SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. MARGARET A. CHAN **PART** IAS MOTION 33EFM

Justice

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DR. JOON SONG,

Plaintiff,

- v -

MHM SPONSORS CO., MHM SPONSORS INC., CHESAPEAKE OWNERS CORP., FIRSTSERVICE RESIDENTIAL NEW YORK, INC., JOSHUA FRIEDMAN, KEITH ALLONE, THE OLNICK ORGANIZATION, INC., DENISE MARTORANA, ROGER ANCONA

Defendants.

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INDEX NO. 657460/2017

MOTION DATE

MOTION SEQ. NO. 003; 004

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 003) 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 106, 107, 108, 109, 110, 111, 112, 114

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104

were read on this motion to/for DISMISS.

Upon the foregoing documents, the motions to dismiss are granted.

Plaintiff, Dr. Joon Song, M.D., filed summons and complaint against defendants MHM Sponsors Co., MHM Sponsors Inc., The Olnick Org., Denise Martorana (Martorana) (collectively, the Commercial Landlord Defendants) and defendants Chesapeake Owners Corp., Firstservice Residential, Joshua Friedman, Keith Allone, and Roger Ancona (Ancona) (collectively, the Co-op Defendants) for injunctive and declaratory relief, and a variety of tort and contract claims relating to the installation of an emergency exit alarm that restricted access to the residential lobby from the commercial areas of 201 E. 28th Street in the City, State, and County of New York. Plaintiff also alleges that defendants' agents assaulted him and their actions constituted a tortious interference with his business relations with his patients.

Plaintiff's motion for a preliminary injunction, motion sequence #001, was denied from the bench after oral argument on June 6, 2018. Defendants separately move to dismiss plaintiff's remaining claims pursuant to CPLR 3211(a)(1) and (7), which plaintiff opposes, and defendants respectively reply. Furthermore, plaintiff cross-moves to amend his complaint to add Hampton Management Company, LLC as an additional defendant. The motions are consolidated and addressed together herein, as follows:

Facts

Plaintiff, Dr. Joon Song, M.D., entered a commercial sublease with MHM Sponsors Co. for an office suite (the premises) at 201 E. 28th Street, Suite 1B, New York, New York (the building) on December 22, 2015, for the purposes of operating a gynecological practice (NYSCEF Doc. No. 1 – Complaint at ¶12). The Co-op defendants lease the professional units to MHM Sponsors Co. (MHM), the building's commercial landlord, who subleases the units to professional tenants. The sublease only demises Suite 1B to plaintiff and explicitly states that the owner and MHM maintains full control over public entrances, passageways, doors, doorways, corridors, and other public areas of the building (NYSCEF Doc. No. 11 – Lease Agreement at §20, and Rider at §37(C)).

Plaintiff states that upon moving into the premises in March 2016, the building was under construction and that the construction created "deplorable conditions" (Complaint at ¶¶ 38-40). Construction allegedly continued through February 23, 2017, on which date plaintiff complained to defendant Ancona, the residential manager (*id.* at ¶ 43). Plaintiff alleges that Ancona screamed at him and slammed a door in his face (*id.* at ¶ 45).

Plaintiff also contends that around July 2017, defendants prevented him from installing Verizon internet service by demanding that Verizon produce a certificate of insurance before starting any work (*id.* at ¶¶ 48, 52). Plaintiff alleges that the internet installation was further delayed causing plaintiff to close his office for four days because Ancona went on vacation during this time (*id.* at ¶ 56).

Plaintiff claims that defendants escalated their "calculated pattern of harassment" in September 2017, when they installed an alarm on the emergency exit door that separates the building's commercial units from its residential lobby (*id.* at ¶63). Plaintiff used this doorway for "the transportation of heavy medical machinery, waste disposal, and...for medical emergencies" (*id.* at ¶ 65). Plaintiff complained to defendant Martorana, the commercial landlord manager, about the door and alleges that she said in a phone conversation with plaintiff that plaintiff was "very hard to communicate with", which plaintiff perceived as a derogatory reference to his ethnicity (*id.* at ¶ 70).

Without providing the express language of the statements, plaintiff asserts that defendants made racially discriminatory statements on many occasions at plaintiff, his employees, and patients based upon their Asian background (*id.* at ¶69). Plaintiff claims that these discriminatory remarks have scared away patients.

Discussion

In deciding a motion to dismiss pursuant to CPLR 3211(a), the court must liberally construe the pleading, accept the alleged facts as true, and accord the non-

moving party the benefit of every possible favorable inference (*see Leon v Martinez*, 84 NY2d 83, 87 [1994]; *see also Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570 [2005]). "The court must determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon*, 84 NY2d at 88). However, the court need not accept "conclusory allegations of fact or law not supported by allegations of specific fact" or those that are contradicted by documentary evidence (*Wilson v Tully*, 43 AD2d 229, 234 [1st Dept 1998]).

