Manning v 1085 Park Ave. LLC
2018 NY Slip Op 30361(U)
February 26, 2018
Supreme Court, New York County
Docket Number: 153694/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: Hon. Robert D. KALISH
Justice

PART 29

GREGORY MANNING and LAUREN MANNING, individually and, as legal guardians on behalf of their minor child, J.M.

Plaintiffs,

- v -

1085 PARK AVENUE LLC and RUDIN MANAGEMENT COMPANY, INC., and WILLIAM RUDIN, ERIC RUDIN and JOHN J. GILBERT, individually.

Defendants.

INDEX NO. 153694/2017

MOTION DATE 1/22/18

MOTION SEQ. NO. 001

The following papers, numbered 4–15, were read on this motion to dismiss.

Notice of Motion—Affirmation in Support—Exhibit A—Memorandum of Law in Support—RJI	Nos. 4–9
Memorandum of Law in Opposition—Affs in Opposition—Exhibit A	Nos. 10–14
Memorandum of Law in Reply	No. 15

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

Motion by Defendants 1085 Park Avenue LLC ("1085"), Rudin Management Company, Inc. ("Rudin Inc."), William Rudin, Eric Rudin, and John J. Gilbert ("Gilbert") pursuant to CPLR 3211[1] to dismiss the third, fourth, sixth, seventh, and eighth causes of actions in the verified complaint[2] of Plaintiffs Gregory Manning and Lauren Manning, individually and as legal guardians on behalf of their minor child, J.M. (collectively, the "Mannings") and pursuant to CPLR 3024 (b) to strike paragraphs 44, 45, 51, 65, 67, and 74–80 from the verified complaint, and to strike

[1] Although Defendants' motion does not specify the section of CPLR 3211 under which Defendants seek dismissal, based upon the arguments made, the Court considers the instant motion made under CPLR 3211 (a) (1) and (7) and disregards this omission as a mere irregularity.

[2] Neither party has included the verified complaint with their motion papers. While this Court would be well within its discretion to deny Defendants' motion due to this potentially fatal defect, the Court will nevertheless consider Defendants' motion on the merits in the interest of judicial economy. (*See Soule v Lozada*, 232 AD2d 825, 825 [3d Dept 1996].)

the damages demand in the second cause of action and all demands for punitive damages in the verified complaint is granted to the following extent.

At oral argument, on December 18, 2017, and in the Mannings' memorandum of law in opposition (Brickman opp memo) submitted on the instant motion, the Mannings agreed to dismiss the third and fourth causes of action with prejudice. (Tr at 29, lines 7–10; Brickman opp memo at 5, n 1.) The Mannings further agreed to dismiss all claims against William Rudin and to dismiss the action as against him, with prejudice. (Tr at 28, lines 22–26; at 29, lines 2–6; Brickman opp memo at 5, n 1.) The Mannings further agreed to strike paragraphs 74–80 from the verified complaint. (Brickman opp memo at 5, n 1.) The Mannings further agreed to withdraw any claims of aiding and abetting negligence as contemplated under the eighth cause of action. (Tr at 28, lines 15–21.)

For the reasons set forth below, as to the remaining reliefs requested in the instant motion: the motion to dismiss the sixth cause of action is denied; the motion to dismiss the seventh cause of action is granted; the motion to dismiss the remainder of the eighth cause of action is granted; the action is dismissed with prejudice as against Eric Rudin and John J. Gilbert; the motion to strike paragraphs 44, 45, 51, 65, and 67 is denied; the motion to strike the damages demand in the second cause of action is denied; and the motion to strike the demands for punitive damages in the first, second, and fifth causes of action is denied.

BACKGROUND

The Mannings commenced the instant action on April 21, 2017, by e-filing a summons and verified complaint. (NY St Cts Elec Filing [NYSCEF] Doc No. 1 [Complaint].) The Complaint alleges that the Mannings resided at 1085 Park Avenue, Apartment 8C, New York, New York 10128 (the "Unit") from July 8, 2014, to December 2, 2016 (the "Tenancy"). The Complaint further alleges that 1085 is the owner and landlord of the Unit and that Rudin Inc. is 1085's managing agent. The Complaint further alleges that the Mannings were subjected to a campaign of harassment waged by Kenneth Finkel ("Mr. Finkel") and his spouse (collectively, the "Finkels") from "October 2014" to December 2016. (Complaint ¶ 14.) The Complaint further alleges that Mr. Finkel lived in apartment 7C, which is located directly below the Unit, during the Tenancy.

The Mannings allege in their Complaint, in sum and substance, that they documented approximately 250 incidents during the Tenancy where Mr. Finkel

played loud, disruptive music for up to 24 hours a day or stalked, threatened, or confronted the Mannings and their staff in a hostile manner. The Complaint alleges that Mr. Finkel began harassing the Mannings "in their apartment" in "February[] 2015" when he stepped into the Mannings' apartment uninvited and "yelled belligerently at Lauren [Manning] about alleged noise supposedly emanating from the bedroom of" the Mannings' older fourteen-year-old child. (Complaint ¶ 16.) The Complaint alleges various instances where the Finkels spoke to the Mannings or their staff in a manner described as "menacing," "intimidating," "scolding," "harassing," "hostile," and "aggressive." (Complaint ¶¶ 17–18, 20.) The Complaint then alleges that the Mannings made two reports on February 13, 2015, and February 27, 2015, to Rudin Inc. regarding such incidents with the Finkels.

