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

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

ADRIANA FERREYR,

Plaintiff,

- v -

GEORGE SOROS and MASG LLC,

Defendant.

Index No.: 109256/11

Motion Date: 06/08/12

Motion Seq. No.: 01

Motion Cal. No.: _____

The following papers, numbered 1 to 5 were read on this motion to dismiss.

	PAPERS NUMBERED
Notice of Motion/Order to Show Cause -Affidavits -Exhibits	1, 2
Answering Affidavits - Exhibits	3, 4
Replying Affidavits - Exhibits	5

Cross-Motion: ☐ Yes ☒ No

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

Plaintiff's complaint in this action alleges, inter alia, that on two separate occasions defendant promised to purchase an apartment for her and on both occasions defendant breached that promise. Defendants move to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action.

Plaintiff's complaint alleges the following facts. Plaintiff and the individual defendant began a relationship during 2006, and by 2007 were "involved in a serious and

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SETTLE/SUBMIT ORDER/JUDG.

meaningful relationship and ... considered a 'couple' both within and outside United States". In December 2009 plaintiff, following a search, found an apartment she wished to purchase in New York County in a building two blocks away from defendant's residence. Plaintiff states that around this time she mentioned to the defendant that she was interested in purchasing the apartment ("the First Apartment") but was concerned about the asking price. Plaintiff alleges that in January 2010, defendant promised that he would purchase the First Apartment on her behalf and that she did not need to worry about the cost. Defendant also allegedly stated that plaintiff should also take all necessary steps to move forward with the purchase and that the First Apartment would be purchased in the name of co-defendant MASG, LLC so that he would not incur gift tax liability in connection with the transaction.

Plaintiff alleges that defendant on numerous occasions reiterated his intention to purchase the First Apartment for her and that ultimately a contract to purchase the First Apartment was executed with MASG as the signatory buyer. The transaction was allegedly closed on March 2, 2010, but possession was never conveyed to the plaintiff. Between March and August of 2010 the parties' relationship ebbed and flowed leading to an apparent reconciliation by the beginning of August 2010.

However, plaintiff states that on or about August 10, 2010, at defendant's apartment, defendant said that he had given the First Apartment MASG had purchased to another woman whereupon an argument ensued. Plaintiff alleges that during the course of the argument defendant physically assaulted her. Plaintiff states that the police were called and appends to her complaint a copy of a Domestic Incident Report dated August 11, 2010, completed by a police officer and including a signed, handwritten statement by the plaintiff. Plaintiff contends that she suffered physical injuries requiring treatment as well as emotional distress that caused her to be unable to resume her normal daily activities.

The complaint continues that in November 2010 the parties had a further reconciliation and that the defendant told plaintiff on more than one occasion to look again for an apartment that defendant would purchase for her. Plaintiff states that she once again engaged a broker and after a few months a suitable apartment in the same building as the First Apartment ("the Second Apartment") had been found and an offer for it was negotiated. Plaintiff states that when she presented the status of the negotiated offer to defendant in March 2011, the defendant stated he would not purchase the Second Apartment nor any apartment for plaintiff. Further discussions between the parties during this period apparently yielded no rapprochement.

Subsequently, plaintiff apparently decided to attempt to lease another apartment ("the Third Apartment") in the same building as the First and Second Apartments. Plaintiff claims that defendant used various forms of intimidation to discourage plaintiff from leasing the Third Apartment. Plaintiff moved into another apartment in the building in May 2011 as a guest of the apartment owner pending board approval of her lease of the Third Apartment. Plaintiff alleges that due to demands made by defendant upon the building's management she was subsequently barred from entering the building.

Plaintiff's complaint sets forth six causes of action for damages as a result of the foregoing alleged acts of defendant. The first cause of action is for intentional infliction of emotional distress. The second cause of action is for negligent infliction of emotional distress. The third cause of action is for prima facie tort. The fourth cause of action asserts a claim of promissory estoppel. The fifth cause of action is for the intentional torts of assault and battery. Finally, the sixth cause of action asserts a claim for fraud.

Defendants move pursuant to CPLR 3211 (a) (7) to dismiss the entirety of plaintiff's complaint on the grounds that the facts alleged are non-actionable as a matter of law.

