Cetin v Sung Jin Choe
2019 NY Slip Op 30526(U)
March 4, 2019
Supreme Court, New York County
Docket Number: 156161/17
Judge: Robert D. Kalish

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29
----------X
ARIN CETIN,

Plaintiff,

-against-

Index No. 156161/17

SUNG JIN CHOE, EUN CHONG KIM, RIVER 2 RIVER REALTY, INC., DANIEL SCOTT NEIDITCH, GAURAV CHANDHOK, RAKHEE SACHDEVA, and THE BOARD OF MANAGERS OF THE ATELIER CONDOMINIUM,

Defendants. Seq. Nos. 002 & 003

----------X

KALISH, J.:

Motion sequence numbers 002 and 003 are consolidated for disposition.

In this action seeking damages for an unlawful eviction, defendants Daniel Scott Neiditch (Neiditch) and the Board of Managers of the Atelier Condominium (the Board) (together, the Board defendants) move pursuant to CPLR 3211 (a) (5) and (7) to dismiss the amended complaint against them on the grounds that the wrongful eviction claim is time-barred and the remaining claims fail to state a cause of action (motion sequence number 002).

Defendants Guarav Chandhok (Chandhok) and Rakhee Sachdeva (Sachdeva) cross-move pursuant to CPLR 3211 (a) (7), to dismiss the amended complaint for failure to state a cause of action.

Defendant River 2 River Realty, Inc. (River 2 River) moves pursuant to CPLR 3211 to dismiss the amended complaint as against it (motion sequence number 003).

Plaintiff Arin Cetin cross-moves, pursuant to CPLR 3214 (b), for an order lifting the automatic stay of disclosure and scheduling a preliminary conference.

BACKGROUND

The following facts are taken from the amended complaint. Plaintiff alleges that he is a citizen and resident of Turkey (amended complaint, ¶ 1). The Atelier Condominium is a residential condominium located at 635 West 42nd Street in Manhattan (*id.*, ¶ 6). Neiditch is the president of River 2 River and the president of the Board of the Atelier Condominium (*id.*, ¶ 4). River 2 River is the exclusive sales and leasing agent for the Atelier Condominium (*id.*, ¶ 9).

Before May 18, 2016, defendants Sung Jin Choe (Choe) and Eun Chong Kim (Kim) owned unit 15M within the Atelier Condominium (*id.*, ¶ 7). On May 18, 2016, Choe and Kim sold the apartment to Chandhok and Sachdeva (*id.*, ¶ 8). Chandhok and Sachdeva currently own and reside in the apartment (*id.*).

In or about January 2008, Choe and Kim leased the apartment to plaintiff (*id.*, ¶ 11). At the time, plaintiff was living in the United States on a temporary work visa (*id.*, ¶ 12). According to the amended complaint, the lease expired by its terms in January 2009 (*id.*, ¶ 13). In subsequent years, plaintiff, Choe, and Kim agreed in a series of email communications to extend the lease and that Cetin would remain in the apartment for the coming year (*id.*). Plaintiff lived in the apartment and paid rent to Choe and Kim through February 2016 (*id.*, ¶ 14). In February 2016, plaintiff's fiancée, nonparty Basak Sahin Cetin (Basak), stayed in the apartment as plaintiff's guest, lived there temporarily, and kept her belongings in the apartment (*id.*, ¶ 15).

On February 25, 2016, while plaintiff and Basak were temporarily in Turkey preparing to get married, Neiditch, the president of River 2 River and the president of the Board, using a River 2 River email account, emailed plaintiff and informed him that:

> "The unit 15M has been sold and is closing on April 26, 2016. As a courtesy even though you are a month to month tenant, we are giving a 60 day notice for you to vacate the unit. Feel free to reach out to me at the office below if you have any questions"

(*id.*, ¶ 16).

On February 29, 2016, Choe emailed plaintiff and stated that "I am selling my unit and have to close middle of APRIL. Would you please vacate till end of April" (*id.*, ¶ 17).

On March 2, 2016, plaintiff responded to Choe, copying Neiditch and two other individuals, stating that:

> "I hope this email finds you well. Congratulations on the sale. I am in the process of getting married outside the U.S. as this came as a surprise. It would be ideal if I can have a little more time since finding a new home may take time while I prepare for the wedding and the rest. I have very little time to dedicate searching for an apt between all of this. If I find something in the meantime, I will let you know and vacate the apartment.
> I hope you understand. I look forward to hearing from you soon"

(*id.*, ¶ 18).

Neiditch responded to plaintiff by email, "We gave a full 2 months, April 30 is the final day. That is plenty of time" (*id.*, ¶ 19).

