

**Asher v 101 W. 78th, LLC**

2017 NY Slip Op 32455(U)

November 27, 2017

Supreme Court, New York County

Docket Number: 160342/2016

Judge: Erika M. Edwards

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

\_\_\_\_\_  
MAY ASHER,

Plaintiff,

Index No.: 160342/2016

DECISION/ORDER

-against-

101 WEST 78<sup>th</sup>, LLC and MARK RISHE,

Defendants.

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

Papers	Numbered
Notice of Motion and Cross-Motion, Affidavits/ Affirmations/Memos of Law annexed	1, 2
Opposition Affidavits/Affirmations and Memo of Law annexed	3, 4
Reply Affidavits/Affirmations/Memos of Law annexed	5

*ERIKA M. EDWARDS, J.S.C.:*

Plaintiff May Asher (“Plaintiff”) brought this action against Defendants 101 West 78<sup>th</sup>, LLC (“101 West”) and Mark Rische (“Rische”) (collectively “Defendants”) for damages seeking compensatory damages, treble damages, injunctive and declaratory relief. Plaintiff is in her 80’s and resides as a rent controlled tenant in an apartment located in a building owned by 101 West. 101 West is the named sponsor of an offering of condominiums in the building. Rische is the former managing director of First Service Residential New York, Inc. (“First Service”), which is the managing agent of the building. Plaintiff alleges in substance that she was wrongfully evicted, intimidated, threatened and harassed when she was forced to temporarily relocate while construction work was being performed in her apartment and in other areas of the building.

Defendants move to dismiss Plaintiff’s complaint against Rische, pursuant to CPLR 308, 3211(a)(8) and 3211(e), for lack of personal jurisdiction and pursuant to CPLR 3212 because Rische acted as a disclosed agent of 101 West and he has no personal liability for Plaintiff’s alleged causes of action. Defendants also move for summary judgment dismissal of each cause of action alleged in Plaintiff’s complaint. Plaintiff opposes Defendants’ motion and cross-moves to extend the time to serve Rische and to amend the caption. Defendants oppose Plaintiff’s cross-motion. For the reasons set forth herein, the court grants Defendants’ motion to dismiss Plaintiff’s complaint against Rische for lack of personal jurisdiction and for summary judgment in favor of both Defendants. As such, Plaintiff’s complaint is dismissed against both Defendants and Plaintiff’s cross-motion is denied.

Plaintiff alleges eleven (11) causes of action in her complaint, including 1) wrongful eviction; 2) illegal lockout; 3) intentional infliction of emotional distress; 4) a declaration that the parties' Temporary Relocation Agreement ("Agreement") is void ab initio because it is an improper waiver of benefits; 5) a declaration that the Agreement is void ab initio because it is unconscionable; 6) a declaration that the Agreement is void ab initio because it lacks consideration; 7) an injunction directing Defendants to immediately restore Plaintiff to possession of her apartment; 8) an injunction directing Defendants to grant Plaintiff's and/or her agent's immediate access to inspect the premises; 9) an injunction directing Defendants to cease and desist construction of the penthouse above Plaintiff's apartment; 10) an injunction directing Defendants to restore Plaintiff's apartment to its condition as it existed in November 2012; and 11) harassment.

The New York State Attorney General's Office filed a petition against 101 West because of alleged improper offering plan filings and misconduct which resulted in heightened oversight of the project, new requirements and a new entity taking control of 101 West with operational control of the building. Some of the requirements included 101 West advising the tenants of the construction and renovation in the building, warning them of any health or safety issues related to the work and inspecting the apartment and building.

Defendants allege in substance that during an inspection and meeting with Plaintiff, they learned that Plaintiff's apartment was in terrible disrepair and required extensive renovation. Defendants also needed to conduct extensive repair work on the roof and in other areas of the building. Plaintiff was required to temporarily vacate the premises until such construction work in her apartment and on the roof was completed. Defendant 101 West's representatives met with Plaintiff and her roommate and Plaintiff was advised of the safety risks she faced during the construction of her apartment. She was also told that she needed to be out of the apartment during business hours while metal beams were transported and used for construction on the roof.

101 West drafted a Temporary Relocation Agreement which outlined the terms of Plaintiff's temporary relocation at owner's expense. The Agreement anticipated that the construction work would last approximately six to nine months, that the terms of the lease were still in effect, that Plaintiff retained all of her rights as a rent controlled tenant of the apartment and it outlined much of the work that would be conducted in Plaintiff's apartment, including additional work necessary to put the apartment in habitable condition. Additionally, Plaintiff acknowledged that she voluntarily agreed to temporarily vacate the apartment, that she was not harassed in any manner with respect to the Agreement and that she freely entered into the Agreement. Finally, the Agreement expressly stated that if any provision in the Agreement or its application is invalid or unenforceable to any extent, then the remainder of the Agreement, or the applicability of such provision, shall be valid and enforceable to the fullest extent permitted by law and shall be deemed separate and remain in full force and effect.