The court's analysis begins with the well-worn observation that "[i]t is too basic a proposition to require extensive

citation that on a motion to dismiss a complaint, made pursuant to CPLR 3211 (subd [a], par 7), for failure to state a cause of action every fact alleged must be assumed to be true and the complaint liberally construed in plaintiff's favor." European American Bank and Trust Co. v Strauhs & Kaye 102 AD2d 776, 777 (1st Dept 1984) (citation and internal quotation omitted); see Nonnon v City of New York, 9 NY3d 825, 827 (2007) (affidavits may be considered only to remedy pleading defects and not to offer evidentiary support for properly pleaded claims). Therefore the court's analysis is limited to determining the sufficiency of the alleged facts contained in the complaint and the attachments thereto with respect to the causes of action asserted therein and assuming, only for this analysis, that such facts as alleged are true.

Plaintiff's cause of action for intentional infliction of emotional distress asserts defendant's liability based upon defendant's alleged intentional and reckless actions that were intended to cause such distress and harm to plaintiff. The Court of Appeals has stated that

> The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress. The first element--outrageous conduct--serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine. In practice, courts

> have tended to focus on the outrageousness element, the one most susceptible to determination as a matter of law.
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> Consequently, the requirements of the rule are rigorous, and difficult to satisfy. Indeed, of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.

Howell v New York Post Co., Inc., 81 NY2d 115, 121 -122 (1993) (citations and internal quotations omitted).

Plaintiff's complaint adequately alleges that she suffered severe emotional distress because of the manner in which defendant allegedly attempted to restrain her from living in the building. The issue on this motion is whether, as a matter of law, the conduct alleged by plaintiff is sufficient to evince an intent by defendant to inflict severe emotional distress upon plaintiff by means that are extreme and outrageous.

Defendant argues that plaintiff's claim cannot lie asserting that the Appellate Division, Second Department has held that where there is a "relationship as lovers living together" such a cause of action does not lie. Baron v Jeffer, 98 AD2d 810, 811 (2d Dept 1983); Artache v Goldin, 133 AD2d 596, 600 (2d Dept 1987). In Baron, the Court considering plaintiff's claim for intentional infliction of emotional distress stated "we now hold that it would be contrary to public policy to recognize the

existence of this type of tort in the context of disputes, as here, arising out of the differences which occur between persons who, although not married, have been living together as husband and wife for an extended period of time (here, over two years)." Baron, 98 AD2d at 810. The Court reached a similar conclusion in Artache where the plaintiff and defendant lived together under an oral partnership agreement under which they agreed to hold themselves out as husband and wife, and did so for over fourteen years, even though they were unmarried. Artache, 133 AD2d at 597.

The decisions in Baron and Artache were based upon the Court of Appeals holding in Weicker v Weicker (22 NY2d 8, 11 [1968]) where it was held that "strong policy considerations militate against judicially applying these recent developments in this area of the law to the factual context of a dispute arising out of matrimonial differences." In reaching its decision in Weicker, the Court cited the case of Halio v Lurie, 15 AD2d 62, 66 (2d Dept 1961). In Halio, the plaintiff Halio and the defendant Lurie had been living together for two years and were contemplating marriage. Id. at 63. Lurie married another woman without Halio's knowledge and after Halio discovered this fact Lurie composed and sent to Halio a communication that taunted her with her unsuccessful efforts to marry him, intimated that she had made a false claim that he was under an obligation to marry

her, declared that he had avoided marriage to her because he was 'wise to her game,' and expressed the view that through the coming years she would be the object of derision and the subject of amusement, on the part of his wife and himself, by reason of her 'phone calls galore' (presumably to complain that she had not accomplished her purpose to marry him).

Id. at 64. The Court on these facts concluded that

> It is alleged that the mental suffering caused by the defendant's conduct was genuine and extreme and that the results which followed were severe. It will be for the trier of the facts to determine whether such injuries were actually suffered, and whether the conduct of the defendant was such that it may be said that it went beyond all reasonable bounds of decency.
> We hold [that the] cause of action as pleaded is sufficient.

Id. at 67. The Court further held that "[t]here is no lack of authority in this State, however, for the conclusion that there may be a recovery for mental anguish and suffering, and for physical ailments resulting therefrom, unaccompanied by physical contact." Id. at 65; Weicker, 22 NY2d at 11 ("New York law now permits recovery for the intentional infliction of mental distress without proof of the breach of any duty other than the duty to refrain from inflicting it").

Therefore, contrary to defendant's arguments, the Court of Appeals in citing Halio makes clear that a claim for intentional infliction of emotional distress is only barred where the plaintiff and defendant were in marital type relationship or a relationship where the parties held themselves out as being

husband and wife. If the relationship between the parties falls short of that intimacy, a claim for emotional distress otherwise properly pled may proceed. The set of facts pled here indicates that the parties relationship, where the parties never lived together but at all times maintained separate households, falls well short of the marital type relationship that would bar plaintiff's claim.