Plaintiff replied, in another email, explaining that he did not have enough time to find a new place to live and vacate the apartment, since he was getting married overseas (*id.*, ¶ 20). Plaintiff asked for more time and for Neiditch to "relax" (*id.*).

In an email dated March 2, 2016, Neiditch responded to plaintiff, "I am very relaxed. I guess time will tell what happens. I have a good feeling you will have a change of heart and be out by April 30" (*id.*, ¶ 21).

Plaintiff and plaintiff's friend, nonparty Talat Ulutas (Ulutas), who was in the United States, spoke with Choe over the telephone, and Choe agreed that plaintiff could stay in the apartment through the end of May 2016 (*id.*, ¶ 22).

At some point, Choe commenced a landlord/tenant proceeding against plaintiff, under the caption *Sung Jin Choe v Arin Cetin*, L&T Index No. 60909/16 (*id.*, ¶ 23). However, the Housing Court dismissed that proceeding for Choe's failure to prosecute (*id.*).

On May 18, 2016, Choe and Kim sold the apartment to Chandhok and Sachdeva (*id.*, ¶ 24). On May 28, 2016, while plaintiff and Basak were still in Turkey, at plaintiff's direction and with plaintiff's keys, Ulutas attempted to enter the apartment (*id.*, ¶ 25). Ulutas was unable to enter the apartment because the locks had been changed; Chandhok and Sachdeva had taken possession of the apartment (*id.*, ¶ 26).

Plaintiff alleges that all his and Basak's property that was inside the apartment is now gone (*id.*, ¶ 27). Plaintiff has inquired about their belongings but defendants have not provided any information as to their whereabouts (*id.*, ¶ 28). Their lost belongings allegedly include: $60,000 in carpets; $10,000 in Swiss watches; $12,500 in furniture; $5,000 in camping gear; $1,000 in earrings; books; a CD collection; trophies from when plaintiff was in college; kitchenware; paintings; silver objects that plaintiff brought from Turkey; drums from Turkey and Brazil; souvenir objects from the Dominican Republic, Mexico, Haiti, and Spain; between $2,000 and $3,000 in cash; and other items such as their clothes and television (*id.*, ¶ 29). In addition, plaintiff alleges that an irreplaceable pair of antique cufflinks given to plaintiff by his father has been lost (*id.*, ¶ 30).

Plaintiff admits that he does not know the exact role that each of the defendants played in the ouster from the apartment (*id.*, ¶ 32). Plaintiff alleges, "[u]pon information and belief, River 2 River, the Board, and/or Neiditch executed the eviction on behalf of Choe and Kim and/or Chandhok and Sachdeva, using workers employed by River 2 River, the Board, and/or Neiditch" (*id.*, ¶ 37).

On May 1, 2017, plaintiff commenced a lawsuit pertaining to the same events against Choe, Kim, River 2 River, Chandhok, and Sachdeva in the United States District Court for the Southern District of New York, captioned *Arin Cetin v Sung Jin Choe et al.*, Case No. 17-CV-3155 (*id.*, ¶¶ 39, 41). On June 23, 2017, the federal court dismissed the case for lack of subject matter jurisdiction (*id.*, ¶ 40). Plaintiff alleges that Neiditch and the Board were not named in the federal action but were aware of it at the time it was commenced (*id.*, ¶ 41).

On July 10, 2017, plaintiff commenced this action against Choe, Kim, Chandhok, Sachdeva, Neiditch, River 2 River, and the Board. The Board defendants made a motion to dismiss the complaint, arguing that they had not been properly served. Plaintiff then commenced another action styled *Cetin v River 2 River Realty, Inc.*, Index No. 160447/17 (Sup Ct, NY County).

Plaintiff then moved for an order allowing service of the summons and complaint in the second action on the Board defendants by serving their attorneys. The court granted the motion on December 20, 2017.

By so-ordered stipulation dated January 25, 2018, the parties stipulated to the consolidation of the second action into the first action and to the filing of an amended complaint.

The amended complaint asserts five causes of action. The first cause of action, directed at Choe and Kim, is for breach of contract and seeks not less than $100,000 (*id.*, ¶¶ 42-45; wherefore clause, ¶ 1). The second cause of action, directed at all defendants, is for unlawful eviction and requests damages, including treble damages under RPAPL 853, not less than $300,000 (*id.*, ¶¶ 48-52; wherefore clause, ¶ 2). The third through fifth causes of action, also directed at all defendants, are for negligence, conversion, and trespass, respectively, and seek damages, including punitive damages, in an amount not less than $300,000 (*id.*, ¶¶ 53-66;

wherefore clause, ¶ 3). In addition, plaintiff seeks interest, costs and disbursements, and attorneys' fees (*id.*, wherefore clause, ¶ 4).

