

<b>Armstrong v Metropolitan Life Ins. Co., Inc.</b>
2008 NY Slip Op 33636(U)
December 17, 2008
Supreme Court, New York County
Docket Number: 116566/07
Judge: Marcy S. Friedman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MARCY S. FRIEDMAN  
*Justice*

PART 57

Armstrong, Edward

INDEX NO. 116566/07

- v -

MOTION DATE \_\_\_\_\_

Metropolitan Life Insurance

MOTION SEQ. NO. 001

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 3 were read on this motion ~~to~~ for Summary Judgment

Notice of Motion/ Order to Show Cause ~~Affidavits Exhibits ...~~

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

1  
2  
3

Cross-Motion:  Yes  No

Memo of law M1

Upon the foregoing papers, it is ordered that this motion is

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

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION/ORDER.**

**FILED**  
JAN 05 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Dated: 12-17-08

M S Friedman  
**MARCY S. FRIEDMAN** J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST  REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

\_\_\_\_\_ x

EDWARD ARMSTRONG,

*Plaintiff,*

- against -

METROPOLITAN LIFE INSURANCE  
COMPANY, INC., et al.,

*Defendants.*

\_\_\_\_\_ x

Index No.: 116566/07

DECISION/ORDER

**FILED**  
JAN 05 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

In this action, plaintiff-tenant seeks damages from defendant owner and various managing agents or their employees for acts in connection with his tenancy. Defendant Residential Management Group, LLC d/b/a Douglas Elliman Property Management, formerly known as Insignia Residential Group, Inc. (“Insignia”) moves to dismiss the complaint against it, pursuant to CPLR 3211(a)(1), (5) and (7). By separate motion, plaintiff seeks to amend his complaint.

It is well settled that on a motion to dismiss pursuant to CPLR 3211(a)(7), “the pleading is to be afforded a liberal construction (see, CPLR 3026). We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (Leon v Martinez, 84 NY2d 83, 87-88 [1994]. See 511 W. 232<sup>nd</sup> Owners Corp. v Jennifer Realty Co., 98 NY2d 144 [2002].) However, “the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupported based upon the undisputed facts.” (Robinson v Robinson, 303 AD2d 234, 235 [1<sup>st</sup> Dept 2003].)

See also Water St. Leasehold LLC v Deloitte & Touche LLP, 19 AD3d 183 [1<sup>st</sup> Dept 2005], ly denied 6 NY3d 706 [2006].) When documentary evidence under CPLR 3211(a)(1) is considered, “a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (Leon v Martinez, 84 NY2d at 88; Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P., 96 NY2d 300 [2001].)

Here, movant submits documentary evidence that its contract for management of the premises was terminated as of October 31, 2003, and that it had no involvement with the premises after that date. The first cause of action for breach of contract alleges that defendants have systematically blocked, disrupted and denied access to plaintiff’s residence since September 12, 2006. (Comp., ¶ 91.) The amended complaint which plaintiff seeks leave to serve contains the same allegation. (Amended Comp., ¶ 91.) Movant thus demonstrates as a matter of law that it could not have been liable on the breach of contract cause of action.<sup>1</sup>

As to the second cause of action for wrongful eviction, the third cause of action for constructive eviction, the fourth for retaliatory eviction, the fifth for intentional infliction of emotional distress, the sixth for “diminution of credit” and the seventh for assault, movant makes an undisputed showing that these causes of action are subject to a one year statute of limitation or, in the case of the sixth cause of action which appears to seek to plead a claim under the New York Fair Credit Reporting Act, a two year statute of limitations. As Insignia was terminated as of October 31, 2003 and this action was not commenced until 2007, the statute of limitations on

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<sup>1</sup>That Insignia signed the lease with plaintiff on the owner’s behalf does not require a different result, as the wrongful acts are alleged to have occurred after Insignia ceased to manage the premises.

these claims has passed.

As to the eighth cause of action for fraud in the inducement, plaintiff alleges that he gave up a rent stabilized apartment in one of buildings in defendant's apartment complex and moved to an apartment in another of the buildings based on defendants' representation that he "would not be evicted for anything other than non-payment of rent." (Comp., ¶ 133.) The fraud cause of action further alleges that defendants have entered into a systematic campaign to harass plaintiff and to demand that he move from the premises. (*Id.*, ¶ 140.) The breach of contract cause of action also alleges that defendants have engaged in a systematic, intentional pattern of improper acts to constructively evict plaintiff from the premises and to interfere with plaintiff's "peaceful and quiet enjoyment" of the premises and with the warranty of habitability. (*Id.*, ¶¶ 94-95.)

