580 Llorrac St. Corp. v. Bd. of Managers of 580 Carroll Condo.

Supreme Court of New York, Kings County

March 12, 2024, Decided

Index No. 500036/2021

Reporter

2024 N.Y. Misc. LEXIS 1433 *; 2024 NY Slip Op 30976(U) **

[1]** 580 LLORRAC STREET CORP., Plaintiff, -against- THE ***BOARD*** OF MANAGERS OF 580 CARROLL ***CONDOMINIUM***, and 580 CARROLL ***CONDOMINIUM***, Defendants.

Notice: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS

Core Terms

common element, ***condominium***, repair, by-laws, infiltration, business judgment rule, defendants', promptly, damages, mitigate, breach of contract claim, breach of contract, summary judgment, unit owner, fiduciary duty, managing ***board***, good faith, self-dealing, replace

Judges: **[*1]** Hon. Richard J. Montelione, J.S.C.

Opinion by: Richard J. Montelione

Opinion

DECISION / ORDER

Plaintiff 580 Llorac Street Corp. (hereinafter "plaintiff") commenced this action by filing a summons and complaint on December 28, 2020. Issue was joined by defendants the ***Board*** of Managers of 580 Carroll ***Condominium*** and 580 Carroll ***Condominium***[1] (hereinafter "defendants") interposing an answer on January 13, 2021. Plaintiff moves for summary judgment against defendants pursuant to CPLR § 3212 on the causes of action of breach of contract, breach of fiduciary duty, and negligence.

[2]** Plaintiff owned an apartment unit in defendants' residential ***condominium*** building located at 580 Carroll Street, Brooklyn, New York (hereinafter "Unit 4C"). Unit 4C was purchased by plaintiff in June of 2013. From 2015 to October 2018, plaintiff rented Unit 4C to a third party for $6000 per month. In October of 2018, plaintiffs tenant complained of water infiltration into Unit 4C, at which time plaintiff immediately reported the leak to defendants (NYSCEF #26, page 2). On January 15, 2019, plaintiff's agent notified defendants that the water infiltration had persisted since October 2018. In February 2019, a prospective buyer of Unit 4C found mold and **[*2]** unacceptable moisture levels and backed out of the purchase. Plaintiff's agent again informed defendants that the water infiltration into Unit 4C persisted. Defendants advised plaintiff to hire a contractor to determine the source of the leak and notified plaintiff that defendants would not get involved until it had been determined that this was a "building issue, not a unit issue" (NYSCEF #33).

In July 2019, plaintiff hired an engineer who determined that the water infiltration into Unit 4C was caused by damage to the east exterior facade of the building, a common element of the building (NYSCEF #35). On August 2, 2019, plaintiff forwarded this report to defendants and demanded the required repairs be performed. In August 2020, defendants' architect further confirmed that the water infiltration into Unit 4C was caused by damage to a common element and recommended repairs be performed immediately (NYSCEF #41, page 2-3). On January 9, 2020, one year from the original report provided by the plaintiff,

[1] Defendant 580 Carroll ***Condominium*** has been incorrectly sued in this action. "An unincorporated association such as [a] ***Condominium*** has no legal existence separate and apart from its individual members" and therefore cannot be sued solely in its own name. Pascual v. Rustic Woods Homeowners Assn., Inc., 134 A.D.3d 1006, 1006, 21 N.Y.S.3d 687 (2d Dep't 2015) (internal quotation marks and citations omitted).

defendants discussed plaintiffs leak at a ***board*** meeting but made no immediate repairs (NYSCEF #26, page 3). In January 2021, defendants discussed formal bids received for a large-scale capital **[*3]** improvement project to waterproof the entire building (NYSCEF #54, page 12). In March 2021, defendants approved repairs to the building that would address the damage to the east exterior façade. The repairs were completed in November or December 2022, over three years after plaintiff first notified defendants of water infiltration into Unit 4C.

Plaintiff alleges that, as a result of defendants' failure to maintain and repair common elements of the ***condominium*** where plaintiff was a tenant, continuous water infiltration and damage to plaintiff's apartment occurred which rendered it uninhabitable for over four years. Plaintiff argues that under the ***condominium*** by-laws (hereinafter "by-laws") defendants had a duty to "maintain, repair, restore, add to, improve, alter and replace the common elements" (NYSCEF #28, § 2.4(A)(i)). Plaintiff contends that defendants' continuous failure to repair damage to the building's common elements which were confirmed by two engineer reports should be afforded no deference under the business judgment rule as defendants' actions were not taken in the best interest of the ***condominium***. Plaintiff further argues that defendants' failure to maintain and promptly **[*4]** repair the building's common elements in violation of the by-laws constitutes breach of contract, breach of fiduciary duty, and negligence.

In opposition, defendants argue their actions were in good faith, within the scope of their authority under the by-laws, and in the best interest of the ***condominium***, therefore their decisions are protected from judicial scrutiny pursuant to the business judgment rule.

[3]** Defendants contend that the damage to the building's east exterior facade was part of a systematic structural problem that required long-term rectification. Defendants argue their actions did not constitute a failure to repair, but instead an affirmative decision to pursue large scale solutions rather than temporary repairs, and that such decisions were within the scope of their authority and in furtherance of the ***condominium***'s interest (NYSCEF #54, page 17). Should the court choose not to apply the business judgment rule, defendants contend plaintiffs motion should still be denied. Defendants argue plaintiff cannot sustain a breach of contract claim due to plaintiff's failure to mitigate damages, plaintiff cannot prevail on its breach of fiduciary duty theory because defendants' duty **[*5]** extended to the ***condominium*** as a whole and defendants satisfied that duty, and plaintiff cannot prevail on their negligence theory for the same reasons their prior claims fail.

A motion for summary judgment will be granted if, upon all the papers and proof submitted, the cause of action or defense is stablished sufficiently to warrant directing judgment in favor of any party as a matter of law. *Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 967, 520 N.E.2d 512, 525 N.Y.S.2d 793 (1988)*; *Zuckerman v. City of New York; 49 N.Y.2d 557, 562, 404 N.E.2d 718, 427 N.Y.S.2d 595 (1980)*. On such a motion, the evidence will be construed in a light most favorable to the party whom summary judgment is sought. *Spinelli v. Procassini, 258 A.D.2d 577, 686 N.Y.S.2d 446 (2d Dep't 1999)*.

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." *Auerbach v. Bennett, 47 N.Y.2d 619, 629, 393 N.E.2d 994, 419 N.Y.S.2d 920 (1979)*. In New York, the business judgment rule is applicable to the ***board*** of managers of ***condominiums*** and *limits judicial* review of ***condominium*** ***board*** decisions to "whether the action was authorized and whether it was taken in good faith and in furtherance of the legitimate interests of the ***condominium***." *Schoninger v. Yardarm Beach Homeowners Assn., 134 A.D.2d 1, 9-10, 523 N.Y.S.2d 523 (2d Dep't 1987)*; *see also* *Kaung v. Bd. of Managers of Biltmore Towers Condo. Ass'n, 70 A.D.3d 1004, 1006, 895 N.Y.S.2d 505 (2d Dep't 2010)*, *Pascual v. Rustic Woods Homeowners Ass'n, Inc., 134 A.D.3d 1003, 1005, 24 N.Y.S.3d 81 (2d Dep't 2015)*. "Absent a showing of fraud, self-dealing or unconscionability, the court's inquiry is so limited and it will not inquire as to the wisdom or soundness of **[*6]** the business decision." *Schoninger v. Yardarm Beach Homeowners Assn., 134 A.D.2d. at 9*.

"Pursuant to the [business judgment] rule, the party seeking review of a governing ***board***'s actions has the burden of demonstrating a breach of fiduciary duty, through evidence of unlawful discrimination, self-dealing, or other misconduct by ***board*** members." *Hochman v. 35 Park W Corp., 293 A.D.2d 650, 651, 741 N.Y.S.2d 261 (2d Dep't 2002)*; *see also* *Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 539, 553 N.E.2d 1317, 554 N.Y.S.2d 807 (2002)*. Here, plaintiff's complaint does not allege fraud or misconduct on the part of defendants in connection with

the actions complained about, namely that defendants did not perform maintenance on the building's common elements in a timely manner as required in the by-laws, and such action caused physical damage to plaintiff's property. Plaintiff further fails to present any evidence of self-dealing, misconduct, or unlawful discrimination by defendants in connection to these claims. Additionally, the record demonstrates that defendants had authority under the by-laws to repair damage to the building's common elements (NYSCEF #28, § 2.4) and took action that they **[**4]** believed, in good faith, to be in the best interest of the ***condominium*** as a whole (NYSCEF #58, page 45-50).

Accordingly, plaintiff failed to meet their burden and plaintiff's motion for summary-judgment on its claim for breach of fiduciary **[*7]** duty by defendants must be denied. *Schoninger v. Yardarm Beach Homeowners Assn., 134 A.D.2d 1, 10, 523 N.Y.S.2d 523 (2d Dep't 1987)*, "Nile record in this case demonstrates that the ***board*** . . . took action demonstrably in good faith and honest judgment. The action taken was lawful . . . Accordingly, under the business judgment doctrine, there being no claim of fraud, self-dealing, unconscionability or other misconduct, the court's review of the matter is complete."

Plaintiff's motion for summary judgment on its claim for negligence must be denied on the same basis. *Red Apple Child Dev. Ctr. v. **Board** of Mgrs. of Honto 88 **Condominiums**, 2015 N.Y.Misc. LEXIS 2584, 10 (Sup. Ct. N.Y. Cnty. 2015)* (internal citations omitted), "absent any allegation by plaintiff that the ***Board*** acted in bad faith or engaged in self-dealing . . . the ***Board***'s decisions regarding the extent and manner of repairs and maintenance, if unwise, are protected by the business judgment rule, and plaintiff fails to state a cause of action for negligence as to the ***Board***."

However, the business judgment rule does not provide defendants absolute protection in this action. In New York, the business judgment rule does not serve as a defense to a breach of contract claim. *Dinicu v. Groff Studios Corp., 257 A.D.2d 218, 222-223, 690 N.Y.S.2d 220 (1st Dep't 1999)*, "while it may be good business judgment to walk **[*8]** away from a contract, this is no defense to a breach of contract claim. Thus, the business judgment rule does not protect [respondents] from liability." "A violation of by-laws is akin to a breach of contract." *Pomerance v. McGrath, 124 A.D.3d 481, 482, 2 N.Y.S.3d 436 (1st Dep't 2015)*. This is because ***condominium*** by-laws and declarations form a contract between unit owners and the ***condominium***. *Weiss v. Bretton Woods Condo. II, 151 A.D.3d 905, 906, 58 N.Y.S.3d 61 (2d Dep't 2017)*. Therefore, a violation of ***condominium*** by-laws can constitute a breach of contract that is not entitled to protection under the business judgment rule.

Section 2.4(A)(i) of the by-laws states in pertinent part:

> (A) . . . the ***Condominium*** ***Board*** shall have the following specific powers and duties: (i) to operate, maintain, repair, restore, add to, improve, alter and replace the Common Elements . . .

Section 5.1 of the by-laws states in pertinent part:

> Maintenance. (A) . . all painting, decorating, maintenance, and replacements, whether structural or nonstructural, ordinary or extraordinary . . .
>
> (ii) in or to the Common Elements . . . shall be performed by the ***Condominium*** ***Board*** as a Common Expense . . Promptly upon obtaining knowledge thereof, each Unit Owner shall report to the **[**5]** ***Condominium*** ***Board*** or to the Managing Agent any defect which the ***Condominium*** ***Board*** is responsible **[*9]** pursuant to the terms thereof.
>
> (C) Each Unit and all portions of the Common Elements shall be kept in first-class condition and order (and free of snow, ice and accumulation of water with respect to any terrace, patio, roof, or other part of the Property exposed to the elements) by the Unit Owner or the ***Condominium*** ***Board***, whichever is responsible for the maintenance therefore as set forth herein, and such Unit Owner or the ***Condominium*** ***Board***, as the case may be, shall *promptly* make or perform, or cause to be made or performed, all maintenance work (including, without limitation, painting, repairs and replacements) that is necessary in connection therewith. (*Emphasis added*)

Plaintiff asserts that under the by-laws, defendants had a duty to "maintain, repair, restore, add to, improve, alter and replace the common elements" (NYSCEF #28, § 2.4(A)(i)). Plaintiff further contends that the by-laws require defendants to maintain the ***condominium***'s common elements in "first-class condition and order" and to "promptly make or perform . . . all maintenance work" necessary to maintain or repair common elements (NYSCEF #28, § 5.1). Plaintiff argues that defendants breached the by-laws by failing to **[*10]** promptly perform the maintenance work necessary to repair and maintain a common element of the building and that

breach caused damage to plaintiffs apartment, rendering it uninhabitable.

In opposition, defendants argue that the by-laws do not impose a duty to "promptly" make or perform all maintenance work because Section 5.1(C) is strictly limited to the duties of unit owners and the ***condominium*** ***board*** as they relate to seasonal conditions. Defendants also argue that plaintiff cannot prevail on their breach of contract claim due to plaintiff's failure to mitigate damages and pay monthly common charges and special assessments. However, defendants' arguments are unavailing.

In regard to plaintiff's alleged failure to mitigate damages, a defendant raising the affirmative defense that a plaintiff failed to mitigate damages has the burden of showing not only that plaintiff failed to make diligent efforts to mitigate damages but must also establish the extent to which such mitigation efforts would have diminished those damages. *Frank Brunckhorst Co., LLC v. JPKJ Realty, LLC, 40 Misc. 3d 1209(A), 977 N.Y.S.2d 666 (Sup. Ct. Kings Cnty. 2013)*, *aff'd*, *129 A.D.3d 1019, 12 N.Y.S.3d 241 (2d Dep't 2015)*. Defendants here do not meet that burden. Additionally, whether a party failed to mitigate damages generally constitutes a question of fact. *Id.* Therefore, **[*11]** while a failure to mitigate may affect the damages awarded, it is not fatal to a breach of contract claim. Similarly, a tenant's failure to pay monthly common charges does not preclude them from bringing a breach of contract claim against a ***condominium***. *49 E. Owners Corp. v. 825 Broadway Realty, LLC, 2024 N.Y. App. Div. LEXIS 901, 2024 WL 629066, *1 (1st Dep't 2024)* (while there is no case that **[**6]** explicitly states this in the ***condominium*** context, courts have found that in the cooperative context "the fact that defendants breached the lease by failing to pay maintenance charges does not preclude them from asserting independent counterclaims for breach of contract").

In regard to defendants' interpretation of "promptly" within Section 5.1(C) of the by-laws, Section 5.1(C) neither expressly limit the provisions of that section to seasonal conditions nor do defendants give a sufficient reason why Section 5.1(C) should be so narrowly interpreted. Rather, this section specifies that, along with keeping all portions of the common elements in first-class condition and order, unit owners and the ***condominium*** ***board*** are additionally responsible for keeping common elements and certain parts of the property free of snow, ice and accumulation of water. The section further states that whichever or whoever is responsible **[*12]** for the maintenance set forth herein, shall perform that maintenance promptly. Taken together, Sections 2.4 and 5.1 of the by-laws creates a duty by ***Board*** of Managers to repair and maintain all common elements, to keep all common elements in first-class condition and order, and to perform all necessary repairs and maintenance promptly to those common elements.

In support of its motion, plaintiff provides evidence that defendants were first notified of water infiltration into Unit 4C in October 2018. Defendants were informed that the source of the water infiltration into Unit 4C was due to damage to a common element in August of 2019, which defendants have a duty to maintain and repair under the by-laws. Defendants did not commence its own investigation of the source of the water infiltration into Unit 4C to confirm it was due to damage to a common element until August 2020, and defendants did not approve repairs to the damaged common element until March 2021, seven months later.

While seven months may be a reasonable amount of time for a ***condominium*** ***board*** of managers to secure a bid for façade waterproofing, defendants were put on notice that there was damage to a common element a year **[*13]** prior to the August 2020 report. Defendants provide no reasoning as to why it took a year to investigate damage to a common element which was indicated in plaintiffs August 2019 report. Additionally, the record is devoid of any evidence that defendants took measures to ameliorate the damage to a common element, which was the source of the water infiltration into Unit 4C, for seven months. Further, defendants provide no reasoning as to why temporary repairs to the building's east exterior façade could not have been approved or performed while preparing capital repairs to waterproof the building.

Accordingly, plaintiff established *prima facie* that defendants' failure to promptly perform necessary repairs on the eastern wall of the building, a common element, was a violation of the by-laws. *LiNQ1, LLC v. 170 E, End Condo., 221 A.D.3d 409, 410, 199 N.Y.S.3d 44 (1st Dep't 2023)*, "[p]laintiff established prima facie that defendant ***board*** of managers breached its obligations under the ***condominium***'s bylaws and governing documents by failing to maintain and repair certain common elements of the building." In opposition, defendants failed to raise an issue of triable fact as to whether the water infiltration into Unit 4C was caused by anything other than defendants' failure to **[*14]** promptly repair damages to the building's common elements.

Therefore, plaintiff established its entitlement to summary judgment on its claim for breach of contract.

[7]** Based on the foregoing, it is

ORDERED that plaintiff's motion for summary judgment on its cause of action for breach of contract is **GRANTED**; and it is further

ORDERED that inquest shall be scheduled on the issue of damages on July 10, 2024 at 2:30 PM and it is Room 574 further

ORDERED that all other requests for relief are **DENIED**.

This constitutes the decision and order of the court.

ENTER

/s/ Richard J. Montelione

Hon. Richard J. Montelione, J.S.C.

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