The Complaint states that, on or about December 7, 2015, the Mannings made their "first complaint" to their doormen regarding "excessive noise coming from [the] Finkel[s'] apartment." (Complaint ¶ 21.) The Complaint further states that the Finkels were playing music at "floor-vibrating volume without interruption for ten to twelve hours per day." (*Id.*)

On December 8, 2015, Mr. Finkel entered the Mannings' apartment uninvited through their unlocked door.[3] Lauren Manning allegedly made a video recording of this incident, where Mr. Finkel allegedly said: "[Lauren Manning] should be crying"; "I'm crazy"; "I'm a wacko"; "[y]ou like the music? I hope you do, man, because it's going to be so [loud]"; "[y]ou ain't seen nothing with the music"; "[y]ou like the music I hope you do bro because you wanna know something it's only going to get [louder]"; "I'm going to destroy your life at 1085 Park;" and "[y]ou can call the police, you can call Rudin, I'm best friends with Rudin, man." (Complaint ¶¶ 26–28.)

The Complaint then alleges that the Mannings called 911 and informed building staff of what was happening. The Complaint further alleges that, during the two hours that passed from when Mr. Finkel first came to the Mannings' apartment until the first responders arrived, building staff could have restricted Mr. Finkel's movement during this time by blocking his access to the eighth floor or to the Mannings' apartment. The Complaint further alleges that Mr. Finkel repeatedly returned to the Unit during this time for "two hours of sustained intimidation and threats." (Complaint ¶ 36.) The Complaint further alleges that building staff did not

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[3] For this, Mr. Finkel allegedly pled guilty to criminal trespass and harassment in criminal court. (Complaint ¶ 60.)

restrict Mr. Finkel's movement or do anything to stop Mr. Finkel's actions, but did escort one of the Mannings' staff out of the building.

The Complaint further alleges that the Mannings met with Rudin Inc.'s head of security, Michael Sweeney, on December 9, 2015, regarding the December 8, 2015 incident involving Mr. Finkel. The Complaint states that Mr. Sweeney told the Mannings that "everyone in the company" had viewed Lauren Manning's video of the incident. (Complaint ¶ 38.) The Complaint alleges that the Mannings requested that Defendants move the Manning family to another apartment or move the Finkels to another apartment. (Complaint ¶ 50.) The Complaint further alleges that "Defendants ignored these requests and made no specific commitment to act to stop Finkel's harassment." (*Id.*)

The Complaint alleges that on 250 of the next 321 days after the December 8, 2015 incident, Mr. Finkel "targeted the Mannings with a prolonged harassment campaign of excessive noise for 10–12 hours per day, and 24 hours per day over entire weekends when [he] was not even in his apartment." (Complaint ¶ 40.) The Complaint further alleges that the noise lasted "until at least 10 p[.]m[.] for over 250 nights." The Complaint further alleges that the noise "escalated" on January 5, 2016, "to become a near-daily, unabated nuisance." (Complaint ¶ 42.)

The Complaint further alleges that "Defendants did effectively nothing over a 10-month period to stop or deter [the] Finkel[s] from [their] deliberate harassment campaign intended to destroy the Mannings' life." (Complaint ¶ 43.) On December 15, 2015, Gregory Manning allegedly met with Eric Rudin, allegedly an owner of Rudin Inc., and Gilbert, allegedly the Executive Vice President and Chief Operating Officer of Rudin Inc. The Complaint alleges that Gilbert stated at the meeting that "Finkel had a spotless record as a tenant for 40 years prior to December 8, 2015." (Complaint ¶ 47.) The Complaint then alleges that Gilbert further stated that "Mr. Finkel had expressed remorse for his actions" and that "the Mannings must accept [a] warning [to Mr. Finkel to have no contact with the Mannings] as the penalty for [his] criminal actions[] and must take [him] at his word that he would not fulfill his threats of future harassment." (Complaint ¶ 49.) The Complaint further alleges that the Mannings reiterated their request either to move apartments or for the Finkels to move apartments.

The Complaint makes a number of allegations "upon information and belief" relating to Mr. Finkel, including, but not limited to, that:

1. Mr. Finkel "was at first implicitly, and subsequently implicitly, acting as an agent of Defendants in an effort to force Plaintiffs to move out of their apartment";

2. "calls to the New York Police Department ("NYPD") would be [in]effective in stopping [Mr.] Finkel's future deliberate infliction of harm on the Manning family";

3. 1085, Rudin Inc. Eric Rudin, and Gilbert never disavowed Mr. Finkel's claim to be "best friends with Rudin";

4. "[Mr.] Finkel harassed the Mannings with impunity based on his confidence . . . that Rudin [Inc.] would take no action to deter him from harassment of the Mannings and . . . a corollary confidence that Rudin [Inc.] would deter the police from responding to any such actions, potentially including his criminal acts [of December 8, 2015], and would shield him from the consequences of any future NYPD response";

5. Mr. Finkel was "bombard[ing] the entire Manning family with excessive noise . . . with the specific and explicit intent of targeting the Mannings' six-year-old son . . . [and] endanger[ing his] welfare";

6. "a number of employees and executives at Rudin [Inc.] were fully aware of [the] Finkel[s'] actions . . . and by their response and failure to act exhibited bias toward [them] which left the Mannings vulnerable to further harassment";

7. the Rudins denied that the Finkels were doing anything wrong, that it was the Mannings who were making "excessive and unwarranted complaints," and that "[Rudin Inc.] would do nothing to protect [the Mannings] from further harm";.