It is well established that "a cause of action for fraud does not arise when the only alleged fraud relates to a breach of contract." (*Metropolitan Transp. Auth. v Triumph Adv. Prods., Inc.*, 116 AD2d 526, 527 [1<sup>st</sup> Dept 1986]; *Krantz v Chateau Stores of Canada Ltd.*, 256 AD2d 186, 187 [1<sup>st</sup> Dept 1998]; *Rubinberg v Correia Designs, Ltd.*, 262 AD2d 474 [2d Dept 1999].) Further, "a contract action cannot be converted to one for fraud merely by alleging that the contracting party did not intend to meet his contractual obligations." (*Rocanova v Equitable Life Assur. Soc'y of the United States*, 83 NY2d 603, 614 [1994]; *Hudson v Greenwich I Assocs.*, 226 AD2d 119 [1<sup>st</sup> Dept 1996], *lv dismissed* 89 NY2d 860.) In the instant case, the breach of contract and fraud causes of action are duplicative. The latter must therefore be dismissed.

Plaintiff's proposed amended complaint does not correct the deficiencies in the original pleading. As to the new causes of action in the amended complaint for prima facie tort and abuse of process, even assuming *arguendo* that they are properly pleaded, they are based on acts

that occurred after Insignia ceased to manage the premises, and therefore are not maintainable against Insignia.

Plaintiff's motion to amend his complaint is opposed by various other defendants including Metropolitan Life Insurance Company, Inc. It has long been held that leave to amend an answer should not be granted if the amendment is plainly lacking in merit. (See Koss v Board of Trustees of the Fashion Inst. of Technology, 281 AD2d 200 [1<sup>st</sup> Dept 2001]; Sharon Ava & Co. v Olympic Tower Assocs., 259 AD2d 315 [1<sup>st</sup> Dept 1999].) The Appellate Division, Second Department has recently rejected a requirement of an evidentiary showing of merit in support of a motion for leave to amend a pleading under CPLR 3025(b), at least where the motion is not made in response to a motion to dismiss. (See Lucido v Mancuso, 49 AD3d 220 [2d Dept 2008].) However, that Department, like the First Department, has reaffirmed that the amendment should not be granted where the proposed amendment is "palpably insufficient" to state a cause of action or defense or where the delay in seeking the amendment would cause prejudice. (Id. at 229. See Benyo v Sikorjak, 50 AD3d 1074 [2d Dept 2008].)

The new causes of action in amended complaint fail to plead cognizable claims and are therefore plainly lacking in merit. "Where relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading which otherwise fails to state a cause of action in conventional tort." (Freihofer v Hearst Corp., 65 NY2d 135, 143 [1985].) The amended complaint does not contain allegations different from those pleaded in support of the conventional tort causes of action. The cause of action for abuse of process also is not maintainable. "[T]he institution of a civil action by summons and complaint is not legally considered process capable of being abused." (Curiano v Suozzi, 63 NY2d 113, 116 [1984].)

The repleading of the eighth cause of action for fraudulent inducement is allowed.

It is accordingly hereby ORDERED that the motion of defendant Residential Management Group, LLC d/b/a Douglas Elliman Property Management, formerly known as Insignia Residential Group, Inc. is granted to the extent of the dismissing the complaint against said defendant; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that plaintiff's motion for leave to amend is granted to the extent of granting plaintiff leave to serve the amended complaint annexed to the motion as Exhibit C with a repleaded cause of action for fraudulent inducement and without the ninth and tenth causes of action for abuse of process and prima facie tort, respectively; and it is further

ORDERED that the amended complaint shall be deemed served within 10 days after service of a copy of this order with notice of entry, and that the remaining defendants shall have 20 days after said service to serve an answer to the amended complaint; and it is further

ORDERED that the parties shall appear for a preliminary conference in Part 57 of this Court on February 12, 2009 at 9:30 a.m.

This constitutes the decision and order of the court.

Dated: New York, New York  
December 17, 2008

**FILED**  
JAN 05 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

*Marcy Friedman*  
MARCY FRIEDMAN, J.S.C.