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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Solan Scarpulla Justice

PART 19

Index Number : 600288/2010
CONFORTI, JAMES
vs.
CARLTON REGENCY CORP.
SEQUENCE NUMBER : 003
SUMMARY JUDGMENT

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

decided per the memorandum decision dated 12/5/13 which disposes of motion sequence(s) no. 002+003

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

Dated: 12/5/13

_____, J.S.C.

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: IAS PART 19

----------X

JAMES CONFORTI,

Plaintiff,

-against-

Index No. 600288/10

DECISION AND ORDER

THE CARLTON REGENCY CORP., and COOPER SQUARE REALTY, INC.,

Defendants.

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HON. SALIANN SCARPULLA, J.:

In this action to, *inter alia*, recover damages for breach of a lease agreement, plaintiff James Conforti ("Conforti") moves for an order granting him summary judgment: (i) on his first claim for breach of a proprietary lease seeking injunctive relief; (ii) on his second, fourth, and fifth claims seeking damages for breach of contract, negligence, and tortious interference with prospective business relations; and (iii) for attorneys' fees and interest (motion sequence no. 002). Defendants The Carlton Regency Corp. ("the Cooperative") and Cooper Square Realty, Inc. ("the Managing Agent") move for summary judgment on their first counterclaim for breach of the lease (motion sequence no. 003). Conforti cross-moves for summary judgment dismissing defendants' counterclaims, or for leave to file a late reply to the counterclaims. Motion sequence Nos. 002 and 003 are consolidated for disposition.

Conforti is the shareholder and proprietary lessee of penthouse apartment A ("PHA"), as well as several other apartments, in the building owned by the Cooperative, and located at 137 East 36th Street in Manhattan ("the Building") pursuant to a proprietary lease ("the Lease"). Conforti 's father, James Conforti, Jr., with his business partner, Steven Lyras, were the owners of the Building and, in 1980, as sponsors, converted it to cooperative ownership. After his father passed away, Conforti became the owner and holder of the unsold ("sponsor") shares related to the PHA. It is undisputed that Conforti does not reside in the PHA, but, rather, since 2003, when he became the shareholder in the apartment, he might have "stayed there anywhere from a couple of days to a month at a time," that early on he spent more time there, but that, in 2010, he did not spend more than one night in the apartment. He and his father held the apartment as an investment and in order to lease it out.

On March 30, 2003, the Cooperative's board and Conforti signed an agreement in which the Cooperative acknowledged that Conforti succeeded to the rights of his father as an original sponsor-seller, and, that among those rights was the right to sublease his units, including the PHA, without the necessity of seeking board approval. Conforti, however, agreed that he would provide the Managing Agent with documentation reasonably similar to that required to be provided to the Cooperative for prospective purchasers and subtenants. On March 10, 2006, the Cooperative and Conforti entered into another agreement in which the board again agreed that Conforti had the right to sublet without

board approval, but that he had to provide the Managing Agent with reasonably similar documentation.

The Lease, provides, in paragraph 2, entitled "Lessor's Repairs," in relevant part, that:

> "The Lessor shall at its expense keep in good repair all of the building including all of the apartments, . . . except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof"

Paragraph 18 provides, in relevant part, that the lessee is responsible to keep in good repair "the interior of the apartment (including interior walls, floors and ceilings, but excluding . . . windows, window panes, sashes, sills, entrance and terrace doors, frames and saddles)." Paragraph 3, regarding services by the lessor, provides, in part:

> "The Lessor shall maintain and manage the building as a first class apartment building, and shall keep the elevators . . . clean and properly lighted and heated, . . . and shall provide the apartment with a proper and sufficient supply of hot and cold water"

That paragraph further gave the lessor's directors the discretionary power to determine from time to time what services shall be proper, and also what existing services "shall be increased, reduced, changed, modified or terminated." The Lease gave the lessee the right to quiet enjoyment of the apartment.

Conforti claims that he has been singled out for harmful and disparate treatment based on the parties' dispute over ownership rights over another piece of property, the

Soldier's, Sailors', Marines' and Airmen's Club, which is situated between the two buildings which make up the apartment complex. He claims this treatment is evidenced by defendants' failure to make critical repairs to PHA, about which Conforti has complained to defendants "for years," that the repairs were needed to make it habitable and marketable for rental purposes, and that their failure to make such repairs is in breach of the Lease. These complaints include that defendants failed: (1) to provide adequate water pressure; (2) to abate excessive noise generated by a cooling tower located on the roof adjacent to the PHA terrace, despite New York City Department of Housing Preservation and Development ("HPD") violations; (3) to replace defective and antiquated windows, despite replacing windows throughout the Building over 12 years ago; (4) to replace the PHA's inoperable terrace doors which have no locks; (5) to repair large unsightly probe holes made by the Cooperative several years ago or to replace window sills that were removed in its investigation with respect to replacing the windows; (6) to repair water-damaged, wood flooring in the PHA; (7) to remedy inadequate elevator access to the PHA; (8) to replace security fencing between the terrace and roof which defendants removed; and (9) to replace a terrace awning (Conforti's memorandum in support at 1-2). Conforti claims that these conditions have made it impossible for him to sublet this PHA for over 10 years. Conforti was making payments towards the maintenance on the PHA until May 2009.

