SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. CAROL EDMEAD Justice PART 35

Fuisz, Beverly
-v-
6 East 72nd Street

INDEX NO. 153622/12
MOTION DATE 3/19/13
MOTION SEQ. NO. 001

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

In this action to recover for, *inter alia*, property damage, defendants Joseph K. Blum Co., LLP and James J. Blum (collectively, "Blum") move to dismiss the Amended Complaint as asserted against them by plaintiffs pursuant to CPLR 3211(a)(7) for failure to state a cause of action and for failure to plead facts with specificity pursuant to CPLR 3016(b).[1]

Plaintiffs, Robert E. and Beverly ("Beverly") Fuisz (collectively, "Fuisz"), are the cooperative lessors of apartments on the first and second floors of the building located at 6 East 72nd Street, New York, New York (the "Building") (the "Fuisz Apartment"), and defendant Myrna Ronson ("Ronson"), is the cooperative lessor of the apartments located on the third and fourth floors of the Building (the "Ronson Apartment"). Plaintiffs allege that they suffered water damages to their apartment and other personal property as a result of Ronson's improper renovation of her apartment.

Negligence (Fifth Cause Action)

Blum's contention that plaintiffs failed to allege facts sufficient to establish that Blum was in privity with plaintiffs so as to give rise to a duty to plaintiffs lacks merit.

It is axiomatic that, to establish a case of negligence, plaintiff must prove that the

[1] Plaintiffs' Amended Complaint was filed contemporaneous with their opposition papers, and thus superseded the original Complaint which Complaint was the subject of the Blum's motion. In reply Blum addressed the allegations in the Amended Complaint.

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

Dated: _____

 , J.S.C.

1. CHECK ONE: ..... ☐ CASE DISPOSED ☐ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

defendants owed her a duty of care, and breached that duty, and that the breach proximately caused the plaintiff's injury (*see Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 499 NYS2d 392 [1985]; *Wayburn v Madison Land Ltd. Partnership*, 282 AD2d 301, 302, 724 NYS2d 34 [1st Dept 2001]). Absent a duty of care to the injured party, a defendant cannot be held liable in negligence (*Palsgraf v Long Island R.R. Co.*, 248 NY 339 [1928]). The question of whether a duty of care exists is one for the court to decide (*De Angelis v Lutheran Med. Ctr.*, 58 NY2d 1053, 462 NYS2d 626 [1983]; *Stankowski v Kim*, 286 AD2d 282, 730 NYS2d 288 [1st Dept], *lv dismissed* 97 NY2d 677, 738 NYS2d 292 [2001]).

Here, plaintiffs allege that the defendant Board of Directors of 6 East 72nd Street Corporation (the "Board" or "Cooperative") adopted an Apartment Alteration Agreement (the "Alteration Agreement") to be signed by all lessees prior to the commencement of any renovation work in their apartment. The Alteration Agreement allegedly requires that, prior to commencement of any demolition, all plumbing and other "system components" within the apartment and the "adjacent common areas" must be located and listed in the construction plans, which further must state "how the proposed new lines are to be routed to them (Amended Complaint ¶55). Further, Rider 1 of the Alteration Agreement requires the Cooperative's consulting engineer (*i.e.*, Blum) to inspect the "Adjacent Premises" including the apartment below the one to be renovated, and to record the condition of said Adjacent Premises. Blum allegedly had a duty to review the plans for the apartment renovation and inspect the Adjacent Premises (*i.e.*, the Fuisz Apartment) and advise the Cooperation if any portion of a proposed renovation violated any of the provisions of the Alteration Agreement. "This duty extended to all owners of cooperative apartments . . . ." (Amended Complaint, ¶64) (*see e.g., Wing Wong Realty Corp. v Flintlock Const. Services, LLC*, 95 AD3d 709, 945 NYS2d 62 [1st Dept 2012] (engineering consulting firm hired by construction site owner failed to establish that firm could not be held responsible for the damage caused to adjacent building owner where firm's responsibilities included reviewing the plans)).

