[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SALIANN SCARPULLA PART 19

Index Number : 107479/2010

YORK TOWERS

INDEX NO. _____

VS

KOTICK, JOEL

MOTION DATE _____

Sequence Number : 001

MOTION SEQ. NO. _____

SUMMARY JUDGMENT

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

motion ~~and cross motion are~~ decided in accordance with accompanying memorandum decision.

FILED

MAR 15 2012

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/13/12

Saliann Scarpulla
J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 19

----------X

YORK TOWERS, INC.,

Plaintiff,

- against -

JOEL KOTICK AND DALE KOTICK,

Defendants.

----------X

Index No. 107479/10
Submission Date: 11/2/11

DECISION AND ORDER

For Plaintiff:
Gallet Dreyer & Berkey, LLP
845 Third Avenue, 8th Floor
New York, NY 10022-6601

Defendant, *pro se* and for Defendant Dale Kotick:
Joel Kotick, Esq.
501 East 79th Street
New York, NY 10075

Papers considered in review of this motion for summary judgment:

Notice of Motion 1
Aff in Support 2
Mem of Law in Support 3
Aff in Opp 4
Reply Aff 5
Reply Memo of Law. 6

HON. SALIANN SCARPULLA, J.:

Plaintiff York Towers, Inc. ("York") moves for summary judgment (1) dismissing the counterclaims and affirmative defenses; (2) awarding plaintiff monthly maintenance starting from May 2011; and (3) awarding plaintiff the full amount of maintenance arrears through April 2011.

York is a cooperative housing company and owner of a cooperative apartment building where defendants, Mr. and Mrs. Kotick (collectively, the "Koticks" or the "defendants"), are the proprietary lessees of a penthouse apartment. York alleges that the

Koticks failed to maintain their apartment, their terrace, and the greenhouse on the terrace in good repair, failed to reimburse York after it made repairs at its own expense, and failed to pay monthly maintenance as of September 2009. York seeks monthly maintenance of $4,858.10, and arrears of $114,947.46. The Koticks' assert that they stopped paying maintenance because York constructively evicted them, deprived them of the use and enjoyment of their residence, and harassed them.

For many years, York and the Koticks have had an unhappy relationship. The Koticks sued York in 2000, and, in 2002 the Court (Justice Lehner) dismissed the complaint after a bench trial. In this action, the Koticks assert a variety of counterclaims, and seek damages, a reduction in the shares of their apartment, a corresponding reduction of maintenance fees, and punitive damages. The Koticks claim that due to noise generated by the air conditioning, they have been forced to abandon their apartment. Except for constructive eviction, defendants do not specifically identify their counterclaims. Most of the counterclaims are based on allegations that suggest causes of action for the breach of the warranty of habitability, negligence, trespass, or breach of contract.

York now moves for summary judgment dismissing these counterclaims, and for other, related relief. In support of its motion, York presents affidavits by Phyllis Ferber ("Ferber"), the cooperative president, and Padraig Lynch ("Lynch"), the building superintendent.

In opposition, the Koticks present an unsworn affirmation by Mr. Kotick and affidavits by Mrs. Kotick, a physician, a mechanical engineer, and a real estate broker. Except for the affidavit by the real estate broker, the affidavits were notarized by Mr. Kotick. Mr. Kotick, an attorney, represents himself and his wife.

During oral argument, I granted York's motion to the extent of dismissing the third, sixth, seventh, ninth, and thirteenth counterclaims on the basis of res judicata or statutes of limitations. I also ordered the Koticks to pay maintenance starting from December 1, 2011, and to pay maintenance arrears into a joint escrow account. I have incorporated by rulings at oral argument into this decision and order.

Discussion

Validity of Koticks' Affirmations and Affidavits

An attorney who is not a party to an action may file an unsworn affirmation, and that affirmation has the same effect as a sworn affidavit. CPLR 2106; *John Harris P.C. v. Krauss*, 87 A.D.3d 469, 469 (1st Dept 2011). Here, however, Mr. Kotick is a named defendant. Therefore, his unsworn affirmation in place of a notarized affidavit is improper to oppose a motion for summary judgment. *See LaRusso v. Katz,* 30 A.D.3d 240, 243 (1st Dept 2006; *Slavenburg Corp. v. Opus Apparel,* 53 N.Y.2d 799, 801, n. * (1981) ("persons who are statutorily allowed to use such affirmations cannot do so when they are a party to an action").