On February 4, 2012, Conforti brought this action asserting eight claims. He asserted (1) breach of the proprietary lease and breach of the warranty of habitability, seeking an injunction and money damages; (2) that the Cooperative owes Conforti a fiduciary duty which it breached by failing to make the repairs; (3) that defendants negligently performed their obligations to maintain the property including the PHA; and (4) that defendants were aware that Conforti was in the business of subleasing the PHA, and they improperly and tortiously refused to make the repairs, interfering with Conforti's prospective business relations.[1]

Defendants answered the complaint, denying the material allegations regarding its performance under the Lease, setting forth numerous affirmative defenses, including, among others, that the repairs were not its obligation, and that they made the repairs they were obligated to make, and asserting two counterclaims. The first counterclaim sought past due maintenance, assessments, and additional maintenance. The second counterclaim sought attorneys' fees and disbursements in the defense of the action and in pursuing the counterclaims. Conforti failed to respond to the counterclaims.

Conforti now moves for summary judgment on his breach of contract and warranty of habitability (first and second) claims, and on his fourth and fifth claims for negligence and tortious interference, respectively. He contends that there are no genuine issues of fact that, under the Lease, the repairs were defendants' obligation. He has submitted his

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[1] Conforti's claims seeking a declaratory judgment, damages, and an injunction, have all been withdrawn by Conforti pursuant to a stipulation executed on March 15, 2011.

own affidavit, documentary evidence, and the depositions of David May, the president of the board, Robert Holmes, the building superintendent, and Linda Lajara, the property manager employed by the Managing Agent, as evidence demonstrating defendants' failure to perform that obligation. He contends that defendants' failures to repair also constitute a breach of the warranty of habitability in that PHA is not habitable, usable, or safe in the condition it is in, particularly with inadequate water pressure, defective windows, terrace doors without locks, water-damaged floors, and erratic elevator service.

Conforti asserts that he had an appraiser/real estate broker inspect PHA, who opined that if the defects were repaired PHA could rent for $14,000 per month, but, in its present condition, it was unrentable and unmarketable. He also submits a report of a licensed real estate broker, Carol Mann, dated October 10, 2012, who opines that, if defendants repaired the defects, it could rent for $14,000 per month, but that, in its current condition, it is not rentable. Conforti further contends that this constitutes negligence for which defendants are liable in damages. Further, he argues that defendants tortiously interfered with his ability to sublet the PHA by its failure to repair. He points to the 2003 and 2006 agreements with the Cooperative's board in which the board recognized and permitted him to sublet without the board's approval as proof that he had the ability to sublet and that defendants were aware of his subletting. Finally, he seeks attorneys' fees and punitive damages based on defendants' alleged "deliberate and calculated campaign

to single [him] out for tortious, abusive and disparate treatment" because of, among other things, an independent lawsuit between them.

In opposition, defendants contend that there are a number of factual issues in dispute, including whether: Conforti was entitled to sublet the PHA; the water pressure was sufficient in keeping with the building's design, and whether they have taken steps to address the condition; there is an outstanding noise violation, and whether they have taken steps to address any noise condition; the decision not to replace the PHA windows and doors was based on an economic, business decision, and whether they took steps to address the condition; they are responsible for door locks; Conforti impeded their efforts to repair probe holes; they are responsible to replace the wood floor, and whether they took steps to do so; elevator service is sufficient, and whether they tried to address the condition; they are responsible for the wood fence between the roof and the terrace and the awning; their actions were deliberate; and whether Conforti failed to make an effort to sublet or put PHA in rentable condition. They submit Lajara's affidavit, as well as her and other witnesses' deposition testimony, and various letters and other documents in support of their arguments that they are not responsible for many of the repairs, and that they have made efforts to repair and alleviate the conditions about which Conforti complains.

Defendants also move for summary judgment on their first counterclaim, seeking past due maintenance, assessments, and additional maintenance as required under the

Lease. They submit Lajara's affidavit with a printout of Conforti's account with all charges and payments as credited. They point to paragraph 12 of the Lease which provides that Conforti will pay the rent without any deduction on account of any offset or claim which he might have against the Cooperative. They affirm that the claim is timely as Conforti's payments were applied to arrears that had previously accrued so that all charges are within the limitations period. Defendants also consented to Conforti's late service of his reply.

In response and in support of his cross motion, Conforti asserts that his obligation to pay maintenance is dependent upon defendants' performance of their obligation to maintain PHA in habitable condition. He asserts that PHA is not habitable so he is relieved of his obligation. He contends that the counterclaim is barred in part by the six-year statute of limitations, so that recovery for any maintenance arrears before February 3, 2005, amounting to $18,213.70, is barred. Conforti also urges that defendants' second counterclaim seeking attorneys' fees should be dismissed, because Conforti has demonstrated that defendants are not entitled to recovery on the first counterclaim, or alternatively, they are only entitled to fees for pursuing their first counterclaim.