A representative from 101 West left a copy of the Agreement with Plaintiff, Plaintiff was referred to and met with a representative from her local Assemblywoman's office, she met with an attorney from a legal services company and the Attorney General's Office reviewed the Agreement and had no objection to its terms. On November 19, 2015, Plaintiff executed the

Agreement. Plaintiff's son, who had power of attorney over Plaintiff's affairs, voluntarily delivered Plaintiff's keys to 101 West and Plaintiff and her roommate vacated the apartment on December 15, 2015. 101 West had previously paid to have Plaintiff and her roommate look at potential temporary apartments and after Plaintiff selected an apartment, 101 West paid to have movers pack and move Plaintiff to the new apartment. 101 West paid \$4,600 per month for Plaintiff to stay in a luxury apartment on West End Avenue. For approximately six months during this period, Plaintiff's son and later, her attorney, discussed the terms of a buy-out agreement, so the construction work in the apartment was put on hold and delayed. Plaintiff hired an attorney and the attorneys discussed various matters. Additional work was completed in the apartment. After the construction work was completed, Plaintiff moved back into the apartment on March 3, 2017.

Plaintiff alleges in substance that the Defendants forced Plaintiff out of her apartment so they could use her apartment as a construction staging area to complete work on a penthouse above Plaintiff's apartment. Additionally, Plaintiff argues that she was confused, disoriented, harassed and intimidated into giving up her rights to her apartment. Defendants tricked her into signing the Agreement by telling her that she would not be safe if she remained in her apartment and that her new apartment would have good heat. Plaintiff further argues that she has not been restored to the premises because she needs a wheelchair and cannot get up the stairs to enter the building and that her apartment is missing certain things that Plaintiff needs. Also, Plaintiff was injured when she fell twice and she was confined to the hospital and then a rehabilitation facility. At the time Plaintiff filed her opposition papers, she was still staying in the rehabilitation facility.

Plaintiff filed an order to show cause seeking an injunction directing 101 West to provide Plaintiff access to inspect the premises and directing 101 West to cease all work in the apartment, unless it is to restore the apartment back to its condition prior to demolition. On December 16, 2016, the court granted Plaintiff's request for an inspection and denied Plaintiff's request for an order directing 101 West to cease work in the apartment or to restore it.

#### Service of Summons and Complaint on Rishe

When considering Defendants' motion to dismiss Plaintiff's complaint for lack of personal jurisdiction, pursuant to CPLR 3211(a)(8), the court must determine whether service on Rishe was timely and proper. However, Plaintiff concedes that she improperly attempted to serve Rishe at his former place of employment because Plaintiff did not realize Rishe had stopped working at the location after the complaint was filed, but prior to service.

Plaintiff filed her complaint on December 9, 2016, Rishe stopped working at First Service on January 27, 2017, and Plaintiff attempted to serve Rishe on February 8, 2017. Plaintiff had until April 8, 2017 to timely serve Rishe, but failed to do so. Additionally, in the court's order to show cause, it directed Plaintiff to serve Defendants with its summons and complaint by December 19, 2016, but Plaintiff also failed to do so. Now, Plaintiff seeks an extension of time to properly serve Rishe and requests permission to amend the caption.

Based on the facts presented, it is clear that Plaintiff failed to properly and timely serve Rishe so the court dismisses the complaint against Rishe for lack of personal jurisdiction. Also, the court denies Plaintiff's cross-motion to extend the time to serve Rishe and to amend the

caption because Plaintiff failed to demonstrate good cause for failing to timely and properly serve Rishe and because the court determines that all of Plaintiff's claims against Rishe fail as a matter of law. Therefore, the court grants Defendants' motion to dismiss the complaint against Rishe for lack of personal jurisdiction and denies Plaintiff's cross-motion to extend the time to serve Rishe and to amend the caption.

#### Defendants' Motion for Summary Judgment

To prevail on a motion for summary judgment, the movant must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; *Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824, 833 [2014]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). The submission of evidentiary proof must be in admissible form (*Friends of Animals v Associated Fur Mfrs.*, 46 NY2d 1065, 1067-68 [1979]). The movant's initial burden is a heavy one and on a motion for summary judgment, facts must be viewed in the light most favorable to the non-moving party (*Jacobsen*, 22 NY3d at 833; *William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013]).

