Board of Mgrs. of the 900 Park Ave. Condominium v Park Park Assoc., LLC
2024 NY Slip Op 34016(U)
October 31, 2024
Supreme Court, New York County
Docket Number: Index No. 655999/2021
Judge: Verna L. Saunders
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**

Justice

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THE BOARD OF MANAGERS OF THE 900 PARK AVENUE CONDOMINIUM, suing on behalf of the unit owners,
Plaintiff,

- v -

PARK PARK ASSOCIATES, LLC,
Defendant.

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INDEX NO. 655999/2021

MOTION SEQ. NO. 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

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

This is an action brought by the plaintiff Board of Managers of the 900 Park Avenue Condominium in Manhattan, against defendant Park Park Associates, LLC, the owner of a commercial condominium unit located at 900 Park Avenue. In the complaint (NYSCEF Doc. No. 26, *complaint*), plaintiff alleges that defendant, owner of a garage unit, did not properly maintain the unit, causing damage from water and chloride infiltration. The complaint seeks a declaratory judgment that defendant is financially responsible for the repairs (first cause of action), a permanent injunction requiring defendant to perform the necessary repairs (second cause of action), damages for breach of the contractual duty to maintain and repair the unit (third cause of action), and attorney's fees (fourth cause of action). During this litigation, the parties stipulated to complete the repairs (NYSCEF Doc. No. 29, *stipulation*) but they reserved their claims and defenses on liability and costs, rendering the second cause of action moot. In its answer, defendant denies liability and raises several affirmative defenses (NYSCEF Doc. No. 17).

Plaintiff now moves for summary judgment on its first, third, and fourth causes of action and for dismissal of defendant's affirmative defenses (NYSCEF Doc. No. 19). Plaintiff argues that defendant is required to maintain and pay and repair the garage unit because the garage does not qualify as a common element within the condominium declaration and by-laws (NYSCEF Doc. Nos. 32; 33). Plaintiff alternatively argues that even if the court concludes that the concrete slab within the garage unit is a common element, the by-laws nevertheless require maintenance and repairs at the unit's own costs.

In support of its motion, plaintiff proffers the affidavits of John Grande ("Grande") and Daniel Dermer ("Dermer") (NYSCEF Doc. Nos. 21; 23). Dermer is the managing agent and principal of Dermer Management, which manages the 900 Park Avenue Condominium since January 1, 1996 (NYSCEF Doc. No. 23 ¶ 2). The garage is a two-level garage unit, with a concrete slab separating Level A and Level B (NYSCEF Doc. No. 21, p2 n1). Dermer affirms that in or around 2000, the building began to experience periodic water infiltration from the

aboveground planter, causing physical damage to the building (NYSCEF Doc. No. 24 ¶ 8). He further maintains that, in 2017, plaintiff performed extensive repairs and waterproofing to the building's exterior, planters, driveway, and other common areas, rectifying the problem (*id*, ¶ 9). Dermer states that, pursuant to the parties' 2022 stipulation to repair damages, plaintiff paid $181,000.00 into escrow and an additional $44,997.50 in invoices to Super Structure Engineers and Architects.

Grande is an associate principal at Superstructures Engineering and Architects, with 37 years of professional experience in comprehensive evaluations of structural integrity (NYSCEF Doc. No. 21, *Grande affidavit*). Grande opines that although the most significant leak in Level A of the garage unit was caused by water infiltration originating from the planter on the street level, the water leak was not a leading factor in the deterioration of concrete throughout the garage unit. Instead, he concludes that the damage resulted from the lack of "maintenance of an adequate waterproof protective membrane" that was exposed to high concentrations of chlorides, especially during the winter months when cars are likely to carry water into the garage unit, due to snow and ice (*id.*, ¶¶ 12, 15). According to Grande, membranes are at best warranted by a manufacturer for a 10-year period. However, based on his inspection, he determined that the membrane was "decades old" and that most of the conditions resulted from defendant's failure to properly maintain the garage unit for decades (*id.*, ¶ 16).

