SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 2

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JEFFREY LAWRENCE,

Plaintiff,

-against-

WIN FENG, LLC, WEI LIN, COSS MARTE d/b/a Con Body, COSS ATHLETICS, LLC,

Defendants.

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DECISION/ORDER

Index No. 152107/16
Mot. Seq. No. 002

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
NOTICE OF MOTION AND AFFIRMATION IN SUPPORT	1-2 (Exs. 1-5)
MEMO. OF LAW IN SUPPORT	3
AFFIRMATION IN OPPOSITION	4 (Exs. A-E)
REPLY AFFIRMATION	5

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action seeking damages for, inter alia, breach of warranty of habitability and nuisance, defendants Win Feng, LLC and Wei Lin move, pursuant to CPLR 2221(d), for leave to reargue the branches of their prior motion, brought pursuant to 3211(a)(1) and (a)(7), which sought to dismiss, inter alia, plaintiff's claims for breach of warranty of habitability, private nuisance, and attorneys' fees and, upon reargument, seek dismissal of the entire complaint as well as sanctions against plaintiff pursuant to 22 NYCRR 130-1.1 in the amount of $10,000, plus legal fees and such other and further relief as this Court deems just and proper. Plaintiff opposes the motion. After oral argument, and after a review of the parties' papers and a review of the relevant statutes and case law,

the motion is decided as set forth below.

FACTUAL AND PROCEDURAL BACKGROUND:

Plaintiff Jeffrey Lawrence became a rent stabilized tenant of apartment of 6A at 294 Broome Street in Manhattan, a top floor residential unit, in 2004. In January of 2014, he brought a petition against defendants Win Feng, LLC and Wei Lin ("defendants") in the Housing Part of Civil Court, New York County. Ex. 1-I.[1] In that proceeding, he complained, inter alia, of noise and vibrations emanating from the elevator and cooling unit on the roof. Id. The building was owned and managed by Win Feng and Wei Lin, respectively. Id. The proceeding was discontinued without prejudice on August 12, 2014 after "repairs [were] completed." Id.

On or about February 20, 2015, Win Feng, LLC issued a renewal lease to plaintiff. Ex. 1-D. On or about November 23, 2015, Win Feng entered into a lease for the basement of the building with defendant Coss Athletics LLC d/b/a Con Body ("Con Body"). Ex. 1-E. Pursuant to the lease, Con Body was to use the basement as a "[b]ootcamp [and] [y]oga [s]tudio." Id.

On or about April 1, 2016, the New York City Department of Buildings ("DOB") inspected the space leased to Con Body pursuant to a complaint that the premises were being used in a manner contrary to the certificate of occupancy ("COO"), which had been issued on or about December 11, 2002. Exs. 1-C; 1-F. On April 2, 2016, the DOB found that there was no violation warranted and that there was no need to change the COO. Ex. 1-F.

On March 11, 2016, plaintiff commenced the instant action against defendants, Coss Marte

[1]Unless otherwise noted, all references are to the exhibits annexed to the affirmation of Cheryl I. Chan, Esq submitted in support of the motion to dismiss.

d/b/a Con Body and Con Body. Ex. 1-A.[2] In his complaint, plaintiff alleged, inter alia, "dangerous, unsanitary, unhealthy, and/or life threatening conditions" in the subject premises caused by the "illegal occupancy" of Con Body, including, inter alia, continuous noise and vibration emanating into his apartment from the cooling unit that ConBody uses to control its temperature; multiple strangers congregating in the lobby; "[m]issed mail and lost property caused by [the] high influx of random strangers entering and leaving the [building]"; and inadequate janitorial services. Ex. 1-A, at par. 13. He claimed that these conditions adversely affected his health and safety and that he had asked defendants to remedy the same. Id., at pars. 14, 16 and 18.

As a first cause of action, plaintiff alleged a breach of the warranty of habitability. Id., at p. 4. As a second cause of action, he alleged breach of quiet enjoyment. Id., at p. 5. As a third cause of action, he alleged breaches of Multiple Dwelling Law ("MDL") sections 301 and 302. Id., at pp. 5-6. As a fourth cause of action, he sought a declaratory judgment that ConBody's occupancy was illegal and that the cooling unit had to be removed. Id., at p. 6. As a fifth cause of action, plaintiff alleged nuisance. Id., at pp. 6-7. As a sixth cause of action, plaintiff alleged that he was entitled to attorneys' fees from defendants. Id., at pp. 7-8.

On or about May 4, 2016, defendants moved to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) and for sanctions arising from plaintiff's allegedly frivolous claims. By order dated September 6, 2016 (Ex. 5), this Court granted defendants' motion in part, dismissing plaintiff's claim for declaratory relief, as well as his claim pursuant to MDL 301 and 302. Id. This Court also denied defendants' request for sanctions against plaintiff. Id. Further, this Court denied that branch

[2]Although the lease names Coss Athletics LLC d/b/a Con Body, the complaint names Coss Marte d/b/a Con Body.

of defendants' motion seeking to dismiss the claims of breach of warranty of habitability, nuisance, and attorneys' fees. Id.

