Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IA Part 2
Justice

ELSA HERNANDEZ and MILTA HERNANDEZ x

Plaintiff

- against -

JORGE MEDINA, ALEYDA MEDINA, SOUTHBRIDGE COOP SECTION 3, iNC., and COOPER SQUARE REALTY, INC.

Defendant
x

Index Number 31745 2010

Motion Date March 7, 2012

Motion Cal. Numbers 11 and 12

Motion Seq. No. 2 and 3

The following papers numbered 1 to 22 read on this motion by defendants Jorge Medina and Aleyda Medina for an order dismissing the complaint and all cross claims, pursuant to CPLR 3211. Defendants Southridge Coop Section 3 and Cooper Square Realty separately move for an order dismissing the complaint and all cross claims, pursuant to CPLR 3211. Plaintiffs cross move for an order striking defendants answer for their willful failure to appear at deposition as ordered by the court; imposing sanctions pursuant to 22 NYCRR Part 130; and in the alternative seek an order directing defendants to appear for a deposition, and denying the motions for summary judgment.

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Upon the foregoing papers the motions and cross motion are consolidated for the purposes of a single decision and are decided as follows:

Plaintiffs Elsa Hernandez and Milta Hernandez commenced this action on December 23, 2010, and allege that they are the owners of 207 shares of stock in defendant Southridge Coop Section 3, (Southridge) and that Elsa Hernandez is the tenant of unit 3L, pursuant to a proprietary lease dated August 15, 1996, in the premises known as 33-04 91 Street, Jackson Heights, New York. The complaint alleges that defendant Jorge Medina and "Jane" Medina are alleged to be shareholders in the cooperative apartment building and reside in Unit 4L Defendant Aleyda Medina, although named in the summons and caption of the complaint, is not identified in the pleading. The complaint is only verified by Elsa Hernandez, and does not allege that Milta Hernandez resides in Unit 3L.. Defendant Cooper Square Realty Inc. (Cooper) is alleged to be the cooperative's managing agent.

Plaintiff Elsa Hernandez allege that she is the subject of a campaign of harassment, and complains of an unreasonable amount of banging, noise, the movement of furniture, and vibrations, emanating from the apartment located immediately above her and occupied by Jorge Medina and "Jane" Medina on unspecified dates in January 2003, April 2004, September 12, 2006, and January 2007; a loud noise at 2 A..M. in June 2005 which shook the building and caused a kitchen cabinet to fall; banging, drilling and hammering on "Sunday June 2009 until June 2010" and on April 14, 2010 at 6:00 or 7:00 A.M.; a loud noise on October 18, 2010 which went on for two weeks from 11:00 P.M. until 1:00 A.M.; loud bangs on October 25, 2010 at 3:00 A.M., 3:12 A.M., and 3:30 A.M.; and loud banging of furniture and dropping of objects, at various hours late at night into the early hours of the morning, and also at constant intervals in the early hours of the morning or late at night, on November 2, 2010, November 3, 2010, November 4, 2010, November 7, 2010, November 11, 2010, and November 29, 2010. It is also alleged that plaintiff's apartment sustained water damage from leaks emanating from apartment 4L on two occasions in 2003 and 2004. Plaintiff Elsa Hernandez alleges that she have sustained damage to a light fixture and ceiling and experience constant headaches. It is alleged that complaints were made to the president of the cooperative board, the manager, or the super on February 21, 2003, May 22, 2004, June 12, 2004, June 28, 2004, February 11, 2006, and August 29, 2006. Plaintiffs allege that said conduct constitutes a "nuisance and a public menace, rendering it unsafe, unsuitable and unfit for the plaintiffs to continue to reside in their apartment."

Plaintiffs' first cause of action for nuisance, seeks a permanent injunction against Jorge and "Jane" Medina; the second cause of action seeks to recover damages from Southridge and Cooper for breach of their fiduciary duty, and seeks to recover damages from all of the defendants for breach of the statutory warranty of habitability; the third cause of action against Southridge and Cooper allege that they failed to enforce the provisions of the Medinas' proprietary lease, and seeks a mandatory injunction; the fourth cause of action against Southridge and Cooper for a constructive eviction seeks the elimination of maintenance charges during the period of said constructive eviction; the fifth cause of action against Southridge and Cooper seeks to recover legal fees pursuant to Real Property Law §234; the sixth cause of action against Southridge and Cooper seeks declaratory judgement with respect to an agreement entered into in a Housing Court action on March 10, 2008,

and the alleged subsequent failure to adjust plaintiffs' rent bill; the seventh cause of action against Southridge and Cooper seeks to recover damages harassment; the eight cause of action against Southridge and Cooper seeks a mandatory injunction requiring these defendants to provide essential services and to make repairs to plaintiffs' apartment; and the ninth cause of action against Southridge and Cooper seeks to recover damages for breach of the statutory warranty of habitability.

Defendants Jorge Medina and Aleyda Medina served a verified answer and interposed seven affirmative defenses, including the statute of limitations and failure to state a cause of action. Defendants Southridge and Cooper served a verified answer, interposed thirteen affirmative defenses, and a cross claim against the Medinas for common law indemnification and contribution.

Defendants Jorge Medina and Aleyda Medina motion for an order dismissing the complaint and all cross claims:

Plaintiffs' first cause of action for nuisance is governed by a three year period of limitation (CPLR 214). Defendants assert that as plaintiff commenced this action on December 23, 2010, all claims regarding incidents which are alleged to have occurred prior to December 23, 2007 are time-barred, and should be stricken from the complaint . Plaintiffs, in opposition, assert that the acts of nuisance are continuous in nature, and therefore, they are not barred from presenting evidence of the claimed nuisance that occurred prior toDecember 23, 2007.

The "continuous injury" doctrine extends the statute of limitations in certain specific cases, such as, nuisance, where there is a series of continuing wrongs that are said to create separate and successive causes of action. (see generally *Jensen v General Elec. Co.*, 82 NY2d 77, 85 [1993]; *Covington v Walker*, 3 NY3d 287 [2004]; *Bloomingdales, Inc. v New York City Transit Authority*, 52 AD3d 120[2008], affirmed 13 NY3d 61 [2009]). The continuous wrong doctrine is applicable for nuisance where the harm sustained by the complaining party is not exclusively traced to the day when the original objectionable act was committed (see also *509 Sixth Ave. Corp. v New York City Tr. Auth*., 15 NY2d 48 [1964]; *Sorrentino v Mierzwa*, 30 AD2d 549 [1968] revd on other grounds 25 NY2d 59 [1969]). The rule is based on the principle that continuous injuries create separate causes of action barred only by the running of the statute of limitations against each successive nuisance (see *Jensen*, 82 NY2d at 85; see also 509 Sixth Ave., 15 NY2d at 52). The repeated offenses are treated as separate rights of action and the limitations period begins to run as to each upon its commission (*Covington v Walker*, 3 NY3d at 292).

Here, plaintiffs complain of sporadic incidents of excessive noise and water leaks in January 2003, April 2004, June 2005, September 2006 and January 2007, as well as incidents that occurred in 2009 and 2010. Plaintiffs commenced this action on December 23, 2010. Therefore, all of the alleged incidents that occurred prior to December 23, 2007 are barred by the statute of limitations. Accordingly, that branch of the Medina defendants' motion which seeks to dismiss all claims of nuisance that are alleged to have occurred prior to December 23, 2007, is granted.

Plaintiffs' counsel asserts that the second cause of action only asserts a claim against the cooperative for breach of a fiduciary duty, and that it does not set forth a claim against the Medina defendants. The second cause of action, while poorly drafted, appears to alleges a claim against the Medinas, Southridge and Cooper for breach of the warranty of habitabilty, as well as a claim against Southridege and Cooper for breach of fiduciary duty.

Cooperative corporations are required to comply with the statutory warranty of habitability under Real Property Law § 235-b. However, as the statute presumes the existence of landlord-tenant relationship, it does not encompass claims between tenants, or cooperative shareholders , who occupy their apartments pursuant to proprietary lease issued by the cooperative. Therefore, that branch of the Medina defendants' motion which seeks to dismiss the second cause of action asserted against them, is granted.

That branch of the defendants' motion which seeks to dismiss the cross claims is denied. Southridge and Cooper may not seek indemnification or contribution based upon plaintiffs' claim against the Medinas for breach of the warranty of habitability. However, as only a portion of the nuisance claim against the Medinas is barred by the statute of limitations, dismissal of the cross claim is not warranted.

Defendants Southridge and Cooper's separate motion for an order dismissing the complaint and all cross claims, pursuant to CPLR 3211:

Defendants Southridge and Cooper seek to limit or dismiss plaintiffs' second, fourth, fifth, and sixth causes of action on the grounds that they are barred in whole or part by the statute of limitations. As these defendants failed to seek such relief in a pre-answer motion, and failed to preserve the defense of statute of limitations in their answer, this defense has been waived (CPLR 3211[e]). Therefore, that branch of the motion which seeks to dismiss plaintiffs' claims on the grounds of statute of limitations, is denied.

With respect to the fifth cause of action which seeks to recover attorney's fees pursuant to Real Property Law §234, defendants appear to move, pursuant to CPLR 3211(a)(1), and assert that the proprietary lease does not provide for the recovery of attorney's fees by either the cooperative or the tenant. Where a party seeks to dismiss a cause of action by asserting the existence of a defense founded upon documentary evidence, the documentary evidence "must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" *(Trade Source v Westchester Wood Works*, 290 AD2d 437 [2002]; *see, 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002]; *Berger v Temple Beth-El of Great Neck*, 303 AD2d 346, 347 [2003]; *Allstate Ins. Co. v Raguzin*, 12 AD3d 468 [2004]; *Tougher Indus. v Northern Westchester Joint Water Works*, 304 AD2d 822 [2003]). Affidavits submitted by a defendant in support of the motion, however, do not constitute documentary evidence (*Berger v*

Temple Beth-El of Great Neck, 303 AD2d 346, 347, *supra*; *see,* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 20).

Here, defendants Southridge and Cooper submit a one-page agreement dated August 31, 1998, executed by Southridge's president, whereby Southridge consented to the assignment of 207 shares of stock, along with the occupancy agreement, from the prior shareholders to Elsa Hernandez and Milta Hernandez. Although said assignment makes reference to the occupancy agreement, it does not set forth the terms of occupancy and it is not a proprietary lease. Therefore, as the documentary evidence relied upon by the defendants does not resolve all factual issues with respect to the terms of the proprietary lease, defendants' request to dismiss the fifth cause of action, is denied.

The second and ninth causes of action state a claim for a breach of the warranty of habitability. In order to prevail on these claims, plaintiffs are required to demonstrate that the noises and water leaks they complain of are so excessive that they have been deprived of the essential functions that a residence is supposed to provide (see Real Property Law § 235-b [1]; *Solow v Wellner*, 86 NY2d 582 [1995]; *Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 328 [1979], cert denied 444 U.S. 992 [1979] *Kaniklidis v 235 Lincoln Place Hous. Corp*., 305 AD2d 546, 547 [2003]). The measure of damages for breach of the warranty of habitability is limited to the difference between the rent reserved in the lease and the fair market rental value during the period of the breach (*Park W. Mgt. Corp. v Mitchell,* 47 NY2d at 329). Here, the rent reserved is the maintenance paid. Loss or diminution in value of personal property as well as personal injuries and pain and suffering are not recoverable under Real Property Law § 235-b (*Elkman v. Southgate Owners Corp.*, 233 A.D.2d 104, 105 [1996]; *Couri v Westchester Country Club*, 186 AD2d 712[1992] , lv dismissed in part and denied in part 81 NY2d 912[1993]). Although plaintiff Hernandez may not recover for damages to her personal property or for personal injuries, the allegations in the complaint are not so limited so as to preclude plaintiffs from recovering damages should they prevail on these claims. Therefore, that branch of defendants' motion which seeks to dismiss the claims for breach of the warranty of habitability, is denied.

Plaintiffs' cross motion for an order striking defendants answer for their willful failure to appear at deposition as ordered by the court and imposing sanctions pursuant to 22 NYCRR Part 130, and in the alternative seek an order directing defendants to appear for a deposition:

A court may strike an answer as a sanction if a defendant "refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed" (CPLR 3126; see *Thompson v Dallas BBQ*, 84 AD3d 1221 [2011]; *Mazza v Seneca*, 72 AD3d 754 [2010]). However, the drastic remedy of striking an answer is inappropriate absent a clear showing that the defendant's failure to comply with discovery demands was willful or contumacious (see *Hoi Wah Lai v Mack*, 89 AD3d 990, 991 [2011]; *Polsky v Tuckman*, 85 AD3d 750 [2011]; *Moray v City of Yonkers*, 76 AD3d 618 [2010]; *Pirro Group, LLC v One Point St., Inc*., 71 AD3d 654 [2010]; *Dank v Sears Holding Mgt. Corp*., 69 AD3d 557 [2010]). Here, the plaintiffs failed to make such a showing. The Hon. Martin H. Ritholtz, in a compliance conference order dated

December 13, 2011, directed all parties who had yet to be deposed to appear for a deposition on January 26, 2012. None of the parties, including the plaintiffs, appeared for a deposition on that day as plaintiffs had failed to comply with previously served discovery requests. In addition, plaintiffs' cross motion is not supported by an affirmation of good faith, as required by 22 NYCRR 202.7 (see *Hoi Wah Lai v Mack* ; *Quiroz v Beitia*, 68 AD3d 957, 960 [2009]; *Dennis v City of New York*, 304 AD2d 611, 613 [2003]). Plaintiffs' cross motion to strike the defendants' answer, therefore, is denied.

The court notes that as none of the parties have been deposed, Justice Ritholtz in a so-ordered stipulation extended the time to file the note of issue until August 10, 2012. The parties therefore may reschedule the depositions of all parties for a mutually convenient date, place and time, provided that all depositions shall be completed no later than August 3, 2012.

Conclusion:

Defendants Jorge and Aleyda Medina's motion is granted to the extent that all claims of nuisance set forth in the first cause of action which are alleged to have occurred prior to December 23, 2007, are dismissed. The second cause of action is dismissed as to the Medina defendants. Defendants request to dismiss the cross claim is denied. Defendants Southridge and Cooper's motion to dismiss the complaint is denied in its entirety. Plaintiffs' cross motion to strike the defendants' answers is denied.

Dated: May 22 , 2012 .....

J.S.C.