SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
**Justice**

- - - - - - - - - - - - - - - - - - - - x

SHOUSHANA SHAMILZADEH and SOL SHAMILZADEH,

Plaintiffs,

- against -

RALCO REALTY LLC, 64-11 OWNERS CORP, IRINA LEVIYEVA, and VYACHESLAV ISKHAKOV,

Defendants.

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Index No.: 713577/2016

Motion Date: 5/22/17

Motion Nos.: 154, 155

Motion Seqs.: **3 & 4**



The following electronically filed documents read on this motion by defendant RALCO REALTY LLC (seq. no. 3) for an Order pursuant to CPLR 3211(a)(1),(2),(5), and (7) dismissing the complaint and pursuant to Rule 130.1 of the Administrative Rules of the Court imposing costs and reasonable attorney's fees as against plaintiffs for filing a frivolous lawsuit; on this motion by defendants IRINA LEVIYEVA and VYACHESLAV ISKHAKOV (seq. no. 4) for an Order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the complaint and awarding attorney's fees and sanctions; and on this cross-motion by defendant 64-11 OWNERS CORP (seq. no. 4) for an Order pursuant to CPLR 3211(a)(1), (5), and (7) dismissing the complaint:

| | Papers Numbered |
|---|---|
| Notice of Motion(seq. no. 3)-Affirmation-Exhibits... | EF 40 - 62 |
| Notice of Motion(seq. no. 4)-Affirmation-Memo. of Law-Exhibits..... | EF 63 - 67 |
| Notice of Cross-Motion(seq. no. 4)-Exhibits..... | EF 69 - 72 |
| Affirmation in Omnibus Opposition-Exhibits..... | EF 73 - 80 |
| Affirmation in Reply(seq. no. 3)..... | EF 81 |

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This is an action for injunctive relief and damages for private nuisance, breach of contract, negligence, intentional harassment, negligent infliction of emotional distress, and breach of warranty of habitability based on alleged noise nuisance.

Plaintiff Shoushana Shamilzadeh lives in Apartment 111 in the building located at 64-11 99th Street, Rego Park, New York. Plaintiff Sol Shamilzadeh is not a resident of Apartment 111, but is Shoushana Shamilzadeh's guardian and primary caregiver. Defendant 64-11 Owners Corp is the owner of the cooperative portions of the subject building. Defendant Ralco Realty LLC (Ralco) is a shareholder in the cooperative. As a shareholder, Ralco has a proprietary lease in Apartment 111. Ralco and its predecessor Ralco Realty Co. leased Apartment 111 to Shoushana Shamilzadeh since 1981 under a rent stabilized lease. Defendants Irina Leviyeva and Vyacheslav Iskhakov (collectively hereinafter the Neighbors) are shareholders in 64-11 Owners Corp with a proprietary lease in Apartment 211, which is directly above plaintiffs' apartment. The Neighbors have resided in Apartment 211 since 2011 when they executed the proprietary lease with 64-11 Owners. The lease for Apartment 211 includes a provision for "no unreasonable noise". Plaintiffs allege that since the Neighbors have moved into the building in 2011, plaintiffs have been subjected to unreasonably loud noises in the form of excessive and extremely loud creaking floors, stomping, running, jumping, stampeding, unusually loud footstep, banging, clanking, loud noises that shock the conscious, and other sounds that sound like the dropping of heavy items onto the floor, loud television, running and roughhousing, other unreasonably loud sound reverberations, and noises which disrupt plaintiffs' quiet enjoyment of their apartment. Plaintiffs contend that the conduct occurs several times daily, lasts up to 30 minutes per occurrence and as late as 2:00 a.m.