DISCUSSION

Standard of Review

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff[] the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "'factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration'" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006], *affd* 9 NY3d 836 [2007], *cert denied* 552 US 1257 [2008]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6 [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review "is whether the proponent of the pleading has a cause of action, not whether he has stated one" (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks and citation omitted]). This entails an inquiry into whether a material fact claimed by the pleader is a "fact at all" and whether a "significant dispute exists regarding it" (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see also Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008]).

Dismissal is warranted pursuant to CPLR 3211 (a) (1) where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]).

> "'On a motion to dismiss a cause of action pursuant to CPLR 3211 (a) (5) on the ground that it is barred by the statute of limitations, a defendant bears the initial burden of establishing, prima facie, that the time in which to sue has expired. In considering the motion, a court must take the allegations in the complaint as true and resolve all inferences in favor of the plaintiff'"

(*Benn v Benn*, 82 AD3d 548, 548 [1st Dept 2011], quoting *Island ADC, Inc. v Baldassano Architectural Group, P.C.*, 49 AD3d 815, 816 [2d Dept 2008]). "To meet its burden, the defendant must establish, inter alia, when the plaintiff's cause of action accrued" (*Lebedev v Blavatnik*, 144 AD3d 24, 28 [1st Dept 2016] [internal quotation marks and citation omitted]). "If the defendant meets that burden, then the burden shifts to the plaintiff 'to aver evidentiary facts establishing that the cause of action was timely or to raise a question of fact as to whether the cause of action was timely'" (*Lake v New York Hosp. Med. Ctr. of Queens*, 119 AD3d 843, 844 [2d Dept 2014], quoting *Lessoff v 26 Ct. St. Assoc., LLC*, 58 AD3d 610, 611 [2d Dept 2009]). "The plaintiff has the burden of establishing that the statute of limitations has not expired, that it is tolled, or that an exception to the statute of limitations applies" (*Lake*, 119 AD3d at 844).

I. The Board Defendants' Motion to Dismiss (Motion Sequence Number 002)

A. Wrongful Eviction (Second Cause of Action)

The Board defendants argue that plaintiff's unlawful eviction claim is untimely. According to the Board defendants, this claim is subject to a one-year statute of limitations. The Board defendants further argue that, because plaintiff alleges that his landlords sold his apartment on May 18, 2016, and that his friend tried to enter the apartment 10 days later but

could not do so because someone had changed the locks, the latest possible accrual date is May 28, 2016.

Accordingly, the Board defendants argue that the statute of limitations expired no later than May 28, 2017. Plaintiff did not sue the Board defendants until July 10, 2017, more than a month after the statute of limitations expired. Additionally, the Board defendants maintain that CPLR 205 (a) does not extend the statute of limitations in this case.

Plaintiff counters that his unlawful eviction claim is timely pursuant to CPLR 205 (a) because he commenced the federal action on May 1, 2017, and, therefore, this action is deemed commenced as of that date (which is less than one year from May 28, 2016). According to plaintiff, the Board defendants were then served on December 20, 2017, less than six months after the federal action was dismissed. Moreover, plaintiff contends that his unlawful eviction claim relates back to the federal action. Plaintiff argues that: (1) this action is based on the same occurrence as the federal action; (2) the Board defendants are united in interest with River 2 River and Neiditch; and (3) the Board defendants knew that they should have been named in the federal action.

"'Wrongful eviction' claims are governed by the one-year Statute of Limitations applicable to intentional torts" (*Gold v Schuster*, 264 AD2d 547, 549 [1st Dept 1999]; *see also PK Rest., LLC v Lifshutz*, 138 AD3d 434, 436-437 [1st Dept 2016]). "Generally, courts have held that the Statute of Limitations begins to run at such time that it is reasonably certain that the tenant has been unequivocally removed with at least the implicit denial of any right to return" (*Gold*, 264 AD2d at 549).

Here, plaintiff alleges that his landlords sold his apartment on May 18, 2016 (amended complaint, ¶ 24). According to the amended complaint, 10 days later, his friend tried to enter the

apartment but could not enter the apartment because someone had changed the locks (*id.*, ¶ 25). As a result, the Board defendants have established that the latest possible accrual date for plaintiff's wrongful eviction claim is May 28, 2016. Plaintiff did not commence this action against the Board defendants until July 10, 2017 (NY St Cts Electronic Filing [NYSCEF] Doc No. 1), i.e., more than one year after May 28, 2016. Therefore, the Board defendants have established, prima facie, that the time for plaintiff to sue on his wrongful eviction claim has expired (*see Benn*, 82 AD3d at 548).