8. Defendants were aware of the noise coming from the Finkels' apartment and deliberately ignored it;

9. "Defendants recklessly and/or intentionally facilitated and perpetuated the noise-related nuisance and harassment of the

> Mannings in callous disregard of the rights and well-being of the Mannings"; and
>
> 10. Defendants acted in favor of Mr. Finkel's "harassment campaign to compel the Mannings to move [] in cooperation with Finkel[]."

(Complaint ¶¶ 14, 39–41, 52, 55, 58–59, 63–64.)

On or around October 24, 2016, Defendants allegedly installed "noise monitors" in the Finkels' apartment, with the Finkels' knowledge, and the allegedly excessive noise stopped immediately thereafter. (Complaint ¶¶ 68–69.) A week later, on October 31, 2016, the parties settled certain claims pursuant to a stipulation of settlement discussed more fully below. (Blott affidavit, exhibit A [Stipulation].) As a part of that settlement, the Mannings vacated the Unit on December 2, 2016.

The Mannings allege, in sum, that "[a]s a result of Defendants' refusal and failure to appropriately respond to the crimes by [Mr.] Finkel, to appropriately address the threats of ongoing harm by [the] Finkel[s], or to take action to stop or deter [the] Finkel[s] and protect the Mannings, Defendants are responsible for the harm and damages suffered by Plaintiffs." (Complaint ¶ 73.)

At issue in the instant motion to dismiss are three of the Complaint's causes of action: the sixth cause of action, for attorney's fees against 1085 and Rudin Inc.; the seventh cause of action, for intentional infliction of emotional distress against 1085 and Rudin Inc.; and the remainder of the eighth cause of action, for aiding and abetting nuisance and intentional infliction of emotional distress against Eric Rudin and Gilbert individually. Defendants also seek to strike from the Complaint: paragraphs 44, 45, 51, 65, and 67; the damages demand in the second cause of action; and all demands for punitive damages. Plaintiffs in their opposition papers to the motion have included affidavits from the Mannings to supplement the Complaint which the Court has also read and considered.

ARGUMENT

I. Attorney's Fees against 1085 and Rudin Inc.

The sixth cause of action seeks attorney's fees based on a clause in the Mannings' lease that permits 1085 to recover "[a]ny legal fees and disbursements

for legal actions or proceedings brought by [1085] against [tenant] because of a Lease default by [tenant] or for defending lawsuits brought against [1085] because of [tenant's] actions." (Complaint ¶ 114.) The Complaint states that Defendants are liable to Plaintiffs for Plaintiffs' reasonable attorney's fees, costs, and disbursements in the instant action pursuant to RPL § 234.

Defendants in their papers argue that the stipulation of settlement provided that Plaintiffs released any claims for attorney's fees under the lease. Defendants in support of their argument attach as an exhibit to their motion papers a fully executed copy of a Stipulation of Settlement dated October 31, 2016, by and between the Mannings and 1085. The Stipulation states that it applies to the parties and to "their agents [and] attorneys." (Stipulation ¶ 6.) The Stipulation further states that "the parties agree to a mutual release" that

> "includes all claims arising from and related to any cause, claim, action, or inaction (collectively, 'Claims') arising from or relating to anything from the beginning of the world until [December 2, 2016], including but not limited to Claims relating to the Lease, the [Unit], [the Mannings'] continued right of occupancy, rent arrears and rent abatement, and issues of habitability related only to physical repairs that were allegedly required to be made by [1085] to the [Unit]."

(*Id.*) The Stipulation further provides for the following two "Carve-outs," claims which are not released:

> "(1) the Mannings' claims against [1085] and its agents . . . for premises liability related to persistent noise emanating from Apartment 7C and [1085's] response and reaction to the Mannings' complaints and notices regarding that noise, claims related to a complaint of criminal trespass by Finkel, claims related to alleged continuing harassment by Finkel, and claims related to alleged attempted intimidation by Finkel, an alleged breach of contract arising from the Lease relating to the quiet enjoyment of the [Unit] arising from Finkel's conduct as described hereinabove, intentional infliction of emotional distress relating to Finkel's conduct as described hereinabove, and [1085's] responses and reactions to the same, and claimed defamation allegedly made by [1085] and by its alleged agents describing the Mannings and their conduct as tenants; (2) claims by [1085] against the Mannings related to the alleged loss of

> rental income, and any claims for indemnification and contribution on account of claims against [1085] by non-parties arising from the Mannings' alleged conduct as a tenant."

(*Id.*)

The only contemplation of attorney's fees in the Stipulation states that "should either party default under their obligations pursuant to the [Stipulation], the non-defaulting party will be entitled to *legal fees and expenses* as and [sic] against the defaulting party, *in accordance with the Free-Market Lease Agreement*, as well as a judgment for any amounts due to the other party. (*Id.* ¶ 17 [emphases added].) The Stipulation defines the "Free-Market Lease" as the Mannings' lease relating to the Tenancy. (*Id.* at 1.)

