FINDING OF FACT AND CONCLUSIONS OF LAW

SUPREME COURT OF THE STATE OF NEW YORK, COUNTY OF QUEENS
COMMERCIAL DIVISION, PART A
BY: LEONARD LIVOTE, Justice

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Ilan Tavor,

Plaintiff,

-against-

Board of Directors of Lane Towers Owners, Inc., Walter Weis, and Myles Horn,

Defendants.

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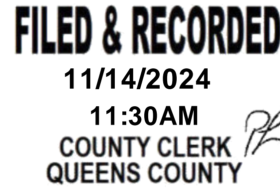
Index No: 700253/2017

Decision and Verdict



The Court conducted a bench trial of the parties' claims and defenses over eleven days from April 8, 2024 through April 22, 2024. The Court was both the finder of facts and the determiner of questions of law. The Court considered the testimony of the witnesses, gave weight to that testimony, and generally determined the reliability of the witnesses' testimony (*see Horsford v. Bacott*, 32 AD3d 310, 312 [1st Dept.2006]). Furthermore, the Court made credibility determinations on a case-by-case basis, wherever necessary and appropriate to do so (*see Noryb Ventures, Inc. v. Mankovsky*, 47 Misc.3d 1220(A), 1220A [Sup.Ct. N.Y. Co.2015]). Upon the evidence found to be credible, the Court makes the following findings of fact and conclusions of law.

Findings of Fact

Plaintiff purchased apartment 18A and 19A in the cooperative building located at 107-40 Queens Boulevard, Forest Hills, New York 11375 ("Lane Towers") in 2001 and 2004 respectively and joined them, creating a duplex apartment.

Lane Towers Owners, Inc. owns Lane Towers and is managed by a seven-member board of directors (the "Board"). The Board operates based upon the vote of a majority of the members. Each Board member has one vote.

Defendant Walter Weis is the President of the Defendant Board. He was elected to the Board in 2015.

Defendant Myles Horn was a member of the entity known as Lane Towers Apartments, LLC. Lane Towers Apartments bought 39 units in Lane Towers in 2015 thereby becoming the building sponsor. Defendant Horn then became a member of the Defendant Board as a representative of Lane Towers Apartments.

In 2013, representatives of Lane Towers approached Plaintiff regarding leaks from either the public terrace, Plaintiff's terrace, or both into apartments on the 17th floor below Plaintiff's. Lane Towers needed access to Plaintiff's apartment to address the leaks into the 17th floor apartments and requested permission to access Plaintiff's apartment and make repairs to Plaintiff's terrace to

address the leaks. After discussions regarding Plaintiff's concerns about his own apartment, Plaintiff and Lane Towers entered into an agreement (the "Agreement") that outlined Lane Towers' obligations. The Agreement's effective date was November 12, 2013. The Agreement primarily addressed repairs that were to be made to Plaintiff's terrace but also addressed certain other work, including Lane Towers' commitment to "remedy any roof leak" that existed in the entry area of apartment 19A. The Agreement also provided that if the repairs were not completed within the specified period, Plaintiff would be credited one month's maintenance for each month the repairs were not completed.

The work was not completed within the time period specified in the Agreement, and additional leaks and mold developed in Plaintiff's apartment. Plaintiff was not charged maintenance for approximately two years. In 2015, after performing several repairs, Lane Towers determined the work it was required perform under the Agreement was complete and informed Plaintiff that he had to resume maintenance payments in December 2015. Plaintiff did not agree that all the work had been completed and refused to resume paying maintenance. The recurring leaks caused excessive water penetration into Plaintiff's apartment, leading to significant water damage and mold buildup.

Eventually, Lane Towers sent Plaintiff a Notice to Cure regarding his nonpayment of maintenance. Plaintiff did not resume paying maintenance, and

Lane Towers began preparing to terminate his proprietary lease. Plaintiff then commenced the instant action.

By Order dated February 6, 2019, the Court ordered Plaintiff to resume maintenance payments and pay outstanding maintenance in the amount of $119,121.38.

In March 2019, Plaintiff moved out of the apartment.

Conclusions of Law

The crux of this case is whether, and to what extent, the Defendant Board is liable to Plaintiff for leaks and mold in his apartment under the Agreement.

Plaintiff's first cause of action is for breach of contract against the Defendant Board for breach of the Agreement. The elements of a cause of action to recover damages for breach of contract are the existence of a contract, the plaintiff's performance according to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach (*Dee v Rakower*, 112 AD3d 204, 208-09 [2d Dept 2013]).