Thus, the burden shifts to plaintiff to "aver evidentiary facts establishing that the cause of action was timely or to raise a question of fact as to whether the cause of action was timely" (*Lake*, 119 AD3d at 844).

CPLR 205 (a) provides as follows:

> "a) New action by plaintiff. If an action is timely commenced and is terminated in any other manner than by a voluntary discontinuance, a failure to obtain personal jurisdiction over the defendant, . . . the plaintiff . . . may commence a new action upon the same transaction or occurrence or series of transactions or occurrences within six months after the termination provided that the new action would have been timely commenced at the time of commencement of the prior action and that service upon defendant is effected within such six-month period."

"The statute's 'broad and liberal purpose is not to be frittered away by any narrow construction'" (*Malay v City of Syracuse*, 25 NY3d 323, 327 [2015], quoting *Gaines v City of New York*, 215 NY 533, 539 [1915]).

If a plaintiff fails to name a party as a defendant in the prior action, the extension afforded by CPLR 205 (a) is unavailable in a subsequent action[1] (*see Cazsador v Greene Cent.*

[1]The Board defendants asserted at oral argument that the federal action was voluntarily discontinued (oral argument tr at 7). However, plaintiff submits a conditional order dismissing the case dated May 5, 2017 and a subsequent order dated June 23, 2017, which dismissed the case, without prejudice (Meier affirmation in opposition, exhibits 4, 7).

School, 243 AD2d 867, 868-869 [3d Dept 1997], *lv denied* 91 NY2d 812 [1998] ["because plaintiff never obtained jurisdiction over Ward's in the prior action (and in fact made no effort to interpose a claim against that party), CPLR 205 (a) has no application to this case"]; *see also Branch v Community Coll. of the County of Sullivan*, 148 AD3d 1410, 1412 n [3d Dept 2017], *lv denied* 29 NY3d 911 [2017] [same]; *Rayo v State of New York*, 882 F Supp 37, 39 [ND NY 1995] ["it is plain that the six month extension applies only if the original court had personal jurisdiction over the same defendant as in the second case"]).

Here, plaintiff "never obtained jurisdiction over [the Board defendants] in the prior action (and in fact made no effort to interpose a claim against [those parties])" (*Cazsador*, 243 AD3d at 868). Therefore, CPLR 205 (a) does not apply here.[2] Thus, the court must consider whether the relation-back doctrine applies.

Under the relation-back doctrine, new parties may be joined as parties after the statute of limitations has expired against them if the plaintiff establishes the following three elements: (1) "the claims against the new defendants arise from the same conduct, transaction, or occurrence as the claims against the original defendants"; (2) "the new defendants are 'united in interest' . . . with the original defendants, and will not suffer prejudice due to lack of notice"; and (3) "the new defendants knew or should have known that, but for the plaintiff's mistake, they would have been included as defendants" (*Higgins v City of New York*, 144 AD3d 511, 512-513 [1st Dept 2016], quoting CPLR 203 [b], [c]).

[2]Although plaintiff relies on *Wells Fargo Bank, N.A. v Eitari* (148 AD3d 193, 195 [2d Dept 2017], *appeal dismissed* 29 NY3d 1023 [2017]), that case held that "a plaintiff in a mortgage foreclosure action which meets all of the other requirements of the statute is entitled to the benefit of CPLR 205 (a) where . . . it is the successor in interest as the current holder of the note."

With respect to the second element – unity of interest – "[t]he classic test" is that "that they stand or fall together and that judgment against one will similarly affect the other" (*Vanderburg v Brodman*, 231 AD2d 146, 147-148 [1st Dept 1997] [internal quotation marks and citation omitted]). "[U]nity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (*Higgins*, 144 AD3d at 513). "[T]he question of unity of interest is to be determined from an examination of (1) the jural relationship of the parties whose interests are said to be united and (2) the nature of the claim asserted against them by the plaintiff" (*LeBlanc v Skinner*, 103 AD3d 202, 210 [2d Dept 2012] [internal quotation marks and citation omitted]).

Plaintiff has not established that the Board may be held vicariously liable for River 2 River's actions or vice versa. Notwithstanding plaintiff's allegation that Neiditch is the president of River 2 River and also the president of the Board (amended complaint, ¶ 4), "having common . . . officers is not dispositive on the issue of unity of interest and such unity of interest will not be found unless there is some relationship between the parties giving rise to the vicarious liability of one for the conduct of the other" (*Valmon v 4 M & M Corp.*, 291 AD2d 343, 344 [1st Dept 2002], *lv denied* 98 NY2d 611 [2002]; *see also Mercer v 203 E. 72nd St. Corp.*, 300 AD2d 105, 106 [1st Dept 2002]). In addition, a judgment against one would not affect the other.