If the moving party fails to make such prima facie showing, then the court is required to deny the motion, regardless of the sufficiency of the non-movant's papers (*Winegrad v New York Univ. Med. Center*, 4 NY2d 851, 853 [1985]). However, if the moving party meets its burden, then the burden shifts to the party opposing the motion to establish by admissible evidence the existence of a factual issue requiring a trial of the action or tender an acceptable excuse for his failure to do so (*Zuckerman*, 49 NY2d at 560; *Jacobsen*, 22 NY3d at 833; *Vega v Restani Construction Corp.*, 18 NY3d 499, 503 [2012]).

Based on the evidence submitted by the parties, the court determines that Defendants demonstrated their entitlement to summary judgment in their favor as a matter of law and Plaintiff failed to set forth material issues of fact in dispute to preclude summary judgment dismissal of her complaint against either Defendant. Plaintiff's allegations against Rishe are general, conclusory and fail to assert any viable claim against him as an individual. To the extent there are allegations against Rishe, he appears to have been acting within his capacity as the managing agent of 101 West and there are no allegations that he engaged in any independent tortious acts in his individual capacity. Furthermore, Plaintiff's allegations in substance that Rishe directed 101 West's agents and/or employees to harass and intimidate Plaintiff into vacating her apartment are unsupported by any factual allegations necessary to sustain this action. Even though discovery is not complete, all claims fail against Rishe as a matter of law based on the evidence presented.

Plaintiff also alleges that Rishe is liable to Plaintiff because he signed the Agreement. Rishe denies signing the Agreement and argues that the signature on the Agreement is not his signature and that it is much different than the signatures on his affidavit and other documents that he signed. The court determines that it does not matter whether he signed the Agreement because the allegations against Rishe fail as a matter of law under either scenario. As such, the court dismisses the complaint against Rishe.

Plaintiff argues in substance that several factual issues in dispute exist requiring a trial, including whether Defendants procured the Agreement by duress, overreaching or undue influence, whether 101 West harassed Plaintiff, whether it was necessary for 101 West to remove Plaintiff's two windows and to seal her two fireplaces and whether Plaintiff was competent to enter into the Agreement since she was in her 80's, easily confused and unrepresented by legal counsel.

Plaintiff's First Cause of Action alleges in substance that 101 West unlawfully, wrongfully and illegally evicted Plaintiff and Rische directed 101 West to harass and intimidate Plaintiff into vacating her apartment, pursuant to RPAPL § 853. Plaintiff's Second Cause of Action alleges that 101 West illegally evicted Plaintiff by changing the locks to Plaintiff's apartment in violation of New York City Administrative Code § 26-521. As Defendants correctly argue, Plaintiff's Second Cause of Action is essentially duplicative of her First Cause of Action for wrongful eviction and must be dismissed.

The court dismisses Plaintiff's first two causes of action because, pursuant to the terms of the Agreement between the parties, Plaintiff voluntarily and freely agreed to temporarily vacate the premises until the construction and renovation work was completed. Plaintiff acknowledged that she temporarily vacated the premises on her own free will and that she was not harassed into doing so. Plaintiff's son, who had power of attorney over her affairs, voluntarily surrendered Plaintiff's keys to 101 West. Plaintiff selected her temporary residence and moved out at 101 West's expense. During the entire period of the temporary relocation, Plaintiff's lease remained in effect and Plaintiff maintained all of her rights as a rent controlled tenant in the apartment. Once the work was completed, Plaintiff was restored to possession of the apartment and her roommate moved back into the premises. Whether Plaintiff chose not to move back into the premises, or whether she is unable to do so because she is confined to a rehabilitation facility after her falls, or because she could no longer walk up the steps to enter the building, does not mean that Defendants failed to restore Plaintiff to possession of the premises. Here, Defendants demonstrated that there was no wrongful, unlawful or illegal eviction and Plaintiff's arguments to the contrary are without merit.

Plaintiff's Third Cause of Action for intentional infliction of emotional distress is also dismissed as the evidence fails to show that Defendants acted in an extreme and outrageous manner with the intent to cause, or in disregard of a substantial probability of causing, Plaintiff's emotional distress and such actions caused Plaintiff to suffer severe emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). Courts have only found liability in rare instances where a defendant's 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" (*id.* at 122). Here, Defendants demonstrated that Plaintiff's allegations failed to demonstrate that Defendants' conduct rose to this level.