Plaintiffs further allege that Blum neglected to perform an inspection prior to the renovations, neglected to review the plans for the Ronson Apartment, and failed to inform Rosen and the Board that the plans did not show the existing plumbing system or how the plumbing system would be re-routed, and that the plans called for relocation of "wet" over "dry" as well as "noisy" over "quiet" (Amended Complaint, ¶¶72, 74, 76). Blum failed to inspect the Fuisz Apartment before renovation of the Ronson Apartment commenced so as to know to correct configuration of the Fuisz Apartment, and negligently relied on the wrong floor plans for the Building (id. ¶¶ 109-111). And, plaintiffs allege that Blum negligently advised the Board that the first leak into the Fuisz Apartment was not caused by Ronson's contractors, but by a pre-existing fault in the waste pipe. As a result, plaintiffs allegedly sustained damages to their apartment.

Blum's reliance on *Raffa v Stilloe Roofing & Siding* (182 AD2d 901, 581 NYS2d 888 [3d Dept 1992]) is misplaced, in that unlike in *Raffa*, plaintiffs and Ronson as lessees and the Cooperative were bound by rules, by-laws, and the Alteration Agreement which imposed obligations specifically designed to inure to the benefit of all lessees. Therefore, accepting the allegations as true, as this Court must, and given that the allegations are not flatly contradicted by any documentary evidence, the Court finds that plaintiffs alleged sufficient facts to establish privity with Blum and causation of plaintiffs' damages, to support their negligence claim.

Aiding and Abetting a Breach of the Board's Fiduciary Duty (Seventh Cause of Action)

A cause of action for aiding and abetting breach of fiduciary duty merely "requires a prima facie showing of a fiduciary duty owed to plaintiff, ... a breach of that duty, and defendant's substantial assistance ... in effecting the breach, together with resulting damages" (*Yuko Ito v Suzuki*, 57 AD3d 205, 869 NYS2d 28 [1st Dept 2008]; *Bullmore v Ernst & Young Cayman Is.*, 45 AD3d 461, 846 NYS2d 145 [1st Dept 2007] (A "person knowingly participates in a breach of fiduciary duty only when he or she provides 'substantial assistance' to the primary violator") *citing Kaufman v Cohen*, 307 AD2d 113, 126 [2003]). "'Substantial assistance occurs when a defendant affirmatively assists, helps conceal *or fails to act when required to do so*, thereby enabling the breach to occur'" (*Sanford/Kissena Owners Corp. v Daral Props., LLC*, 84 AD3d 1210, 923 NYS2d 692 [2d Dept 2011] *citing Monaghan v Ford Motor Co.*, 71 AD3d 848, 850 [2d Dept 2010], quoting *Kaufman v Cohen*, 307 AD2d 113, 126 [1st Dept 2003] (emphasis added)).

Here, plaintiffs sufficiently allege that the Board owed plaintiffs a duty, which included, *inter alia*, the duty to stop Ronson's renovation and her removal of the concrete floor which was in violation of the Cooperative's own rules as well as the Alteration Agreement (Amended Complaint, ¶¶86, 90).

As to Blum, plaintiffs allege, *inter alia*, that Blum failed to perform the required inspections, failed to stop the improper renovations, misled plaintiffs about the existence of the laundry room, and wrongly claimed that the first water leak in August 2009 was caused by a pre-existing weakness in the waste pipe, when in fact, the leak was due to Ronson's improper renovation. Blum's alleged failures enabled the Board to breach its duty to plaintiffs. The allegations herein, which are sufficiently specific in accordance with CPLR 3016(b), render the cases cited by Blum factually distinguishable (*cf. Roni LLC v Arfa*, 72 AD3d 413, 897 NYS2d 421 [1st Dept 2010] (defendant attorneys who simply "structured and organized entities that acted as the brokers on the property acquisitions and collected *commissions—activities which are part of ordinary real estate lawyering*" did not aid or abet a breach of fiduciary duty); *Eurycleia Partners, LP v Seward & Kissel, LLP*, 46 AD3d 400, 849 NYS2d 510 [1st Dept 2007] (plaintiff alleged no facts indicating that defendant "not only had actual knowledge of a breach of fiduciary duty by the fund but also rendered "substantial," *rather than inadvertent*, assistance to the fund " (emphasis added)).

Therefore, contrary to Blum's contention, plaintiffs state a claim for aiding and abetting a breach of fiduciary duty.

Tortious Interference with the Board's Contract with Plaintiffs (Eighth Cause of Action)

To state a cause of action for tortious interference with contract, plaintiffs must allege that they had a contractual relationship with a party, that Blum had knowledge of the contract, and that Blum intentionally interfered with that contract (*see Nicosia v Board of Managers of Weber House Condominium*, 77 AD3d 455, 909 NYS2d 412 [1st Dept 2010]). Here, plaintiffs sufficiently alleged that Blum interfered with plaintiffs' contract with the Cooperative and Ronson. Plaintiffs allege facts indicating that the leases, by-laws, and house rules of the Cooperative and Alteration Agreement are binding agreements upon plaintiffs, Ronson and the Cooperative (*Chuz v St. Vincent's Hosp.*, 186 AD2d 450, 589 NYS2d 17 [1st Dept 1992] (acknowledging that "by-laws may form the basis of a claim for breach of contract")), and that

Ronson and the Cooperative breached these agreements. The alleged failure to inspect, stop Ronson's contractors, wrongful reliance of the wrong plans, and failure to take corrective action do not amount to intentional conduct. However, contrary to Blum's contention, to the extent that plaintiffs allege that Blum "intentionally" mislead and "intentionally" decided to mislead plaintiffs about the location of maid's bathroom and existence of the laundry room, such allegations are sufficient at this juncture. And, Blum's contention that it could not have acted with the intent to procure a breach of contract because he lacked knowledge that it was doing so raises an issue to be addressed during discovery. Assuming the allegations as true, as this Court must, the Court finds that dismissal of this claim for failure to state a cause of action is unwarranted.

Nuisance (Tenth Cause of Action)

The elements of a common-law claim for a private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." (*Berenger v 261 West LLC*, 93 AD3d 175, 940 NYS2d 4 [1st Dept 2012] *citing Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570, 394 NYS2d 169, 173, 362 NE2d 968, 972 [1977]). "Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct" (*Berenger v 261 West LLC, supra*).

Here, the allegations in the Amended Complaint are sufficient, at this juncture, to sustain this claim. Plaintiffs' allege that Blum's intentional acts and various failures to act interfered with plaintiffs' real and personal property rights by causing the Apartment to become uninhabitable and by causing their personal property to become damaged or destroyed. Therefore, dismissal of this cause of action is unwarranted.

Aiding and Abetting Conversion (Twelfth Cause of Action)

New York does not recognize civil conspiracy to commit a tort, including conversion, as an independent cause of action" (*Brown v Mohammed*, 31 Misc.3d 1225(A), 929 NYS2d 198 (Table) [Sup. Ct., Kings County 2011] *citing Dickinson v Igoni*, 76 AD3d 943, 945, 908 NYS2d 85 [2d Dept 2010]). Hence, "a claim alleging conspiracy to commit a tort stands or falls with the underlying tort" (*id.*). Thus, in order to state the above claim, plaintiff must sufficiently allege that defendants "intentionally and without authority, assume[d] or exercise[d] control over personal property belonging to [plaintiffs], interfering with [plaintiffs'] right of possession (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 860 NE2d 713 [2006]). Here, the Amended Complaint fails to state a claim against Blum for aiding and abetting conversion in that allegations fail to show that any defendant assumed or exercised any control over plaintiffs' real or personal property. Therefore, dismissal of this claim is warranted.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendants Joseph K. Blum Co., LLP and James J. Blum to dismiss the Amended Complaint as asserted against them pursuant to CPLR 3211(a)(7) and CPLR 3016(b) is granted solely as to the twelfth cause of action for aiding and abetting conversion pursuant to CPLR 3211(a)(7); and it is further

ORDERED that defendants Joseph K. Blum Co., LLP and James J. Blum shall serve a copy of this order with notice of entry upon all parties within 20 days of entry; and it is further

ORDERED that the defendants Joseph K. Blum Co., LLP and James J. Blum shall serve their Answer within 20 days of entry of this order; and it is further

ORDERED that the parties shall appear in Part 35 for a Preliminary Conference on June 11, 2013, 2:15 p.m.

This constitutes the decision and order of the Court.

Dated 4/18/13 **ENTER:** _____, J.S.C.

HON. CAROL EDMEAD

Check one: ☐ **FINAL DISPOSITION** ☑ **NON-FINAL DISPOSITION**

Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**