SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ALEXANDER M. TISCH** **PART** **IAS MOTION 18EFM**

Justice

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ROBERTA CARTAGENA, MAXIMINO GONZALEZ, OLGA GONZALEZ, EUGENIO GONZALEZ, JUDITH HERRERA

Plaintiff,

- v -

RHODES 2 LLC,NIKOS MASTOMINOS,

Defendant.

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INDEX NO. 158587/2017

MOTION DATE 09/25/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 29, 30, 31, 32, 33, 34, 35, 36, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER

Upon the foregoing papers, plaintiffs move for partial summary judgment pursuant to CPLR 3212 on their claims for harassment, negligence, and negligent infliction of emotional distress. In opposition, defendants seek dismissal of all claims asserted against defendant Nikos Mastominos, as well as summary judgment pursuant to CPLR 3212 (b).[1]

BACKGROUND

Plaintiffs are tenants who currently reside in a six-unit apartment building (the building) located at 2036 Second Avenue, New York, New York. Defendant Rhodes 2 LLC (Rhodes 2) is the current owner of the building, having purchased it on April 25, 2013. Defendant Nikos Mastominos (Mastominos) – also known as Nikolaos Mastrominas or Nikos Mastrominas – is the managing member of Rhodes 2.

[1] Because defendants did not cross-move, the Court may only consider dismissal and/or summary judgment for the claims on which summary judgment is sought by plaintiffs (*see Costello v Hapco Realty, Inc.*, 305 AD2d 445 [2d Dept 2003]).

Plaintiffs bring this action seeking damages for, *inter alia*, defendants' alleged negligence, negligent infliction of emotional distress, and harassment. Plaintiffs allege that throughout their respective tenancies they were deprived of basic necessities, such as gas services for months at a time, heat and hot water at various times, and pest problems. Plaintiffs also allege that defendants failed to maintain the structural integrity of the building and failed to make timely repairs, resulting in plaintiffs incurring expenses to perform repairs themselves.

Roberta Cartagena

Roberta Cartagena (Cartagena) has resided in apartment 4 with her son and two children since 1998. Cartagena maintains that she has experienced a myriad of issues throughout her tenancy. With respect to defendants' tenure as owners, Cartagena alleges that from the years 2010 to 2014, defendants failed to repair her rotting kitchen cabinets. For the duration of the year 2015, the floors in the apartment were rotten and unleveled, and that as a result, the bathtub collapsed through the floor forcing Cartagena and her family to spend two nights in a hotel.

Cartagena also alleges that fixtures, including the refrigerator, stove, and faucets have been replaced at her expense. There is an alleged mold problem that persists despite Cartagena's requests to defendants to fix the issue. In the winter of 2016, defendants allegedly cut a hole in the living room wall in preparation to repair an air conditioning unit. They did not fix the unit until July 2017 and in the interim, covered the hole with thin metal paneling which allowed for wind and cold air to enter the apartment.

Most pertinent to the instant motion, Cartagena alleges that there was insufficient, and at times a complete lack of, heat and/or hot water in her apartment during the winters between 2011 and 2016. In 2015, there was no running water for fifteen days. Cartagena also alleges that

between June 2015 and February 2016 her gas service was entirely disconnected. She was unable to cook meals in her own home and was forced to eat out at an additional expense.

According to records from the Department of Housing Preservation and Development (HPD), defendants were issued three violations for lack of gas service at Cartagena's apartment: June 26, 2015; August 27, 2015; and November 10, 2015.[2] Cartagena maintains that as a result of the conditions of the apartment, she suffers from severe, constant, and intense stress and anxiety.

Eugenio Gonzalez and Judith Herrera

Eugenio Gonzalez and Judith Herrera (Gonzalez and Herrera) have resided in apartment 5, along with their three minor children and Gonzalez's brother, since 2003. Gonzalez and Herrera maintain that throughout their tenancy plaster has fallen from the walls and ceiling, the bathtub has leaked, the toilet has been broken, and that the bathroom door has remained defective. From January 2016 until May 2016, defendants made a large hole in the wall of the apartment to prepare for the installation of a new air conditioning unit. The hole exposed them to lose electrical wiring, cold air, and vermin. Despite repeated complaints to defendants, Gonzalez and Herrera maintain that only superficial repairs have been made.

Like Cartagena, Gonzalez and Herrera allege that gas service was completely disconnected between June 2015 and March 2016. Additionally, the apartment only had intermittent heat and hot water between 2013 and 2015. Defendants were issued two violations for lack of gas service at Gonzalez and Herrera's apartment: November 5 and 12, 2015. Defendants were also issued a violation for lack of hot water on October 29, 2015 and one for bedbugs on November 19, 2015. Gonzalez and Herrera maintain that as a result of these conditions, they incurred out-of-pocket expenses and that they suffer from severe, constant, and intense stress and anxiety.

