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[2] GREAT NORTHERN INSURANCE COMPANY, as subrogee of ANITA KAHN, Plaintiff, -against- 33072 OWNERS CORP., THE BOARD OF DIRECTORS OF 33072 OWNERS CORP., GERARD J. PICASO, INC., BREND RENOVATION CORPORATION and JOSEPH K. BLUM CO., LLP, Defendants.**

Index No.: 117529/06

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2009 N.Y. Misc. LEXIS 4639; 2009 NY Slip Op 30882(U)

April 2, 2009, Decided
April 6, 2009, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

JUDGES: [*1] Walter B. Tolub, J.S.C.

OPINION BY: Walter B. Tolub

OPINION

DECISION

TOLUB, J.

BACKGROUND

Defendants 33072 Owners Corp. (co-op), the Board of Directors of 33072 Owners Corp. (board), and Gerard J. Picaso, Inc. (Picaso)(collectively, moving defendants) move, pursuant to CPLR 3212, to dismiss the complaint and any cross-claims against them. On March 2, 2009, this court dismissed the complaint and any cross-claims against defendant Brend Renovation Corporation (Brend) 1 .

1 On an earlier motion for summary judgment to dismiss the complaint served by Joseph K. Blum Co., LLP, plaintiff indicated that it would not respond to that motion, which is not presently before this court. Additionally, it is noted that an earlier summary judgment motion made by moving defendants based on an alleged waiver of subrogation was denied by this court on January 2, 2009.

[**3] Facts

Anita Kahn (Ms. Kahn) is and was the proprietary lessee of the subject premises. The moving defendants are the lessor (coop), the board and the managing agent for the premises (Picaso).

During the summer of 2004, the co-op hired Brend to perform facade work on the subject building. During the course of this work, around August 2004, Ms. Kahn notified the board [*2] that she was experiencing dust infiltration in her apartment. Plaintiff claims to have paid out Ms. Kahn's dust infiltration claim, pursuant to the insurance policy it had with her.

The co-op hired Becker Engineering, P.C. (Becker),

a professional engineering firm, to determine the cause and origin of the dust. Becker determined that the dust infiltration was caused by the removal of several wythes (layers) of brick between the building facade and the apartment. Ms. Kahn had removed brick layers several years earlier in order to recess radiators when she renovated her apartment (Affidavit of John C. Becker and accompanying engineer's report).

In addition to the dust infiltration, plaintiff claims that it paid Ms. Kahn for a water damage claim stemming from a burst pipe beneath Ms. Kahn's apartment floor. Plaintiff did not present any evidence that the moving defendants had any notice of a water pipe problem, but it appears that defendants had not inspected the pipes in 70 years.

[**4] Plaintiff, as Ms. Kahn's subrogee, has asserted four causes of action against the defendants: (1) negligence leading to water and dust damage; (2) false statements as to the effectiveness of repairs; (3) constructive [*3] eviction; and (4) breach of the warranty of habitability.

Discussion

At the outset, the court notes that defendants' current summary judgment motion is not precluded by this court's January 2, 2009 denial of an earlier summary judgment motion. Although, multiple summary judgment motions in the same action are generally discouraged, because this motion is based on different evidence and a different legal theory, it is not precluded. *Rose v Horton Medical Center,* 29 AD3d 977, 816 N.Y.S.2d 174 (2d Dept 2006); *See Luna v Hyundai Motor America,* 25 AD3d 321, 808 N.Y.S.2d 38 (1st Dept 2006); *Smith v Metropolitan Transportation Authority,* 226 AD2d 168, 641 N.Y.S.2d 8 (1st Dept 1996); *Green Point Savings Bank v Strum,* 183 AD2d 870, 584 N.Y.S.2d 136 (1st Dept 1992).

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein,* 35 AD3d 184, 185-186, 826 N.Y.S.2d 216 (1st Dept 2006). The burden then shifts to the motion's opponent to "present facts in admissible form sufficient to raise a [**5] genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art,* 27 AD3d 227, 228, 812 N.Y.S.2d 12 (1st Dept 2006); [*4] *see Zuckerman v City of New York,* 49 NY2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. *See Rotuba Extruders v Ceppos,* 46 NY2d 223, 231, 385 N.E.2d 1068, 413 N.Y.S.2d 141 (1978).

Plaintiff concedes that it stands in the shoes of its subrogor and is not pursuing its claim for damages caused by the dust infiltration (Opposition at 3-4). Therefore, the only issues before the court concern the water damage.

Action Against the Board

As stated in *Levandusky v One Fifth Avenue Apartment Corp.* (75 NY2d 530, 540, 553 N.E.2d 1317, 554 N.Y.S.2d 807 [1990]),

> "The business judgment rule protects the board's business decisions and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority."

Plaintiff's only argument against the board is that it did not order or make sufficient inspections of the building to assure efficient and adequate repairs to the [*5] premises.

> "Plaintiff[] disagree[s] with the board's decisions as to the costs, means, allocation and methods employed in making repairs to the building, but fail[s] to adduce evidence of self-dealing, fraud, or other acts [**6] constituting a breach of fiduciary duty sufficient to overcome the business judgment rule [citations omitted]."

