Board of Mgrs. of the Alexandria Condominium v Adelman
2024 NY Slip Op 33941(U)
November 1, 2024
Supreme Court, New York County
Docket Number: Index No. 153870/2017
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS A. KAHN, III **PART** 32
Justice

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BOARD OF MANAGERS OF THE ALEXANDRIA CONDOMINIUM,

Plaintiff,

- v -

ROBERT C. ADELMAN, LINDA RACKIS, COMMISSIONER OF JURORS, JOHN DOE, JOHN DOE, JOHN DOE, JOHN DOE, JOHN DOE, JOHN DOE, JOHN DOE, HOHN DOE, JOHN DOE, JOHN DOE,

Defendant.

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INDEX NO. 153870/2017

MOTION DATE

MOTION SEQ. NO. 011 012

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 011) 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 012) 285, 286, 287, 288, 289, 290, 291, 292, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER.

Upon the foregoing documents, the motions are determined as follows:

Plaintiff Board of Managers of the Alexandria Condominium ("Alexandria") commenced this proceeding to foreclose on its lien for common charges against premises located at 201 West 72nd Street, Unit 10M, New York, New York. Defendant Robert C. Adelman, the unit owner, answered, *pro se*, and pled three counterclaims. As best as to Court can discern, the first counterclaim seeks to recover for personal injuries and pleads a claim for negligence, products liability as well as breach of warranty. Also contained in this claim is an assertion that Adelman lost his personal property because of Alexandria's "negligence, dereliction, intentional deprivation of property, theft, reckless waste, [and] fraudulent misrepresentations". The second counterclaim seems to allege interference with the use and enjoyment of real property. The third is for intentional infliction of emotional distress and/or abuse of process. Alexandria replied to the counterclaims. All the counterclaims arise out of an incident that occurred at the unit on August 7, 2014. As alleged by Adelman, a dishwasher at the premises spontaneously exploded, which resulted in, according to Adelman, "a fire" and "tremendous toxic chemical fumes, smoke and exhaust". By these claims Adelman seeks money damages for *inter alia* personal injury and property damage.

By order of Justice Arlene Bluth dated January 1, 2018, the counterclaims were severed. By order dated July 3, 2018, Justice Bluth granted Plaintiff's motion for partial summary judgment on its cause of action to foreclose its lien for common charges. As part of that decision, Justice Bluth

dismissed Adelman's affirmative defenses, including the fifth which alleged Adelman was denied use and enjoyment of the subject unit by Alexandria. Discontinuance of Alexandria's action was granted by order dated October 25, 2019. Simultaneously, the counterclaims were restored to the calendar and discovery proceeded. On March 13, 2024, Adelman filed a note of issue. Now, Adelman moves (Mot Seq No 11) for *verbatim* as follows:

> (a) To grant special trial preference based on counterclaimant Adelman being well over 70 years of age, and based on the antiquity of this case, an antiquity caused by the dilatory tactics of Alexandria counsel, preference needed so that Adelman can get necessary care and can enjoy the fruits of recovery;
>
> (b) Directive that there be available as the first witness at trial witness supplied by the Alexandria as certifying complete resident file on Unit 10-M running from January 1995 to March, 2019 with such witness bringing original or certified copy of resident file in order to lay foundation to introduce and authenticate file;
>
> (c) Ruling declaring the Alexandria's liability insurance company, Admiral, to be in bad faith by reason of self-serving refusal to negotiate settlement within coverage limit that would shield from exposure to multi-million-dollar judgment because the carrier protects its own profits as the expense of high risk to the insured.
>
> (d) Decision granting partial summary judgment on liability issues as to which there is no serious dispute in order to administer justice on a 2017 case with overdue judicial economy and efficiency;
>
> (e) Ruling authorizing amended counterclaim pleadings to raise Ad Damnum to$3,000,000 on each cause of action for restitution or compensatory damages upon the ground that newly discovered evidence shows the damages to exceed what was estimated in 2017, and also to take into account inflation that shrinks dollar value since 2017;
>
> (f) Directive that investigation witness Jonathan LeBow be available as trial witness #2 to lay foundation to introduce and authenticate accident investigative report dated 10-27-14, LeBow being a fact witness for Adelman without prejudice to Alexandria using him as expert witness at their discretion;

Alexandria opposes Adelman's motion and by separate motion (Mot Seq No 12) moves to dismiss the counterclaims pursuant to CPLR §3211[a][1], [5], [6] and [7] as well as for summary judgment pursuant to CPLR §3212. Adelman opposes the motion.

On a motion pursuant to CPLR §3211[a][7], the allegations contained in the complaint must be presumed to be true, liberally construed and a plaintiff must be accorded every possible favorable inference (*see eg. Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46 [2016]; *M & E 73-75, LLC v 57 Fusion LLC*, 189 AD3d 1, 5 [1st Dept 2020]). In determining such a motion, "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*298 Humboldt, LLC, v Torres*, 197 AD3d 1081, 1083 [2d Dept 2021], *quoting Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]). In certain situations, however, the presumption falls away when bare legal conclusions and factual claims contained in the complaint are flatly contradicted by evidence submitted by the Defendant

(*see Guggenheimer, supra*; *Kantrowitz & Goldhamer, P.C. v Geller*, 265 AD2d 529 [2d Dept 1999]). When in the uncommon circumstance the evidence reaches this threshold (*see Lawrence v Miller*, 11 NY3d 588, 595 [2008]), the court "must determine whether the proponent of the pleading has a cause of action, not whether she has stated one" (*Kantrowitz & Goldhamer, P.C. v Geller*, *supra*; *see also Rovello v Orofino Realty Co.*, 40 NY2d 633, 635-636 [1976]).

A party moving for summary judgment must establish, in the first instance, entitlement to judgment as a matter of law by tendering sufficient evidence in evidentiary form which eliminates any material issues of fact (*see Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make a *prima facie* case requires denial of the motion regardless of the sufficiency of the opposition papers (*see Alvarez v Prospect Hospital*, supra at 324; *see also Smalls v AJI Industries, Inc.*, 10 NY3d 733, 735 [2008]). If the movant meets its requirement, the burden shifts to the opposing party to establish the existence of a triable issue of fact (*see Alvarez v Prospect Hosp.*, *supra*; *Zuckerman v City of New York*, *supra*).

A plaintiff "may be awarded summary judgment on the issue of a defendant's negligence where 'there is no conflict at all in the evidence' and 'the defendant's conduct fell far below any permissible standard of due care'" (*Davis v Commack Hotel*, 174 AD3d 501 [2nd Dept 2019], *citing Andre v Pomeroy*, 35 NY2d 361, 364-65 [1974]). Proof of the absence of a plaintiff's comparative fault is not necessary to obtain partial summary judgment on the issue of liability (*see Rodriguez v City of New York*, 31 NY3d 312 [2018]). On the other hand, a defendant is required to demonstrate, *prima facie*, that one or more of the essential elements of plaintiff's negligence claim are negated as a matter of law (*see Poon v Nisanov*, 162 AD3d 804 [2d Dept 2018]; *Nunez v Chase Bank*, 155 AD3d 641 [2d Dept 2017]).

"In any negligence action, the threshold issue before the court is whether the defendant owed a legally recognized duty to the plaintiff" (*see Gilson v Metropolitan Opera,* 5 NY3d 574, 577 [200]; *see also Ferreira v. City of Binghamton*, 38 NY3d 298, 308 [2022]). "If, in connection with the acts complained of, the defendant owes no duty to the plaintiff, the action must fail. Although juries determine whether and to what extent a particular duty was breached, it is for the courts first to determine whether any duty exists" (*Darby v Compagnie Nat'l Air France,* 96 NY2d 343, 347 [2001]).

Concerning whether Alexandria owed Adelman a duty of care in tort, necessitates examination of the nature of a condominium. The Court of Appeals has observed that the "characteristics of condominium ownership are individual ownership of a unit, an undivided interest in designated common elements, and an agreement among unit owners regulating the administration and maintenance of the property" (*All Seasons Resorts v Abrams*, 68 NY2d 81, 90-91 [1986]). Described differently, "the cooperative or condominium association is a quasi-government – 'a little democratic sub society of necessity'" (*Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537 [1990][internal citation omitted]). Condominium owners generally cede control of running the day-to-day affairs of the condominium which regularly have extensive powers over such areas as financial decision making to propagating rules regarding everything from refuse disposal to renovations (*see Wong v Board of Mgrs. of the 45 W. 67th St. Condominium,* 221 AD3d 572, 573 [1st Dept 2023]). "The basic agreement among the unit owners as to the manner in which the condominium shall be administered and maintained is set forth in the condominium's bylaws" (*Schoninger v Yardarm Beach Homeowners' Asso*, 134 AD2d 1, 6 [2d Dept 1987]). Thus, in this context, it is the condominium bylaws which define the existence or absence of a duty in this circumstance (*see Kwan v Kuie Chin Yap*, 220 AD3d 715, 717 [2d Dept 2023]["condominium bylaws . . . conclusively demonstrates that the [Board] had no duty to install window guards in the subject apartment"]).