"The fundamental rule of contract interpretation is that agreements are construed in accord with the parties' intent" (*Riverside S. Planning Corp. v CRP/Extell Riverside, L.P.*, 60 AD3d 61, 66 [1st Dept 2008], affd, 13 NY3d 398 [2009]). "The best evidence of what parties to a written agreement intend is what

they say in their writing" (*Slamow v Del Col*, 79 NY2d 1016, 1018 [1992]). "Thus, a written agreement that is complete, clear and unambiguous on its face must be enforced according to the plain meaning of its terms" (*Greenfield v Philles Records, Inc.*, 98 NY2d 562, 569 [2002]). Courts are not free to alter unambiguous contracts to reflect their own notions of fairness and equity (*Id.*).

"The threshold question of whether a contract is unambiguous, and the subsequent construction and interpretation of an unambiguous contract, are issues of law within the province of the court" (*NRT New York, LLC v Harding*, 131 AD3d 952, 954 [2d Dept 2015]). Where the language of a contract is reasonably susceptible to only one interpretation, it is unambiguous (*see Brad H. v City of New York*, 17 NY3d 180, 186 [2011]).

Paragraph 11 of the Agreement states that Lane Towers "will remedy any roof leak which may currently exist in the entry area at 19A within (30) days" of execution of the Agreement. When the Agreement is read as a whole, this provision is susceptible of only one reasonable interpretation. Paragraph 11 required Lane Towers to fix whatever leak or leaks may have existed in entry area of 19A as of November 12, 2013 by December 12, 2013. However, the Agreement does not require Lane Towers to keep Plaintiff's apartment free of all leaks constantly and perpetually. Repair work to address leaks was done to the roof in 2014. While the record establishes that there was at least one leak affecting

19A as of 2024, the record indicates that this leak was not the same leak in the entry area that existed on November 12, 2013, but rather a new leak(s) that had begun after the former leak was remedied.

Paragraph 6 of the Agreement states that Lane Towers "will construct a three foot high brick wall in the comer of the terrace which separates Mr. Tavor's terrace from the public terrace. The wall will contain a scupper (weep hole) at least 2" high and 7" wide, situated below the level of the pavers, to allow water runoff to flow onto the public terrace." This provision is also unambiguous. While the wall was built, the weep hole was built above the pavers, not below. Lane Towers' construction of the weep hole above the pavers did not allow adequate water runoff, contributing to continued roof leaks in Plaintiff's apartment. While the Defendant Board did breach the Agreement by failing to properly construct the weep hole, Plaintiff has failed to establish what extent of the damage to Plaintiff's apartment is attributable to the breach.

Paragraph 8 of the Agreement states that at the conclusion of the work done pursuant to the Agreement, "all pavers will be replaced, as will all planters and personal property, as will the trellis and its lights, all so as to leave the terrace in the substantially the same physical condition as it was prior to any work being done." Paragraph 2 of the Agreement states in relevant part that the "pavers and all personal property will be restored to their current locations and condition."

When read together, these provisions are unambiguous and require that should Lane Towers remove Plaintiff's pavers during repair work, it reinstalls the same so that they are restored to their original condition before the repairs were done. The record establishes that Lane Towers fulfilled this obligation.

Paragraph 12 of the Agreement states that Lane Towers shall not do future repair work to Plaintiff's terrace "absent a written agreement signed by both parties, which shall contain, among other things, start and finish dates, and define responsibility for restoration of any affected areas after work is completed." While there was work done that restricted access to the terrace and blocked windows, this work was not terrace repair work and was, thus, not covered by this provision.

Paragraph 2 of the Agreement states in relevant part that Lane Towers "will dismantle the iron and wood trellis and its electrical lights, secure it, paint it and reinstall it in its current location at the conclusion of the work." Plaintiff has not established a breach of this provision.

Paragraph 7 of the Agreement states that on top of the wall built pursuant to Paragraph 6, Lane Towers will "place a white solid PVC/vinyl fence. . ." This was done. Plaintiff has not established a breach of this provision.

Paragraph 9 of the Agreement states in relevant part that "[i]n the event of any new damages to the interior of the apartment, the landlord will restore or

reimburse Ilan Tavor for damages within 30 days of estimates from two (2) contractors being provided to Landlord." Plaintiff testified that the work done pursuant to this Agreement caused leaks and mold in and around the master bedroom. However, Plaintiff failed to establish that he timely provided repair estimates for these specific alleged damages from two contractors to Lane Towers as required by Paragraph 9.

Paragraph 5 of the Agreement states "[a]ll work to be done commencing November 13, 2013, through and ending by November 22, 2013. In the event of inclement weather which slows or prevents work from proceeding, the contractor may continue and conclude the job by November 27, 2013." It is undisputed the work continued well beyond November 27, 2013. Thus, Lane Towers breached Paragraph 5 of the Agreement. However, the breach of Paragraph 5 has been resolved under Paragraph 10.