In opposition, defendant argues that summary judgment is inappropriate because relevant issues of fact remain. Defendant also contends that the motion is premature because discovery remains outstanding, to wit, facts regarding the water leak and repairs; the repairs made to address prior water infiltrations in 2000 and 2016; efforts made after the April 9, 2013 letter from defendant, which notified plaintiff of water infiltration (NYSCEF Doc. No. 42); the 17-year delay in addressing the issue; the measures taken to correct the issue; what if any testing was conducted and by whom; and the method of instillation of the original membrane, which is relevant to the liability to repair, maintain and replace. Defendant relies on the affidavit of Anthony Stasio, a licensed professional engineer, who opined that other factors may have contributed to the leak (NYSCEF Doc. No. 39). Defendant argues that these facts are within the exclusive control of plaintiff.

The proponent of a summary judgment motion must make a *prima facie* case and will only prevail if it submits sufficient evidence to demonstrate the absence of a material issue of fact (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Once the movant makes this showing, the burden shifts to the party opposing the summary judgment motion to produce evidentiary proof in admissible form sufficient to establish the existence of a material issue of fact (see *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The evidence must be considered in the light most favorable to the party in opposition of the motion *(Henderson v City of NY*, 178 AD2d 129, 130 [1st Dept 1991]). It is well-established that "[w]hen deciding a motion for summary judgment, the court's function is issue finding, rather than issue determination" (*Kershaw v Hospital for Special Surgery*, 114 AD3d 75, 82 [1st Dept 2013]).

Plaintiff argues it is entitled to summary judgment on its first cause of action, which seeks a declaration that defendant is financially responsible for the repairs of the garage unit. It maintains that the concrete floors and ceilings are not "common elements" under the governing

documents. To this point, plaintiff relies on Article 6, § 6.2-3 of the condominium declaration, entitled "Common Elements", to argue that the subject provision makes no mention of "concrete slab" and that the reference to "all concrete floors and concrete ceilings" within the definition of common elements applies solely to the residential portion of the building, as it describes the walls and partitions separating the residential units from one another (NYSCEF Doc. No. 32). Plaintiff argues that the context of Article 6, § 6.2-3 along with Schedule B, clearly shows that it applies to the residential units only, as the commercial units are specifically listed in schedule B of the declaration (*id.* § 6.2-3; Schedule B).

In opposition to this prong of plaintiff's motion, defendant argues that because "concrete floor and ceilings" are expressly referred to as common elements in Article 6, § 6.2-3 of the declaration, it would be inclusive of the garage and, thus, that plaintiff is responsible for repairing and maintaining the concrete floor in the garage unit (NYSCEF Doc. No. 37). Furthermore, defendant asserts that Article 6, § 6.2-3 of the declaration does not distinguish between residential and commercial units; therefore, defendant's argument that the section only applies to residential units is incorrect (NYSCEF Doc. No. 32).

New York Real Property Law Article 9-N § 339(d) governs the creation and administration of condominiums. A condominium is created by the filing of a declaration; the condominium parcel then becomes subject to the jurisdiction of the Condominium Act (Real Property Law § 339[f]). Section 339(v) of the Condominium Act provides for the creation of the condominium by-laws. Once created, the condominium is subject to the governing terms. In essence, the by-laws serve as an agreement amongst the unit owners which explains how the condominiums will operate. "The HOA [home-owner's association] by-laws and declaration are contracts." (*Keller v Kay*, 170 AD3d 978, 980 [2d Dept 2019], citing *Weiss v Bretton Woods Condominium II,* 151 AD3d 905 [2d Dept 2017]). In a written contract, the unambiguous provision must be afforded their plain and ordinary meaning, and the interpretation of such a provision is a question of law for the court (*Board St., LLC v Gulf Ins. Co*, 37 AD3d 126, 130 [1st Dept 2006]). "[W]hen the meaning of a contract is ambiguous, and the intent of the parties become a matter of inquiry, a question of fact is presented, which cannot be resolved on a motion for summary judgment" (*Ruttenberg v Davidge Data Sys. Corp.*, 215 AD2d 191, 192-93 [1st Dept 1995] quoting *Eden Music Corp. v Times Sq. Music Publs.* 127 AD2d 161, 164 [1st Dept 1987]; see *Blume v Jacobwitz,* 212 AD3d 403, 404 [1st Dept 2023]).