Breach of Quiet Enjoyment Claim (Fourth Cause of Action)[1]

Plaintiff claims that defendants breached the covenant of quiet enjoyment by prohibiting plaintiff's use of the emergency door, forcing plaintiff to close his business for four days due to internet installation procedures, and subjecting plaintiff to construction noise and unpleasant odors. Plaintiff's claim as to the Co-op defendants and the Commercial Landlord defendants fails.

As to the Co-op defendants, the quiet enjoyment claim lies in contract. The Co-op defendants are not in privity of contract with plaintiff. There can be no breach of contract when there is no agreement between the parties. Thus, plaintiff cannot maintain a breach of quiet enjoyment claim against a non-contracting party (*see Wright v Catcendix Corp.*, 248 AD2d 186 [1st Dept 1998] ["plaintiff, as subtenants, have no cause of action against defendant cooperative corporation... for constructive eviction, breach of the lease agreement, [or] breach of the implied covenant of quiet enjoyment... since between them and the cooperative, there was neither a contractual agreement nor a landlord-tenant relationship"]).

As to the Commercial Landlord defendants, to establish a breach of the covenant of quiet enjoyment, plaintiff must show actual or constructive eviction (*see Dave Herstein Co. v Columbia Pictures Corp.*, 4 NY2d 117, 121 [1958]). For there "to be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises." And the tenant "must have been deprived of something to which he was entitled under or by virtue of the lease" (*Barash v Penn. Terminal Real Estate Corp.*, 26 NY2d 77, 82-83 [1970]). Actual eviction occurs when the landlord wrongfully ousts the tenant from physical possession of the leased premises and there must be physical expulsion or exclusion, which is not claimed here (*id.*). Alternatively, constructive eviction occurs when the landlord's wrongful acts deprive the tenant of the beneficial use and enjoyment of the premises and the tenant abandons possession of the premises (*id.*). Again, there was no abandonment on this basis.

One key aspect in plaintiff's breach of quiet enjoyment claim is defendants

[1] The court will address plaintiff's fourth cause of action first because the breach of quiet enjoyment claim is the centerpiece of plaintiff's complaint. Plaintiff's first cause of action was for injunctive relief and as the court has already resolved that matter, it is not included in this decision and order.

barring him from using the emergency exit for his business purposes. The lease agreement is clear that the demised premises includes only Suite 1B, and the landlord maintains control over all doors and doorways (NYSCEF Doc. No. 11 – Lease Agreement at §20). The lease gives plaintiff no right of control over the emergency door or access to the residential premises. Plaintiff cannot be excluded from premises to which he is not entitled under the lease (*see Barash*, 26 NY2d at 82-83). Plaintiff's contention that he was inconvenienced by having to use another door that is also used by all the commercial units does not constitute an eviction. Inconvenience caused by "interference with ingress and egress does not amount to partial actual eviction" (*Cut-Outs, Inc. v Man Yun Real Estate Corp.*, 286 AD2d 258, 261 [1st Dept 2001]). By requiring plaintiff to use the entrance way for all commercial tenants, rather than plaintiff's preferred emergency exit, defendants did not breach the covenant of quiet enjoyment.

With respect to plaintiff's allegation that defendant frustrated his internet installation attempts, it is noted that plaintiff failed to follow the procedures outlined in his lease agreement regarding installation procedures. The lease requires that for any installation activity, such as drilling a hole in the wall, plaintiff must first obtain MHM's approval and provide it with all required insurance certificates (NYSCEF Doc. No. 11 at §44). Plaintiff failed to seek approval for the installation. Thus, defendants were within their rights under the lease to delay the installation. Any injury plaintiff suffered in closing the office for four days was due to his own failure to comply with the lease and not a wrongful act by the landlord (*Barash*, 26 NY2d at 82-83).

Finally, plaintiff alleged that defendants subjected him to construction noise and unpleasant odors. Despite this problem, plaintiff did not abandon the premises, which is a prerequisite for a valid quiet enjoyment claim based on constructive eviction (*see 127 Rest. Corp. v Rose Realty Group, LLC*, 19 AD3d 172 [1st Dept 2005] ["plaintiff's claims of partial actual eviction, constructive eviction and breach of the covenant of quiet enjoyment are not viable since the record discloses that at all relevant times plaintiff remained in full possession of the leased premises"]). Thus, this allegation also fails.

Tortious Interference with Business Relations Claim (Second Cause of Action)

To make a valid claim for tortious interference with business relations, plaintiff must allege that "(a) the plaintiff had business relations with a third party; (b) the defendant interfered with those business relations; (c) the defendant acted with the sole purpose of harming the plaintiff or by using unlawful means; and (d) there was resulting injury to the business relationship" (*Thome v Alexander & Louisa Calder Found.*, 70 AD3d 88, 108 [1st Dept 2009]).