In holding that plaintiff had stated a claim for breach of warranty of habitability, this Court noted that he had pleaded "dangerous, unsanitary, unhealthy, and/or life threatening conditions" at the premises caused by Con Body's occupancy, including strangers congregating in the lobby and inadequate janitorial services. Id., at p. 5. In holding that plaintiff stated a claim against defendants sounding in nuisance, this Court reasoned that, "although plaintiff [did] not specifically assert intentional conduct by [defendants]", a necessary element of the claim, it inferred such intent from the fact that defendants had not responded to his requests to address the noise and vibrations emanating from the cooling system. Id., at p. 7. This Court denied that branch of defendants' motion seeking to dismiss plaintiff's claim for attorneys' fees on the ground that plaintiff would be entitled to such fees if he were to prevail in this action. Id., at pp. 8-9. Finally, this Court declined to impose sanctions on plaintiff given that he had set forth colorable claims for breach of warranty of habitability, nuisance, and attorneys' fees. Id., at p. 9.

POSITIONS OF THE PARTIES:

Defendants argue that they are entitled to reargument of their motion to dismiss pursuant to CPLR 2221(d) and that, upon reargument, they are entitled to dismissal of plaintiff's claims for breach of warranty of habitability, nuisance, and attorneys' fees. They further assert that they are entitled to sanctions against plaintiff for bringing the aforementioned claims, since they are frivolous.

In asserting that the breach of warranty of habitability claim must be dismissed, defendants assert that documentary evidence, specifically the COO, conclusively refuted plaintiff's claim that

Con Body's tenancy was illegal. Defendants further assert that plaintiff "fail[ed] to allege any conditions that render [his] premises uninhabitable." Defs.' Memo. Of Law, at pp. 7, 9.

Defendants also maintain that plaintiff's nuisance claim must be dismissed because his allegation that they failed to remedy noise and vibrations from the gym's cooling unit on the roof of the building did not rise to the level of a claim of intentional conduct. They further assert that this Court erred in inferring that noise and vibration have been a "longstanding problem" in the building (Ex. 5, at p. 8, n. 5) since plaintiff specifically alleges that these problems began on January 1, 2016, after Con Body's lease began. Ex. A, at par. 12; Ex. E.

Next, defendants assert that plaintiff is not entitled to attorneys' fees since plaintiff would only be entitled to such fees if he were successful in defending a claim against him by defendants.

Finally, defendants assert that they are entitled to sanctions against plaintiff based on the fact that the claims he asserted in this action are frivolous.

In opposition to the motion, plaintiff argues that defendants are not entitled to reargument of the motion since this Court did not misapprehend any facts or misapply any principles of law. He maintains that he demonstrated a cognizable claim for breach of warranty of habitability by alleging interference with his use of the premises by, inter alia, strangers congregating in the lobby and inadequate janitorial services and that the COO introduced by defendants did not conclusively establish a defense to the claim. Plaintiff further asserts that this Court correctly inferred intent on the part of the defendants in finding that he had stated a claim for nuisance. Next, plaintiff urges that this Court properly refused to dismiss his claim for attorneys' fees since he is entitled to recover the same from defendants pursuant to Real Property Law § 234 in the event he prevails in this action. Finally, plaintiff maintains that, since his claims are not frivolous, defendants are not entitled to

sanctions.

In their reply affirmation, defendants essentially reiterate the arguments which they made in support of the motion.

LEGAL CONCLUSIONS:

A motion for leave to reargue, pursuant to CPLR 2221(d), "shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the proper motion." Such motion "is addressed to the sound discretion of the court." *William P. Pahl Equip. Corp. v. Kassis*, 182 A.D.2d 22 (1st Dept.1992), *lv dismissed*, 80 N.Y.2d 1005 (1992), *rearg denied* 81 N.Y.2d 782 (1993). In N.Y. Prac, § 254, at 449 (5th ed), Professor David Siegel succinctly instructed that a motion to reargue "is based on no new proof; it seeks to convince the court that it was wrong and ought to change its mind."

On a motion to dismiss pursuant to CPLR 3211, the court accepts as true the facts as alleged in the complaint and submissions in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001])." *VisionChina Media Inc. v Shareholder Representative Services, LLC*, 109 AD3d 49, 55-56 (1st Dept 2013). "Dismissal pursuant to CPLR 3211(a)(1) is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law (citation omitted)." *Id.*, at 56.

In applying the foregoing principles, this Court grants reargument to defendants and, upon reargument, dismisses plaintiff's claim for nuisance. As this Court stated in its order dated

September 6, 2016:

> [A] claim of private nuisance arises from an interest in the use and enjoyment of property. 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." *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (1977).

