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

PRESENT: HON. RICHARD F. BRAUN J.S.C. Justice PART 23

Index Number : 104327/2010
KOENINGSBERGER, DEBORAH , et al.
VS.
200 FIFTH AVENUE OWNER, LLC, et al.
SEQUENCE NUMBER : 002
DISM ACTION/INCONVENIENT FORUM

INDEX NO.
MOTION DATE 7/21/11
MOTION SEQ. NO.
MOTION CAL. NO.

this motion to/~~for~~ dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion is granted to the extent of dismissing the second, third, fourth, and fifth causes of action in the Verified Complaint, and it is further

ORDERED that the remaining cause of action is severed and shall continue.

This constitute the decision and order of this Court, See separate Opinion.

FILED

DEC 16 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York, December 9, 2011 ENTER:

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE
☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 23

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DEBORAH KOENINGSBERGER and
NOIR ET BLANC BIS, INC.,

Index No. 104327/10

Plaintiffs,

OPINION

-against-

200 FIFTH AVENUE OWNER, LLC,
L&L HOLDING COMPANY, LLC,
DAVID BERKEY, KEVIN FALLON, and
MITOFSKY SHAPIRO NEVILLE & HAZEN LLP,

Defendants.

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RICHARD F. BRAUN, J.:

This is an action for defamation, illegal eviction, negligence, intentional infliction of mental and emotional distress and harassment, and tortious interference with plaintiffs' contractual and business relationships. Defendant Mitofsky Shapiro Neville & Hazen LLP (MSNH) moves to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (1) and (a) (7). Alternatively, MSNH moves to dismiss the complaint of plaintiff Deborah Koeningsberger (Koeningsberger), pursuant to CPLR 3211 (a) (1) and (a) (7). Defendants 200 Fifth Avenue Owner, LLC (200 Fifth), L&L Holding Company, LLC (L&L), David Berkey (Berkey), and Kevin Fallon (Fallon) (defendants) move to dismiss plaintiffs' second, third, fourth, and fifth causes of action, pursuant to CPLR 3211 (a) (7).

MSNH argues that plaintiffs served their opposition papers to its motion late. While this court did reject a sur-reply, MSNH did not indicate that it was prejudiced regarding the late submission of plaintiffs' opposition papers (*see Adler v Gordon*, 243 AD2d 365 [1st Dept 1997] [where the moving papers were not rejected by the Court, which noted that there was no prejudice to the motion's opponent]).

Koeningsberger formed plaintiff Noir et Blanc Bis, Inc. (Noir) to conduct a high end boutique at 200 Fifth Avenue, New York, New York. Noir is a lessee of the ground floor and mezzanine of the subject premises. Noir entered a 10 year lease, dated May 23, 2002, ending April 20, 2012. Defendant 200 Fifth

is the landlord and owner of the subject premises. Defendant L&L is the managing agent. Defendant Berkey is allegedly an agent of 200 Fifth, and defendant Fallon is a vice president and general counsel for defendant L&L. In December, 2008, plaintiffs complained that the heat was too high in the leased premises. Because of this condition, plaintiffs left the front door of the subject premises open. Two armed men entered the premises, and threatened to kill Noir's employee and Koeningsberger. The two men robbed the store.

On a motion pursuant to CPLR 3211 (a) (1) and (7), a complaint must be liberally construed, the factual allegations therein must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the Court must decide only whether the facts alleged fall under any recognized legal theory (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *Wiener v Lazard Freres & Co.*, 241 AD2d 114, 120 [1st Dept 1998]). To succeed on a CPLR 3211 (a) (1) motion to dismiss, the documents upon which the movant relies must definitively dispose of the cause(s) of action of the opposing party (*see AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; *Scott v Bell Atl. Corp.*, 282 AD2d 180, 183 [1st Dept 2001]; *Fischbach & Moore v Howell Co.*, 240 AD2d 157 [1st Dept 1997]).

Only plaintiffs' second cause of action alleging an illegal eviction is asserted against MSNH. Based on documentary evidence, the lease agreement is between 200 Fifth and Noir only. MSNH asserts that only Noir was harmed, not Koeningsberger, with respect to the illegal eviction claim in plaintiffs' complaint. Koeningsberger does not allege personal harm to her by MSNH. As Koeningsberger is not the tenant of the subject premises, she lacks standing to bring a personal claim against MSNH for an illegal eviction based on the lease agreement (*see Society of Plastics Industry, Inc. v County of Suffolk*, 77 NY2d 761, 772-773 [1991]). As MSNH contends, despite preliminary actions performed at the leased premises, an eviction did not take place.

As to the second cause of action against defendants, the tenant was not deprived of either the beneficial enjoyment, or actual possession of the lease premises (*see Barash v Pennsylvania Term. Real*

Estate Corp., 26 NY2d 77, 82-83 [1997]). Accordingly, there was no actual eviction, as the actions did not continue to the point of an eviction, which was evidenced by the letter from the Marshal's office. Furthermore, there was no abandonment of the premises by Noir and thus no constructive eviction (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d at 83). The claim of a wrongful eviction, pursuant to RPAPL § 853, cannot stand.

As to the third cause of action, defendants have shown that plaintiffs have not alleged facts that defendants allegedly providing excessive heat was the cause of the robbery. That was an independent intervening act, which caused the events to unfold as they did (see *Derdiarian v Felix Contr. Corp.*, 51 NY2d 308, 315 [1980]) . It is not sufficient that defendants' acts allegedly created the occasion for the robbery to occur (*see D'Avilar v Folks Elec. Inc.* (67 AD3d 472 [1st Dept 2009]).

As to the fourth cause of action, defendants have shown that plaintiffs do not allege facts sufficient to establish the elements of a claim of intentional infliction of emotional distress. As defendants note, it is extremely difficult to pass the "outrageousness" test (see *Stella v County of Nassau*, 71 AD3d 573, 574 [1st Dept 2010]). Plaintiffs' allegations do not rise to the level of outrage required for a cause of action for intentional infliction of emotional distress (*see Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 NY3d 15, 22-23 [2008]; *Howell v New York Post Co.*, 81 NY2d 115, 121-122 [1993]; *cf. Green v Fischbein Olivieri Rozenholc & Badillo*, 119 AD2d 345, 350-351 [1st Dept 1986] [where the action was "founded upon the allegedly baseless eviction proceedings and other actions brought against plaintiff over a period of several years."]). Further, as stated in *Edelstein v Farber* (27 AD3d 202 [1st Dept 2006]), "New York does not recognize a common-law cause of action for harassment (*see Hartman v 536/540 E. 5th St. Equities, Inc.*, 19 AD3d 240 [2005])."

As to the fifth cause of action, defendants have shown that plaintiffs do not allege facts sufficient to establish the elements of a claim of tortious interference with contract and business relations (*see Carvel Corp. v Noonan*, 3 NY3d 182, 189-191 [2004]; *Snyder v Sony Music Entertainment*, 252 AD2d 294, 299-300

[1st Dept 1999]). Plaintiffs' complaint does not identify a specific contract that was breached (*see White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422, 426 [2007]).

Defendants show that plaintiffs do not allege independent tortious conduct by defendant Fallon in relation to the second, third, fourth, and fifth causes of action. Absent such allegations, there can be no personal liability as to him (*see DeCastro v Bhokari*, 201 AD2d 382, 383 [1st Dept 1994]). The same is true as to defendant Berkey, an alleged agent of a disclosed principal. Berkey would not be personally liable unless there is clear evidence that he intended to substitute or superadd his personal liability for that of his principal (*see Performance Comercial Importadora E Exportadora Ltda v Sewa Intl. Fashions Pvt. Ltd.*, 79 AD3d 673 [1st Dept 2010]).

Therefore, by separate decisions and orders, both dated December 9, 2011, MSNH's motion was granted to the extent of dismissing the plaintiffs' complaint against MSNH, and defendants' motion was granted to the extent of dismissing the second, third, fourth and fifth causes of action in plaintiffs' complaint. The remaining cause of action is severed and shall continue.

Dated: New York, New York
December 13, 2011

Richard F. Braun

RICHARD F. BRAUN, J.S.C.