Here, the allegations are the installation of the emergency exit door, the delay with the internet installation, the assault on plaintiff by defendants Ancona and Martorana, and the discriminatory animus against plaintiff's Asian patients. With

respect to "unlawful means", defendant's conduct "must amount to a crime or independent tort" and "[c]onduct that is not criminal or tortious will generally be 'lawful' and thus insufficiently 'culpable' to create liability for interference" (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]).

The installation of the emergency exit door is not directed solely at harming plaintiff because it equally affects all commercial tenants. Defendants' actions requiring plaintiff to follow installation procedures were lawful as outlined in the lease. The alleged assault claims are improperly plead, as will be addressed in the following section. Finally, while plaintiff claim that the defendants have "frightened away numerous patients" and employees (Complaint, Second Cause of Action ¶25), he does not provide any allegation of interaction between his patients or employees and the defendants that would suggest such interference.

In any event, while plaintiff's allegations are accepted as true for this motion, plaintiff still fails to make out a claim for tortious interference because plaintiff has not alleged a resulting loss of business. This alone is fatal to plaintiff's claim since plaintiff cannot make out the fourth prong for tortious interference (*see Aramid Entertainment Fund Ltd. v Wimbledon Fin. Master Fund, Ltd.*, 105 AD3d 682 [1st Dept 2013]). In sum, plaintiff did not demonstrate that defendants used any unlawful means to interfere with plaintiff's business relations, nor did plaintiff establish that any of the defendants' actions were taken with the "sole purpose of harming the plaintiff or by using unlawful means" (*Thome,* 70 AD3d at 108) or that he sustained a loss of business. As such, plaintiff's claim of tortious interference is dismissed.

Assault Claim (Third Cause of Action)

Plaintiff alleges that defendants Ancona and Martorana put plaintiff in fear that he would be physically battered: Ancona yelled at him and slammed a door in his face; and Martorana sent him an email stating "[Y]ou are ****[2] and very hard to communicate with. That's why I am writing in email [sic]. Unfortunately you do not have any legal right in the building. You need to follow whatever building changes."

These allegations fail to make out a valid assault claim. Civil assault is the intentional placing of another person in fear of an imminent battery (*see Charkhy v Altman*, 252 AD2d 413, 414 [1st Dept 1998]). Mere words, without a display of violence or a threatening gesture, are insufficient to demonstrate assault (*see Okoli v Paul Hastings LLP*, 117 AD3d 539, 540 [1st Dept 2014] ["[t]he physical conduct alleged by plaintiff, which amounts to finger pointing and generalized yelling in the context of a heated deposition... is not the type of menacing conduct that may give rise to a reasonable apprehension of imminent harmful conduct needed to state an actionable claim of assault"]).

[2] The "****" is included in the original, without further explanation.

The "assault" allegations do not give rise to the inference that defendants intentionally placed plaintiff in imminent fear of physical harm. Slamming a door, while impolite, removes the imminent fear of harm by way of placing a physical barrier – the door – between the two parties (*see Holtz v Wildenstein & Co.*, 261 AD2d 336 [1st Dept 1999] ["[t]o sustain a claim for assault there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful contact"]). And, with the email, "mere words, without more, cannot constitute an assault claim (*see Okoli*, 117 AD3d at 540). As such, no claim for assault can be sustained against Ancona or Martorana.

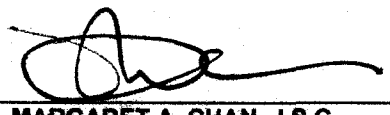
Declaratory Judgment Claim (Fifth Cause of Action)

Plaintiff seeks to have the lease declared void ab initio because plaintiff claims that the landlord does not exist (Complaint, Fifth Cause of Action at ¶42). Plaintiff's gripe with MHM's corporate registration is not a valid reason to void the lease. MHM is operational and, therefore plaintiff's request to have the lease agreement deemed void is denied.

Accordingly, it is hereby ORDERED that Defendants' respective motions to dismiss (motion sequence #003 and #004) are granted, and plaintiff's complaint is dismissed, it is further

ORDERED that Plaintiff's cross-motion to amend his complaint to add Hampton Management is denied as academic as the complaint is being dismissed. The Clerk of the Court is directed to enter judgment in favor defendants as written.

This constitutes the decision and order of the court.



7/16/2018
DATE

MARGARET A. CHAN, J.S.C.
MARGARET A. CHAN J.S.C.

CHECK ONE:	X	CASE DISPOSED			NON-FINAL DISPOSITION		
	X	GRANTED		DENIED	GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE