

**O'Hara v Board of Directors of the Park Ave. &
Seventy-Seventh St. Corp.**

2021 NY Slip Op 31692(U)

May 19, 2021

Supreme Court, New York County

Docket Number: 153400/2020

Judge: Phillip Hom

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PHILLIP HOM **PART** **IAS MOTION 2**

Justice

-----X

ROBERT O'HARA, BONNIE O'HARA,

Plaintiff,

- v -

THE BOARD OF DIRECTORS OF THE PARK AVENUE
AND SEVENTY-SEVENTH STREET CORPORATION,
ANDREAS LAZAR, ELANNA LAZAR

Defendant.

-----X

INDEX NO. 153400/2020

MOTION DATE March 18, 2021

MOTION SEQ. NO. 001 002

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 32, 33, 34, 43

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 35, 36, 37, 38, 39, 40, 41, 42

were read on this motion to/for DISMISSAL.

In the interest of justice and judicial economy, motions Sequence Numbers 1 and 2 are decided together for the purpose of a decision.

Upon the foregoing documents, it is ORDERED that motion Sequence Number 1 by Defendants the Board of Directors of the Park Avenue and Seventy-Seventh Street Corporation (the "Board") and the Park Avenue and Seventy-Seventh Street Corporation (the "Coop") (collectively, the "Coop Defendants") to dismiss the Complaint against it is granted solely to the extent of dismissing the ninth cause of action for constructive/actual eviction, the tenth cause of action for negligence and the eleventh cause of action for attorneys' fees against the Board. It is further ORDERED that motion Sequence Number 2 by Defendants Andreas Lazar and Elanna Lazar ("the Lazar Defendants") to dismiss the complaint is denied in its entirety.

Background

Plaintiffs Robert O'Hara, Jr. and Bonne O'Hara ("O'Hara Plaintiffs") are the downstairs neighbors (Apartment 10-D) of the Lazar Defendants (Apartment 11-D) at 850 Park Avenue, New York, New York. Plaintiffs are suing the Coop Defendants for breach of fiduciary duty, breach of the proprietary lease, breach of warranty of habitability, breach of the covenant of quiet enjoyment, actual and/or constructive eviction, negligence and attorneys' fees. Plaintiffs are also suing the Lazar Defendants for injunctive relief and damages alleging nuisance and breach of the Coop's House rules.

All of these claims arise from Plaintiffs' claim that the Lazar Defendants committed a private nuisance by creating "the utterly intolerable noise conditions and damage in Plaintiffs' home and exacerbated by the inaction and negligence of the Board and Coop" (NYSCEF No. 1 ¶2). Plaintiffs further claim "the nuisance, which in part can be described as noise and vibrations that appear to be the product of stomping and other activities in Apartment 11-D ("Lazar Apartment"), have made life in Plaintiffs' apartment, Apartment 10-D (O'Hara Apartment), intolerable and uninhabitable" (*id* ¶3).

Motion to Dismiss a Complaint under CPLR §3211(a)(1) and (7)

When a party moves to dismiss a complaint under CPLR §3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*African Diaspora Mar. Corp. v Golden Gate Yacht Club*, 109 AD3d 204 [1st Dept 2013]). Although bare legal conclusions are not presumed to be true on a motion to dismiss under CPLR §3211(a)(7), the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether

the facts as alleged fit within any cognizable legal theory (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]).

Whether a plaintiff can ultimately establish its allegations is not taken into consideration in determining a motion to dismiss (*Philips S. Beach, LLC v ZC Specialty Ins. Co.*, 55 AD3d 493 [1st Dept 2008]; *African Diaspora Mar. Corp. v Golden Gate Yacht Club, supra* at 211). On a motion to dismiss the complaint, “the pleading is to be afforded liberal construction” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, CPLR §3211(a)(1) warrants dismissal of a cause of action where the court finds that the documentary evidence presented conclusively establishes a defense to the asserted claims as a matter of law (*150 Broadway N.Y. Assocs. L.P. v Bodner*, 14 AD3d 1, 5 [1st Dept 2004]).

The Coop Defendants

Breach of Fiduciary Duty

The fifth cause of action for “Damages-Breach of Fiduciary Duty” states that the Board “[b]y... failing to inspect the LAZAR Apartment, to enforce the By-laws against the Lazars or direct its employees and/or Managing Agent to inspect and enforce and failure to meaningfully address Plaintiffs’ claims, actually, sufficiently, and properly the Board breached the fiduciary duties it owes to Robert” (NYSCEF Doc. No. 1¶154). NY Business Corporations Law §401 states in relevant part that a corporate director “shall perform his [or her] duties as a director... in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances” (*Hubshman v 1010 Tenants Corp.*, 2011 NY Slip Op 32768(U) (Gische, J.)).