Similarly, plaintiff has adequately alleged that defendant's actions were so extreme as to be actionable, and her allegations against defendant are sufficient to state a cause of action for intentional infliction of serious mental distress and are actionable per se under Halio. Her contentions that after promising her occupancy of the First Apartment, defendant permitted another woman to stay there without her knowledge, and thereafter told her that she did not "deserve" to receive an apartment, disparaged her to the building management and caused the building management to exclude from the building are sufficiently similar to Halio's facts to be cognizable as an independent tort. Moreover, although not required to sustain plaintiff's cause of action, plaintiff alleges the defendant physically confronted her. Assuming these allegations are true, as this Court must do for purposes of this motion, such conduct is sufficiently extreme to support the first cause of action.

For similar reasons, the court shall deny dismissal of plaintiff's second cause of action for negligent infliction of emotional distress. "[S]uch 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." Johnson v New York City Bd. of Educ., 270 AD2d 310, 312 (2d Dept 2000). Plaintiff's allegations that defendant exhibited violent conduct towards her and hired persons to follow and intimidate her constitute a sufficient predicate for avoiding dismissal at this juncture. See Kennedy v McKesson Co., 58 NY2d 500, 504 (1983) ("when there is a duty owed by defendant to plaintiff, breach of that duty resulting directly in emotional harm is compensable even though no physical injury occurred").

The court shall also sustain for pleading purposes plaintiff's claim for prima facie tort. As articulated by the Court

> Prima facie tort affords a remedy for the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful. The requisite elements of a cause of action for prima facie tort are (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful. A critical element of the cause of action is that plaintiff suffered specific and measurable loss, which requires an allegation of special damages.

Freihofer v Hearst Corp., 65 NY2d 135, 142 -143 (1985) (citations and internal quotations omitted). Justice Breitel cogently

outlined the limited applicability of the prima facie tort doctrine stating

> The key to the prima facie tort is the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful. The need for the doctrine of prima facie tort arises only because the specific acts relied upon--and which it is asserted caused the injury--are not, in the absence of the intention to harm, tortious, unlawful, and therefore, actionable. The remedy is invoked when the intention to harm, as distinguished from the intention merely to commit the act, is present, has motivated the action, and has caused the injury to plaintiff, all without excuse or justification.
> Where, on the other hand, as appears from this complaint, reliance is apparently had only on specific unlawful and tortious acts, the remedy is not in prima facie tort. Then the remedy, if any, is in what was characterized in the Brandt case as 'traditional tort' and characterized in the quotation in the Advance Music case as the 'categories of tort.' Thus, where specific torts account for all the damages sustained, whether provable as general damages or pleadable and provable as special damages, prima facie tort does not lie. (See the dismissal of the amended complaint in the second appeal in Brandt v Winchell, 286 App Div 249.) Consequently, it is not surprising that the remedy need rarely be invoked, for the 'categories of tort' are many, and development within the categories is progressive indeed. The doctrine, as noted in Brandt v Winchell (283 App Div 338, 342, supra), has its greatest impact and value in the field of trade and business, and generally comprehends interference with some form of contractual relation.

Ruza v Ruza, 286 AD 767, 769 -770 (1st Dept 1955).

In this action, plaintiff alleges that the basis for the prima facie tort cause of action are the multiple promises made by defendant to purchase plaintiff an apartment which when unfulfilled caused damage to plaintiff who spent time and money in the search for an apartment in reliance upon those promises,

and the exclusion of plaintiff from the building caused by defendant's wrongful actions. These allegations are independent of those contained in plaintiff's causes of action for emotional distress and plaintiff adequately pleads special damages with sufficient particularity to survive dismissal. See Bernstein v 1995 Associates, 185 AD2d 160, 163 (1st Dept 1992) (allegations that defendant conspired with others with malice to oust the plaintiffs from leasehold stated a cause of action for prima facie tort and was not duplicative of emotional distress causes of action).

Plaintiff's fourth cause of action seeks recovery on a theory of promissory estoppel. "The elements of a claim for promissory estoppel are: (1) a promise that is sufficiently clear and unambiguous; (2) reasonable reliance on the promise by a party; and (3) injury caused by the reliance." MatlinPatterson ATA Holdings LLC v Federal Express Corp., 87 AD3d 836, 841-842 (1st Dept 2011).[1]

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[1]But see Swerdloff v Mobil Oil Corp., 74 AD2d 258 (2nd Dept 1980), which affirmed dismissal of the promissory estoppel claim on a trial motion for a directed verdict at the close of plaintiff's case. The court in Swerdloff held that the "doctrine of promissory estoppel has been applied to preclude a defendant from pleading the statute of frauds as a defense, but that such doctrine is "properly applied to that limited class of cases where 'the circumstances are such as to render it unconscionable to deny" the promise upon which the plaintiff has relied." See also Buddman Distribs v Labatt Importers, 91 AD2d 838, 839 (4th Dept 1982) (holding also that whether the promise is removed from the operation of the statute of frauds and whether the circumstances are so egregious should not be determined on the

Defendant argues that neither promise to purchase the First or Second Apartments as alleged by plaintiff in the complaint was a clear and unambiguous promise to purchase an apartment for the plaintiff. In support of this argument defendant cites Rogowsky v McGarry (55 AD3d 815 [2d Dept 2008]). In Rogowsky, plaintiffs alleged that the defendant promised to honor the decedent's wish to convey an apartment to them in exchange for the forbearance by the plaintiffs from contesting the decedent's will, which named the defendant as executor and bequeathed the apartment to defendant. The Court found that "the cause of action sounding in promissory estoppel was also properly dismissed, as there was no clear and unambiguous promise upon which the plaintiff sons could have reasonably relied to sustain a cause of action for breach of contract on a theory of promissory estoppel." Id. at 817 (citation and internal quotation omitted). However, unlike this case, the promise the Court in Rogowsky found ambiguous was not the owner's (i.e. decedent's) promise to transfer the apartment to the plaintiffs (his sons), but the alleged promise by the executor to carry out the decedent's (i.e. owner's) alleged wish

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pleadings). The appellate court in this department favorably cited Swerdloff in Tribune Print Co v 264 Ninth Ave Realty, 88 AD2d 877 (1st Dept 1982). The restrictive view set forth by the court in Swerdloff that limits the application of promissory estoppel to certain specific factual scenarios leaves the New York rule unsettled. See Cyberchron Croporatin v Calldata Systems Development, Inc., 47 F3d 39, 45-46 (2d Cir 1995).

to transfer the apartment to them notwithstanding the contrary bequest in the owner's (i.e. decedent's) will.

The complaint here states that defendant "promised her that he would purchase the First Apartment on her behalf," that "he wanted to make her happy" and "that he intended to buy [plaintiff] the First Apartment in the name of his company, MASG, so that he could avoid having to pay gift taxes on it." The First Department has held that where a defendant promised to purchase an apartment for a female companion in return for "love and affection" the "promise to provide an apartment for plaintiff was unambiguous and complete." Rose v Elias, 177 AD2d 415, 416 (1st Dept 1991). The Court declined to enforce the promise on other grounds, i.e. because of the illegality of the promise as facilitating adultery. Id.

Here, unlike in Rose, the complaint does not allege that either party is married; nor does defendant argue that the alleged promise was illegal as against public policy. Therefore, at this pleading stage, plaintiff's allegations are sufficient to sustain a cause of action for promissory estoppel. Contrary to defendant's argument that the alleged promise lacked clarity but was ambiguous, the complaint contends that defendant promised to purchase the First Apartment for plaintiff utilizing co-defendant MASG as a conduit for tax purposes and that ownership of the First Apartment would then be transferred to plaintiff.

Defendant concedes on this motion that the First Apartment was in fact purchased by MASG, but ownership was never conveyed to the plaintiff. The communications between plaintiff, defendant's representatives and the real estate brokers establish, for pleading purposes, the factual elements of the transaction which were contained within defendant's alleged promise. That is, plaintiff alleges not merely that defendant was going to supply her with a place to live, but that defendant intended to place ownership of the First Apartment with plaintiff.[2] Further, "[w]hether plaintiff's reliance on the alleged promise was reasonable is an issue of fact that should not be decided on this motion to dismiss." Global Icons, LLC v Sillerman, 45 AD3d 457 (1st Dept 2007).

The court also notes that plaintiff's damages under this cause of action are limited to "reliance damages," that is "those expenses that plaintiff incurred in relying on defendant's alleged promise." Clifford R. Gray, Inc. v LeChase Const.

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[2]The decision in Williams v Eason (49 AD3d 866, 868 [2d Dept 2008]), although resolving a motion for summary judgment and therefore looking beyond the pleadings, is instructive. In Williams, the court denied summary judgment dismissing the promissory estoppel claim, holding that plaintiff raised an issue of fact that defendant promised that the parties would form a corporation in which they would both have ownership interests and that defendant would then transfer his title to the property to the corporation, where defendant knew plaintiff in reliance thereupon would forgo opportunities to redeem the property on his own and perhaps gain sole ownership of the property. Thus, analogous facts alleged in the complaint at bar are sufficient to state a claim for promissory estoppel.

Services, 51 AD3d 1169, 1171 (3d Dept 2008). In other words, the complaint is not an attempt to enforce an oral agreement to purchase either the First or the Second Apartment, but rather states a cognizable claim for the plaintiff to recover resources spent "in reliance on statements made by and at the request of defendant... That defendant did not benefit from plaintiff's efforts does not require dismissal; plaintiff may recover for those efforts that were to [her] detriment and that thereby placed [her] in a worse position. Farash v Sykes Datatronics, 59 NY2d 500, 503 (1983).

Taking plaintiff's allegations as true, a claim for promissory estoppel is sufficiently pled. "Although the plaintiff[] will be required, at trial, to prove the specific details of each of the elements, no such detailed showing is required to survive a motion to dismiss pursuant to CPLR 3211." Rogers v Town of Islip, 230 AD2d 727, 728 (2d Dept 1996).

The court shall deny the motion to dismiss plaintiff's fifth cause of action for assault and battery. "To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact. To recover damages for battery, a plaintiff must prove that there was bodily contact, that the contact was offensive, and that the defendant intended to make the contact without the plaintiff's consent." Bastein v Sotto, 299 AD2d 432,

433 (2d Dept 2002). The statement of plaintiff contained in the Domestic Violence Report made with the police, which defendant contends is inconsistent with the allegations of the complaint, does not constitute flatly contradictory evidence that the pleadings ought not to be presumed to be true. Asgahar v Tringali Realty, Inc., 18 AD3d 408, 409 (2nd Dept 2005). The inconsistencies in the statement, as argued by defendants, merely raise matters of credibility that are not implicated on a motion to dismiss. Therefore, the allegations that the defendant slapped plaintiff and attempted to hit her with a lamp adequately state a cause of action for assault and battery and dismissal shall be denied.

Finally, the court shall dismiss plaintiff's claim for fraud. "To plead a claim for common-law fraudulent inducement, a plaintiff must assert the misrepresentation of a material fact, which was known by the defendant to be false and intended to be relied on when made, and that there was justifiable reliance and resulting injury." Braddock v Braddock, 60 AD3d 84, 86 (1st Dept 2009) (citation omitted). "A fraud claim should be dismissed as redundant when it merely restates a breach of contract claim, i.e., when the only fraud alleged is that the defendant was not sincere when it promised to perform under the contract." First Bank of Americas v Motor Car Funding, Inc. 257 AD2d 287, 291 (1st Dept 1999) (citation omitted). The Court in First Bank

distinguished the situation where a party enters into a transaction because a defendant misrepresented material facts as different and distinct from a situation where a defendant misrepresents a future intent to perform. In the former situation a claim for fraud is stated, in the latter circumstance a claim for fraud is duplicative of a breach of contract claim and therefore does not lie. Id. at 291-292.

In this case, plaintiff's allegation, that defendant's promise that he would purchase an apartment for her was false, constitutes a misrepresentation of a future intent to perform and therefore sounds in breach of contract, not tort. See Harrington v Murray, 169 AD2d 580, 582 (1st Dept 1991) (cause of action for fraud properly dismissed where defendant allegedly promised to buy plaintiff a home as alleged fraud only relates to a breach of contract). Therefore, plaintiff's claim for fraud does not lie and shall be dismissed.

Based upon the foregoing, it is

ORDERED that defendants' motion to dismiss plaintiff's complaint is GRANTED only as to the sixth cause of action alleging fraud, and plaintiff's sixth cause of action is hereby DISMISSED; and it is further

ORDERED that defendants' motion is otherwise DENIED; and it is further

ORDERED that defendants' shall answer the complaint in accordance with CPLR 3211 (f); and it is further

ORDERED that the parties shall appear for a preliminary conference on February 21, 2013 at 9:30 A.M., in IAS Part 59, Room 103, 71 Thomas Street, New York, NY 10013.

This is the decision and order of the court.

Dated: January 22, 2013 ***ENTER:***

J.S.C.
DEBRA A. JAMES