Defendants argue that the Stipulation is a "general release" that is enforceable to bar a subsequent lawsuit on a released claim. (Pollack memo at 7.) Defendants further argue that "the Mannings did not reserve any claims for their attorneys' fees under the lease *or otherwise*." (*Id.* at 8 [emphasis added].) Defendants further argue that "any claims for attorneys' fees under the lease ha[ve] been released." (*Id.*)

Plaintiffs argue in their opposition papers that the sixth cause of action for attorney's fees has not been released or waived. (Brickman opp memo at 8.) Plaintiffs further argue that the Stipulation released "*some of their claims* against [1085]" but that "attorneys' fees were not addressed in the [Stipulation]." (*Id.*) Plaintiffs further argue that they have a reciprocal right to attorney's fees stemming from the lease and from RPL § 234, which cannot be waived as a matter of public policy. (*Id.* at 9.)

Defendants argue in their reply papers that the public policy at issue is the courts' enforcement of settlement agreements. (Pollack reply memo at 11.) Defendants further argue that Plaintiffs released "all claims relating to the Lease" and only reserved certain other claims. (*Id.* at 12.) Defendants further argue that RPL § 234 is inapposite in that, under the plain language of the Stipulation, "Plaintiffs broadly released their claims under the lease, including their current claim for attorneys' fees."

At oral argument, counsel for Defendants argued that the Stipulation "specifically releases all claims under the lease except for an alleged breach of

contract arising from the lease relating to the quiet enjoyment of the premises" which Plaintiffs voluntarily dismissed. (Tr at 17, lines 14–23.) Counsel further argued that "[t]he point of the [Stipulation] was to release all claims under the lease. [The Mannings'] claim for attorneys' fees is under the lease." (*Id.* at 18, lines 2–5.)

Counsel for Plaintiffs argued in opposition that RPL § 234 provides for "a statutory attorneys' fee" that cannot be waived. (*Id.* at 42, lines 10–15.) Counsel further argued that a cause of action for warranty of habitability "allows for attorneys' fees under certain circumstances, including indicia of malevolence, which is exactly and precisely what we have alleged in this circumstance." (*Id.* at 42, lines 18–23.) Counsel further argued that a common law claim of nuisance allows for attorney's fees. (*Id.* at 43, lines 4–9.) Counsel then stated that attorney's fees are not available under common law in "every case," but only in cases involving "disinterested malevolence." (*Id.* at 43, line 26; at 44, lines 2–15.) Counsel further argued that Plaintiffs have pled disinterested malevolence. (*Id.* at 44, lines 14–15.)

Counsel for Defendants argued in reply that Plaintiffs did not raise in their papers the possibility of obtaining attorney's fees in nuisance and negligence where a disinterested malevolence standard is met. Counsel then argued that the sixth cause of action in the Complaint "is purely under the lease. And to the extent that claims under the lease were released by the [Stipulation], the sixth cause of action needs to be dismissed." (*Id.* at 54, lines 5–12.)

Counsel then cited to the Stipulation language stating that "'[n]otwithstanding anything herein above to the contrary, the [Carve-out] shall be construed in a manner narrowly and most favorable to the claims being released." (*Id.* at 54, lines 15–19.) Counsel argued that "the release is interpreted expansively, as releases are, and the [C]arve-out[] [is] interpreted narrowly." (*Id.* at 54, lines 20–21.)

II. Intentional Infliction of Emotional Distress against 1085 and Rudin Inc.

Defendants argue in their papers that, taking all of Plaintiffs' allegations as true, the conduct of 1085 and Rudin Inc. does not constitute extreme and outrageous conduct. Defendants further argue that even multiple acts of affirmative and deliberate misconduct by a landlord have been held not to have constituted

outrageous conduct sufficient to state a cause of action for intentional infliction of emotional distress.

Plaintiffs argue in their opposition papers that they have alleged in the Complaint that 1085 and Rudin Inc. "knowingly supported [] a campaign of harassment [by the Finkels] which caused extreme emotional distress to the [Mannings]." (Brickman opp memo at 11.) Plaintiffs cite to cases where campaigns of harassment or intimidation have constituted claims for "emotional distress" against parties engaged in "harassing conduct." (*Id.* at 10.) Plaintiffs further argue that 1085 and Rudin Inc. both "actively participated in" and "condoned" Mr. Finkel's harassment campaign. (*Id.* at 12.) Plaintiffs further argue that 1085 and Rudin Inc.'s extreme and outrageous conduct included their "condonation of vulgar language, threats of violence, criminal trespass, and playing excessively loud music pointed at the Mannings' apartment 10 to 12 hours a day, for nearly 250 consecutive days." (*Id.*)

Defendants argue in their reply papers that Plaintiffs have failed to state a cause of action for intentional infliction of emotional distress because Plaintiffs do not allege that 1085 and Rudin Inc. engaged in any affirmative misconduct or outrageous acts. Defendants further argue that the cases cited by Plaintiffs sustained such a cause of action against the actor actually engaging in harassing conduct. Defendants then argue that 1085 and Rudin Inc. were not such "actors."

At oral argument, counsel for Defendants argued that Plaintiffs have failed to allege an extreme and outrageous course of conduct by 1085 or Rudin Inc. (Tr at 5, lines 14–21.) Counsel further argued that such a course of conduct requires allegations of affirmative actions. (*Id.* at 5, lines 21–24.) Counsel further argued that Plaintiffs' allegation that 1085 and Rudin Inc. condoned Mr. Finkel's conduct is not sufficient to state a cause of action for intentional infliction of emotional distress under *Taggart v Costabile* (131 AD3d 243 [2d Dept 2015]). Counsel further argued that condoning and failing to act are not sufficient to establish the requisite course of conduct. Counsel further argued that Plaintiffs have not alleged that 1085 or Rudin Inc. told the Finkels to harass the Mannings or "encouraged the harassment in any way." (Tr at 8, line 17.)

Counsel for Plaintiffs argued in opposition that Defendants stated on December 15, 2015, that there wasn't noise or a nuisance emanating from apartment 7C. Counsel further argued that this statement shows that Defendants specifically condoned the Finkels' actions. Counsel further argued that where

Defendants "affirmatively denied something they knew was true, [] that [wa]s an affirmative act." (*Id.* at 32, lines 7–9.) Counsel further argued that Defendants "did something wrong" by "not hav[ing the] Finkel[s] removed from the building." (*Id.* at 32, lines 24–26.) Counsel further argued that Defendants had notice of the Finkels' bad acts and ignored them.

Counsel then argued that Plaintiffs have alleged that "Eric Rudin, the company's Vice Chairman, was instructing his employees to fabricate records and otherwise shield [Mr. Finkel] from responsibility for his actions." (Aff of Gregory Manning ¶ 30; tr at 34, lines 7–14.) Counsel further argued that a subsequent letter sent by the Mannings to management attempting to resolve the issues resulted in a response only that the Mannings' lease would not be renewed. Counsel further argued that "the effect that all this behavior on the part of Finkel was having on the Mannings' child [] is most of the crux of [the] intentional [in]fliction of emotional distress [cause of action]." (Tr at 35, lines 13–16.)

When the Court asked counsel for Plaintiffs, Mr. Leonard to "[r]emember[] the criteria for [intention]al infliction" and to tell the Court "what is the extreme conduct?" the following colloquy occurred:

> <u>Mr. Leonard</u>: You're right. It is absolutely a high standard, Your Honor.
>
> <u>The Court</u>: It is a very high standard. It may be certain things may have happened, but there's different levels.
>
> <u>Mr. Leonard</u>: Absolutely, Your Honor, and frankly, at this point at this stage in the pleadings we would say on [a] motion to dismiss, when you're talking about the welfare of a child that's being neglected and as part of intentional emotional distress where there have been submissions that that child had to go see a psychiatrist, that there have been all sorts of issues concerning his mental wellbeing from these acts that were not protect that were known in advance and nothing was done to alleviate the situation before it escalated further, that it would rise to that level.
>
> And Your Honor, it might be at the end of the day a motion for summary judgment before a jury. We don't have it. It doesn't rise to that level. At this stage, though, given the allegations and concerns of

the welfare of a minor as well as the wellbeing of these two tenants, I think it does reach the standard for a motion to dismiss.

(Tr at 36, lines 17–26; at 37, lines 2–17.)

Counsel for Defendants argued in reply that Plaintiffs' argument that there is "some kind of lower [intentional infliction of emotional distress] standard because a minor allegedly was involved in this" is hypocritical and has no merit. (*Id.* at 50, lines 24–26; at 51, lines 5–15.) Counsel further argued that the Mannings have admitted in their papers that they chose not to move out of the Unit and held over on their lease, which ended in July 2016, for several months "on the advice of counsel, for litigation." (*Id.* at 51, lines 20–21.) Counsel then argued that there is no such lower standard involving minors, that Plaintiffs have failed to allege an intentional, affirmative course of conduct that is gross and wanton, and that therefore the seventh cause of action stated in the Complaint should be dismissed.

III. Aiding and Abetting Nuisance and Intentional Infliction of Emotional Distress against Eric Rudin and Gilbert

Defendants argue in their papers that the Complaint fails to state claims against Eric Rudin and Gilbert individually beyond their mere status as corporate officers of Rudin Inc. Defendants further argue that the standard for imposing individual liability on a corporate officer is whether "the officer personally participated in any malfeasance or misfeasance constituting an affirmative tortious act." (Pollack memo at 11.) Defendants further argue that any specific allegations against Eric Rudin and Gilbert in the Complaint do not show affirmative participation in a tortious act and at best amounts to nothing more than nonfeasance.

Defendants further argue that the Complaint does not allege that Eric Rudin or Gilbert substantially assisted with the commission of any tortious act, and thus does not support a cause of action for aiding and abetting liability. Defendants further argue that any cause of action for aiding and abetting intentional infliction of emotional distress should be dismissed if the underlying tort claim of intentional infliction of emotional distress is dismissed.

Plaintiffs argue in their opposition papers that inaction may constitute substantial assistance for the purposes of aiding and abetting liability. Plaintiffs further argue that Mr. Finkel was acting as an agent of Defendants and that Eric

Rudin and Gilbert directed building staff to support or ignore Mr. Finkel's bad acts, directed the falsifying of documents, and condoned Mr. Finkel's behavior.

Plaintiffs argue, in the main, that Eric Rudin and Gilbert "became personally liable for the tortious actions and issues plaguing the Manning tenancy when they became personally involved due not only to their knowledge and failure to act, but on account of their affirmative actions as enumerated [] in the Complaint and in the [] [a]ffidavit of Greg[ory] Manning." (Brickman opp memo at 16.) Plaintiffs further argue that "[a]dvice or encouragement to act operates as a moral support to a tortfeasor, and if the act encouraged is known to be tortious it has the same effect upon the liability of the adviser as participation or physical assistance." (*Id.* at 17.)

Defendants argue in their reply papers that the Complaint fails to allege any act by Eric Rudin or Gilbert to support 1085 or Rudin Inc. in misconduct. Defendants further argue that the Complaint fails to allege any affirmative misconduct by 1085 or Rudin Inc. Defendants further argue that inaction alone cannot support an aiding an abetting claim except where a complaint alleges a breach of fiduciary duty, which is not the case in the instant action. Defendants further argue that Plaintiffs' allegations, particularly those regarding instructing building staff not to respond to their complaints, are without any factual support or are made upon information and belief and that this Court is entitled to discount them as conclusory and speculative.

Defendants argue that Eric Rudin and Gilbert attended a single meeting with the Mannings about apartment issues and this is not substantial assistance. Defendants further argue that the letter from Eric Rudin to the Mannings regarding that their lease would not be renewed was signed in the normal course of business, has nothing to do with Mr. Finkel's alleged misconduct, and is not substantial assistance. Defendants further argue that the allegation that Eric Rudin and Gilbert sent a surrogate to meet with the NYPD to impede Mr. Finkel's prosecution is inherently incredible, outlandish, and unsupported and should be disregarded. Defendants further argue that when Mr. Finkel said that he was best friends with Rudin, this did not relate to conduct by Eric Rudin or John Gilbert, and it is a generalization that did not name a specific Rudin.

At oral argument, counsel for Defendants reiterated that aiding and abetting liability requires allegations of affirmative action and that Eric Rudin and Gilbert each provided substantial assistance to 1085 and Rudin Inc. in any alleged tortious conduct. Counsel then argued that neither Eric Rudin nor Gilbert took any

affirmative act preventing 1085 or Rudin Inc. from doing anything relating to Mr. Finkel's alleged harassment of the Mannings.

Counsel further argued that the Complaint and supporting affidavits group-plead speculative allegations against Eric Rudin and Gilbert which in and of itself makes this cause of action dismissible. Counsel then stated that Plaintiffs have to have a factual basis to their Complaint and cannot make repeated speculative or conclusory allegations on information and belief.

Counsel for Plaintiffs argued in opposition that whether Eric Rudin or Gilbert were acting within the scope of their employment at Rudin Inc. is ultimately a question of fact to be explored during discovery. Counsel further argued that Eric Rudin and Gilbert substantially assisted both Rudin Inc. and 1085 with regard to bad acts. Counsel further argued that "what [Eric] Rudin did here was based in sort of [a] personal animus" and that falsifying of documents falls outside the scope of legitimate employment. (Tr at 39, lines 23–24.)

Counsel for Defendants argued in reply that there is no allegation in the Complaint of personal animus that Eric Rudin was acting for any personal benefit. Counsel further argued that companies act through their employees and there is no allegation that Eric Rudin or Gilbert did anything outside of the scope of their employment.

IV. Paragraphs 44, 45, 51, 65 and 67 of the Complaint

Defendants argue in their papers that paragraphs 44, 45, 51, 65, and 67 of the Complaint (the "Paragraphs") make allegations concerning topics about which the parties settled pursuant to the Stipulation. Defendants further argue that, pursuant to the Stipulation, the Mannings agreed not to introduce such statements as evidence in future legal proceedings. Defendants then raise their concern that these paragraphs "could potentially come into evidence at a later point." (Pollack memo at 18.) Defendants argue that, as such, Plaintiffs are in express violation of the Stipulation and that the Paragraphs should be stricken from the Complaint.

Plaintiffs argue in their opposition papers that "[t]he factual underpinning set forth in [the] [P]aragraph[s] [] [is] necessary to establish the motivation for the actions of the Defendants" and "their personal animus relating to their interaction with the Mannings concerning [the topics in the paragraphs]." (Brickman opp memo at 21.) Plaintiffs further argue that the topics fit within the Carve-outs,

specifically the provision excepting "the Landlord's response and reaction to the Mannings' complaints and notices regarding th[e] noise [from apartment 7C]." (*Id.*) Plaintiffs further argue that motions to strike a pleading are disfavored.

Defendants argue in reply that the Paragraphs pertain to "'physical repairs that were allegedly required to be made by [1085] to the [Unit]' or 1085's response to those complaints." (Pollack reply memo at 12.) Defendants further argue that the parties agreed in the Stipulation to limit the evidence available if and when legal proceedings were commenced concerning the Carve-outs.

Defendants then argue that the law which disfavors striking a pleading is inapplicable here because Defendants are not seeking to strike scandalous or prejudicial material. Defendants reiterate their argument that the allegations in the Paragraphs "violate the express limitations in the [Stipulation]" and should be stricken. (*Id.* at 13.)

At oral argument, counsel for Defendants reiterated Defendants' argument that the Mannings agreed in the Stipulation not to use the allegations set forth in the Paragraphs.

Counsel for Plaintiffs argued in opposition that the Complaint is a filing and has not been introduced into evidence as contemplated by the Stipulation. Counsel further argued the Complaint provides background and that Defendants should seek to preclude allegations in the Paragraphs from coming into evidence at a later time. Counsel argued, in sum, that the Complaint is not a submission of evidence.

DISCUSSION

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201–02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703–704 [2d Dept 2008].) "It is axiomatic that, on a motion brought pursuant to CPLR 3211, our analysis of a plaintiff's claims is limited to the four corners of the pleading." (*Nomura Home Equity Loan, Inc. v Nomura Credit & Capital, Inc.*, 133 Ad3d 96, 105 [1st Dept 2015], *aff'd* —NE3d—, 2017 NY Slip Op 08622 [2017].) "'The criterion is whether the proponent of the pleading has a cause of action, not

whether he has stated one.'" (*Sigmund Strauss, Inc. v East 149th Realty Corp.*, 104 AD3d 401, 403 [1st Dept 2013], quoting *Leon v Martinez*, 84 NY2d 83, 88 [1994].) "Such a motion should be granted only where, even viewing the allegations as true, the plaintiff still cannot establish a cause of action." (*Kamen v Berkeley Co-op. Towers Section II Corp.*, 98 AD3d 1086, 1086 [2d Dept 2012], citing *Hartman v Morganstern*, 28 AD3d 423, 424 [2d Dept 2006]).

I. Attorney's Fees against 1085 and Rudin Inc.

The sixth cause of action alleges that 1085 and Rudin Inc. are liable to Plaintiffs for Plaintiffs' reasonable attorney's fees, costs, and disbursements incurred in the instant action, pursuant to the lease and to RPL § 234, upon a finding that that 1085 or Rudin Inc. defaulted on the lease. RPL § 234 provides that

> "Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease . . . there shall be implied in such lease a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease . . . , and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord . . . . Any waiver of this section shall be void as against public policy."

In the instant motion, Defendants have not moved to dismiss Plaintiffs' second cause of action, which is for breach of the implied warranty of habitability. The implied warranty of habitability exists in every residential lease in New York and ensures the residence is fit for human habitation and is not in a hazardous or dangerous condition. (RPL § 235-b; *see also Kent v 534 East 11th Street*, 80 AD3d 106, 112 [1st Dept 2010].)

Insofar as the Complaint alleges that 1085 and Rudin Inc. have defaulted on the lease by breaching the implied warranty of habitability, the lease provision regarding the recovery of attorney's fees remains in effect. Reference is made in paragraph 17 of the Stipulation to the attorney's fees provision in the lease as remaining operative with respect to a default on the Stipulation by either party.

The Court finds that the Stipulation does not release the parties from a cause of action under the lease for attorney's fees relating to a lease default. The implied warranty of habitability is part of every residential lease, and breaches thereof have been held to entitle tenants to an award of attorney's fees under a reciprocal right granted by RPL § 234. (*See Senfeld v I.S.T.A. Holding Co., Inc.*, 235 AD2d 345 [1st Dept 1997].) As such, the sixth cause of action states a cause of action for the recovery of attorney's fees under the lease and should not be dismissed.

II. Intentional Infliction of Emotional Distress against 1085 and Rudin Inc.

New York courts have adopted the Second Restatement of Torts' formulation of intentional infliction of emotional distress as subjecting to liability "[o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another." (Restatement [Second] of Torts § 46 [1] [1965]; *see Howell v New York Post Co., Inc.*, 81 NY2d 115, 121 [1993].) "The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress." (*Howell*, 81 NY2d at 121.) Critically, "[t]he first element—outrageous conduct—serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff's claim of severe emotional distress is genuine." (*Id.*)

"The requirements for demonstrating intentional infliction of emotional distress are 'rigorous, and difficult to satisfy.'" (*Rossetti v Ambulatory Surgery Center of Brooklyn, LLC*, 125 AD3d 548, 549 [1st Dept 2015], quoting *Howell*, 81 NY2d at 121.) "Indeed, of the intentional infliction of emotional distress claims considered by [the Court of Appeals], every one has failed because the alleged conduct was not sufficiently outrageous. Liability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." (*Howell*, 81 NY2d at 122.)

The Court, having reviewed every allegation in the Complaint and the supplemental affidavits provided in Plaintiffs' opposition papers, finds that the Complaint does not adequately allege extreme and outrageous conduct. (*See Kerzhner v G4S Government Solutions, Inc.*, 138 AD3d 564, 564 [1st Dept 2016]; *Suarez v Bakalchuk*, 66 AD3d 419, 419 [1st Dept 2009].) As such, the seventh cause of action fails to state a cause of action and is dismissed.

III. Aiding and Abetting Nuisance and Intentional Infliction of Emotional Distress against Eric Rudin and Gilbert

The elements for aiding and abetting are: (1) the existence of an underlying tort; (2) knowledge of this tort on the part of the aiding and abetting party; and (3) substantial assistance by the aiding and abetting party in achieving this tort. (*See Oster v Kirschner*, 77 AD3d 51 [1st Dept 2010]; *Starfield Offshore Leveraged Assets, Ltd. V Metropolitan Life Ins. Co.*, 64 AD3d 472 [1st Dept 2009].) Based upon the papers and oral argument, the Court finds that the actions of Eric Rudin and Gilbert as alleged are insufficient to show that either of them provided substantial assistance to 1085, Rudin Inc., or the Finkels in committing tortious acts. Further, the actions of Eric Rudin and Gilbert, if any, were done in the scope of their employment by Rudin Inc and not in an individual capacity. As such, the eighth cause of action fails to state a cause of action and is dismissed, and the Complaint is dismissed against individual defendants Eric Rudin and John J. Gilbert.

IV. Paragraphs 44, 45, 51, 65 and 67 of the Complaint

Defendants' motion to strike the Paragraphs from the Complaint is denied. The issues as to evidence that will be admissible at the time of trial shall be made by the trial judge and it will be for the trial court to determine if the offered evidence is barred by a prior stipulation signed by the parties.