It is well settled that corporate directors and officers have a fiduciary duty to their shareholders, but no such duty is imposed upon the cooperative housing corporation (*Peacock v Herald Square* 67 AD3d 442, 443 [1st Dept 2009]). Defendants' argument that the business-judgment rule warrants dismissal of this cause of action is untimely because although it may be imposed as an affirmative defense, it is not a basis to dismiss the breach of fiduciary claim at this stage (*Hubshman v 1010 Tenants Corp. supra citing EBC I. Inc v Goldman, Sachs & Co.*, 5 NY3d 11 [2005]). The Court finds that the O'Hara Plaintiffs have stated a cognizable cause of action for breach of fiduciary duty against the Board, and the motion to dismiss the fifth cause of action for breach of fiduciary duty is denied.

Breach of Contract

The Court similarly finds that the O'Hara Plaintiffs have sufficiently pled a cognizable cause of action for breach of the proprietary lease against the Board outlined in their sixth cause of action. (NYSCEF Doc. No. 1 ¶89-109). In order to maintain a breach of a proprietary lease claim, a plaintiff must set forth the existence of a lease agreement, performance by plaintiff, breach by defendant and damages (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010] *citing Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [2007]). It is uncontroverted that the proprietary lease is a binding agreement between Plaintiff Robert O'Hara as the lessee and the Coop as the lessor of the O'Hara apartment, #10D (NYSCEF Doc. No. 14).

Among some of the responsibilities under Article I of the Proprietary Lease are (1) duty to repair structural damage, 2) duty to maintain a first-class apartment building and (7) [provide] right to quiet enjoyment. Plaintiffs allege in their complaint that "[t]he Board... has breached its duties by, among other things: (a) allowing the unabated violation of Robert's rights as a

shareholder ... (b) interfering with Plaintiffs' quiet enjoyment and (c) failing to engage in good faith and fair dealing" (NYSCEF Doc. No.1 ¶10). The Complaint further alleges "[a]side from a few empty promise emails, until that time, the Manager and Board did nothing to even investigate the nuisance" (*id* at ¶82). Plaintiffs have also alleged physical damage to their apartment and health issues. Accordingly, it is ORDERED that the branch of the motion to dismiss the sixth cause of action for breach of the proprietary lease is denied.

Breach of Warranty of Habitability

The seventh cause of action against the Board is for breach of warranty of habitability. Real Property and Proceedings Law § 235-b states that in every lease, the lessor warrants that the premises are "fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." The Plaintiffs claim that "the unabated conditions have rendered the O'Hara apartment either completely or partially uninhabitable from at least February 2017 through at least the date of the Complaint" (NYSCEF Doc. No. 1 ¶169). The conditions, including noise and vibration, also allegedly caused significant physical damage to the O'Hara's apartment (NYSCEF Doc. No. 1 ¶¶ 2-16). The warranty of habitability claim applies to tenant-shareholders in cooperative buildings (*Frisch v Bellmarc Mgmt.*, 190 AD2d 383, 384-385 [1st Dept 1993]). The Court finds that the O'Hara Plaintiffs have stated a cognizable claim for breach of warranty of habitability and accordingly it is ORDERED that the branch of the motion to dismiss the cause of action for breach of warranty of habitability is denied.

Breach of Quiet Enjoyment

The Court finds that the eighth cause of action for breach of quiet enjoyment duplicates the cause of action for breach of quiet enjoyment in the O'Hara Plaintiffs' sixth cause of action for breach of the Proprietary Lease. Accordingly, it is ORDERED that the branch of the motion to dismiss the eighth cause of action for breach of quiet enjoyment is granted.

Constructive/Actual Eviction

Similarly, it is ORDERED that the motion to dismiss the ninth cause of action for constructive/actual eviction is granted. This cause of action may only be asserted defensively (*Elkman v Southgate*, 233 AD2d 104 [1st Dept 1996] citing *Minjak Co. v Randolph*, 140 AD2d 245 [1st Dept 1988]). Parenthetically, it is also duplicative of the breach of warranty of habitability and quiet enjoyment claims.

Negligence

It is ORDERED that the branch of the Coop Defendants' motion to dismiss the tenth cause of action for negligence is granted. There are no allegations the Coop Defendants engaged in tortious conduct separate and apart from their contractual obligations. It is well settled that "where a party is merely seeking to enforce its bargain, a tort claim will not lie" (*NYU v Cont'l Ins. Co.*, 87 NY2d 308 [1995]).

Attorney's Fees

It is further ORDERED that the branch of the motion to dismiss the eleventh cause of action for attorneys' fees is denied as premature because there has not been a determination of

this case on the merits (*Musk v 13-21 E. 22nd Street Res. Corp.*, 2012 NY Slip Op 33021(U) (Sup Ct. NY Co. 2012).

The Lazar Defendants

Service of Process

The Lazar Defendants allege that the O'Hara Plaintiffs do not have personal jurisdiction over them because they did not serve them according to CPLR §308(2) by serving a person of suitable age and discretion at the Lazar Defendants' dwelling place or usual place of abode (NYSCEF Doc. No. 30 page 10). This argument is unavailing because the affidavits of service of the licensed process server, Robert Jenkins, state that he served the super (NYSCEF Doc. Nos. 21 and 22). Mr. Jenkins also submits an affidavit along with his book entries (NYSCEF Doc. Nos. 37-40). Mr. Jenkins specifically states that building staff refused to allow him to go to the Lazar apartment and he served an individual "who I believed to be the superintendent but he refused to give me his name" (NYSCEF Doc. No. 37 ¶4-7). He also states that he followed up with the requisite mailing of the complaint to both Mr. and Mrs. Lazar, under CPLR §308(2) (NYSCEF Doc. No. 37 ¶ 8). It is well settled that "a process server's affidavit constitutes *prima facie* evidence of proper service" (see *Johnson v Deas*, 32 AD3d 253, 254 [1st Dept 1998]); *Fairmount Funding v Stefansky*, 235 AD2d 213,214 [1st Dept 1997]). Service of process on a doorman is proper when the process server is denied access to a defendant's apartment (*Charnin v Cogan*, 250 AD2d 513 [1st Dept 1998]).

The Lazar Defendants also do not deny having received the summons and complaint and even use the envelope mailed to them as an Exhibit in their motion papers (NYSCEF Doc. No. 26). The Lazar Defendants argument that Plaintiffs failed to timely file the affidavit of service is

equally unavailing because Governor Cuomo extended filing requirements under EO 202.8 because of the Covid-19 pandemic.

Nuisance

The Lazar Defendants argue that Plaintiffs have not pled a cognizable claim for nuisance and consequently the first cause of action seeking an injunction enjoining the nuisance conduct and the second cause of action seeking damages for such nuisance must be dismissed. The Lazar Defendants argue that the noise emanating from their apartment is normal for city dwelling. As stated above, in a CPLR §3211 motion, whether a plaintiff can ultimately establish its allegations “is not part of the calculus to determine a motion to dismiss” (*EBC, Inc. v Goldman, Sachs & Co.*, 5 NY3d at 19). Plaintiffs allege the excessive disruptive noise coming from the Lazar apartment in their Complaint (NYSCEF Doc. No. 1 ¶¶3-9, 14-16, 23, 44-47 and 95).

The fact that the City has not issued any noise violations is of no consequence (*61 W. 62 Owners Corp v CGM Emp LLC*, 86 AD3d 403 [1st Dept 2011]). In *61 W. 62 Owners Corp v CGM Emp LLC*, the First Department reversed and remanded the lower court’s denial of injunctive relief to plaintiff who alleged defendants caused excessive noise, finding that “the court’s failure to enjoin defendants was an abuse of discretion” despite there being no noise violations (*id* at 404).

The Lazar Defendants also argue that the O’Hara Plaintiffs cannot seek injunctive relief since they also seek monetary damages. It is well settled that in a private nuisance claim, “while money damages may be available to compensate a person for a nuisance created by loud noises, injunctive relief is not precluded where, as here, such damages are inadequate to abate the

nuisance (*Bd. Of Mgrs. Of 400 Cent. Park W. Condominium v Henriquez-Berman*, 2018 NY Slip Op 31397[U] [Sup. Ct. NY Co. 2018] *citing 61 W. 62 Owners Corp v CGM Emp LLC, supra*).

Accordingly, it is ORDERED that the branches of the Lazar Defendants' motion to dismiss the first and second causes of action for injunctive relief and damages due to their nuisance claims are denied.

Breach of Contract

The Lazar Defendants further argue that the O'Hara Plaintiffs cannot maintain their breach of contract claims. The Verified Complaint alleges breach of the House Rules, specifically Rule 7 which "prohibits a resident from using their apartment in a manner that interferes with the rights, comforts and conveniences of other residents" (NYSCEF Doc. No. 1 ¶140). "[B]oth the Proprietary Lease as well as Bylaws Article II, Section 10 imposes these rules on the residents of the building" (*id* ¶142). The Proprietary Lease states "the Lessee shall obey all such rules and see that they are faithfully observed... it being understood that such rules apply to and be binding upon all of the tenants of the building . . ." (NYSCEF Doc No. 14 page 9). Although Plaintiffs are a third party to the Proprietary Lease between the Lazar Defendants and the Coop, in New York, third parties may enforce a contract "when the third party is the only one who could recover from the breach" or "when it is otherwise clear from the language of the contract that there is an intent to permit enforcement by the third party" (*Dormitory Auth. of N.Y. v Samson Constr. Co.*, 30 NY3d 704, 709, 711 [2018]).

The Court finds that Plaintiffs have sufficiently pled their third and fourth causes of action for injunctive relief and damages related to the alleged breach of rules and it is

ORDERED that the branches of the Lazar Defendants' motion to dismiss these claims are denied.

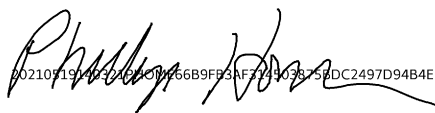
Conclusion

Based on the foregoing, the Coop Defendants' motion to dismiss (Sequence No. 1) is granted solely to the extent of dismissing the ninth cause of action for constructive/actual eviction, the tenth cause of action for negligence and the eleventh cause of action for attorneys' fees.

The Lazar Defendants' motion to dismiss (Sequence No. 2) is denied in its entirety.

All Defendants shall serve and file their answers within twenty days from this date.

The foregoing constitutes the decision and order of this court.


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<u>5/19/2021</u> DATE					<hr/> PHILLIP HOM, J.S.C.			
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