In addition, for affidavits to be acceptable, the "notary public witnessing signatures must take the oaths of the signatories or obtain statements from them as to the truth of the statements to which they subscribe their names." *See Bayview Loan Servicing, LLC v. Bozymowski,* 30 Misc. 3d 1228[A], 2011 NY Slip Op 50240[U], *3 (Sup Ct. Suffolk County 2011). The manual "Notary Public License Law," dated June 2011, submitted by York with its reply, provides: "To state the rule broadly: if the notary is a party to or directly and pecuniarily interested in the transaction, the person is not capable of acting in that case."

A party should not ordinarily notarize the affidavit of a witness. *See Sumkin v Hammonds,* 177 Misc. 2d 1006, 1009 (Nassau Dist. Ct. 1998) (pro se landlord's notarization of affidavit of service deemed a nullity in view of owner's pecuniary interest in litigation's outcome). Conversely, a party has been permitted to notarize another party's affidavit. *See Matter of Siani v. Clark,* 23 Misc. 3d 1123[A], 2009 NY Slip Op 50906[U], *2 (Sup. Ct. Albany Co. 2009) (the court determined that there was no danger of clashing interests between the parties).

After York objected in its reply to Mr. Kotick's non-notarized affirmation and improperly notarized affidavits, Mr. Kotick wrote to the court asking to submit properly notarized documents. During oral argument on November 2, 2011, in the interests of a fair resolution that considered both sides, I decided to take into account Mr. Kotick's affirmation, in which he speaks for himself. I will also consider Mrs. Kotick's affidavit,

which Mr. Kotick notarized, because she is a party and she and Mr. Kotick have the same interests in this proceeding. However, I will disregard the other affidavits notarized by Mr. Kotick. They are nonparty affidavits, and it is improper for Mr. Kotick, as a party, to "acknowledge that a signatory who appears before a notary is who she purports to be and attest that such person actually signs the document." *Alfieri v. Guild Times Pension Plan,* 446 F. Supp. 2d 99, 110 (E.D.N.Y. 2006).

York's Motion for Summary Judgment

To prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York Univ. Med. Ctr.,* 64 N.Y.2d 851, 853 (1985). The failure to make such a prima facie showing requires denial of the motion regardless of the sufficiency of the opposing papers. *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). If the movant succeeds in the prima facie showing, the party opposing the motion for summary judgment must produce "proof in admissible form sufficient to establish the existence of material issues of fact which require a trial." *Id.* As summary judgment is a drastic remedy, it will not be granted when there is any doubt that a triable issue exists. *Rotuba Extruders v. Ceppos*, 46 N.Y.2d 223, 231 (1978). The evidence must be considered in the light most favorable to the party opposing the motion, *Henderson v. City of New York,* 178 A.D.2d 129, 130 (1st Dep't 1991), and the motion must be denied where conflicting inferences may be drawn

from the evidence. *Nowacki v. Metropolitan Life Ins. Co.*, 242 A.D.2d 265, 266 (2d Dept 1997). I review the Koticks' counterclaims with these standards in mind.

The Koticks' first counterclaim alleges that, on June 8, 2010, the cooperative wrongly allowed a strange man to come to their apartment. The man was the process server who served defendants with the summons and complaint in this action. In her affidavit, Mrs. Kotick says that she suffers from Parkinson's disease and that she was home alone recovering from knee surgery on that day. The man "violently rang" the doorbell, and Mrs. Kotick "hobbled as fast" as she could to the door, thinking that perhaps there was a fire or other emergency. When she saw the man, "[M]y heart stopped and I did not know if I was going to be assaulted or robbed." He handed her some papers. She was "shaking." Because of "this serious violation of my rights, I suffered injury to my knee and suffered extreme emotional shock, and a set back in my Parkinson's disease."

The Koticks assert that by allowing the process server to come to their door, York breached its own rules that all visitors must be announced. York's employees, when deposed, were not clear whether such a rule existed. Even if the building had such a rule, however, the Koticks' allegations do not amount to a cause of action of any kind. First, New York State "does not recognize a civil cause of action for harassment," *Broadway Cent. Prop. v. 682 Tenant Corp.*, 298 A.D.2d 253, 254 (1st Dept 2002).