Here, Article 5 of the declaration states that "[e]ach Unit consists of the area measured vertically from the top of the concrete floor to the underside of the concrete ceiling, except that any Common Element located in any Unit shall not be considered as a part of that Unit." Furthermore, Article 6, § 6.2 of the declaration which defines the phrase "common elements," provides in pertinent part:

> "6.2 The Common Elements consist of the following:
> 6.2-1 the Land;
> 6.2-2 all foundations columns, girders, beams and supports;
> 6.2-3 all exterior walls of the Building, not including the Unit side of unfinished surface of the plaster finish on such walls; …all walls and partitions separating Units from corridors, elevator shafts, stairs and

> mechanical spaces, other than the Unit side of the unfinished surface of such walls and partitions; the walls and partitions; and all concrete floors and concrete ceilings."

There is no mention of the term "concrete slab" in the declaration or the by-laws. When Article 6, § 6.2-3 of the declaration is read together with Article 5 of the declaration it reads, "common elements consist of ...all concrete floors and concrete ceilings" which is measured "vertically *from the top of the concrete floor* [emphasis supplied] to the underside of the concrete ceiling." Essentially, the lower level of the garage, Level A, according to Grande, the location of the most significant leak (NYSCEF Doc. No. ⁋ 9), shares a concrete floor and ceiling within Level B of its own unit, although Level B may share a ceiling with another unit. Nonetheless, the express language in the declaration is unclear as to its definition of the word "from." In contrast, the affidavits present clear descriptions as to where the membrane would be placed. The affidavits of both Stasio, defendant's licensed engineer expert, and Grande, plaintiff's expert, provide that the material that is needed to prevent water infiltration goes on the top of the floor. Grande refers to the material as a "water topper;" and Stasio refers to the material as a "traffic bearing membrane," but both terms describe material that goes *on top of the concrete floor* (NYSCEF Doc. No. 21 ⁋ 5, and Doc No. 39 ⁋ 26-29 [emphasis supplied]).

"[T]he [c]ondominiums' declaration and [b]y-laws must be interpreted together because they were a part of the same transaction" (*Board of Mgrs. of the 411 E. 53rd St. Condo. v Perlbinder*, 2014 NY Slip Op 31897[U] *15 [Sup Ct, NY County 2014] [*Board of Managers*], citing *Perlbinder v Board of Mgrs. of 411 E. 53rd St. Condominium*, 65 AD3d 985, 988, 886 [1st Dept 2009]). In *Board of Managers*, the garage unit experienced corrosion of the slab due to infiltration of water and salt that was carried in by vehicles and the concrete floor coating deteriorated allowing water to enter from the upper level of the garage. The condominium argued that the slab was not a common element because it was entirely located in the garage. The court referred to Article § 6(c) of the condominium declaration, which stated that the garage unit was "measured horizontally *from the inside of the exterior walls of the [b]uilding to the inside surface of the demising walls...from the top of the concrete floor* to the underside of the concrete ceiling" (*Board of Managers*, 2014 NY Slip Op 31897 [U], *19 [Sup Ct, NY County 2014]). The court stated that, in this context, "[u]se of the word 'from' could mean 'beginning after', but can also mean 'beginning with'... [i]f interpreted to mean beginning with, the [g]arage measurements include the surface of the walls, floors and ceilings of the [g]arage..." (*id.*, at *20).

The facts before the court are similar to those in *Board of Managers*, and the court finds the reasoning in that case persuasive. After reviewing the declaration and by-laws in this case, and in light of the affidavits, the court finds that the "water topper" as referred to by Grande, or "traffic bearing membrane" as referred to by Stasio, is a concrete structure that gets applied above the concrete floors to prevent deterioration, which may or may not classify as a common element, depending on the intent and meaning the parties gave to the word "from" at the time the contract was entered into. Thus, plaintiff has not established its right to relief as to this cause of action. Accordingly, the Court denies the branch of plaintiff's motion seeking a declaratory judgment.