Parker v Marglin, 56 AD3d 374, 374, 869 N.Y.S.2d 21 (1st Dept 2008); *see also Chambers Associates LLC v*

105 Acquisition LLC, 37 AD3d 365, 831 N.Y.S.2d 55 (1st Dept 2007).

Without more, plaintiff fails to overcome the business judgment rule. Plaintiff fails to show that any of the Board members engaged in wrongdoing. In the absence of any allegations that the individual Board members acted, inter alia, tortiously, or that they acted without notice or that they acted beyond the scope of their authority, the action against the Board must be and is dismissed. *Brasseur v. Speranza,* 21 A.D.3d 297, 800 N.Y.S.2d 669 [1st Dept 2005].

Action Against Managing Agent Picaso

The only act attributed to Picaso is that it did not inspect the pipes, an act of non-feasance.

> "[T]he managing agent correctly argues that as an agent for a disclosed principal it is not liable to [plaintiff ...] for nonfeasance. It has long been an established [*6] rule of law that the agent is not liable to third persons for non-feasance but only for affirmative acts of negligence or other wrong [internal quotation marks and citations omitted]."

Pelton v 77 Park Avenue Condominium, 38 AD3d 1, 11, 825 N.Y.S.2d 28 (1st Dept 2006). It follows that the action is also dismissed as against Picaso.

[**7] Action Against Co-Op

The Co-Op's motion for summary judgment to dismiss the first cause of action for negligence is granted.

Plaintiff argues that the failure to inspect the building pipes caused the water pipe to burst, but submitted no expert affidavit or report indicating that to be true. Defendant's expert, Mr. Becker's, opinions that Defendant had no notice of damage and that any pipe damage was caused by prior work done by Plaintiff's contractors, has gone unchallenged. Plaintiff submits no admissible evidence to identify the cause and origin of the burst pipe or any information to counter Defendant's evidence. Plaintiff's bare statement that Defendant was negligent, without more, cannot survive this CPLR § 3212 motion for summary judgment. As such, the Co-Op's motion to dismiss the negligence cause of action is granted. *See Sweeney v Bruckner Plaza Associates,* 57 AD3d 347, 869 N.Y.S.2d 453 (1st Dept 2008).

The [*7] Co-Op's motion to dismiss the second cause of action for false representation is granted. There is no evidence of any false representations regarding the nature of any repairs, except for plaintiff's conclusory statements. Such statements are insufficient to withstand a motion for summary judgment. *Wessel v Sichel,* 238 AD2d 177, 655 N.Y.S.2d 955 (1st Dept 1997).

The motion to dismiss the third cause of action for [**8] constructive eviction is also granted. A claim for constructive eviction requires the tenant to abandon possession of the premises. Here, plaintiff does not claim to have abandoned the apartment. As such the constructive eviction claim is dismissed. *Cut-Outs, Inc. v Man Yun Real Estate Corp.,* 286 AD2d 258, 729 N.Y.S.2d 107 (1st Dept 2001).

Finally, the motion to dismiss the fourth cause of action for breach of the warranty of habitability is denied.

A warranty of habitability mandates

> "first, that the premises are fit for human habitation; second; that the condition of the premises is in accord with the uses reasonably intended by the parties; and, third, that the tenants are not subjected to any conditions endangering or detrimental to their life, health or safety."

Park West Management Corp. v Mitchell, 47 NY2d 316, 325, 391 N.E.2d 1288, 418 N.Y.S.2d 310 (1979). [*8] A warranty of habitability applies to co-operative shareholder-tenants. *Frisch v. Bellmarc Management, Inc.,* 190 A.D.2d 383, 597 N.Y.S.2d 962 (1st Dept 1993).

Here, there remain questions as to whether the conditions in the apartment were so severe that a reasonable person would find that the warranty of habitability had been breached. *Park West Management Corp. v Mitchell, supra* at 329; *see also Birch v Ryan,* 281 AD2d 786, 721 N.Y.S.2d 711 (3d Dept 2001); *Molloy v Li,* 235 Ad2d 342, 652 N.Y.S.2d 964 (1st Dept 1997). As such, the Co-Op's motion to dismiss the fourth cause of action is denied.

[**9] Conclusion

Accordingly, it is

ORDERED that the motion for summary judgment with respect to the Board of Directors of 33072 Owners Corp. and Gerard J. Picaso, Inc. is granted, and the complaint is hereby severed and dismissed as against said defendants; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment in favor of defendants the Board of Directors of 33072 Owners Corp. and Gerard J. Picaso, Inc., with costs and disbursements to said defendants as taxed by the Clerk of the Court; and it is further

ORDERED that the motion for summary judgment to dismiss the first cause of action is granted; and it is further

ORDERED that the motion [*9] for summary judgment to dismiss the second and third causes of action is granted; and it is further

ORDERED that the motion for summary judgment to dismiss the fourth cause of action is denied.

Counsel for the remaining parties are directed to appear as scheduled for trial on April 27, 2009 at 9:30AM in room 335.

Dated: 4/2/09

ENTER:

/s/ Walter B. Tolub

Walter B. Tolub, J.S.C.