A tenant may raise harassment as an element of a claim for breach of the covenant of quiet enjoyment. *See Bresnick v. Farquahar*, 151 A.D.2d 390, 391 (1st Dep't 1989) (lessee claimed pattern of harassment by cooperative); *Yochim v. McGrath,* 165 Misc. 2d 10, 16 (Yonkers City Ct.). 1995. Under the Housing Maintenance Code, which applies to residents of cooperative units, *Kahn v. 230-79 Equity,* 2 Misc. 3d 140[A], 2004 NY Slip Op 50302[U], *2 (App Term, 1st Dept 2004); *McMunn v Steppingstone Mgt. Corp.*, 131 Misc. 2d 340, 342 (Civ. Ct. NY Co. (1986), the owner of a dwelling shall not harass tenants. *See* Administrative Code of the City of New York ("Admin. Code"), § 27-2005 (d). Pursuant to the Admin. Code an owner may not engage

> in repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any [tenant] and that cause or are intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy

Admin. Code § 27-2004 (a) (48) (ii) (g). Here, however, the facts alleged above are insufficient to plead a counterclaim for breach of the covenant of quiet enjoyment.

To the extent that the Koticks claim intentional infliction of emotional or bodily harm, this claim, too, must fail. In general, a single incident of allegedly aggravating conduct is not sufficient to establish liability for intentional infliction of emotional distress. *See Roberts v. Pollack,* 92 A.D.2d 440, 447-448 (1st Dep't 1983). The conduct alleged here does not fall into one of the categories for which liability can be imposed for intentionally caused harm. The conduct was "not 'so outrageous in character, and so

extreme in degree, as to go beyond all possible bounds of decency.'" *Rogin v. Rogin*, 90 A.D.3d 507, 508 (1st Dep't 2011) (quoting *Howell v. New York Post Co.*, 81 N.Y.2d 115, 122 (1993)). Nor did the complained of conduct involve an unreasonable risk of causing distress that would lead to bodily harm, and there is no allegation that plaintiff should have been aware of any risk. *Johnson v. New York City Bd. of Educ.*, 270 A.D.2d 310, 312 (2d Dept 2000) ("Although physical injury is no longer a necessary element of a cause of action for negligent infliction of emotional distress, such a cause of action generally must be premised on conduct that unreasonably endangers the plaintiff's physical safety or causes the plaintiff to fear for his or her physical safety"). As the Koticks have not plead facts which would make out a claim for relief in the first counterclaim, it is dismissed.

In the second counterclaim the Koticks allege that, in about May 2010, the superintendent or other staff did not check or negligently checked the air conditioning unit ("AC unit") in the apartment, and failed to correct a rusted drip pan. The Koticks allege that "as a result of this willful and wanton negligence by York, the rusted pan could not contain the water dripping from the AC unit "and the defendants suffered harm." The twelfth counterclaim asserts that in about May 2010, the cooperative identified a leak from the AC unit and did not correct it. Mr. Kotick does not deny that this is the same incident as the one at issue in the second counterclaim.

York makes no legal arguments in support of its motion for summary judgment dismissing the second and twelfth counterclaims. However, York does submit the affidavit of Lynch, the building superintendent. Lynch states in his affidavit that the cooperative staff performed the annual maintenance on defendants' AC unit on April 5, 2010, and found nothing wrong, and that he was never notified of a rusted drip pan or unsafe condition regarding the AC unit. In his opposing affidavit, Mr. Kotick states that he and his wife notified the superintendent in May 2010 that there was a leak under the AC unit and that the pan was rusted. As a result of the leak, the wood floor came up, and the building refused to correct it.

To establish a prima facie case of negligence, defendants must prove that plaintiff owed them a duty of care, that plaintiff breached the duty, and that the breach proximately caused them an injury. *See Chunhye Kang-Kim v. City of New York,* 29 A.D.3d 57, 59 (1st Dept 2006). For an owner or "landlord to be held liable for a defective condition upon the premises, he must have actual or constructive notice of the condition for such a period of time that, in the exercise of reasonable care, he should have corrected it." *Putnam v. Stout,* 38 N.Y.2d 607, 612 (1976). As Lynch stated in his affidavit that York changed the air conditioner filters and performs annual air conditioner maintenance for shareholders, York assumed the duty of maintaining the AC unit. As there are two conflicting accounts of the inspection of the AC unit, there exists an issue of fact, and the

motion to dismiss the second counterclaim is accordingly denied. The twelfth counterclaim is dismissed as duplicative of the second.

In the fourth counterclaim the Koticks allege that in about October 2009, the Koticks complained to York that the window in the living room was leaking. The Koticks also claim damages caused by a leak from outside the Kotick's apartment. As alleged in the fourth counterclaim, in March 2010, without asking the Koticks and while they were not home, the superintendent brought in an engineer who caused a flood and damage in the apartment. York then billed defendants for the engineer's services. York told defendants that the leak was coming from around the light fixture on the outside brick surface of the building and that, as the Koticks had installed the light fixture, they were responsible for the leak. The Koticks claim that they did not install the light fixture.

In support of its motion to dismiss the fourth counterclaim, York relies on the affidavit of Ferber, York's president. She states that York arranged for the light fixture to be replaced and for the outside and inside of the apartment to be repaired. York did not charge the Koticks for this work. Ferber also states that the incident at issue in the eleventh counterclaim, concerning a leak outside the apartment, appears to involve the same incident.

The Koticks put in no opposition to these or the other statements in Ferber's affidavit. In fact, they concede that York repaired the damage caused by the leak, as the Koticks allege that when York made repairs inside the apartment, it painted the window

shades in the process. Aecordingly, both the fourth and eleventh counterclaims are dismissed for failing to state any causes of action or raising any issues of fact.

In the fifth counterclaim the Koticks allege that, in or about April 2010, the superintendent entered the apartment without consent when the Koticks were out of town. York did not explain to the Koticks why Lynch had been there. The Koticks further allege that after this incident, York harassed defendants by sending them a threatening letter stating that the superintendent noticed a small break in the door to the terrace and that if the Koticks did not fix it, the cooperative would do so at the Koticks expense.

In his affidavit, Mr. Kotick notes that at Ferber's deposition, he learned for the first time that Ferber and the entire cooperative board entered their apartment to listen to the noise from the AC unit. Mr. Kotick further that this was done at a time when Ferber knew that the Koticks were not at home. The Koticks request to amend their answer and counterclaims to "conform to this newly discovered evidence."

Defendants may amend their pleadings to reflect these allegations. CPLR §3025(b) (party permitted to amend pleadings at any time with leave of court, provided that opposing party is not prejudiced thereby); *Valdes v. Marbrose Realty Inc.*, 289 A.D.2d 28 (1st Dept. 2001) (motions to amend pleadings are to be liberally granted absent prejudice or surprise). York only addresses the fifth counterclaim to the extent that it moves to dismiss the Kotick's claim of harassment in "their first affirmative defense and first through fifteenth counterclaims." I review the fifth counterclaim as the Koticks propose

to amend it, and find that the fifth proposed amended counterclaim sets forth a cause of action for trespass. *See Congregation B'Nai Jehuda v. Hiyee Realty Corp.,* 35 A.D.3d 311 (1st Dept. 2006) (a claim for trespass requires an affirmative act constituting or resulting in an intentional intrusion upon plaintiff's property). However, to the extent that the fifth counterclaim, prior to the proposed amendment asserted a cause of action for harassment, the motion to dismiss it is granted for the reasons set forth above.

In the eighth counterclaim the Koticks allege that they purchased the penthouse because it had a large terrace with large trees. After the Koticks added more trees, York compelled them to remove the trees and enacted new rules limiting the size of plants on the terrace. It is alleged that these rules are arbitrary and unfair and do not apply to all the tenants. During oral argument, Mr. Kotick stated that last year or the year before he submitted a plan to redo the terrace that included trees, and that the cooperative rejected the plan. Ferber's affidavit states that the house rule in question was enacted on October 2, 2003 and applies to all apartments with terraces. Mr. Kotick responds that the tenants on the 17th floor have trees on their terrace, but says nothing about the size. He does not show that the rules were enacted to apply to defendants only.

The eighth counterclaim is barred by the business judgment rule, which provides that so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. *See 534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick*, 90 A.D.3d 541 (1st Dep't 2011);

Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 538-539 (1990). Defendants do not allege any facts tending to show discrimination, self-dealing, or misconduct. *See Jones v. Surrey Coop. Apts.*, 263 A.D.2d 33, 36 (1st Dept 1999). The business judgment rule supports York's right to enact rules about the size of the trees on the terrace. Accordingly, the motion to dismiss the eighth counterclaim is granted.

In the tenth counterclaim the Koticks assert that when the Koticks moved into the building, the rules permitted the tenants on each floor to refurbish the common hallways at their own expense. Accordingly, the Koticks installed lighting, as well as floor and wall coverings in the hallway. York subsequently adopted a house rule prohibiting lessees from placing furniture in the common hallway, and replaced defendants' furnishings with those that matched the rest of the building. The Koticks further allege that, as the hallway is the route to the roof and the machine room, workers are obligated to traverse it and it consequently has become worn and shabby.

This issue of furniture in the hallway was handled in the 2000 trial, with the court (J. Lehner) finding that the regulation was protected by the business judgment rule. The tenth counterclaim is therefore barred by res judicata, *see Parker v. Blauvelt Volunteer Fire Co.* , 93 N.Y.2d 343, 347 (1999) (under the doctrine of res judicata "once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy"), except to the extent that there is a claim that York has a duty to keep the

common hallway clean. The Koticks asserts that in the common hallway, the floor and walls are filthy and that despite complaints it is not cleaned. In support, the Koticks look to the proprietary lease, which provides that "The Lessor shall maintain and manage the building as a first class apartment building, and shall keep the elevators and the public halls, cellars and stairways clean . . . ."

However, the proprietary lease also provides that it is within "the discretion of the Board of Directors of the Lessor top prescribe the manner of maintaining and operating the building . . . ." Ferber, also states in her affidavit that "it is also within the board's discretion to determine the level of maintenance and care required on public hallway floors. Floor scuffing is not a basis for defendants to withhold payment of all maintenance."

Koticks account of "worn and shabby and [] disgrace[ful]" public hallways is at odds with Ferber's indication that there was scuffing of the hallway floors. As there is an issue of fact, York's motion for summary judgment on the tenth counterclaim is denied insofar as it asserts a claim based on York's alleged failure to maintain the cleanliness of the public hallways.

In the fourteenth counterclaim the Koticks allege that for the last four years, bricks and mortar have been falling onto the terrace, that the cooperative refused to fix the problem despite repeated complaints, and that defendants were deprived of the full use and enjoyment of the terrace. A covenant is implied into leases that the lessee is entitled

to quiet enjoyment of the demised property. *Fifth Ave. Bldg. Co. v. Kernochan*, 221 N.Y. 370, 376 (1917).[1] For there to be a breach of the covenant, the lessee must endure an actual or constructive eviction from the premises. *Dave Herstein Co. v. Columbia Pictures Corp.*, 4 N.Y.2d 117, 119-121 (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 premises." *Barash v. Pennsylvania Term. Real Estate Corp.*, 26 N.Y.2d 77, 83 (1970). A constructive eviction does not require physical removal from the premises; it is sufficient to demonstrate that the lessee could not use the premises for the purpose(s) intended and had to abandon the premises under the circumstances. *Dinicu v. Groff Studios Corp.*, 257 A.D.2d 218, 224 (1st Dept 1999). A partial constructive eviction is created where the landlord's acts force the lessee to abandon a portion of the demised premises. *Bernard v. 345 E. 73rd Owners Corp.*, 181 A.D.2d 543, 544 (1st Dept 1992).

Ferber states in her affidavit that the cooperative first received a complaint about this condition on June 25, 2009, that the board approved a proposal for repair on July 22, 2009, and that a contractor was hired. Repairs were completed on October 27, 2010. Mr. Kotick claims that Mrs. Kotick complained about the terrace before June 25, 2009; however her affidavit is silent on that subject. Mr. Kotick does not explain when or to

---

[1] "'A proprietary lessee is entitled to the statutory protection [of the warranty of habitability].'" *Granirer v. Bakery, Inc.*, 54 A.D.3d 269, 271 (1st Dep't 2008) (quoting *In Suarez v. Rivercross Tenants' Corp.* (107 Misc. 2d 135 (App. Term. 1st Dep't (1981)).

what extent they were denied use of the terrace and does not contest that the repairs are complete. Ferber's affidavit, to which Kotick offers no factual opposition, shows that York acted expeditiously upon receiving notice. Therefore, the fourteenth counterclaim is dismissed, as defendants fail to raise an issue of fact regarding partial constructive eviction from the terrace.

In the fifteenth counterclaim the Koticks allege that, in May 2009, the cooperative installed a new AC unit for the entire building on the roof above the penthouse. The last time this was done, the cooperative made certain that the noise from the unit would not negatively impact the penthouse residents. But, the Koticks allege, the most recent AC unit is intolerably noisy, causing defendants to be constructively evicted from their penthouse, and that their complaints were ignored by York. Because of the noise, defendants only sleep at the penthouse two or three times a week.

York alleges that it first received a complaint about the noise in June 2009. It hired an engineer who determined that the decibel level in the penthouse complied with the standards of the Noise Control Code, Administrative Code § 24-202, *et seq.*, which governs permissible acoustic levels produced by a particular sound source. York entered into a contract for sound attenuation, which included, among other things, installing sound panels, new spring isolators, and flexible hoses, and sealing and insulating ductwork, and sealing all pipe openings. The total cost was $54,278. In addition, the staff removed certain brackets or clamps from the AC unit. A subsequent report dated

May 17, 2010 by the cooperative's sound engineer states that the noise levels in the penthouse comply with the Noise Control Code.

Mr. Kotick states that the remedial measures have been ineffective and that defendants can neither sell, nor reside in, the penthouse. In support of this claim, the Koticks submit an affidavit from the real estate broker who listed the apartment. The broker states that he could not sell the unit in August 2009 because of the noise level. I note that the work to reduce the noise was done after that date, but York fails to conclusively establish that the noise did not cause the Koticks to abandon their residence.

In regard to the warranty of habitability, a lessee can obtain an abatement for the period of time he or she resided in the apartment. *Genson v. Sixty Sutton Corp.*, 74 A.D.3d 560, 560 (1st Dept 2010); *Leventritt v. 520 E. 86th St.*, 266 A.D.2d 45, 45-46 (1st Dept 1999). Likewise, damages for constructive eviction are based on the lessee's intended use of the premises. *See Pacific Coast Silks, LLC v. 247 Realty, LLC*, 76 A.D.3d 167, 173 (1st Dep't 2010) (establishing that tenant was "deprived of the expected and intended use of the premises . . . is required for constructive eviction").

Accordingly, the fifteenth counterclaim raises issues of fact as to whether the noise generated by the building's AC unit constructively evicted the Koticks, and York's motion for summary judgment dismissing the fifteenth counterclaim is denied.

In their first affirmative defense the Koticks assert that the cooperative harmed and harassed and constructively evicted them. For the reasons stated above, this affirmative

defense will not be dismissed as to the constructive eviction claim, but is otherwise dismissed.

In the second affirmative defense the Koticks allege that the building is not run as a first-class residence with adequate security. Affirmative defenses "which merely plead conclusions of law without supporting facts are insufficient and should be stricken. *Petracca v. Petracca*, 305 A.D.2d 566, 567 (2d Dep't 2003). *See also 170 West Village Assocs. v. G&E Realty, Inc.*, 56 A.D.3d 372, 372-373 (1st Dep't 2008) ("challenged affirmative defenses, which pleaded conclusions of law without supporting facts, were properly stricken as insufficient"). Accordingly, the second affirmative defense is dismissed.

In the third affirmative defense the Koticks allege that York's action is barred by equitable estoppel. The defense of equitable estoppel arises where a party knowing the real facts "makes a false representation or conceals a material fact, with the intention that the other party will act" upon the false representation or concealment. *Fuchs v. New York Blood Ctr.*, 275 A.D.2d 240, 241 (1st Dept 2000). The answer does not contain any allegations to support such a claim, and the third affirmative defense is accordingly dismissed.

In accordance with the foregoing, it is

ORDERED that the motion by York Towers, Inc. for summary judgment and dismissal of defendants Joel Kotick and Dale Kotick's counterclaims and affirmative defenses, and for maintenance and arrears is granted to the extent that:

(1) the first, third, fourth, fifth (as to harassment), sixth, seventh, eighth, ninth, eleventh, twelfth, thirteen, and fourteenth counterclaims, and the first (as to harassment) second and third affirmative defenses are severed and dismissed;

(2) defendants are ordered to pay monthly maintenance starting from December 1, 2011, and to pay maintenance arrears for the months of September 2009 through November 2011 into a joint escrow account; and

(3) the motion is in all other respects denied; and it is further

ORDERED that the Koticks' request to amend their answer and fifth counterclaim is granted, and it is further

ORDERED that the Koticks are directed to serve the amended answer and counterclaim on plaintiff within thirty (30) days of the date of this order; and it is further

ORDERED that all parties are to appear before the Court, 80 Centre Street, Room 279, on May 16, 2012, at 2:15 pm for a compliance conference.

This constitutes the Decision and Order of the Court.

Date: New York, New York
March 13, 2012

ENTER:

Saliann Scarpulla, J.S.C.