Discussion

I. Conforti's Motion for Summary Judgment

A. The First and Second Claims for Breach of Contract

First, with respect to Conforti's breach of contract claims, the court finds that while Conforti has presented prima facie proof of the Cooperative's failure to meet some of its repair and maintenance obligations under the Lease, the Cooperative has raised genuine fact issues warranting a trial on these claims. To establish a claim for breach of the proprietary lease, Conforti must demonstrate: (1) the existence of a lease or agreement; (2) performance by plaintiff; (3) breach by the defendants; and (4) damages. *See Harris v. Seward Park Hous. Corp.*, 79 A.D.3d 425, 426 (1st Dept 2010). Conforti is relying on paragraph 2 of the Lease which provides that the Cooperative, as the lessor, "shall at its expense keep the building in good repair, including all the apartments . . . except those portions the maintenance and repair of which are expressly stated to be the responsibility of the Lessee pursuant to Paragraph 18 hereof." Paragraph 18 of the Lease provides that Conforti is responsible to keep in good repair "the interior of the apartment (including interior walls, floors and ceilings, but excluding . . . windows, window panes, sashes, sills, entrance and terrace doors, frames and saddles)." Paragraph 3 requires the Cooperative to provide Conforti with a "proper and sufficient supply of hot and cold water."

Conforti has submitted various documents demonstrating problems with the condition of the PHA, his complaints, and defendants' response. With regard to the issue of the water pressure, Conforti claims that the standard practice for a luxury high rise, is to design for 30 pounds per square inch ("psi") of water pressure, but that PHA water

pressure is significantly below that. He submits a letter dated July 24, 2001, in which he specifically complained to Al Curtain, a representative of the Cooperative, that the water pressure was too low, and, that as a result, the kitchen faucet and bath shower heads did not work properly. On February 1, 2002, Conforti complained about the low water pressure, and noted that the situation was worsening. On April 11, 2005, Conforti, again, complained about the low water pressure by letter to Robert Holmes, the Building superintendent. The Cooperative hired a plumber, David Nechamkin of A. Steinman Plumbing and Heating Corp., who reported, by letter dated May 24, 2005, that if the Building was covered by the previous building code, 8 psi was all the water pressure that was required, and his readings in the PHA indicated 16 psi. He further stated, however, that under the new building code, if the fixtures in place were not working adequately, they could be replaced with new ones, restrictor fittings could be removed, or a pumping system could be installed to increase water pressure. Nothing was done since that date. Conforti submits an April 12, 2012 report from Leonard Williams, a New York City master plumber, in which Williams indicated that he took pressure readings in the PHA at 7:45 a.m., and the pressure was inadequate. He stated that, under the old building code (citing 1968 New York City Building Code, subchapter 16, section 27-901[b]), the minimum pressure required was 8 psi, but that the hot water pressure in the upper level of the PHA (it is a bi-level) was only 7.5 psi without a faucet running, but if a second hot water faucet was running, it went down to 6 psi. Williams also stated that the modern

faucets, and particularly the modern antiscald shower valves, which have been mandated for the last 10 years by the plumbing code, will not "flow much water with low water pressure" such as is present in the PHA.

Defendants maintain that the building was built in 1962 so that it is under the old building code, and, thus, according to Nechamkin, the water pressure is sufficient. Holmes testified that 8 psi is acceptable because it's in the plumbing code for this building, but that some of the modern water fixtures, like the new ones Conforti installed upon doing renovations to the PHA in 2001, require a greater water pressure to function correctly. He also stated that the water pressure could fluctuate during different times of the day given the volume of use. Lajara states, in her affidavit in opposition, that the Cooperative has investigated various ways to increase the PHA's water pressure, and that "[n]ew pumps are being replaced and/or added in connection with a current boiler project, which should increase the water pressure." Based on the evidence presented, the court finds that the conflicting reports of Conforti's and the Cooperative's plumbers as to the actual psi in PHA, and the issue of whether the Cooperative has acted sufficiently to address Conforti's complaints, raises a genuine triable issue which must be resolved at trial.

Conforti has also complained about noise from the cooling tower, which is located adjacent to the PHA terrace and near one of the bedrooms. He contends that this violates the Lease provision granting him quiet enjoyment of the premises. By letter dated

October 30, 1995, from Cerami & Associates, Inc., acoustical engineers, to Larry Lynn of Akam Associates, a previous building managing agent, the engineers stated that based on their measurements taken at the site, the cooling tower produced a noise violation. This became part of a dispute between prior subtenants of the PHA, and was the subject of stipulation of settlement in New York City Civil Court in which the Cooperative agreed to take all action necessary to correct and cure the noise violation. By letter dated July 24, 2001, Conforti complained to the Cooperative about excessive noise emanating from the cooling tower. On April 11, 2005, Conforti again complained about the excessive noise. New York City's HPD indicated on its website that, as of September 21, 2012, there was an open violation from August 13, 2009 for excessive noise emanating from the air conditioning unit on the penthouse level. May and Holmes both agreed at their depositions that it was their responsibility to remedy HPD violations, but Holmes admitted that nothing has actually been done to remedy the noise violation by the Cooperative.

Lajara asserts in opposition that she was only made aware of an HPD noise violation on the HPD website during this action, but has not been able to locate the violation in defendants' records, and, thus, could not ascertain the nature of the issue. She further attests that in 2012, a "variable frequency drive was installed on the cooling tower so that it does not run at 100% capacity continuously, thereby reducing the sound it emits," and stated that once the cooling season started in May 2013, defendants would

further test to confirm if the noise has been abated, and, if so, would file a certification of correction with HPD. Defendants also point to Holmes' testimony that in March 2013, they hired Cerami & Associates, again, as a consultant, to take noise readings, and that defendants have taken various measures, including ongoing maintenance of the exhaust fans for the cooling tower, as well as the installation of the variable frequency drive, to address Conforti's complaint. This conflicting proof raises triable issues as to the existence and level of the noise created by the cooling tower, the existence of an outstanding HPD noise violation, and the reasonableness of defendants' efforts to address and alleviate Conforti's complaints.

Conforti next challenges the defendants' failure to keep the windows of the PHA in good repair, particularly in light of the fact that defendants had engaged in a building-wide window replacement project over 15 years ago that replaced all of the building windows except for PHA's double-height windows and sliding terrace doors, which Conforti complains suffer from water and air penetration, and the rollers, bearings, and guides on the terrace doors are inoperable. He further asserts that the window sills were removed, and probe holes were made in the wall, during an investigation into the support of the windows, and have not been replaced or repaired by defendants. He also presents proof that the terrace doors do not have sufficient locks. This, Conforti asserts, is in breach of the Lease provision requiring that, while the lessee shall keep the interior of the apartment in good repair, the lessor was obligated to repair the windows, sills, and

entrance and terrace doors. Conforti contends that he inquired and complained about the failure to replace the windows and doors from 1998 and on, and that defendants responded that they were obtaining bids, and then, in 2001, offered to pay just part of the cost of the living room windows.

By letter dated June 17, 2005, defendants admitted that "pursuant to the Proprietary Lease, Carlton Regency Corp. is responsible for the maintenance of the windows and doors," and they were determining how to proceed with their replacement. Conforti attests that, in 2006, defendants informed him that a contract had been signed and work to replace the windows and terrace doors was to begin shortly, but then nothing was done. Conforti further asserts that defendants have undertaken a deliberate campaign stretching over many years to refuse to make such critical repairs, such as these windows, the terrace doors and door locks, and the probe holes and sills, singling Conforti out for disparate treatment due in part to an independent lawsuit between the parties over the Soldiers', Sailors', Marines' and Airmen's Club property. This is sufficient as prima facie proof of defendants' breach of their obligation regarding the windows and doors.

In response, defendants present proof that the standard windows in PHA were replaced, but that the irregular, much larger PHA living room windows needed additional structural reinforcement to accommodate the new windows, and the Cooperative found that it could not undertake the additional expense. The sliding doors in the building were not replaced in any of the apartments. They also contend that lot line windows were not

replaced because of the cost. In 2001, the Cooperative investigated the cost of replacing the PHA windows, and, again, according to defendants, the cost was more than the Cooperative could expend. Defendants point to May's testimony that the cost was somewhere between $150,000 to $200,000, barring any unforseen problems. Defendants do not deny that they made the probe holes in the wall, and assert that they have tried to gain access to repair them, but that they were unable to contact Conforti or to obtain access to the PHA. As with other repairs, defendants contend that the business judgment rule protects the Cooperative's decision to not spend the money on replacing the PHA windows and all the doors of the building. The conflicting evidence regarding the nature of the repair and the cost thereof, whether defendants made sufficient attempts or unreasonably delayed repairing the windows, doors, door locks, probe holes, and the sills, or if Conforti denied them access to the apartment unreasonably, and whether the defendants were reasonable in refusing to make the window replacements, warrants denial of summary judgment.

Defendants' argument based on the business judgment rule is not a complete defense to Conforti's claims. Under the business judgment rule, courts will not inquire into, or substitute its judgment for, a cooperative board's actions so long as the board acts for the cooperative's purposes and "within the scope of its authority and in good faith." *534 E. 11th St. Hous. Dev. Fund Corp. v. Hendrick*, 90 A.D.3d 541, 542 (1st Dept 2011). The business judgment rule, however, does not protect a board from liability for its own

breach of contract. *See Goldstone v. Gracie Terrace Apt. Corp.*, 110 A.D.3d 101, 105 (1st Dept 2013). Moreover, unequal treatment of shareholders is sufficient to overcome a board's insulation from liability under the business judgment rule. *See Kleinerman v. 245 E. 87 Tenants Corp.*, 105 A.D.3d 492, 493 (1st Dept 2013). Here, there are issues of fact as to whether the Cooperative, in failing to replace only the PHA windows while replacing all the other windows in the building over 15 years before, acted in good faith based on the interests of the Cooperative, and whether or not Conforti was accorded disparate treatment. Therefore, the business judgment rule is not a complete defense under these circumstances.

Conforti further claims that some flooding on the terrace and an air conditioning unit leak caused water damage spots to the wood floors in the living room and one of the bedrooms, and these are defendants' responsibility because of defendants' failure to maintain the PHA in good repair. He presents proof that, for at least one to two years, defendants have been aware of such damage to the floor, but have not repaired it. Defendants assert that under paragraph 18 of the Lease, the apartment floors are Conforti's responsibility. They contend that, if the flooding was a result of clogged drains on the terrace, that also was Conforti's responsibility to maintain the terrace and keep the drains clear. They assert that they have offered to repair the area that was damaged, but informed Conforti that the finish on the repaired area would be different, and suggested that he may want to hire a floor contractor to refinish the whole floor. Defendants deny

responsibility to refinish the entire floor in both rooms to return it to the original condition. It is not clear from the evidence submitted by either party how the floors in each room were damaged – whether it was from a failure to clear drains on the terrace, flooding on the terrace for other reasons, or a broken or leaking air conditioning unit, or all three. This will determine who is responsible for the repair – while Conforti has some responsibility for maintenance of interior floors, if defendants failed to maintain other areas or their maintenance resulted in damage to the floors, then they have a responsibility as well. In addition, if defendants are responsible, there are issues as to the extent of the repair that would be required to meet this responsibility. Resolution of these issues must be reserved for trial.

Conforti also claims that defendants have failed to provide adequate elevator service to PHA – the service is unpredictable and unreliable, with long wait times. He points to Lease paragraph 29 which provides that the Cooperative "shall not be liable, except by reason of Lessor's negligence, for any failure or insufficiency of . . . elevator service . . . .", and apparently contends that the Cooperative was negligent. The building has two elevators, but PHA is only accessible by the north elevator, even though it is located in the south tower of the building. Conforti claims that the north elevator also serves as the service or freight elevator, and is unavailable three times a day due to garbage collection. He states that when the elevator is used for these other purposes, he has to wait from 30 minutes to one hour for the elevator. He contends that the elevators

were recently modernized for the benefit of the other residents, but that the south elevator was not upgraded so that PHA could be accessed by both elevators, which Conforti claims shows unequal treatment.

Defendants challenge how Conforti could know the elevator wait times, since he admits he has not lived there except staying there a couple of days to a month at a time, he has not stayed there since 2010, and no one but Conforti has lived or stayed in the apartment since his previous subtenants vacated in 1998. They assert that the standing order to the building staff is that when the PHA calls the north elevator, it is to be released immediately to it. They state that when they undertook the elevator refurbishing, they considered Conforti's request regarding the south elevator, but because that upgrade required expansion of the entire elevator shaft and mechanicals, it was not economically feasible for the Cooperative.

While Conforti presents some proof about the adequacy of the elevator service[2] and its reliability, defendants present proof that the Cooperative has made efforts to make the elevator available as soon as practicable. They also present proof that they investigated making the south elevator available. This is sufficient to raise a triable issue as to whether the Cooperative met its obligations under the lease with respect to the provision of elevator service, warranting denial of summary judgment to Conforti.

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[2] The court notes that Conforti was aware upon obtaining PHA that only one elevator serviced the apartment.

Conforti next asserts that there used to be a wooden security fence between the PHA and the roof, which deteriorated and defendants removed it. He complained, but defendants refused to replace it. This, Conforti contends, breaches the Lease paragraph 2, requiring the Cooperative to keep in good repair all of the building including "its equipment and apparatus." He maintains that defendants' offer to replace it with a chain link fence was insufficient. Defendants agree that installing a fence was their responsibility, they removed the fence to do roof repairs, they offered the chain link fence because that was the "building standard," but that Conforti did not find that acceptable. Defendants contend that they have met their responsibility. While defendants admit responsibility for a fence between the roof and PHA terrace on the Cooperative, the Lease does not specify the type of fence. Neither party presents proof as to who placed the wooden fence there rather than the alleged "building-standard" chain link fence in the first place. Therefore, contrary to Conforti's contentions, it is not clear that replacement of the wood fence with the chain link fence was in breach of defendants' contractual obligation. Whether defendants have sufficiently maintained the building "equipment and apparatus," and provided a sufficient fence between the terrace and the roof cannot be determined on these papers. Accordingly, summary judgment to Conforti is not appropriate.

Conforti next argues that the Cooperative is obligated to replace the terrace awning which had fallen into disrepair. Defendants deny responsibility, asserting that, while they

had replaced it one time, in 1995, that was done as a courtesy to Conforti's father. Conforti has failed to present any proof that defendants were responsible for its repair. The Lease does not specifically address the maintenance obligations with regard to terrace awnings. If it is part of the Conforti's "equipment and appliances," then he is responsible for repairing it, but if it is part of the building's "equipment and apparatus," then it is defendants' responsibility. Conforti's failure to present prima facie proof as to responsibility for the awning, warrants denial of summary judgment on this portion of the claim.

Therefore, as discussed above, the record raises issues of fact as to whether the Cooperative maintained the building, and the portions of PHA for which it was responsible, in "good repair" pursuant to the Lease. While it appears that defendants' efforts were ineffectual, in that they have not repaired the probe holes, replaced the sills, replaced the windows or terrace doors and the locks thereon, or repaired the water-damaged flooring, the reasonableness of the actions they did take, and whether they failed to make the required repairs in a timely manner, raise issues of fact precluding summary judgment on the claims for breach of the proprietary lease. *See Goldstone v. Gracie Terrace Apt. Corp.*, 73 A.D.3d 506, 507 (1st Dept 2010); *Granirer v. Bakery, Inc.*, 54 A.D.3d 269, 270 (1st Dept 2008); *34-35th Corp. v. 1-10 Indus. Assoc., LLC*, 16 A.D.3d 579, 580 (2d Dept 2005).

B. Claim for Breach of Warranty of Habitability

Conforti includes in his first and second claims, claims that defendants' failure to repair constitute breaches of the warranty of habitability in Real Property Law § 235-b. This portion of the claim is dismissed. Conforti, admittedly, was not a resident of the PHA, and did not make a bona fide attempt to live there. He stated that he could not quantify the time he has spent in the apartment since 2003, but he "stayed there anywhere from a couple of days to a month at a time," but he could not recall any time he spent there in 2009, 2010 or 2011. A lessee, however, cannot avail himself of the protection of the warranty of habitability during the periods he was not living in the apartment. *Genson v. Sixty Sutton Corp.*, 74 A.D.3d 560, 560 (1st Dept 2010) ("plaintiff who was not a full-time resident of . . . cooperative . . ., was not entitled to compensation for breach of the warranty of habitability" for period she was not living there). Conforti fails to present proof that he lives, or has made a bona fide attempt to live, in PHA. Therefore, he cannot avail himself of the warranty of habitability. In addition, the statutory warranty of habitability does not permit a tenant to recover property damages. *40 Eastco v. Fischman*, 155 A.D.2d 231, 231 (1st Dept 1989), and the loss or decrease in value of personal property, such as a Conforti's cooperative shares, is not recoverable. *See Mastrangelo v. Five Riverside Corp.*, 262 A.D.2d 218, 218 (1st Dept 1999).

C. Negligence

Summary judgment to Conforti also is denied on his claim for property damages arising from defendants' negligence. In his fourth claim, Conforti alleges that defendants

negligently performed their obligation to operate, maintain, manage, and control the overall maintenance and upkeep of the building, including PHA, and that he suffered damages as a result thereof.

To establish a prima facie claim for negligence, a plaintiff must demonstrate that defendants owed him a duty of care, they breached that duty, and the breach caused plaintiff injury. *See Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d 967, 969 (1994). For a landlord or owner to be held liable for a defective condition on the premises, he or she must have created or had actual or constructive notice of the condition for a period of time that, in the exercise of reasonable care, he or she should have corrected it. *Piacquadio v. Recine Realty Corp.*, 84 N.Y.2d at 969; *Putnam v. Stout*, 38 N.Y.2d 607, 612 (1976).

Conforti alleges both that defendants created certain of the conditions, for example, the missing window sills (removed by Conforti as directed by the Cooperative), the probe holes (made by the Cooperative), and the wood-damaged floors, and had actual notice of other conditions, such as the water pressure, the windows, and the terrace door locks, by Conforti's multiple complaints and their own investigations. He further asserts that defendants should have corrected these conditions in the exercise of reasonable care.

First, the court notes that Conforti's claims are not just negligent performance of the contract (the proprietary lease), and the failure to perform certain work. Instead, they involve allegations that defendants caused property damage to Conforti in attempting to

maintain and repair PHA, including damaging the wood floors through flooding on the terrace, and a broken or leaking air conditioning unit; making probe holes in the walls and then failing to repair them; and having the window sills removed and not replacing them. Conforti is not just seeking the benefit of its bargain. *Cf. Baker v. 16 Sutton Place Apt. Corp.*, 2 A.D.3d 119, 121 (1st Dept 2003)(gross negligence claim arising only from defendant's failure to repair under the contract duplicates breach of contract claim); *see Duane Reade v. SL Green Operating Partnership, LP*, 30 A.D.3d 189, 190-191 (1st Dept 2006). In addition, contrary to defendants' contention, Conforti does not have to allege personal injury in order to recover under a theory of negligence. However, as discussed above, there are factual issues as to the Cooperative's efforts in attempting to correct the conditions and effect the repairs, and whether it acted reasonably, under the circumstances, in failing to remedy them. Thus, summary judgment to Conforti on this cause of action is denied.

D. Tortious Interference Claim

Conforti's tortious interference claim (fifth cause of action) is dismissed. This claim alleges that defendants tortiously interfered with Conforti's prospective business relations with potential subtenants by refusing to properly effectuate necessary repairs, renovations, and improvements to PHA. To establish a tortious interference claim, the Conforti must show that a contract would have been entered into with a prospective contractor "but for" defendant's misconduct. *Parrott v. Logos Capital Mgt., LLC*, 91

A.D.3d 488, 489 (1st Dept 2012), and that defendant's interference "was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." *GS Plasticos Limitada v. Bureau Veritas*, 88 A.D.3d 510, 510 (1st Dept 2011)(quotation and citation omitted). Wrongful means include fraud, misrepresentation, physical violence, criminal prosecutions, civil suits, and some degree of economic pressure, "but more than simple persuasion is required." *Snyder v. Sony Music Entertainment*, 252 A.D.2d 294, 300 (1st Dept 1999)(citation omitted).

Here, Conforti's claim is insufficient, because he fails to name the parties to a specific contract that he would have obtained, and, thus, cannot demonstrate "but for" causation. He only speculates as to what leases he might have entered into, and does not identify any prospective tenants. *See Zetes v. Stephens*, 108 A.D.3d 1014, 1020 (4th Dept 2013)(must identify a specific customer plaintiff would have obtained "but for" defendant's wrongful conduct); *Learning Annex Holdings, LLC v. Gittelman*, 48 A.D.3d 211, 211 (1st Dept 2008). Conforti also fails to show wrongful means – the proof of defendants' economic motivation with regard to at least the windows, doors, and elevator, negates any claim that they acted solely to harm Conforti. Therefore, the court searches the record, and grants summary judgment to defendants dismissing this claim.

The court notes that defendants' argument that Conforti did not have the right to sublet without board approval is rejected. The 2003 and 2006 agreements clearly give

Conforti this right, and are supported by consideration. The 2006 agreement specifically recites the consideration given in the very first sentence.

Finally, Conforti's request for summary judgment awarding him punitive damages and attorneys' fees is denied. In light of the above determinations of numerous issues of fact, there is no basis for such relief.

II. Defendants' Motion for Summary Judgment on Counterclaim

First, the branch of Conforti's cross motion for leave to file a late reply to defendants' counterclaims is granted on consent, and the court will consider Conforti's proposed reply in determining defendants' summary judgment motion.

Defendants' motion for summary judgment on its first counterclaim is granted as to liability, and the issue of the amount due, which shall be paid into an escrow account while Conforti's claims in this action are pending, shall be referred to a Special Referee to hear and report. Conforti's cross motion dismissing defendants' counterclaims is denied.

Defendants present prima facie proof that Conforti has failed to pay maintenance, assessments, and additional maintenance totaling $358,693.83 through October 7, 2012. The Lease provides that as lessee, Conforti was obligated to pay the rent (or maintenance) on the first day of the month and "such additional rent as may be provided for herein when due." Defendants submit Lajara's affidavit, the account manager for the Cooperative, who states that the monthly maintenance for the PHA is $5,774.63, and that through to October 7, 2012, the amount accrued for the PHA for maintenance and other

charges is $358,693.83 (. She submits Conforti's account profile, indicating the amounts due per month, and Conforti's payments, and the running balance. This tenant account profile, however, has not been updated to the present.

In opposition, Conforti contends that his obligation to pay maintenance is dependent upon the Cooperative's performance of its obligation to maintain the apartment, and the Cooperative has completely failed to maintain it in a habitable condition. The Lease, however, clearly provides in paragraph 12 that the "Lessee will pay the rent to the Lessor upon the terms and at the times herein provided, without any deduction on account of any set-off or claim which the Lessee may have against the Lessor." Such "no offset" provisions are enforceable. *See Dune Deck Owners Corp. v. Liggett*, 34 A.D.3d 523, 524 (2d Dept 2006)(shareholders of cooperative waived right to any offset for arrears by agreeing to no offset provision). A lessee's obligation to pay rent is not suspended by the lessor's breach of duty, and the obligation continues so long as the lessee is in possession of the premises. *Lincoln Plaza Tenants Corp. v. MDS Props. Dev. Corp.*, 169 A.D.2d 509, 512 (1st Dept 1991); *Earbert Rest. v. Little Luxuries*, 99 A.D.2d 734, 734 (1st Dept 1984). While a residential tenant's rent may be abated in whole or in part where he can show that he was constructively evicted. *Minjak Co. v. Randolph*, 140 A.D.2d 245, 248 (1st Dept 1988). Conforti fails to show he resided in PHA, or that he was constructively evicted. Conforti's reliance on defendants' alleged breaches of the warranty of habitability, and his right thereunder to abate his rent for alleged breaches, is

unavailing. As discussed above, Conforti admittedly did not live in PHA, and, therefore, is not covered by the warranty of habitability. The court also notes that "courts have routinely required shareholders to pay ongoing maintenance pending resolution of litigation based on warranty of habitability." *170 W. End Ave. Owners Corp. v. Turchin*, 37 Misc.3d 1226(A) *8 (Civ. Ct. N.Y. Co. 2012). A pending claim cannot provide the shareholder with a license to withhold maintenance and other rent charges from the cooperative corporation for an indefinite time. *Caspi v. Madison 79 Assoc.*, 85 A.D.2d 583, 583-584 (1st Dept 1981). While defendants have presented proof of the amounts due up to October 7, 2012, they will need to submit an updated tenant account profile to demonstrate the amounts presently outstanding. Therefore, the issue of the amount of maintenance, additional maintenance, assessments, late fees and electrical charges ("Maintenance") due under the Lease is referred to a Special Referee to hear and report, and upon determination of that amount, Conforti is directed to pay the past due arrears and accruing Maintenance into an escrow account, pending a trial of the factual issues set forth above.

Conforti further urges that defendants' first counterclaim is barred, in part, by the statute of limitations. He contends that the limitations period for the counterclaim is six years, the answer was served on February 3, 2011, and, thus, any maintenance dating back before February 3, 2005, totaling $18,213.70, is untimely. First, defendants demonstrate that they applied the payments that they received from Conforti to the rent arrears, rather

than the current rent, so that amounts due pre-February 3, 2005 were already paid by Conforti's later payments of rent. A lessee's most recent rent payment may be applied to the oldest outstanding amounts due, in the absence of an agreement or specific notation to the contrary. *Hughes v. Wagner*, 4 A.D.2d 980, 980 (3d Dept 1957)(where no proof of how landlord credited payment, it must be presumed to be credited against oldest items due); *600 Hylan Assoc. v. Polshak*, 17 Misc.3d 134[A], 2007 NY Slip Op 52225(U)(App Term, 2d Dept 2007). In addition, the portion of the counterclaim for pre-February 2005 maintenance is not subject to dismissal as time-barred, because, even if it was time-barred, that portion of the counterclaim would be viable to the extent of the amount demanded in the complaint as a recoupment. *See Carlson v. Zimmerman*, 63 A.D.3d 772, 774 (2d Dept 2009)(CPLR 203 (d) allows defendant to assert otherwise untimely counterclaim arising out of same transaction as that asserted in complaint as a shield for recoupment purposes, but not for affirmative relief). The counterclaim relates back to the time the complaint was filed on February 4, 2010, and arises out of the same transaction, the Lease, as the claims in the complaint. *See Matter of SCM Corp. (Fisher Park Lane Co.)*, 40 N.Y.2d 788, 789 (1976)(relation back applies so long as the counterclaim stems from an alleged breach of the same agreement). Therefore, the counterclaim is timely.

Conforti's cross motion seeking dismissal of the second counterclaim for attorneys' fees is denied. Defendants are only seeking summary judgment on their first counterclaim. In addition, under paragraph 28 of the Lease, if Conforti is in default under

the Lease, and the "Lessor shall incur any expense . . . in instituting any action or proceeding based on such default, or defending, or asserting a counterclaim in, any action or proceeding brought by the Lessee," the lessor may seek expenses, including reasonable attorneys' fees and disbursements from the lessee. Therefore, Conforti fails to provide a basis to dismiss this counterclaim.

In accordance with the foregoing, it is hereby

ORDERED that plaintiff James Conforti's motion for summary judgment is denied, and it is further

ORDERED that pursuant to CPLR 3212 (b), the fifth claim for tortious interference with prospective business relations is dismissed; and it is further

ORDERED that defendants The Carlton Regency Corp. and Cooper Square Realty, Inc.'s motion for summary judgment on the first counterclaim is granted as to liability only; and it is further

ORDERED that the issue of the amount of the past due and accruing maintenance, additional maintenance, assessments, late fees and electrical charges due under the parties' proprietary lease is referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine the aforesaid amounts due, which will then be paid into an escrow account pending determination of this action; and it is further

ORDERED that this portion of defendants' motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that counsel for defendants shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet[3] upon the Special Referee Clerk in the Motion Support office in Rm. 119 at 60 Centre Street, who is directed to place this matter on the calendar of the Special Referee's Part (part 50R) for the earliest convenient date; and it is further

ORDERED that plaintiff James Conforti's cross motion for summary judgment dismissing the counterclaims, or for leave to file a late reply to the counterclaims is granted only to the extent of granting leave to file Conforti's late reply to counterclaims, and is otherwise denied, and the reply in the proposed form annexed to Conforti's cross-motion papers shall be deemed served upon service of a copy of this order with notice of entry thereof.

This constitutes the decision and order of the court.

FILED
DEC 06 2013
NEW YORK
COUNTY CLERK'S OFFICE

Dated: New York, New York
~~September~~ December 5, 2013

ENTER:

J.S.C.

[3] Copies are available in Rm. 119 at 60 Centre Street, and on the Court's website.