[2] HPD records list 112 open violations as of 12/28/2015. For the purposes of this decision, the Court will only discuss those violations pertaining to essential services and pest problems issued in the years 2013 through 2015.

Maximino and Olga Gonzalez

Maximino and Olga Gonzalez (Gonzalez family) have resided with their three children in apartment 3 since 1999. As with other plaintiffs, the Gonzalez family has experienced poor conditions such as lack of gas service and unreliable hot water and heat. In January 2015, the apartment had no water or heat for three weeks, during which time they paid for gym memberships in order to bathe. Hot water and heat were not restored until January 2016 and the family was without gas service from June 2015 through March 2016.

The Gonzalez family also allege that they experienced a continuous bedbug infestation between 2010 and 2015 in both the apartment and common area. Due to defendants' failure to timely remedy the condition, the family was forced to pay for treatments, mouse traps, and silicone to seal cracks and holes.

According to HPD records, four violations were issued for lack of water/hot water: June 12, 2015, September 23, 2015, and two on October 5, 2015. Defendants were also issued four violations for lack of gas service at the Gonzalez apartment: June 12, 2015, September 23, 2015, October 10, 2015, and November 10, 2015. Finally, a violation was issued for a mice problem on October 5, 2015. The Gonzalez family maintains that as a result of defendants' conduct, they suffer from severe, constant, and intense stress and anxiety.

DISCUSSION

Pursuant to CPLR 3212 (b), summary judgment shall be granted if the cause of action or defense shall be established sufficiently to warrant judgement as a matter of law. "The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007]). The movant's burden is "heavy," and "on a motion for summary

judgment, facts must be viewed in the light most favorable to the non-moving party" (*William J. Jenack Estate Appraisers & Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] [internal quotation marks and citation omitted]). Failure to do so requires that the motion be denied regardless of the sufficiency of the opposing papers (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Upon proffer of evidence establishing a prima facie case by the movant, "the party opposing a motion for summary judgment bears the burden of 'produc[ing] evidentiary proof in admissible form sufficient to require a trial of material questions of fact'" (*People ex rel. Spitzer v Grasso*, 50 AD3d 535, 545 [1st Dept 2008], quoting *Zuckerman*, 49 NY2d at 562).

Plaintiffs argue that absent an exact measure of damages, the record supports a finding that plaintiffs have established liability on their claims, thus entitling them to partial judgment as a matter of law. Plaintiffs present four grounds for partial summary judgment. First, there are multiple violations issued by the HPD for the failure to provide services such as hot water, heat, and gas. Next, plaintiffs argue that the defendants breached their duty of care to provide habitable apartments as established by New York City Administrative Code (NYC Admin Code) § 27-2005 and the Multiple Dwelling Law § 78 (1). Third, plaintiffs maintain that defendants' negligence was so outrageous and extreme "as to go beyond all possible bounds of decency," inflicting emotional distress on plaintiffs. Finally, plaintiffs argue that defendants' conduct constitutes harassment under NYC Admin Code § 27-2005.

In opposing the motion, defendants argue that plaintiffs' claims are barred by the doctrines of *res judicata* due to prior proceedings initiated by plaintiffs in New York City Housing Court. Res judicata notwithstanding, defendants also argue that plaintiffs failed to meet their prima facie burden. Defendants maintain that the Court has no evidentiary facts to rely on because plaintiffs

failed to submit any affidavits. Additionally, even if plaintiffs did meet their burden, defendants successfully raised issues of material fact.

With respect to the claims against individually named defendant Mastominos, defendants argue that members of an LLC are personally exempt from obligations of the LLC. Defendants aver that plaintiff's attempt to pierce the corporate veil is both inappropriate and insufficient. Lastly, defendants ask this Court to grant summary judgment in their favor pursuant to CPLR 3212 (b) as the evidence demonstrates plaintiffs' claims are without merit.

I. Defendant Mastominos

Defendants correctly argue that a finding of liability on the tort claims requires plaintiffs to successfully "pierce the corporate veil" (*see Mendez v City of New* York, 259 Ad2d 441 [1st Dept 1999]). However, that only pertains to the claims for negligence and negligent infliction of emotional distress, not harassment. NYC Admin Code § 27-2004 (a)(45) defines owner as "the owner…agent, or any other person, firm or corporation, directly or indirectly in control of a dwelling." Therefore, plaintiffs need not "pierce the veil" in order to hold defendant Mastominos liable for harassment. Rather, they must establish that Mastominos falls within the enumerated categories.

In his affirmation, Mastominos acknowledges that he is the managing member of Rhodes 2. Mastominos' signature appears on the real property transfer report, the registration for water and sewer billing, both the 2014 and 2015 construction agreements, and the managing agreement. As the purpose of NYC Admin Code § 27-2004 (a)(45) is to impose liability on any entity or person with control of the operation of the building, it is axiomatic that Mastominos is an "owner" as imagined by the NYC Admin Code (*see Robinson v Taube*, 63 Misc 3d 1224[A], 2019 NY Slip Op 50666[U] [Civ Ct, NY County 2019]; *see also Schlam Stone & Dolan, LLP v Poch*, 40 Misc

3d 1213[A], 2013 NY Slip Op 51176[U] [Sup Ct, NY County 2013] ["...personal liability may attach to a corporate officer who is construed to be an agent irrespective if the officer is or is not involved with the operation of the subject building...In other words, responsible officers can not turn a blind eye or hide behind a corporate shield, but they must timely correct violations"]). In light of this broad definition, with respect to the claim for harassment, the Court finds that Mastominos may be held personally liable. As for the claims of negligence and negligent infliction of emotional distress, plaintiffs failed to meet their burden demonstrating the ability to pierce the corporate veil.

II. Res Judicata

A final judgment on the merits of an action precludes the parties from relitigating issues that were or could have been raised in that action. "Typically, principles of res judicata require that 'once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy'" (*Xiao Yang Chen v Fischer*, 6 NY2d 94, 98 [2005] quoting *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]). However, "unfairness may result if the doctrine is applied too harshly; this '[i]n properly seeking to deny a litigant two days in court, courts must be careful not to deprived [the litigant] of one'" (*id.* quoting *Reilly v Reid*, 45 NY2d 24, 28 [1978]).

Defendants direct this Court to Housing Court proceedings that were initiated by plaintiffs against Rhodes 2 and the predecessor management company.[3] Defendants argue that the instant matter should be dismissed because they are seeking the same relief, under the same circumstances, with the same parties.

[3] Defendants contend that a proceeding before the Department of Housing and Community Renewal was initiated, however defendants failed to submit any evidence showing the same.

A Housing Part (HP) proceeding is typically brought by a tenant for the purpose of enforcing provisions of the state and local laws that govern housing standards such as the Multiple Dwelling Law, the Housing Maintenance Code, the Building Code, and the Health Code (*D'Agostino v Forty-Three E. Equities Corp.*, 12 Misc 3d 486 [Civ Ct, NY County 2006], *affd* 16 Misc 3d, 59 [App Term 2007]). The Court will order a landlord to correct outstanding violations and may assess penalties, payable only to the Housing Perseveration Department (*see Amsterdam v Goldstick*, 128 Misc 2d 374 [Civ Ct, NY County 1985], *adhered to* 131 Misc 2d 131 [Civ Ct, NY County 1986], *affd* 136 Misc 2d 946 [1st Dept 1987]).

This Court agrees with plaintiffs that the type of proof and remedies available in the HP are substantively different. In the prior HP proceeding, plaintiffs sought a court order directing Rhodes 2 to respond to and remedy several violations. In this action, plaintiffs seek money damages arising from the harm they suffered due to their living conditions. While the proceedings involve the same conduct and conditions, the HP proceeding was brought to correct those conditions. Plaintiffs did not expect to attach all the claims they now bring (*see Dominguez v Zinnar*, 2009 NY Slip Op 33266[U] [Sup Ct, NY County 2009] ["[a]lthough the HP and 7-A proceedings...whose central objections are to correct conditions to remove violations with penalties payable only to HPD, it cannot be said that the parties['] expectations were such that a claim for breach of the warranty would necessarily have to be joined"]). Additionally, tort-based damages are typically determined by a jury, rather than a judge (*id.*). Under these circumstances, plaintiffs' suit is not barred by the doctrine of *res judicata*.

III. Negligence

Housing Maintenance Code and Multiple Dwelling Law impose a duty on landlords to maintain their buildings in a safe and habitable condition (*see* MDL § 78(1); NYC Admin Code §

27-2005; *see also Juarez by Juarez v Wavecrest Management Team Ltd.*, 88 NY2d 628 [1996]; *Edge Management Consulting, Inc. v Blank*, 25 AD3d 364 [1st Dept 2006]). In order for a landlord to be held liable for a breach of that duty, plaintiff must establish that the landlord had actual or constructive notice of a condition and a reasonable opportunity to repair it (*Jaurez by Jaurez*, 88 NY2d at 642). "Breach of a landlord's general statutory duty to maintain leased premises in a safe condition...requires a showing of those elements compromising common-law negligence" (*id.* at 644; *see Altz v Leiverson*, 233 NY 16 [1927]).

There is no dispute that defendants owed statutory duties of care to plaintiffs (*see supra*). However, plaintiffs failed to meet their prima facie burden establishing that defendants breached those duties. In support of their motion, plaintiffs submit a print-out of the multiple violations issued by the HPD as well as their statements in the verified complaint, which they submit in lieu of affidavits.[4] While the violations corroborate plaintiffs' testimonies, it cannot be stated that the case is clearly made out on undisputed facts presented in the record (*see Barrett v Jacobs*, 255 NY 520, 521 [1931]).