The Alexandria bylaws provide in Section 10[a], titled "Maintenance and Repairs" as follows:

> All maintenance of and repairs to any unit, structural or non-structural, ordinary or extraordinary (other than maintenance of and repairs to any Common Elements contained therein and not necessitated by the negligence, misuse or neglect of the Owner of such Unit) shall be made by the Owner of such Unit. Each Unit Owner shall be responsible for all damages to any and all other Units and/or to the Common Elements that occur as a result of his failure to perform such maintenance and repairs.

Section 2[a][i] states the Board is responsible for the "[o]peration, care, upkeep and maintenance . . . of the Common Elements". Section 14 provides that the "members of the Board of Managers shall not be liable to the Unit Owners for any mistake of judgment, negligence, or otherwise, except for their own individual willful misconduct or bad faith.". Regarding replacement of appliances after a fire causing damage or destruction to the building Section 3 states the Board is not responsible for replacement of same as part of its duty.

Based on the foregoing, Alexandria owed no duty of care to Adelman to keep his unit and the appliances therein in a reasonably safe condition and, therefore, the negligence cause of action fails. This conclusion is analogously supported by the Appellate Division, First Department's decision in *Frisch v Bellmarc Mgt.*, 190 AD2d 383 [1st Dept 1993], wherein it was determined that statutory warranty of habitability under Real Property Law §235-b, does not apply between a condominium unit owner and a board of managers since condominium unit ownership is a form of fee ownership of property and not a household interest involving a landlord/tenant relationship.

However, a condominium board does owe unit owners a fiduciary duty after purchase of the unit in the performance of its duties (*see Odell v 704 Broadway Condo.*, 284 AD2d 52, 59 [1st Dept 2001]; *Desernio v Ardelean*, 188 AD3d 992, 993 [2d Dept 2020]). "To state a claim for breach of fiduciary duty, [defendant] must allege that (1) [plaintiff] owed [her] a fiduciary duty, (2) [plaintiff] committed misconduct, and (3) [defendant] suffered damages caused by that misconduct" (*Burry v Madison Park Owner LLC*, 84 AD3d 699, 699-700 [1st Dept 2011]). Such a claim must be pled with particularity as defined by CPLR §3016[b] (*see Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 808 [2d Dept 2011]). Failure to allege any individual wrongdoing by members of a condominium board separate and apart from their collective actions made for the benefit of the condominium renders a cause of action against a board collectively defective as a matter of law (*see eg Granirer v Bakery, Inc.*, 54 AD3d 269 [1st Dept 2008]). This is because "[t]he individual Board members are protected by the business judgment rule absent allegations of tortious acts outside of legitimate condominium purposes" (*Board of Mgrs. of Honto 88 Condominium v Red Apple Child Dev. Ctr., a Chinese Sch.*, 160 AD3d 580, 582 [1st Dept 2018]). The business judgment rule "' bars judicial inquiry into actions of corporate directors taken in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of corporate purposes'" (*Fe Bland v Two Trees Management Co.*, 66 NY2d 556, 565 [1985], *citing Auerbach v Bennett*, 47 NY2d 619, 629 [1979]). Indeed, "it is presumed that the actions of a cooperative's directors are [made in good faith]" (*40 W. 67th St. v Pullman*, 296 AD2d 120, 126 [1st Dept 2002], *aff'd* 100 NY2d 147 [2003]). In the present case, Alexandria demonstrated that its actions after the fire in Adelman's his unit were taken without malice and in furtherance of its purposes. Adelman's allegations in the complaint and in opposition to the motion were too conclusory and lacked sufficient corroboration to raise an issue of fact.

As to the claim of breach of warranty, Adelman does not plead whether an express or implied warranty is claimed. For an express warranty, "there must be an affirmation of fact or promise by the seller, the natural tendency of which is to induce the buyer to purchase" which was relied upon (*Friedman v Medtronic, Inc.*, 42 AD2d 185, 190 [2d Dept 1973]). To the extent the existence of an implied warranty is claimed, that "is a guarantee by the seller that its goods are fit for the intended purpose for which they are used and that they will pass in the trade without objection" (*Saratoga Spa & Bath v Beeche Sys. Corp.*, 230 AD2d 326, 330 [3d Dept 1997]; *see also Denny v Ford Motor Co.*, 87 NY2d 248 [1995]). Here, Adelman fails to plead any affirmative statements made by Alexandria about the dishwasher prior to his purchase of his condominium unit. This is likely because, Adelman's deed for the subject premises, dated January 17, 1995, states the grantor was Broadway/72nd Associates, not Alexandria. For this reason, the defective product claim against Alexandria also fails since it did not introduce or facilitate distribution of the dishwasher into the stream of commerce (*see generally Gebo v Black Clawson Co.*, 92 NY2d 387, 392 [1998]).

The branch of Defendant's motion to dismiss the cause of action of conversion is granted. "[A] conversion takes place when someone, (1) intentionally and without authority, (2) assumes or exercises control over personal property belonging to someone else, (3) interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49–50 [2006]). Alexandria demonstrated that after the fire, Adelman's personal property was moved to a storage facility and that Alexandria forwarded Adelman multiple correspondences over the course of several years informing him of same.

Adelman's second counterclaim alleging Alexandria interfered with his use and enjoyment of the unit fails by operation of the doctrine of law of the case. Justice Bluth dismissed Adelman's fifth affirmative defense concerning use and enjoyment of the subject unit finding that he was not denied access based upon Adelman's own writings which acknowledged his possession of a key to the unit and the ability to access same (NYSCEF Doc No 104).

The third counterclaim alleges Alexandria's actions after the fire constituted abuse of process. That cause of action has "three essential elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective" (*see Perry v McMahan*, 164 AD3d 1486, 1488 [2d Dept 2018] *citing Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). "Frivolous litigation requiring a party to expend legal fees is not a sufficient basis for a cause of action sounding in abuse of process" (*Perry v McMahan*, *supra*; *Marks v Marks*, 113 AD2d 744 [2d Dept 1985]). Absent from this counterclaim is any indication what "process" was issued by Alexandria nor is there any proof of unlawful interference with person or property (*Curiano v Suozzi*, supra; *Williams v Williams*, 23 NY2d 592, 596 [1969]).

The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress (*see Chanko v American Broadcasting Cos. Inc.*, 27 NY3d 46, 56 [2016]; *Silverman v. Park Towers Tenants Corp.*, 206 AD3d 417, 418 [1st Dept 2022]; *Waterbury v New York City Ballet, Inc.*, 205 AD3d 154, 165 [1st Dept 2022]). Moreover, a claimant must show that the conduct was "beyond all possible bounds of decency" and "utterly intolerable in a civilized community" (*Chanko v American Broadcasting Cos. Inc.*, supra at 56). Presently, the acts Adelman claims are attributable to Alexandria are not remotely extreme and outrageous enough (*see Silverman v. Park Towers Tenants Corp.*, supra; *Benyo v Sikorjak*, 50 AD3d 1074, 1077 [2d Dept 2008]; *see also Fludd v City of New York*, 199 AD3d 894 [2d Dept 2021]).

Accordingly, it is

ORDERED that the motion (MS# 12) by Board of Managers of the Alexandria Condominium is granted and all the counterclaims pled by Robert C. Adelman are dismissed, and it is

ORDERED that Robert C. Adelman's motion (MS# 11) is necessarily denied in its entirety.

11/1/2024
DATE

FRANCIS A. KAHN, III, A.J.S.C.

HON. FRANCIS A. KAHN III
J.S.C.

CHECK ONE:	[X]	CASE DISPOSED		[ ]	NON-FINAL DISPOSITION		
	[ ]	GRANTED	[X] DENIED	[ ]	GRANTED IN PART	[ ]	OTHER
APPLICATION:	[ ]	SETTLE ORDER		[ ]	SUBMIT ORDER		
CHECK IF APPROPRIATE:	[ ]	INCLUDES TRANSFER/REASSIGN		[ ]	FIDUCIARY APPOINTMENT	[ ]	REFERENCE