Similarly, plaintiff has not established that Neiditch may be held vicariously liable for River 2 River's actions or vice versa. There is not a showing either that the distinction has been blurred between the two or that Neiditch could be held vicariously liable for the acts of River 2 River. Moreover, although plaintiff argues that the Board may be held liable for Neiditch's acts, Neiditch was not a defendant in the federal action. Therefore, plaintiff's reliance on the relation-back doctrine is unavailing.

Although plaintiff relies on *DeLuca v Baybridge at Bayside Condominium I* (5 AD3d 533 [2d Dept 2004]), the court finds this case to be distinguishable. There, the Second Department held that the plaintiff's causes of action against a condominium and managing agent were not time-barred because the plaintiff was entitled to rely on the relation-back doctrine (*id.* at 534-535). The court held, among other things, that the evidence indicated that the defendants were united in interest (*id.* at 535). The plaintiff submitted documents indicating that the same person signed letters on behalf of both the condominium and the managing agent, and that the managing agent's name was printed on a check issued by the condominium (*id.* at 534).

DeLuca was subsequently cited for the proposition that two entities were united in interest where the two entities, "intentionally or not, often blurred the distinction between them" (*Uddin v A.T.A. Constr. Corp.*, 164 AD3d 1400, 1401 [2d Dept 2018] [LLC and alleged owner were united in interest where two brothers jointly operated both LLC and alleged owner, and LLC had been designated in condominium declaration to receive service of process on behalf of alleged owner], citing *Donovan v All-Weld Prods. Corp.*, 34 AD3d 257, 257 [1st Dept 2006] [claims against subsidiary related back to claims asserted against parent corporation, for statute of limitations purposes, "where two companies, intentionally or not, often blurred the distinction between them," and parent company produced an employee of subsidiary for deposition]). In this case, however, plaintiff has not demonstrated that the Board and River 2 River "intentionally or not, often blurred the distinction between them" (*id.*).

Accordingly, plaintiff's wrongful eviction claims against the Board and Neiditch are time-barred and must be dismissed.

B. Negligence, Conversion and Trespass (Third, Fourth and Fifth Causes of Action)

The Board defendants argue that plaintiff's negligence, conversion, and trespass claims are wholly based upon and subsumed into the untimely wrongful eviction claim.

To establish a claim of negligence, the plaintiff must show that the defendant owed a duty of care to the plaintiff, the breach of that duty, that such breach was a proximate cause of the resulting injury, and actual loss, harm or damage (*Baptiste v New York City Tr. Auth.*, 28 AD3d 385, 386 [1st Dept 2006]).

"A conversion takes place when someone, intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]). "Two key elements of conversion are (1) plaintiff's possessory right or interest in the property and (2) defendant's dominion over the property or interference with it, in derogation of plaintiff's rights" (*id.* at 50).

"Trespass is the invasion of a person's right to exclusive possession of his [or her] land" (*Berenger v 261 W. LLC*, 93 AD3d 175, 181 [1st Dept 2012]). The necessary elements to prove trespass to land are: (1) intent or recklessness, (2) entry by a person or thing upon land, and (3) in the actual or constructive possession of another (*Long Is. Gynecological Servs. v Murphy*, 298 AD2d 504, 504 [2d Dept 2002]). Cases have held that a wrongful eviction is also a trespass (*see North Main St. Bagel Corp. v Duncan*, 6 AD3d 590, 592 [2d Dept 2004]; *Long Is. Airports Limousine Serv. Corp. v Northwest Airlines*, 124 AD2d 711, 714 [2d Dept 1986]).

However, more recent cases hold, in the specific context of a wrongful eviction action, that plaintiff's conversion, negligence, and trespass claims "'do not constitute cognizable causes of action but merely state demands for damages to be considered as elements of the statutory

cause of action [wrongful eviction] upon which summary relief is sought'" (*Suarez v Axelrod Fingerhut & Dennis*, 142 AD3d 819, 820 [1st Dept 2016], quoting *Mayes v UVI Holdings*, 280 AD2d 153, 161 [1st Dept 2001]; *accord Sunset Café, Inc. v Mett's Surf & Sports Corp.*, 103 AD3d 707, 709 [2d Dept 2013]; *Maracina v Shirrmeister*, 105 AD2d 672, 673 [1st Dept 1984]). As noted by the First Department in *Mayes*, "[i]n an action for wrongful eviction, courts have permitted recovery of damages for loss of property" (*Mayes*, 280 AD2d at 161, citing *H & P Research v Liza Realty Corp.*, 943 F Supp 328, 330 [SD NY 1996] ["Damages for the removal, destruction or discarding of property in the course of an unlawful eviction are included under RPAPL § 853"]).

Moreover, courts have dismissed causes of action as duplicative of time-barred causes of action, where they essentially repeat the untimely causes of action (*see e.g. Oasis Sportswear, Inc. v Rego*, 103 AD3d 569, 569 [1st Dept 2013] ["The court correctly dismissed the breach of contract claim as duplicative of the time-barred negligence claim, which was essentially a professional malpractice claim"]; *Stefatos v Frezza*, 95 AD3d 787, 787 [1st Dept 2012] ["The fraud and misrepresentation and breach of fiduciary duty claims are duplicative of the [untimely] breach of contract claim"]; *Murray Hill Invs. v Parker Chapin Flattau & Klimpl*, 305 AD2d 228, 229 [1st Dept 2003] ["The fraud and fiduciary breach causes of action were properly dismissed as duplicative of the untimely and insufficient malpractice claim"]).[3]

[3]Plaintiff argues that the proper time for the Board defendants to argue that his causes of action are improperly duplicative is at the summary judgment stage. However, CPLR 3211 (a) (7) permits a party to move to dismiss "one or more causes of action asserted against [that party] . . . on the ground that . . . the pleading fails to state a cause of action," and courts have dismissed similar causes of action in a wrongful eviction action on a motion to dismiss (*see e.g. Sunset Café, Inc.*, 103 AD3d at 709 [dismissing cause of action alleging loss of property resulting from alleged wrongful ejection on motion to dismiss]).

Plaintiff requests that the court deny the Board defendants' motion pursuant to CPLR 3211 (d).

CPLR 3211 (d) provides that:

> "[s]hould it appear from affidavits submitted in opposition to a motion made under subdivision (a) or (b) that facts essential to justify opposition may exist but cannot then be stated, the court may deny the motion, allowing the moving party to assert the objection in his responsive pleading, if any, or may order a continuance to permit further affidavits to be obtained or disclosure to be had and may make such other order as may be just."

Pursuant to CPLR 3211 (d), the opposing party must specify the facts that need to be developed in discovery and explain why those facts are material to the opposition (*see Koeppel v Volkswagen Group of Am., Inc.*, 128 AD3d 441, 441-442 [1st Dept 2015]; *Warshaw Burstein Cohen Schlesinger & Kuh, LLP v Longmire*, 106 AD3d 536, 537 [1st Dept 2013]).

Here, plaintiff has failed to explain why any facts are material to his opposition. "[I]f the [claim] fails to state a cause of action as a matter of law and no amount of discovery can salvage the claim, it must be dismissed and no discovery is warranted" (*Herzog v Town of Thompson*, 216 AD2d 801, 803-804 [3d Dept 1995]). "[T]he mere hope that discovery may reveal [facts essential to justify opposition] does not warrant denial of the motion" (*Cracolici v Shah*, 127 AD3d 413, 413 [1st Dept 2015]).

Accordingly, since plaintiff's conversion, negligence, and trespass claims are duplicative of his untimely wrongful eviction claim, the Board defendants are entitled to dismissal of the amended complaint.

II. Chandhok and Sachdeva's Cross Motion to Dismiss

Chandhok and Sachdeva join in the arguments made by the Board defendants. Thus, Chandhok and Sachdeva argue that the wrongful eviction claim as against them is untimely, and that the remaining claims asserted against them fail to state a cause of action. Chandhok and

Sachdeva further maintain that the amended complaint does not include any specific allegations against them. Additionally, they argue that plaintiff cannot assert a claim for wrongful eviction and trespass against them because they were the lawful owners of the unit. Furthermore, Chandhok and Sachdeva maintain that they did not owe plaintiff a duty of care.

A. Wrongful Eviction (Second Cause of Action)

Initially, the court must determine whether plaintiff's wrongful eviction claim against Chandhok and Sachdeva is timely. As indicated above, wrongful eviction claims have a one-year statute of limitations (*see Gold*, 264 AD2d at 549). Plaintiff brought the federal action on May 1, 2017 (Stewart affirmation in support, exhibit B), which is within one year from May 28, 2016 (amended complaint, ¶¶ 22, 25, 26). Unlike the Board defendants, Chandhok and Sachdeva were defendants in that action (Stewart affirmation in support, exhibit B). The federal action was dismissed for lack of diversity jurisdiction on June 23, 2017, "without prejudice" (Meier affirmation in opposition, exhibit 7). Plaintiff brought this action on July 10, 2017 (NYSCEF Doc No. 1). Therefore, affording plaintiff the benefit of CPLR 205 (a), the court finds that plaintiff's wrongful eviction claims against Chandhok and Sachdeva are timely (*see Dyer v Cahan*, 150 AD2d 172, 173 [1st Dept 1989] [wrongful death action was timely, since it was brought within six months of dismissal without prejudice of same action by federal court for lack of diversity jurisdiction]).