Based on the above alleged "nuisance conduct", plaintiffs commenced this action by filing a summons with notice on November 14, 2016. Plaintiffs then filed an Order to Show Cause for a preliminary injunction and temporary restraining order. By Order dated December 23, 2016, plaintiffs' application was denied. Plaintiffs filed a complaint on February 13, 2017, alleging nine causes of action: (1) injunctive relief to cease certain nuisance conduct caused by the Neighbors; (2) injunctive relief against Ralco and 64-11 Owners Corp to cease the nuisance conduct and to repair the apartment; (3) private nuisance created by defendants; (4) breach of contract stemming from the numerous failures of Ralco to repair plaintiffs' apartment and enforcing the lease; (5) negligence caused by Ralco failing to act within its duty of care; (6) negligence caused by 64-11 Owners Corp and the Neighbors for their failure to act within their duty of care; (7) intentional harassment by Ralco against plaintiffs which substantially interferes with their quiet enjoyment of their apartment; (8) negligent infliction of emotional distress against defendants; and (9) breach of warranty of habitability against Ralco. All defendants now move to dismiss the complaint.

"To succeed on a motion to dismiss pursuant to CPLR 3211(a)(1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (Teitler v Pollack & Sons, 288 AD2d 302 [2d Dept. 2001]). A motion to dismiss a complaint based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (Stein v Garfield Regency Condominium, 65 AD3d 1126 [2009], quoting Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]).

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83 [1994]; Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679 [2d Dept. 2011]). A complaint must allege the material elements of the cause of action (see Lewis v Village of Deposit, 40 AD2d 730 [1972]; Kohler v Ford Motor Company, Inc., 93 AD2d 205 [3d Dept. 1983]). A court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) (see CPLR 3211[c]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]). When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see Basile v Wiggs, 98 AD3d 640 [2d Dept. 2012]).

In support of the motions to dismiss, defendants submit an affidavit dated March 31, 2017 from John Busch. Mr. Busch affirms that he is employed by Delta Management LLC, the managing agent for Ralco and 64-11 Owners Corp. He also annexes his prior affidavit dated November 28, 2016 submitted in opposition to plaintiffs' application for a preliminary injunction. Mr. Busch affirms that by lease dated January 29, 1981, Ralco leased Apartment 111 to Simon and Shoushana Shamilzadeh. The lease was periodically renewed through the present. Ralco, as sponsor, formed the co-operative for the subject building which was named 64-11 Owners Corp. The certificate of incorporation was filed on October 4, 1985. Thereafter, Ralco became the owner of and acquired 1090 unsold shares in the cooperative and a proprietary interest in Apartment 111 pursuant to the proprietary lease between 64-11 Owners Corp and Cohen, Sollar & Segal d/b/a Ralco Realty Company dated September 17, 1987. A copy of the

proprietary lease is annexed to the motion papers. Under the proprietary lease, 64-11 Owners Corp is responsible for the maintenance and management of the building and maintenance personnel. In April 2011, Esther Cohen, then a resident shareholder in the co-operative with a proprietary lease in Apartment 211, sold her shares and transferred her interests to the Neighbors. Upon approval of sale, 64-11 Owners Corp executed an assignment of the 1100 shares to the Neighbors. On April 5, 2011, 64-11 Owners Corp executed a proprietary lease with the Neighbors. Copies of the proprietary lease and shares assignment agreement are annexed. Based on the proprietary leases, Mr. Busch affirms that Ralco had no rights or proprietary interest in Apartment 211 and no contract at all with the Neighbors. He also affirms that he personally inspected Apartment 211 and verified that the Neighbors have laid down carpeting over the required eighty percent of the floor area.

In opposition, plaintiffs submit the verified complaint; letters from plaintiffs to Mr. Busch and Earl Almonte, the president of 64-11 Owners Corp; a letter from Leonard M. Mattes, M.D.; and a letter from Joseph DeVito, M.D. The letters addressed to Mr. Busch and Mr. Almonte, dated October 2012 through December 2013, detail the nuisance conduct occurring from Apartment 211 and the super's apartment, which is located directly below the plaintiffs' apartment. Dr. Mattes submits an unsworn letter dated November 26, 2016 regarding Shoushana Shamilzadeh's health. Dr. Mattes opines that the continuing noises and disturbances from the tenants residing above Shoushana Shamilzadeh have exacerbated her anxiety and caused her increasing agitation. Dr. DeVito also submits an unsworn letter dated November 22, 2016 regarding Sol Shamilzadeh's health. Dr. DeVito opines that he needs anti-anxiety medications to assist in daily functioning.

Each of the causes of action will be addressed separately herein.

Private Nuisance And Negligence As Against All Defendants:

The third cause of action alleges private nuisance as against all defendants, the fifth cause of action alleges negligence as against Ralco, and the sixth cause of action alleges negligence as against 64-11 Owners Corp and the Neighbors.

"The elements of a cause of action for a private 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 failure to act'" (Ewen v Maccherone, 32 Misc.3d 12, 14 [1st Dept. 2011], quoting Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 570 [1977]). "Conduct which is either reckless or negligent in character may form the basis of a nuisance claim, but whether characterized as either negligence or nuisance, [it] is but a single wrong." (Chenango, Inc. v County of Chenango, 256 AD2d 793 [3d Dept. 1998]). Here, although the complaint alleges causes of action for both nuisance and negligence, the complaint is grounded in allegations of negligence.

The alleged disturbances of creaking floors, stomping, running, jumping, stampeding, unusually loud footsteps, banging and clanking around, what sounds like the dropping of items onto the floor, loud television, and running and roughhousing do not, as a matter of law, rise to the level of substantial and unreasonable interference with plaintiffs' use of the property which would constitute a nuisance (see Kaniklidis v 235 Lincoln Place Hous. Corp., 305 AD2d 546 [2d Dept. 2003]; Lewis v Stiles, 158 AD2d 589 [2d Dept. 1990][finding the "alleged disturbances of dogs barking, children frolicking, and the discordant sounds of music and outdoor summer life do not, as a matter of law, rise to the level of substantial and unreasonable interference with the plaintiffs' use of their own property which would constitute a private nuisance"]; Ewen v Maccherone, 32 Misc.3d 12 [1st Dept. 2011]).

Accordingly, plaintiffs are unable to establish that defendants breached a duty owed to plaintiffs as the alleged disturbances do not rise to a level of substantial and unreasonable interference. Thus, both the nuisance and negligence causes of action must be dismissed.

Regarding the failure to maintain and repair the floor of Apartment 211 and the ceiling of Apartment 111, plaintiffs failed to sufficiently articulate what repairs are necessary. Moreover, Mr. Busch's affidavit affirms that the building complies with relevant building codes and that Apartment 211 has sufficient carpeting.

Breach Of Contract As Against Ralco:

As a fourth cause of action, the complaint alleges that Ralco has actual and constructive notice that the floor boards and ceiling in between Apartment 111 and Apartment 211 need to be repaired and that the Neighbors' nuisance conduct and the superintendent's nuisance conduct is interfering with plaintiffs' comfort, repose, peace, and quiet enjoyment of the apartment. The essential elements for pleading a cause of action to recover

damages for breach of contract are the existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of his or her contractual obligations, and damages resulting from the breach (see Dee v Rakower, 112 AD3d 204 [2d Dept. 2013]; Elisa Dreier Reporting Corp. v Global NAPS Networks, Inc., 84 AD3d 122 [2d Dept. 2011]).

Based on the annexed proprietary lease between 64-11 Owners Corp and Ralco dated September 17, 1987 and relating to Apartment 111, 64-11 Owners Corp accepted responsibility for the management and maintenance of the premises, including maintenance personnel. Accordingly, as 64-11 Owners Corp retained responsibility for the structural conditions of the building and for maintenance personnel, plaintiffs' failed to allege the existence of a contract between plaintiffs and Ralco requiring Ralco to repair the ceiling in Apartment 211 or to maintain responsibility over the maintenance personnel. Moreover, plaintiffs allegation that the ceiling in their apartment is defective is unsubstantiated and conclusory.

Additionally, based on the proprietary lease dated April 5, 2011 between the Neighbors and 64-11 Owners Corp., Ralco did not own, manage, maintain or repair Apartment 211 or the floor of Apartment 211, had no contract or lease relating to Apartment 211, and had no access to Apartment 211. Accordingly, plaintiffs have failed to state a cause of action for breach of contract due to the Neighbors' nuisance conduct.

Harassment As Against Ralco:

The seventh cause of action alleges harassment as against Ralco for engaging in acts or omissions that cause or are intended to cause plaintiffs to leave their apartment.

As the New York State Division of Housing and Community Renewal (DHCR) has the primary jurisdiction to determine and address harassment claims arising out of rent stabilized leases, this Court lacks subject matter jurisdiction to adjudicate such claim (see Sohn v Calderon, 78 NY2d 755 [1991]; Ugweches v 600 West 218 St. Assocs., LLC, 2001 NY Slip Op 30071[U] [Sup Ct., New York Cnty. 2001]).

Negligent Infliction Of Emotional Distress As Against All Defendants:

"A cause of action for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, generally must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers the

plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety" (Sheila C. v Povich, 11 AD3d 120 [1st Dept. 2004]).

Here, plaintiffs failed to allege that they were caused to fear for their own physical safety due to the alleged nuisance conduct.

Breach Of Warranty Of Habitability As Against Ralco:

As the ninth cause of action, plaintiffs allege breach of warranty of habitability as against Ralco. Plaintiffs failed to demonstrate that the noises they complained of were so excessive that they were deprived of the essential functions that a residence is supposed to provide (see Thoreson v Penthouse Intl., 80 NY2d 490 [1992]); Kaniklidis v 235 Lincoln Place Housing Corp., 305 AD2d 546 [2d Dept. 2003]). Moreover, Mr. Busch affirmed that 85% of the floor of Apartment 211 was covered with padded rugs.

Injunction As Against All Defendants:

The first and second causes of action seek a permanent injunction against the defendants. To state a cause of action for a permanent injunction, the complaint must allege the "violation of a right presently occurring, or threatened and imminent . . . that the plaintiff has no adequate remedy at law . . . that serious and irreparable injury will result if the injunction is not granted [and] that the equities are balanced in the plaintiff's favor" (Elow v Svenningsen, 58 AD3d 674 [2d Dept. 2009]). An irreparable injury constitutes a "continuing harm resulting in substantial prejudice caused by the acts sought to be restrained if permitted to continue pendente lite" (Chrysler Corp. v Fedders Corp., 63 AD2d 567 [1st Dept. 1978]).

Here, as this Court has already dismissed the other causes of action, and as plaintiffs have failed to sufficiently allege a violation of a right, those causes of action seeking a permanent injunction against all defendants must be dismissed.

Regarding those branches of the motions seeking sanctions and attorneys' fees as against plaintiffs, although this Court has found plaintiffs' arguments to be unpersuasive, defendants have not demonstrated that plaintiffs are simply seeking to harass or maliciously injure them (see Mechta v Mack, 154 AD2d 440 [2d Dept. 1989]). As such, the requests for the imposition of sanction upon plaintiffs for bringing a frivolous lawsuit is denied.

Accordingly, for the above stated reasons, it is hereby

ORDERED, that the motion to dismiss by RALCO REALTY LLC (seq. no. 3), the motion to dismiss by defendants IRINA LEVIYEVA and VYACHESLAV ISKHAKOV (seq. no. 4), and the cross-motion to dismiss by defendant 64-11 OWNERS CORP (seq. no. 4) are granted, the complaint is dismissed as against all defendants, and the Clerk of the Court shall enter judgment accordingly.

Dated: Long Island City, NY
6/19, 2017

ROBERT J. McDONALD
J.S.C.