With respect to that branch of the motion seeking summary judgment on its third and fourth causes of action for breach of contractual duty to maintain and repair, as well as, attorney fees, plaintiff notes that an offering plan for a condominium, which includes its declaration and by-laws, among other documents, is a contract as a matter of law. Plaintiff argues that because the concrete slab is not a common element, defendant breached the contract when it disclaimed responsibility for its maintenance and repair. Alternatively, plaintiff argues that the by-laws provide that the unit owner bears the cost of maintenance and repairs. Plaintiff argues that it is defendant's failure to properly maintain the garage unit that resulted in decomposition of the concrete slab, and that defendant is liable for the cost of repairs.

In opposition, defendant argues that the concrete slab is a common element. Alternatively, even if it were not, plaintiff would be responsible for the cost because plaintiff made repairs in the garage unit in 2017, and that should be taken as an "admission against interest." Defendant further argues that there is a lack of information concerning this issue, which is in the exclusive control of plaintiff, and thus discovery is necessary to establish whether plaintiff or a prior owner of the garage unit installed a membrane. Furthermore, defendant challenges the contention that it is responsible for most of the deteriorating conditions in the garage. Specifically, it disputes the statement in the Dermer affidavit, that the periodic water infiltration from the planter damaged only "a small portion of the garage" (NYSCEF Doc. 23 ¶ 8). Defendant asserts that discovery is needed to clarify what plaintiff means by "some damage to a small portion of the garage."

Defendant additionally concludes that plaintiff negligently failed to properly remediate the water infiltration in the building and that this negligence resulted in the damage of the garage unit. Defendant asserts that the concrete floor and ceiling of the garage unit contribute to the safety and structural integrity of the building; therefore, delegating the repair and maintenance to the unit owner is illogical and dangerous. In support, defendant provides Stasio's affidavit which states that the leaks from the foundational walls, over an extended period, contributed to the garage unit's water damage. Stasio concludes that the issue is caused by the inadequate slope or incline of the garage, which is a construction defect, in addition to an unusual design of embedded electrical conduits, which collectively may impact the water infiltration system (NYSCEF Doc. No. 39 ¶¶ 70, 71, 72, 75). Stasio states that the water leaks from the building's foundational walls further contributed to the damage in the garage unit, which were also the cause of the deteriorated conditions in the garage unit (*id.*, ¶ 73). Stasio concludes that the deteriorated condition in the garage were not caused solely by the failure to repair or replace the membrane damages due to the high chloride levels alone, but more so because of the deterioration of the structure (*id.*, ¶ 45).

In reply, plaintiff argues that the repairs it made in 2017 were related to the building cellar ceiling, not concrete slab. Therefore, it does not demonstrate an assumption of liability, and defendant's reliance on these specific facts is misplaced. Plaintiff also asserts that discovery is not required because defendant also has access to the information requested.

To determine the liability for the repairs, the court turns to Article 6, § 6.9 of the by-laws (NYSCEF Doc. No. 33), which states, in pertinent part:

> ...maintenance, repairs and replacements, whether structural or non-structural, ordinary or extraordinary, (a) in or to any Unit (including any portion of the Common Element included therein and maintained as a part of such Unit pursuant to 6.15-4 but excluding other Common Elements included therein)...shall be made by the owner of such Unit at such Unit Owner's sole cost and expense and (b) in or to the Common Elements shall be made by the Board, and the cost and expense thereof shall be charged to the Unit Owners as a Common Expense."

The provision makes it clear that the cost of repairs to the common elements are charged to the unit owner, except for those listed in Section 6.15-4, which refer to the residential units serviced or benefited by common elements adjacent or appurtenant to such unit. However, Article 6, § 6.9-2, provides that "[i]f any painting, decorating, maintenance, repairs or replacements to the Property or any part thereof is necessitated by the negligence, misuse or neglect of any Unit Owner, then the entire cost thereof shall be borne by such Unit Owner", which introduces the issue of negligence. If repairs and maintenance are due to the negligence, misuse or neglect of any unit owner, then the unit owner shall be responsible. Therefore, the issue turns to whether the garage unit owner was negligent.

Based on the above, the court agrees with defendant that summary judgment is premature. Although plaintiff argues that the interpretation of the contractual provisions is a question of law, the relevant provision, Article 6 § 6.9-2, states that the unit owner is liable for the cost of repairs if it is negligent or if there are other grounds for liability (NYSCEF Doc. No. 33 Sec. 6.9-2.1). Defendant demonstrates that issue of fact exists as to the duty to repair and liability following past dealings and how they affect the current circumstances in the garage unit (see *Board of Managers of the 411 E. 53rd St. Condo. v Perlbinder*, 2014 NY Slip Op 31897[U], *23-24 [Sup Ct, NY County 2014]). Therefore, the branch of plaintiff's motion seeking summary judgment for breach of contract is denied. Consequently, the branch of the motion seeking attorney's fees is also denied.

Lastly, plaintiff seeks dismissal of defendant's affirmative defenses. Pursuant to CPLR 3211(b), a party may move to seek a judgment of dismissal of one or more defenses on the ground that defendant failed to state a defense or on the ground that defendant's affirmative defense lacks merit. Plaintiff has the burden of showing the defense is without merit as a matter of law (see *Emigrant Bank v Rosabianca*, 210 AD3d 527, 527 [1st Dept 2022]). The court should not dismiss a defense if there remains a question of fact requiring a trial (see *534 E 11th St. Housing Dev. Fund Corp v Hendrick,* 90 AD3d 541, 542 [1st Dept 2011]).

The court grants this prong of the motion only as to defendant's first and fourth affirmative defenses (NYSCEF Doc. No. 17 ¶¶ 51 and 54). Defendant's first affirmative defense alleges that the complaint fails to state a cause of action (CPLR 3211[a][7]). The court must afford the pleading liberal construction (*see* CPLR 3026) and determine whether the facts alleged to be true fit into a cognizable legal theory (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Here, the complaint alleges facts that support claims of a declaratory judgment, permanent injunction, breach of contract, and attorney's fees.

Defendant's fourth affirmative defense asserts that plaintiff's breach of contract claim is barred by the statute of limitations. Defendant argues that plaintiff does not provide a timeframe by which defendant failed to make repairs. Plaintiff asserts that since defendant has not repaired the garage as of the commencement of this lawsuit, filed on October 15, 2021, the limitation period for breach of contract has not expired. Further, plaintiff adds that defendant's failure to pay the entire sum due for the repairs allows plaintiff to proceed with its claim. In New York, the statute of limitations for breach of contract is six years (*see* CPLR 213[2]). However, where a contract "requires continuing performance over a period of time, each successive breach may begin the statute of limitations running anew." (*Madison 92nd St. Assoc., LLC v Courtyard Mgt. Corp.*, 2016 NY Slip Op 32287[U] *11 [Sup Ct, NY County 2016], citing *Guilbert v Gardner*, 480 F3d 140, 150 (2d Cir 2007). Terms under the condominium declaration and by-laws require certain conditions be met for the period of occupancy. There is no date after which the unit owners will not be bound to adhere to the declaration and by-laws. Therefore, the court grants dismissal of defendant's first and fourth affirmative defense. For the reasons above, therefore, it is hereby

ORDERED that that branch of plaintiffs' motion seeking summary judgment as against defendant is denied; and it is further

ORDERED that that portion of plaintiff's motion seeking to dismiss defendant's affirmative defenses is granted solely to the extent of dismissing defendant's first and fourth affirmative defenses, and it is otherwise denied; and it is further

ORDERED that the parties shall appear for a remote preliminary conference on January 8, 2025, details which shall be provided by the court no later than January 6, 2025.

This constitutes the decision and order of this court.

October 31, 2024

HON. VERNA L. SAUNDERS, JSC

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