The court must next consider whether plaintiff has stated a cause of action for wrongful eviction.

RPAPL 853 provides that:

> "If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer."

"A claim under this provision is only available to one evicted from property of which he or she was in actual possession" (*Gold*, 264 AD2d at 550). However, "[t]he statutory language does not restrict recovery to tenants who are in actual physical occupancy. It is sufficient that the tenants have . . . the legal right to peaceful possession of the leased property" (*Lyke v Anderson*, 147 AD2d 18, 25-26 [2d Dept 1989]). Here, plaintiff sufficiently alleges that he had the legal right to peaceful possession of the unit. Indeed, plaintiff alleges that he had a written lease for the apartment, which his landlords agreed to extend until at least through the end of May 2016 (amended complaint, ¶¶ 11-13, 22). However, on May 28, 2016, at plaintiff's direction and with his keys, plaintiff's friend was unable to enter the apartment because the locks had been changed (*id.*, ¶¶ 25-26).

Despite Chandhok and Sachdeva's argument to the contrary, a wrongful eviction claim does not have to be pleaded with heightened particularity (*see* CPLR 3016). CPLR 3013 states that "[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action." Notice pleading is satisfied provided that the pleading gives notice to an adversary of the transactions or occurrences giving rise to a claim (*Colleran v Rockman*, 232 AD2d 322, 323 [1st Dept 1996]; *Foley v D'Agostino*, 21 AD2d 60, 63 [1st Dept 1964]). Applying this standard, the court finds that Chandhok and Sachdeva have been sufficiently apprised of the conduct upon which this claim is predicated.

Chandhok and Sachdeva's contention that a landlord cannot trespass against a tenant is without merit (*see Long Is. Airports Limousine Serv. Corp.*, 124 AD2d at 714). Courts have held that a landlord's acts of changing locks and otherwise preventing tenants from gaining access are sufficient to establish a wrongful eviction or actual eviction in a wrongful eviction action (*see*

e.g. 3855 Broadway Laundromat v 600 W. 161st St. Corp., 156 AD2d 202, 203 [1st Dept 1989]). Moreover, even though the amended complaint alleges that Choe and Kim sold the unit to Chandhok and Sachdeva on May 18, 2016 (amended complaint, ¶ 24), "[i]t is well recognized in this State that the transferee of real property takes the premises subject to the conditions as to tenancy, including any waiver of rights, that his predecessor has established if the transferee has notice of the existence of the leasehold" (*52 Riverside Realty Co. v Ebenhart*, 119 AD2d 452, 453 [1st Dept 1986]). Therefore, the branch of Chandhok and Sachdeva's motion is denied as to plaintiff's wrongful eviction claim.

B. Negligence, Conversion, and Trespass (Third, Fourth, and Fifth Causes of Action)

However, as noted above, the negligence, conversion, and trespass claims asserted against Chandhok and Sachdeva "do not constitute cognizable causes of action but merely state demands for damages to be considered as elements of the statutory cause of action [wrongful eviction] upon which summary relief is sought" (*Mayes*, 280 AD2d at 161). Plaintiff may recover damages for loss of property under RPAPL 853 (*see id.*). Plaintiff has failed to identify a basis to deny the motion as to these claims under CPLR 3211 (d) (*see Koeppel*, 128 AD3d at 441-442).

Accordingly, the third, fourth, and fifth causes of action are dismissed as against Chandhok and Sachdeva.

III. River 2 River's Motion to Dismiss (Motion Sequence Number 003)

River 2 River argues that the amended complaint is devoid of any allegations against it. River 2 River contends that it cannot be deduced how River 2 River was involved except that it was owned by Neiditch. In addition, River 2 River asserts that it has no agency or authority with respect to any other defendants, was not involved in the eviction in any capacity, and lacks any

connection with this action aside from being the seller's broker. Further, River 2 River argues that the complaint fails to state a cause of action as against it.

Contrary to River 2 River's argument, plaintiff alleges, "[u]pon information and belief, River 2 River, the Board, and/or Neiditch executed the eviction on behalf of Choe and Kim and/or Chandhok and Sachdeva, using workers employed by River 2 River, the Board, and/or Neiditch" (amended complaint, ¶ 37). Plaintiff further alleges that Neiditch, the president of River 2 River, directly emailed him and told him to vacate the apartment (*id.*, ¶¶ 4, 16, 19, 21). Thus, plaintiff has sufficiently pleaded River 2 River's involvement in the events alleged in the amended complaint (*see* RPAPL 853). Whether plaintiff will ultimately be successful in proving these allegations is not part of the inquiry (*see Landon*, 22 NY3d at 6).

Although River 2 River submits an affidavit from Neiditch indicating that it was not involved in any eviction and did not have any agency or authority with respect to any defendants (Neiditch aff, ¶¶ 6, 8), River 2 River has not shown that a material fact claimed by plaintiff is not a fact at all and that there is no dispute regarding it (*see Guggenheimer*, 43 NY2d at 275; *Asmar v 20th & Seventh Assoc., LLC*, 125 AD3d 563, 564 [1st Dept 2015] [third-party defendant's "affidavit was . . . insufficient to warrant dismissal of the third-party complaint pursuant to CPLR 3211 (a) (7), since the facts therein do not demonstrate the absence of any significant dispute nor do they completely refute the allegations against (third-party defendant)"]). Moreover, Neiditch's affidavit does not constitute "documentary evidence" for purposes of CPLR 3211 (a) (1) (*see Celentano v Boo Realty, LLC*, 160 AD3d 576, 577 [1st Dept 2018]).

Nevertheless, plaintiff's negligence, conversion, and trespass claims as against River 2 River "do not constitute cognizable causes of action but merely state demands for damages to be considered as elements of the statutory cause of action [wrongful eviction] upon which summary

relief is sought" (*Mayes*, 280 AD2d at 161). As noted above, plaintiff may recover damages for loss of property under RPAPL 853 (*see id.*). Plaintiff has failed to identify a basis to deny the motion as to these claims pursuant to CPLR 3211 (d).

Accordingly, River 2 River's motion to dismiss is granted to the extent of dismissing the third, fourth, and fifth causes of action asserted against it.

IV. Plaintiff's Cross Motion to Lift the Stay of Disclosure and Schedule a Preliminary Conference

Plaintiff requests that the court lift the automatic stay of disclosure imposed by CPLR 3214 (b) and that the court schedule a preliminary conference during the pendency of these motions. However, CPLR 3214 (b) provides that "[s]ervice of a notice of motion under rule 3211, 3212, or section 3213 stays disclosure until determination of the motion *unless the court orders otherwise*" (emphasis added). The court's part rules provide that "[d]iscovery is not stayed pending the determination of summary judgment motions or other motions unless specifically indicated by the Court."[4] In addition, plaintiff did not move by order to show cause for interim relief.

Therefore, plaintiff's cross motion is granted to the extent of directing counsel for the remaining parties to appear for a preliminary conference (*see* 22 NYCRR 202.12 [a]).

CONCLUSION

Accordingly, it is

ORDERED that the motion (sequence number 002) of defendants The Board of Managers of the Atelier Condominium and Daniel Scott Neiditch to dismiss the amended complaint is granted and the amended complaint is dismissed in its entirety as against said

[4] The court's part rules are available at http://www.nycourts.gov/courts/1jd/supctmanh/Uniform_Rules.pdf (last visited March 4, 2019).

defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; 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 dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for defendants The Board of Managers of the Atelier Condominium and Daniel Scott Neiditch shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh)]; and it is further

ORDERED that the cross motion of defendants Gaurav Chandhok and Rakhee Sachdeva to dismiss the amended complaint is granted to the extent of dismissing the third (negligence), fourth (conversion), and fifth (trespass) causes of action as against them, and is otherwise denied; and it is further

ORDERED that the motion (sequence number 003) of defendant River 2 River Realty, Inc. to dismiss the amended complaint is granted to the extent of dismissing the dismissing the

third (negligence), fourth (conversion), and fifth (trespass) causes of action as against them, and is otherwise denied; and it is further

ORDERED that plaintiff shall serve all remaining parties by NYSCEF e-filing with a second supplemental summons and second amended complaint conforming the pleadings to the terms of the decision and order on this motion on or before April 1, 2019; and it is further

ORDERED that the cross motion of plaintiff to lift the automatic stay of disclosure and to schedule a preliminary conference is granted to the extent of directing counsel for the remaining parties to appear in Part 29, located at 71 Thomas Street Room 104, New York, New York 10013-3821, on Tuesday, March 12, 2019, at 9:30 a.m., for a preliminary conference.

Dated: March 4, 2019

ENTER:

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