Paragraph 10 of the Agreement states in relevant part "[s]hould the work not be completed by November 22, 2013, (or November 27, 2013 in the event of weather delays) then Tavor will receive an additional credit of one month's maintenance for each month, or any part thereof, that the work is not completed." The record establishes that the work was completed by December 2015. Plaintiff contends that the work was not completed, but what he really means is that the work was not completed to his satisfaction. When read in context with the rest of

the Agreement, Paragraph 10 served to forgive maintenance until the repair work had wrapped up, not until every problem with Plaintiff's apartment was fixed. The repair work done to Plaintiff's apartment was completed by December 2015, and Plaintiff has already been credited the maintenance he is entitled to for the delay under Paragraph 10.

The record establishes that the work pursuant to the Agreement was completed by December 2015. While Plaintiff's apartment has suffered substantial water damage and mold buildup, the Agreement only covered leaks in one specific area, and the evidence suggests that the leaks in that area were repaired as required by the Agreement, albeit likely insufficiently. Paragraph 10 of the Agreement served to credit maintenance while work was ongoing, not to credit maintenance indefinitely for any alleged breach, and work was no longer ongoing as of December 2015. Additionally, Plaintiff has failed to sufficiently establish damages for the Defendant Board's breach of Paragraph 6. Accordingly, Plaintiff is not entitled to additional maintenance credits or any other damages award under the Agreement.

Plaintiff's second and fifth causes of action are for breach of the covenant of quiet enjoyment against Defendant Board and Defendant Horn respectively. A tenant must perform any conditions precedent to maintain an action for breach of the covenant of quiet enjoyment unless there was a waiver of those conditions

(*Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). Paragraph 10 of Plaintiff's proprietary lease contains a covenant of quiet enjoyment that states "[t]he Lessee, upon paying the rent and performing the covenants and complying with the conditions on the part of the Lessee to be performed as herein set forth, shall, at all times during the term hereby granted, quietly have, hold and enjoy the apartment without any lawsuit, trouble or hindrance from the Lessor, subject, however, to the rights of present tenants or occupants of the apartment, and subject to any and all mortgages and underlying leases of the Residential Unit." Thus, by the express terms of the proprietary lease, Plaintiff was required to pay maintenance while remaining in possession of the apartment as a condition precedent to receiving the benefit of quiet enjoyment.

Additionally, "In actions for damages for breach of the covenant of quiet enjoyment, a tenant likewise must show an ouster, or if the eviction is constructive, an abandonment of the premises" (*Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). "A constructive eviction occurs where the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the leased premises" (*Grammer v Turits*, 271 AD2d 644, 645-46 [2d Dept 2000]). Failure to repair a building can constitute an actual or constructive eviction (*34-35th Corp. v 1-10 Indus. Assoc., LLC*, 16 AD3d 579, 580 [2d Dept 2005]).

Here, Plaintiff contends that the Defendant Board's failure to address problems with the building's roof caused his apartment to become uninhabitable due to excessive leaks and mold. The evidence brought out at trial establish that the frequent leaks affecting the building are the result of Lane Towers' failure to properly maintain the roof and replace it when it reached its lifespan of 20 years. The Board failed to properly maintain the roof in accordance with industry standards and allowed it to exceed its lifespan. The deterioration of the roof caused excessive water penetration into Plaintiff's apartment, leading to significant water damage and mold buildup. However, as discussed above, Plaintiff's contractual waiver of maintenance payments expired in December 2015 when the work pursuant to the Agreement was completed and the Board requested Plaintiff resume maintenance payments. Despite the Board's demands that he resume payments, Plaintiff refused to pay maintenance while remaining in possession of the apartment until at least March 2019 when he stopped residing in it full-time. Even after being ordered by the Court in 2019, Plaintiff did not pay maintenance until 2022. Thus, Plaintiff is precluded from claiming a breach of the covenant of quiet enjoyment.

Plaintiff's third and fourth causes of action are for breach of fiduciary duty against Sypro Kyrou & Defendant Weis and Defendant Horn respectively. The Court dismissed the cause of action as against Kyrou during the trial. The

elements of a breach of fiduciary duty are (1) the existence of a fiduciary relationship, (2) misconduct by the defendant, and (3) damages directly caused by the defendant's misconduct (*Palmetto Partners, L.P. v AJW Qualified Partners, LLC*, 83 AD3d 804, 807 [2d Dept 2011]). “The board of directors of a cooperative corporation owes its shareholders a fiduciary duty” (*Stinner v Epstein*, 162 AD3d 819, 820 [2d Dept 2018]).

The business judgment rule provides that courts should defer to a cooperative board's determinations so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 147, 153 [2003]). Unequal treatment of shareholders is sufficient to overcome the directors' insulation from liability under the business judgment rule, and directors who participate in the commission of a tort may be held individually liable (*Meadow Lane Equities Corp. v Hill*, 63 AD3d 699, 700 [2d Dept 2009]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012]).

Here, the core of Plaintiff’s theory of breach of fiduciary duty is that Defendants Weis and Horn breached their fiduciary to him by preventing the Defendant Board from completing the repair work to his apartment pursuant to the Agreement. To establish that Defendants Weis and Horn breached their fiduciary to Plaintiff, he must prove that they treated him unequally. Plaintiff has failed to meet this burden.

The record does not establish that Defendants Weis and Horn committed misconduct. Apart from Plaintiff's own feelings and perceptions, there is no evidence that Defendants Weis and Horn singled him out for unequal treatment. Although it took longer than expected, the Board completed the repairs required under the Agreement and credited Plaintiff $115,378.99 in maintenance. Further, although couched in language that alleges misconduct, the core of Plaintiff's allegations against Defendants Weis and Horn concern conduct protected by the business judgment rule. Corporate directors are not liable for merely inducing a breach of contract. Plaintiff is upset, and understandably so, that the Board did not fix all the leakage problems affecting his apartment. However, Defendants Weis's and Horn's voting and management decisions not to make further roof repairs, without more, is not a breach of their fiduciary duty. In fact, the record establishes that at least Defendant Weis determined that the leaks could not be permanently rectified without a replacement of the roof. The decision to not replace the roof of building at any given time is certainly not a decision into which this Court will inquire in the context of fiduciary duty. Additionally, Plaintiff's other complaints regarding construction work and disagreements with staff and other tenants do not amount to any breach of fiduciary duty. Accordingly, the Court finds for the Defendants on these causes of action.

At the conclusion of the trial, Plaintiff moved to conform the pleadings to the proof and add a cause of action for breach of the proprietary lease.

Leave to conform a pleading to the proof should be freely granted absent prejudice or surprise resulting from the delay (*Bryant v Broadcast Music, Inc.*, 60 AD3d 799, 800 [2d Dept 2009]). Here, the Defendant Board suffered no prejudice or surprise because the proprietary lease is a written agreement admitted into evidence as a Defendants' exhibit before trial and Plaintiff has not alleged any new facts (*Id.*). Further, both parties had the opportunity to make legal arguments regarding Plaintiff's motion in post-trial memoranda of law. Accordingly, Plaintiff's motion is granted.

Section 4 of Plaintiff's proprietary lease states in relevant part:

> "[i]n case the damage resulting from fire or other cause shall be so extensive as to render the apartment partly or wholly untenantable, or if the means of access to thereto shall be destroyed, the rent hereunder shall proportionately abate until the apartment shall again be rendered wholly tenantable or the means of access restored. . ."

As discussed above, the record establishes that Plaintiff's apartment has been extensively damaged by leaks and mold buildup. The record further establishes that the water damage rendered Plaintiff's apartment untenantable by January 2023. Accordingly, Plaintiff is entitled to rent abatement from January 2023 until his apartment is made wholly tenantable pursuant to Section 4 of the

proprietary lease. It should be noted, however, that Section 4 shall not require the Board to repair or replace equipment, fixtures, furniture, or decorations installed by Plaintiff. Section 4 also shall not require the Board to repaint or replace the wallpaper or refinish the floors in the apartment.

For the reasons stated above, it is,

ORDERED, ADJUDGED AND DECREED, that Plaintiff's causes of action for 1) breach of contract, 2) breach of the covenant of quiet enjoyment, and 3) breach of fiduciary duty were not proven by Plaintiff by the requisite applicable burdens of proof and are accordingly denied and dismissed, and it is further

ORDERED, ADJUDGED AND DECREED, that Plaintiff's motion to assert a cause of action for breach of Plaintiff's proprietary lease against the Defendant Board is granted, and it is further

ORDERED, ADJUDGED AND DECREED Plaintiff's cause of action for breach of his proprietary lease against the Defendant Board is granted, and it further

ORDERED, ADJUDGED AND DECREED, that Plaintiff shall recover proportionate maintenance paid from January 2023 and maintenance shall proportionately abate until Plaintiff's apartment is made wholly tenantable pursuant to Section 4 of the proprietary lease, and it is further

ORDERED, ADJUDGED AND DECREED, that any other and further relief requested and not specifically addressed herein, including any outstanding counterclaims are denied.

This constitutes the Decision and Order of the Court.

Settle Judgment.

Dated: 11/8/2024

FILED & RECORDED
11/14/2024
11:30AM
COUNTY CLERK
QUEENS COUNTY

Leonard Livote, J.S.C.

Clerk