For instance, defendants maintain that they did provide a temporary heating solution in the form of two 80-gallon electric water tanks, along with electric units and electric water heater corroborate the violations. Additionally, according to Mastominos, at the time of the purchase, the building had over 200 violations. Since then defendants have made renovations and repairs in an effort to reduce that number. Defendants submit contracts with contractors to undertake said renovations and invoices reflecting work done. Thus, questions remain concerning the alleged failure to maintain and timely remediate essential services, warranting denial of that branch of plaintiffs' motion.

[4] Pursuant to CPLR 105 (u), a verified pleading qualifies as an affidavit for the purposes of a motion for summary judgment.

IV. Harassment

Section 27-2005 of the NYC Admin Code states that "[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling." Harassment is defined as "any act or omission by or on behalf of an owner that causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy" (NYC Admin Code § 27-2004 [a][48]). Harassment includes "repeated interruptions or discontinuances of essential services, or an interruption or discontinuance of an essential service for an extended duration or of such significance as to substantially impair the habitability of such dwelling unit" (NYC Admin Code § 27-2004 [a][48][b]), and "an interruption or discontinuance of an essential service that (i) affects such dwelling unit and (ii) occurs in a building where repeated interruptions or discontinuances of essential services have occurred" (NYC Admin Code § 27-2004 [a][48][b-1]). Upon a finding of harassment, tenants may seek an order from a court restraining an owner from engaging in such conduct, and to impose civil penalties of not less than $2,000.00 and not more than $10,000.00 (NYC Admin Code § 27-2115 [m][2]).

Contrary to defendants' assertion, plaintiffs need not establish intent. NYC Admin Code § 27-2004 (a)(48)(ii) states that the term harassment "includes one or more of the following acts or omissions, provided that there shall be a rebuttable presumption that such acts or omissions were intended to cause such a person to vacate such dwelling unit or to surrender or waive any rights."

Here, the record is clear that plaintiffs experienced repeated interruptions of gas, heat, running water, and hot water. Such interruptions of essential services fit squarely into the definition of harassment. Pursuant to NYC Admin Code § 27-2004 (a)(48), the burden then shifts to defendants to rebut the presumption that such acts or omissions were intended to cause plaintiffs

to vacate or surrender their occupancy rights. Defendants failed to meet that burden. Defendants' argument that plaintiff submitted no evidence of harassment is flatly contradicted by the HPD violations, HP orders, and plaintiffs' statements in the verified complaint. The Court therefore directs defendants to refrain from engaging in any conduct in violation of NYC Admin Code § 27-2004 (a)(48). In light of the egregious repeated interruptions of essential services, the Court at this time imposes a penalty of 3,500.00 per apartment at issue for a total of $10,500.00 payable to the New York City Commissioner of Finance.

V. Negligent Infliction of Emotional Distress

"Damages for emotional harm can be recovered even in the absence of physical injury 'when there is a duty owed by defendant to plaintiff, [and a] breach of that duty result[s] directly in emotional harm'" (*Perry-Rogers v Obasaju*, 282 AD2d 231, 231 [1st Dept 2001] quoting *Kennedy v McKesson Co.*, 58 NY2d 500, 504 [1983]). A plaintiff need not be in fear of his or her own physical safety (*see Johnson v State of New York*, 37 NY2d 378 [1975]). However, a plaintiff "must produce evidence sufficient to guarantee the genuineness of the claim" (*Kaufman v Physical Measurements*, 207 AD2d 595, 596 [1994]), such as "contemporaneous or consequential physical harm, coupled with the initial psychological trauma" which is "thought to provide an index of reliability otherwise absent in a claim for psychological trauma with only psychological consequences" (*Johnson*, 37 NY2d at 381).

As plaintiffs failed to establish that defendants breached the duties owed to plaintiffs, that branch of the motion seeking summary judgment on the claim for negligent infliction of emotional distress is similarly denied.

It is hereby ORDERED that the branch of plaintiffs' motion for partial summary judgment as to the claim for harassment is granted as against defendants Rhodes 2, LLC and Nikos Mastominos; and it is further

ORDERED defendants shall pay a civil penalty of $10,500.00 payable to the New York City Commissioner of Finance; and it is further

ORDERED that the branch of plaintiffs' motion that seeks partial summary judgment on liability for the claim of negligence is denied; and it is further

ORDERED that the branch of plaintiffs' motion that seeks partial summary judgment on liability for the claim of negligent infliction of emotional distress is denied.

This constitutes the decision and order of the Court.

2/3/2020
DATE

ALEXANDER M. TISCH, J.S.C.

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