Plaintiff's Fourth, Fifth and Sixth Causes of Action for declarations that the Temporary Relocation Agreement is void ab initio for waiver of benefits, because it is unconscionable and for failure of consideration, respectively, also fail as a matter of law. As discussed above, the court determines that the evidence demonstrates that Plaintiff voluntarily and freely entered into the Agreement, that Plaintiff had ample opportunity to discuss the terms of the Agreement with

an attorney, that Plaintiff discussed the Agreement with a representative from her local Assemblywoman's office, an attorney from a legal services agency and with her roommate and son. Additionally, the Attorney General's Office did not object to the terms of the Agreement. Plaintiff failed to demonstrate any waiver of benefit of law sufficient to void the Agreement and failed to demonstrate how the loss of two interior facing windows in her kitchen and bathroom, which were replaced by a larger window with a much better view, and the loss of two fireplaces, which were necessary to install an ADA compliant elevator, deprived Plaintiff of required services. Additionally, based on the evidence, the Agreement was not unconscionable as both sides clearly benefited from the terms of the Agreement and Defendants did not intend to harass or intimidate Plaintiff into signing the Agreement. Also, there was consideration for the Agreement and 101 West bore the expenses of renovating Plaintiff's apartment into a much better condition, driving Plaintiff and her roommate around to look for a new temporary apartment, paying to pack and move Plaintiff's belongings, paying \$4600 per month rent in the luxury temporary apartment and paying to pack and move Plaintiff back into her apartment. Based on the evidence, the court determines that the Agreement is not void ab initio.

Plaintiff's Seventh, Eighth and Ninth Causes of Action for injunctions directing Defendants to immediately restore Plaintiff to possession of her apartment, to grant Plaintiff's and/or her agent's immediate access to inspect the premises and to cease and desist construction of the penthouse above Plaintiff's apartment are dismissed as moot as Defendants have restored Plaintiff to possession of the apartment, Defendants provided Plaintiff and her agents access to the apartment to inspect the premises and Defendants completed the construction work in the areas above Plaintiff's apartment. Additionally, Plaintiff failed to demonstrate its entitlement to such relief on the merits. As mentioned earlier, Plaintiff's arguments that she has not been restored possession of the apartment are without merit. Therefore, the court dismisses Plaintiff's Seventh, Eighth and Ninth Causes of Action.

Plaintiff's Tenth Cause of Action for an injunction directing Defendants to restore Plaintiff's apartment to its condition as it existed in November 2012 is dismissed as such claim is impractical, unfair and prejudicial to both parties and could be impossible. As Defendants argue, Defendants have no knowledge of the condition of the apartment back in November 2012. However, Defendants argue that prior to the renovation work, Plaintiff's apartment was in disrepair, including holes in the walls and window areas. Two windows were removed, one larger, better window was installed, and two fireplaces were sealed so an ADA compliant elevator could be installed. If the court directed Defendants to remove the windows and unseal the fireplaces, then they would have to remove the new elevator. Furthermore, additional structural work was completed to make the apartment more accessible for Plaintiff and to enhance the apartment, including leveling floors, installing new floors, replacing all of the windows, installing a ventilation system, sprinkler system and extensive electrical work. If Defendants were directed to restore the apartment to its previous dilapidated condition, then Defendants would be forced to rip up floors, break into walls, rip out electrical wiring and replace the windows with old windows. Such work would force Plaintiff and her roommate to temporarily vacate the apartment and it would virtually destroy the apartment. Such outcome would be absurd and virtually impossible.

Plaintiff's Eleventh Cause of Action for harassment is dismissed because Defendants demonstrated their entitlement to dismissal as a matter of law and Plaintiff failed to raise material issues of fact to sustain this claim, even when viewing the facts in the light most favorable to Plaintiff. Again, Plaintiff acknowledged that she was not harassed in her Agreement and there is no evidence that Defendants intended to harass Plaintiff into giving up any rights to her apartment, as such rights were never given up. Therefore, the court also dismisses this claim against Defendants as a matter of law.

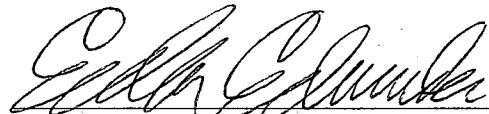
For the foregoing reasons, the court grants Defendants' motion to dismiss Plaintiff's complaint against Defendants and denies Plaintiff's cross-motion in their entirety, with prejudice and without costs to either side.

Accordingly, it is hereby

**ORDERED** that the court grants Defendants 101 West 78<sup>th</sup>, LLC's and Mark Rische's motion to dismiss Plaintiff May Asher's complaint against both Defendants with prejudice and without costs, the court dismisses Plaintiff May Asher's complaint against both Defendants and the Clerk is directed to enter judgment in favor of Defendants 101 West 78<sup>th</sup>, LLC and Mark Rische as against Plaintiff May Asher; and it is further

**ORDERED** that the court denies Plaintiff May Asher's cross-motion for extension of time to serve Defendant Mark Rische with her summons and complaint and to amend the caption in its entirety with prejudice and without costs.

Date: November 27, 2017



HON. ERIKA M. EDWARDS