Berenger v 261 W. LLC, 93 AD3d 175, 182 (1st Dept 2012).

Defendants correctly assert that this Court erred by inferring that they acted with intent. Indeed, in the *Copart* case cited above, the Court of Appeals stated that "[a]n invasion of another's interest in the use and enjoyment of land is intentional when the actor (a) acts for the purpose of causing it; or (b) knows that it is resulting or substantially certain to result from his conduct (citations omitted)." *Copart*, 41 NY2d, at 569. Since plaintiff clearly did not plead such intent on the part of defendants, this cause of action is dismissed upon reargument.

However, upon reargument, this Court adheres to its prior findings regarding plaintiff's claims for breach of warranty of habitability and attorneys' fees and defendants' request for sanctions.

As noted above, defendants claim that, since the breach of warranty of habitability claim is based entirely on "the illegal occupancy [of Con Body]" (Ex. 1-A, at par. 13), and the COO established that no such illegality existed at the premises (Ex. 1-C), the said claim must be dismissed. However, defendants disingenuously assert that, despite the COO, plaintiff "nonetheless fail[ed] to allege any conditions that render[ed his] premises uninhabitable." Defs.' Memo. Of Law, at pp. 7, 9. This is clearly contradicted by the complaint, in which plaintiff alleged that there were "dangerous, unsanitary, unhealthy, and/or life threatening conditions in the subject

premises and the subject building" including multiple strangers congregating in the lobby; "[m]issed mail and lost property caused by [the] high influx of random strangers entering and leaving the [building]"; and inadequate janitorial services. Ex. 1-A, at par. 13. Thus, plaintiff has adequately pleaded a claim sounding in breach of warranty of habitability. See Real Property Law § 235-b.

Defendants claim that they are entitled to dismissal of plaintiff's claim for attorneys' fees because a landlord's obligation to pay reciprocal attorneys' fees is triggered by Real Property Law 234 "only after a tenant is successful in defending an action . . .commenced by the landlord against the tenant out of the lease." Chan Aff., Ex. 1, at par. 31. However, defendants disregard that "where a lease grants the landlord the ability to recover fees and costs in a successful action to enforce the terms of the lease, the tenant will possess a reciprocal right to recover fees and costs upon a failure by the landlord to perform its obligations under the lease, such as a breach of warranty of habitability." *Permanent Mission of the Republic of Estonia v Thompson*, 477 F. Supp. 2d 615 (SDNY 2007).

Since plaintiff has sought to recover such fees pursuant to RPL 234 (Ex. 1-A, at pars. 50-51), he has stated a claim for such fees against defendants. However, whether plaintiff will be entitled to recover such fees is unclear at this juncture, since defendants only annexed to their motion a renewal lease (Ex. 1-D), and thus this Court cannot yet determine whether plaintiff's initial lease contained a fees provision.

Since plaintiff's claims for breach of warranty of habitability and attorneys' fees are colorable, this Court adheres to that part of its original decision which it decided, in its discretion,

not to impose sanctions against plaintiff for what defendants alleged was his frivolous conduct.[3]

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by defendants for reargument pursuant to CPLR 2221 is granted; and it is further,

ORDERED that upon reargument, that branch of the motion by defendants Wing Feng, LLC and Wei Linn seeking to dismiss the complaint pursuant to CPLR 3211(a)(1) and (a)(7) is granted to the extent of dismissing plaintiff's fifth cause of action sounding in nuisance; and it is further,

ORDERED that, upon reargument, this Court otherwise adheres to its original decision dated September 6, 2016; and it is further,

ORDERED that the Clerk is directed to enter judgment dismissing the fifth cause of action against defendants Win Feng, LLC and Wei Lin; and it is further,

ORDERED that the remainder of plaintiff's claims, for breach of warranty of habitability and attorneys' fees, are severed and continued; and it is further,

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[3]Defendants maintain that they seek attorneys' fees from plaintiff pursuant to 22 NYCRR 130-1.1 based on his frivolous conduct and not based on RPL 234. Defs.' Memo. Of Law in Supp., at p. 13, n. 3. However, as noted above, this Court declines defendants' request for such sanctions.

ORDERED that movants shall serve a copy of this order, with notice of entry, on all parties, as well as on the County Clerk's Office (Room 141B) and the Clerk of the Trial Support Office (Room 158), within 30 days of the date hereof; and it is further,

ORDERED that all parties shall appear for a preliminary conference at 80 Centre Street, Room 280, on June 6, 2017 at 2:30 p.m.; and it is further,

ORDERED that this constitutes the decision and order of the court.

Dated: March 16, 2017

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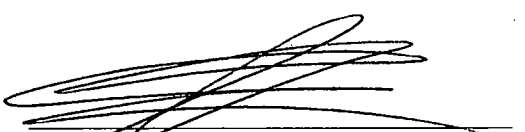

KATHRYN E. FREED, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT