SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN J.S.C. PART _____
Justice

Index Number : 151387/2013
7001 EAST 71ST STREET LLC.
vs
MAIMONIDES MEDICAL CENTER
Sequence Number : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

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

Dated: 6/11/13

CK
_____, J.S.C.
CYNTHIA S. KERN

1. CHECK ONE: ..... ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION
2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER
3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER
☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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7001 EAST 71st STREET, LLC,

Plaintiff,

Index No. 151387/13

-against-

DECISION/ORDER

MAIMONIDES MEDICAL CENTER, MILLENNIUM HEALTH SERVICES, MILLENNIUM PEDIATRICS, JORDAN MEYERS, M.D., DANIEL ABUELENIN, M.D., PEDRAM BRAL, M.D., ORRIN LIPPOFF, M.D. and JOHN DOES 1-10,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff 7001 East 71st Street, LLC ("7001") commenced the instant action against defendants Maimonides Medical Center ("Maimonides"), Millennium Health Services ("Health Services"), Millennium Pediatrics ("Pediatrics"), Jordan Meyers, M.D. ("Dr. Meyers"), Daniel Abuelenin, M.D. ("Dr. Abuelenin"), Pedram Bral, M.D. ("Dr. Bral"), Orrin Lippoff, M.D. ("Dr. Lippoff") and John Does 1-10 to recover damages to plaintiff's premises stemming from defendants' alleged conduct during Hurricane Sandy. Defendant Dr. Abuelenin now moves pursuant to CPLR § 3211 (a)(7) to dismiss plaintiff's complaint on the ground that it fails to state a cause of action. Dr. Abuelenin also requests sanctions against the plaintiff on the ground that

the action against him is frivolous. For the reasons set forth below, defendant's motion is granted in part and denied in part.

The relevant facts are as follows. Plaintiff owns the premises located at 7001-7023 Avenue U, Brooklyn, New York (the "subject premises"). Defendant Maimonides leased a portion of the subject premises from plaintiff (the "Lease") and subleased all or some of that space to other businesses, including the remaining defendants. Dr. Abuelenin is a pediatrician employed by Pediatrics, a subtenant of the subject premises. On or about October 29, 2012, Hurricane Sandy substantially damaged the subject premises. On or about November 14, 2012, plaintiff was informed by licensed professional engineers that the electrical system at the subject premises had been seriously damaged and that it was unsafe to use any of the electrical system components. On or about November 15, 2012, plaintiff advised Maimonides that Consolidated Edison had cut off electrical service to the subject premises, that Maimonides should not energize the electrical system because it could cause an explosion and that no one was authorized to enter the subject premises without plaintiff's prior written consent. On or about November 20, 2012, plaintiff wrote to Maimonides enclosing a statement received from a licensed electrician setting forth hazards at the subject premises and a report from an environmental consulting firm advising that the subject premises had become contaminated with fecal coliform, fecal bacteria and mold. The letter further demanded that Maimonides immediately cease and desist all activities at the subject premises and vacate the subject premises.

On or about December 7, 2012, plaintiff terminated the Lease and Maimonides later consented to the Lease's termination. Plaintiff alleges that defendants did not promptly vacate the subject premises but instead attempted to connect a portable generator into the existing lighting and power panel at the subject premises, which caused a substantial risk of harm and

significant fire hazard. In or around February 2013, plaintiff commenced the instant action against defendants with the filing of a Summons and Complaint alleging causes of action for breach of contract, negligence, prima facie tort, nuisance and conversion and requesting damages in the amount of $1,000,000.00. Specifically, the Complaint alleges that defendants caused damage to the subject premises, distinct and separate from Hurricane Sandy, including, *inter alia*, leaving medical waste, including sharp disposal units and hazardous radiation equipment, illegally running a "jury-rigged" power cable, removing numerous fixtures, including electrical outlet covers and switch plates and completely destroying parts of interior plumbing and sanitation drains. Dr. Abuelenin now moves, pre-Answer, for an Order pursuant to CPLR § 3211 (a)(7) dismissing the complaint and for sanctions.

On a motion addressed to the sufficiency of the complaint, the facts pleaded are assumed to be true and accorded every favorable inference. *Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover "a complaint should not be dismissed on a pleading motion so long as, when plaintiff's allegations are given the benefit of every possible inference, a cause of action exists." *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept. 1990). "Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to 'whether it states in some recognizable form any cause of action known to our law.'" *Foley v. D'Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977) (*citing Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956).

In the instant action, Dr. Abuelenin's motion for an Order pursuant to CPLR § 3211(a)(7) dismissing plaintiff's complaint is granted in part and denied in part. As an initial matter, Dr. Abuelenin's motion to dismiss plaintiff's first cause of action for breach of contract is granted. In this case, plaintiff alleges a breach of contract claim against Dr. Abuelenin on the ground that it was a third-party beneficiary of the sublease between Maimonides and Millenium. A

complaint adequately states a cause of action for breach of contract when it alleges (1) the existence of a contract; (2) the plaintiff's performance under the contract; (3) the defendant's breach of the contract; and (4) damages as a result of the breach. *See JP Morgan Chase v. J.H. Electric of NY, Inc.*, 69 A.D.3d 802 (2d Dept 2010). In the context of a third-party beneficiary claim, the plaintiff must allege

> (1) the existence of a valid and binding contract between other parties, (2) that the contract was intended for [its] benefit, and (3) that the benefit to [it] is sufficiently immediate...to indicate the assumption by the contracting parties of a duty to compensate [it] if the benefit is lost.

Mendel v. Henry Phipps Plaza W., Inc., 6 N.Y.3d 783, 786 (2006). Here, plaintiff alleges that "[u]pon information and belief, [Dr. Abuelenin], by agreement or otherwise, assumed responsibility to Maimonides to comply with the terms of the Lease between Maimonides and Landlord, and Landlord became a third party beneficiary of the promises and responsibilities assumed by [Dr. Abuelenin]." However, this allegation is merely conclusory and fails to state a claim for breach of contract as plaintiff has not alleged the specific language in the sublease on which it relies nor does it provide the court with a copy of the sublease. *See Mandarin Trading Ltd. v. Wildenstein*, 944 N.Y.3d 173 (2011)(dismissing plaintiff and alleged third-party beneficiary's breach of contract claim on the ground that "[t]he complaint only offers conclusory allegations without pleading the pertinent terms of the purported agreement...by failing to plead the salient terms of a valid and binding contract, Mandarin cannot show that the contract was intended for its immediate benefit.") Thus, plaintiff's first cause of action for breach of contract against Dr. Abuelenin must be dismissed.

However, that part of Dr. Abuelenin's motion which seeks to dismiss plaintiff's second cause of action for negligence, fourth cause of action for nuisance and fifth cause of action for

conversion is denied. As an initial matter, plaintiff's second cause of action sufficiently states a claim for negligence against Dr. Abuelenin. To sufficiently plead a claim for negligence, a plaintiff must allege (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon by Solomon v. City of New York*, 499 N.Y.S.2d 392 (1985). Here, the complaint sufficiently makes out a claim for negligence as it alleges that Dr. Abuelenin "owed a duty to Plaintiff to maintain and leave the Premises in a safe and reasonable manner", that he breached said duty and that due to said breach, the subject premises was damaged in the amount of at least $1,000,000.00.

Additionally, plaintiff's fourth cause of action sufficiently states a claim for nuisance against Dr. Abuelenin. The elements of a claim for 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 failing to act." *Berenger v. 261 West LLC*, 93 A.D.3d 175, 182 (1st Dept 2012). Here, the complaint sufficiently makes out a claim for nuisance as it alleges that Dr. Abuelenin "intentionally, substantially, and unreasonably interfered with [plaintiff's] right to use and enjoyment of the Premises by, *inter alia*, leaving hazardous medical waste at the Premises upon termination of the Lease" and that plaintiff has been damaged as a result of such conduct in excess of $1,000,000.00.

Further, plaintiff's fifth cause of action sufficiently states a claim for conversion against Dr. Abuelenin. "The rule is clear that, to establish a cause of action in conversion, the plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question...to the exclusion of the plaintiff's rights." *Fiorenti v. Central Emergency Physicians*,

305 A.D.2d 453, 454 (2d Dept 2003), citing *Independence Discount Corp. v. Bressner*, 47 A.D.2d 756, 757 (2d Dept 1975); *see also Fitzpatrick House III, LLC v. Neighborhood Youth & Family Servs.*, 55 A.D.3d 664 (2d Dept 2008). Here, the complaint sufficiently makes out a claim for conversion as it alleges that defendant Dr. Abuelenin "intentionally and without authority, exercised dominion and control over Plaintiff's property, specifically the fixtures at the Premises, thus interfering with Plaintiff's property rights" and alleges damages in the amount of $1,000,000.00. Dr. Abuelenin's assertion as to the above causes of action that they should be dismissed on the ground that he was not on the sublease maintained between Maimonides and Millennium and that he does not nor did he ever have any ownership or equity interest in Millennium is without merit as plaintiff may still maintain causes of action against Dr. Abuelenin for negligence, nuisance and conversion regardless of privity of contract.

However, Dr. Abuelenin's motion to dismiss plaintiff's third cause of action for prima facie tort is granted. The elements of prima facie tort are that (1) the tortfeasor acted maliciously; (2) inflicted intentional harm by an otherwise legal action; and (3) that plaintiff suffered special damages. *See Curiano v. Suozzi*, 63 N.Y.2d 113 (1984). The claim of "[p]rima facie tort is designed to provide a remedy for intentional and malicious actions that cause harm and for which no traditional tort provides a remedy." *Id.* Here, the complaint alleges that Dr. Abuelenin, "with willful intent and without justification, substantially damaged the Premises to the detriment of [plaintiff]" and that plaintiff has suffered special damages in excess of $1,000,000.00. However, plaintiff failed to sufficiently plead that Dr. Abuelenin acted maliciously other than by stating so in conclusory fashion. Further, there are other traditional torts that may provide plaintiff a remedy and which he has already pled, such as conversion, negligence and nuisance. Therefore,

plaintiff's third cause of action alleging prima facie tort must be dismissed.

Finally, that portion of Dr. Abuelenin's motion which seeks sanctions against plaintiff on the ground that the action against him is frivolous is denied as this court has already found that the complaint sufficiently states four causes of action against Dr. Abuelenin and is thus not frivolous.

Accordingly, Dr. Abuelenin's motion for an Order pursuant to CPLR § 3211 (a)(7) dismissing plaintiff's complaint is granted only to the extent that plaintiff's first cause of action for breach of contract and plaintiff's third cause of action for prima facie tort are dismissed as against Dr. Abuelenin. That portion of Dr. Abuelenin's motion which seeks sanctions against plaintiff is denied. This constitutes the decision and order of the court.

Dated: 6/11/13

Enter: _____

J.S.C.

CYNTHIA S. KERN
J.S.C.