V. The Ad Damnum Clause in Plaintiffs' Second Cause of Action

Plaintiffs' second cause of action, for breach of the implied warranty of habitability, seeks a minimum of $2,000,000 in damages.The rule in New York is that a party cannot recover more in a monetary judgment than is requested in the demand for relief in the complaint. (*See Michalowski v Ey*, 7 NY2d 71, 75 [1959].) Leave to increase the amount of relief requested in an ad damnum clause of a complaint is freely given in the absence of prejudice to the defendant. (*See Loomis v Civetta Corrino Constr. Corp.*, 54 NY2d 18 [1981].) "Prejudice, of course, is not found in the mere exposure of the defendant to greater liability. Instead, there must be some indication that the defendant has been hindered in the preparation of his case or has been prevented from taking some measure in support of his position." (*Id.* at 23.)

Here, Defendants are fully aware of the damages ceiling set by Plaintiffs (despite it being phrased in the Complaint as a minimum) and instead wish at this time on a motion to dismiss to litigate the appropriate measure of damages to be awarded for a breach of the implied warranty of habitability. Defendants will have the opportunity to argue the correct measure and amount of damages, if any, available to Plaintiffs for such a breach at the appropriate time. This is not an appropriate argument for a motion to dismiss or strike. Further, Defendants are not prejudiced by the inclusion of this ad damnum clause in the Complaint. Further, Plaintiffs are entitled to set an amount in the ad damnum clause, and the amount stated in the second cause of action in the Complaint is not unreasonable for the purposes of surviving a motion to dismiss or strike. As such, the ad damnum clause in the Complaint's second cause of action shall not be stricken.

VI. Plaintiff's Demands for Punitive Damages

As the Court of Appeals has stated,

> "[p]unitive damages are not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights. However, where the breach of contract also involves a fraud evincing a high degree of moral turpitude and demonstrating such wanto dishonesty as to imply a criminal indifference to civil obligations, punitive damages are recoverable if the conduct was aimed at the public generally. . . . [A] private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally."

(*Rocanova v Equitable Life Assur. Soc. of U.S.*, 85 NY2d 603, 613 [1994].)

Further, in a nuisance action, "[p]unitive damages may be awarded only where the defendant is guilty of quasicriminal conduct, utterly reckless behavior, a malicious intent to injure plaintiffs, or of gross, wanton or willful fraud." (*Gellman v Seawane Golf & Country Club, Inc.*, 24 AD3d 415, 418 [2d Dept 2005] [internal quotation marks and emendation omitted].)

Further, "punitive damages are not available for ordinary negligence. In order to recover punitive damages, a plaintiff must show, by clear,

unequivocal and convincing evidence, egregious and willful conduct that is morally culpable, or is actuated by evil and reprehensible motives." (*Munoz v Puretz*, 301 AD2d 382, 384 [1st Dept 2003] [internal citations and quotation marks omitted].)

In light of the foregoing, the Court finds it would be premature to strike Plaintiff's demands for punitive damages in the remaining applicable causes of action—nuisance, breach of the implied warranty of habitability, and negligence. (*See Minjak Co. v Randolph*, 140 AD2d 245 [1st Dept 1988].) The propriety of a punitive damages award in any or all of the remaining applicable causes of action may properly come before the court on a motion for summary judgment. As such, for the purposes of the instant motion to dismiss, Plaintiffs' demands for punitive damages survive in the first, second, and fifth causes of action of the Complaint.

CONCLUSION

Accordingly, it is

ORDERED that the motion by Defendants 1085 Park Avenue LLC, Rudin Management Company, Inc., William Rudin, Eric Rudin, and John J. Gilbert pursuant to CPLR 3211 to dismiss the third, fourth, sixth, seventh, and eighth causes of actions in the verified complaint of Plaintiffs Gregory Manning and Lauren Manning, individually and as legal guardians on behalf of their minor child, J.M. and pursuant to CPLR 3024 (b) to strike paragraphs 44, 45, 51, 65, 67, and 74–80 from the verified complaint, and to strike the damages demand in the second cause of action and all demands for punitive damages in the verified complaint is granted in part; and it is further

ORDERED that the third and fourth causes of action are dismissed with prejudice; and it is further

ORDERED that the seventh and eighth causes of action are dismissed; and it is further

ORDERED that paragraphs 74–80 are stricken from the verified complaint; and it is further

ORDERED that the action is dismissed with prejudice against William Rudin; and it is further

ORDERED that the action is dismissed against Eric Rudin and John J. Gilbert; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissals and that all future papers filed with the court bear the amended caption, as follows:

---X

GREGORY MANNING and LAUREN MANNING, individually and, as legal guardians on behalf of their minor child, J.M.

Plaintiffs,

- against -

1085 PARK AVENUE LLC and RUDIN MANAGEMENT COMPANY, INC.

Defendants.

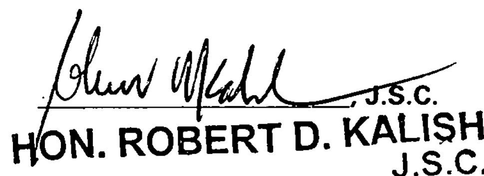
---X

And it is further

ORDERED that counsel for movant shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158M), who are directed to mark the court's records to reflect the change in the caption herein.

The foregoing constitutes the decision and order of the Court.

Dated: February 26, 2018
New York, New York



, J.S.C.

HON. ROBERT D. KALISH
J.S.C.

1. Check one:................................ ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check if appropriate:........ MOTION IS: ☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate:..................... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE