWEITZER,
JUSTIN WELLEN AND RICHARD YIEN, Individually
and as Members of the Residential Board of Managers of
The Gotham Condominium, Cooper Square Realty, Inc.,
JOHN/JANE DOES 1 through 4,**

Defendants.
-----X

FILED

DEC 27 2011

NEW YORK
COUNTY CLERK'S OFFICE

LOUIS B. YORK, J.:

In this bitter dispute between the owners of a condominium apartment and the condominium board, the apartment owners sue for compensatory and punitive damages for what the plaintiffs describe as abhorrent living conditions and treatment by the condominium. The plaintiffs are suing the condominium and individual board members as well as the managing agent. Defendants have brought this pre-answer motion to dismiss a number of the causes of action as well as dismissal of the action against all of the board members.

Allegations of the Complaint

The complaint alleges that since 2004, plaintiffs have suffered from holes, buckling and deterioration of the floors which have been inadequately corrected, a defective and non-functioning security system, inadequate heat, dirty tap water, damage to the walls, floors, railings and appurtenances to the terraces, and non-functioning air conditioning in the

railings and appurtenances to the terraces, and non-functioning air conditioning in the hallway outside of the apartment.

The complaint further states that the defendants have promised to repair these conditions but have not done so. It also alleges that due to work required by Local Law 11, the contractors and agents used the plaintiffs' terraces "as their staging area." They used the terrace railings to go to and from scaffolding, "scratching, denting ..." and severely damaging the terraces. Workmen constantly left their equipment, coffee cups and garbage on the terraces. For more than two years, plaintiffs could not use these terraces. Plaintiffs could not use their bathrooms from the hours of 8:00 a.m. to 5:00 p.m. because of workmen observing them. The workmen also left the stairwells to the plaintiffs' terraces unlocked. The complaint further alleges that throughout the existence of these conditions, the defendants have promised to rectify them but have failed to do so.

The complaint goes on to allege that during the time that the defendants' workmen occupied the terraces, they placed dirty blue tarp material outside the windows to give plaintiffs some privacy. However, the tarps were frequently blown down by the wind. This went on for two years. Despite plaintiffs' request to put the terraces back into the condition they were in before the project, the defendants allowed the workmen to leave without repairing the damage they had done and without cleaning up the garbage and other debris they had left.

According to the complaint, continuous leaks in the kitchen and dining room became

so bad during rainstorms that the building manager placed industrial size garbage cans to collect the water. Although the causes were unknown to plaintiffs, defendants were aware that the leaks were caused by structural defects in the flashings and roof. Nevertheless, the defendants' solutions were to spackle the damaged areas and claim the condition had been fixed, until the next time.

Because the board agreed that they would fix the terraces and the damage to the plaintiffs' apartment, the plaintiffs held back on their intention to sue for damages, but later was determined that the terraces could not be adequately restored. The board then promised to replace the damaged railings. Before they tackled the terraces, the parties agreed that the roof and flashings would be repaired first. As the roof project continued, plaintiffs complained that the terraces were being damaged further, as parts of the terraces not previously harmed were now being bombarded with garbage, equipment, workmens' clothing and assorted debris.

To deter the plaintiffs from bringing suit, the defendants falsely told them that the railing had been manufactured and delivered. But at that time, they had not even been ordered.

Also, defendants' lawyer asked plaintiffs to forebear on bringing suit, while he brought in an expert on construction to take charge of the repairs. Plaintiffs agreed to refrain from bringing the lawsuit and continued to pay the monthly common charge. Thereafter, defendants notified plaintiffs that they would make the necessary repairs only if plaintiffs

signed a release from all their claims for damages. Although they agreed to repair the railings without a release. The plaintiffs complain, *inter alia* that the repairs to the floors, replacement bannister between floors and the painting of the ceiling have not been done.

On October 28, 2008, defendants wrote to plaintiffs stating that they would not rectify all the problems concerning the conditions of the apartment unless plaintiffs released the defendants from all of the claims that plaintiffs had against the defendants, although they did send a contractor to repair the rails. However, the railings, alleges the complaint, were improperly repaired, and the defendants have refused to have it done correctly, so that plaintiffs have been deprived of the use of their terraces for the last seven years.

Other conditions that defendants have failed to repair are set forth. The alarm system, for example, has not functioned for years. In unsuccessfully repairing it, defendants have created patches in the walls. Also, the pecan-herringbone patterned wood floors are rotted because of numerous leaks. The defendants have replaced them with non-matching different sized wood, thereby making the floors hazardous.

Causes of Action

The first cause of action is for fraud with the plaintiffs alleging that the defendants promised to make repairs without the intention of doing so, causing injury to plaintiffs and inducing them to defer taking action against defendants.

The second cause of action is for negligence.

The third cause of action is for breach of contract. The plaintiffs allege that the

defendants breached the Declaration and By Laws and other operative instruments of the condominium.

The fourth cause of action alleges breach of fiduciary duties, claiming that the defendants acted willfully, unconscionably and in bad faith.

The fifth cause of action is for trespass caused by the defendants' prolonged use of the terraces without permission.

The sixth cause of action is for nuisance.

The seventh cause of action alleges breach of the covenant of good faith and fair dealing.

The eighth cause of action claims overcharges for electricity and abuse of process when defendants threatened to place a lien on plaintiffs' apartment.

Motion to Dismiss

Defendants are moving to dismiss the portion of the complaint asserted against each of the individual board members, the fourth cause of action for breach of fiduciary duty and the eighth cause of action for abuse of process.

They also move to dismiss the third cause of action for breach of contract and the seventh alleging breach of the covenant of good faith and fair dealing. Defendants also seek dismissal of the second cause of action for negligence as well as the fifth for trespass and sixth for negligence.

Finally, they seek to strike the demand for punitive damages and reasonable attorney's

fees pursuant to NYCRR §130.

Opinion and Decision

Against Individual Board Members

This motion is granted as to each of the individual directors except for Thomas Burke and Jeanne Back. It is well to remember that on a motion to dismiss the complaint, the assertions in the complaint are deemed true (*Navarro v Florita*, 271 AD2d 62, 62, (?) NYS2d 730 [1st Dept 1946] affd 296 NY 783 [1947]). The allegations are accorded every favorable inference while the complaint will be upheld so long as the facts which are alleged fit within any cognizable legal theory (*Napoleon Art & Prod. V Laughlin*, 14 Misc3d 1226 (A), 836 NYS2d 494 [Table], 2007 WL 308960 [Sup Ct NY Cty 2007]).

The business judgment rule as decided in *Levandusky v One Fifth Ave. Apt. Corp.*, [1990] 75 NY2d 530, 554 NYS2d 807 [1990] permeates this decision. In that action, the Court of Appeals determined that the same rule that governs decisions of the board of directors of corporate entities, applies to review the conduct of cooperative and condominium boards. To hold an individual board member liable, the complaint must specifically plead independent tortious acts (*Pelton v 77 Park Avenue Condominium*, 38 AD3d 1 825 NYS2d 28 [1st Dept 2006]). Thus, while unequal treatment of shareholders may be sufficient to remove the bar of the business judgment rule as to the board of directors, the failure of the complaint to allege separate tortious acts against individual shareholders resulted in dismissal in *DeCastro v Bhokar*, 201 AD2d 382, 607 NYS2d 348 [1st Dept 1994]); *See, also, Konrad*

v 136 E. 64th Street, 246 Ad2d 324, 667 NYS2d 354 [1st Dept 1968]).

These rules, with very strong protections for board members, are there for a very good reason. It is important that shareholders be willing to participate in the governance of their corporations. Shackling them with individual liability for the board's actions would deter them from participating. Only individual and separate acts of self dealing or other personally corrupt activities should burden them with liability. A review of the factual allegations fails to disclose any such separate tortious activities of individual board members except board members Burke and Back. According to the complaint, Burke represented to plaintiff that the flooring companies he had contacted no longer manufactured the type of flooring necessary to replace plaintiffs' flooring. He even sent them an e-mail attaching the names of the companies he had contacted. Plaintiffs allege, however, that a number of companies, including the ones in the e-mail, continue to manufacture the same type of floorboards that are now rotten from leaks.

In September, 2007, board member Back advised plaintiff Grubin that the railings have been ordered. On May 6, 2008, Burke advised that the railings had been paid for and delivered. In June, 2008, defendants' attorney advised that the railings had never been ordered. Burke advised that water entering their apartment from the adjacent terraces were caused by weeds on plaintiffs' terrace area, even though this condition was caused by failings in the roof and flashings.

These independent acts, justify causes of action against these individuals for fraud and

breach of fiduciary duties.

The complaint, while alluding to the board's actions, fails to name any individual board member, except Burke and Back, with individual tortious acts committed in bad faith against the plaintiffs or any other board members (*See, DeCastro v Bhokar*, 201 AD2d 382, 607 NYS2d 348 [1st Dept 1994]). Thus, as to the remaining board members, plaintiffs have failed to satisfy their burden (*Jones v Surrey Cooperative Apartments*, 263 AD2d 33, 700 NYS2d 118 [1st Dept 1999]).

Against The Board As An Individual Entity

Under the Business Judgment Rule, so long as the board acts in good faith and within its corporate powers to further its corporate purposes, its actions will not be second-guessed by the Courts (*Levandusky v One Fifth Ave. Apartment Corp.*, 75 NY2d 530, 554 NYS2d 807 [1990]; *40 W.67th Street v Pullman*, 100 NY2d 147, 760 NYS2d 745 [2003]). Nevertheless, on a motion to dismiss, the allegations of the complaint must be construed as true and the Court must determine whether they fit within any cognizable legal theory (*DeMicco Bros. v Consolidated Edison of NY*, 8 AD3d 99, 779 NYS2d 10 [1st Dept 2004]; *Gen. Cas. Ins. Co. v Kerr Heating Products*, 48 AD3d 512, 852 NYS2d 257 [2d Dept 2008]). In other words, the board will be upheld when it acts in good faith in accordance with its powers and its actions set aside when it does not do so.

(A) Fraud and Breach of Fiduciary Duty

Defendant moves to dismiss the first cause of action for fraud and the fourth cause of

action for breach of fiduciary duty on the ground that they are not alleged with the specificity required by CPLR 3016(b). The plaintiffs have concisely summarized the specificity with which plaintiffs have pleaded their fraud claims at Page 11 of their Memorandum of Law. Briefly, they were the following: building manager Scully's statement that he had fixed the leaks when he had not, board member statements that the replacement railings had been ordered when they hadn't been, the building manager's statement that the problem of dirty tap water had been remedied when it hadn't been, the statement that the security system for the plaintiffs' apartment had been fixed when it hadn't been, the statement that replacements for the plaintiff's pecan floor boards weren't available, and the building manager's statement that the hall air conditioning had been repaired when it wasn't.

Plaintiffs' claim that because of the defendants' false representations, they refrained for some time from enforcing their rights by bringing this lawsuit. These allegations are sufficient to make out a claim for fraud in that this complaint alleges in detail misrepresentation of material facts, knowledge of such falsity, reliance on the misrepresentation and injury (*LaSalle Nat'l Bank v Ernst & Young*, 285 Ad2d 1013, 729 NYS2d 671 [1st Dept 2001]). Nor is this cause of action duplicative of the breach of contract claim because it asserts allegations not pleaded in the contract cause of action such as deliberate misrepresentations and injury resulting from refraining from bringing this lawsuit. These allegations are essential to the fraud claim but are not necessary for the breach of contract claim.

In a breach of fiduciary duties situation, the fiduciary must have a fiduciary relationship with the plaintiffs, and plaintiffs' damages are the result of the fiduciary's misconduct (*Kurtzman v Bristol, Bergstol*, 40 AD3d 588, 590 [2d Dept 2007]). While the defendants argue that the conclusory language pleaded defeats any claim for breach of fiduciary duties, the Page 11 summary of the facts in the complaint and the greater elaboration of these facts in the body of the memo, belies the argument that the cause of action is based only on conclusory allegations.

Abuse of Process

The defendants seriously err when they seek to dismiss the eighth cause of action because it does not adequately plead abuse of process. A careful reading of that cause of action, clearly establishes that the plaintiffs are suing for electricity overcharges. While there is a cursory mention of abuse of process, the main thrust of this claim points to the unlawful charges for electrical use.

Breach of Contract

The third cause of action is for breach of contract. Somehow, the defendants' brief at Pages 26 through 29 talk about breach of implied warranty of habitability, trespass and nuisance. But there is very little discussion of breach of contract which is what this cause of action is about. Nevertheless, despite the confusion, the elements of a contract are established through the lease along with the offering plan, by-laws and regulations. Plaintiffs have adequately pleaded a breach by virtue of the issues they have raised as to the condition

of their apartment which went a long time without repair, the recurrent leaks and the taking over of their terraces for several years. Defendants do not explain how plaintiffs have failed to adequately plead this cause of action.

Statute of Limitations Defense

The defendants are invoking CPLR 214 to dismiss portions of the second, fifth and sixth causes of action that seek damages for events which exceed three years prior to the commencement of this action. However, they ignore those allegations which indicated forbearance by the plaintiffs as a result of representations made by the condominium's employees, shareholders and defendants' attorney himself, promising to rectify the problems and in some instances doing some repairs. Not to be overlooked are out-and-out misrepresentations by the defendants that certain items were on order when they weren't and promises to replace the floorboards and then reneging because the type of planks needed were no longer commercially available, when they were available.

On a motion to dismiss the complaint as time-barred, this Court is required to accept these allegations as true and accord the benefit of every favorable inference to the non-movant (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 595 NYS2d 931 [1993]).

There is ample authority to invoke the doctrine of equitable estoppel, preventing the enforcement of the Statute of Limitations based on the allegations that the plaintiff was induced by misrepresentation or deception to delay the bringing of a timely lawsuit (*Highland Mech. Indus. v Herbert Const. Co.*, 216 AD2d 161, 628 NYS2d 655 [1st Dept

1995]; *Corsello v Verizon NY*, 77 AD3d 344, 908 NYS2d 57 [2d Dept 2010]).

The Court has reviewed the balance of defendants' claims and finds them to be without merit.

Plaintiffs have cross-moved to compel discovery. It is the policy of this Court to schedule a preliminary conference to establish a timetable for discovery before entertaining motion practice. Accordingly, it is

ORDERED that the portion of this motion to dismiss the complaint against the individual board members is granted except as to Jeanne Back and Michael Burke; and it is further

ORDERED that the portion of the motion to dismiss the fourth, the eighth, third, seventh, second, fifth and sixth causes of action and the demand for punitive damages is denied; and it is further

ORDERED that defendants shall serve and file their Answer within fifteen (15) days of the service of a copy of this Decision and Order with notice of entry; and it is further

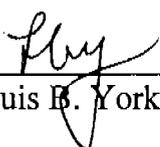
ORDERED that a Preliminary Conference shall be held in I.A. Part 2, 71 Thomas Street, NY, NY, Room 205 on February 8, 2010 at 2:00 p.m.

Dated: December 21, 2011

Enter:

FILED

DEC 27 2011



Louis B. York, J.S.C.

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