SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. PAUL A. GOETZ** **PART** **47**

Justice

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BARBARA ESKIN, SARAH KATZ,

Plaintiffs,

- v -

60 E. 9TH ST OWNERS CORP., THE BOARD OF DIRECTORS OF 60 E. 9TH ST OWNERS CORP., NICK SPIRO

Defendants.

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INDEX NO. 151069/2022

MOTION DATE 05/05/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 99, 100, 101, 102

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

In this cooperative nuisance action, plaintiffs Barbara Eskin and Sarah Katz move pursuant to CPLR § 3212 for summary judgment on their fifth cause of action for breach of fiduciary duty, twelfth cause of action for residential tenant harassment, and thirteenth cause of action for tortious retaliatory conduct as against defendant 60 E. 9th St Owners Corp. (the coop) and defendant The Board of Directors of 60 E. 9th St Owners Corp. (the board) (collectively, the coop defendants), and pursuant to CPLR § 3211 (a) (5), (6), and (7) to dismiss defendant Nick Spiro's first counterclaim for defamation (motion seq no 001).

Defendants oppose the motion and the coop defendants cross-move pursuant to CPLR § 3212 for summary judgment on plaintiffs' fifth cause of action for breach of fiduciary duty, twelfth cause of action for residential tenant harassment, thirteenth and fourteenth causes of action premised upon tortious retaliation, tenth cause of action for negligence and, ninth cause of action for constructive eviction.

BACKGROUND

Plaintiff Eskin is the proprietary lessee and shareholder of Unit 328 in the cooperative building located at 60 East 9th Street, New York, New York (Statement of Material Facts, ¶ 1, NYSCEF Doc No 50). Plaintiff Katz is Eskin's daughter and a full-time, board-approved resident of the apartment (*id.* at ¶ 3). Shortly after defendant Spiro moved into Unit 428 on January 31, 2019, plaintiffs submitted numerous informal complaints concerning excessive noise-related nuisance created by Spiro to the coop and the board's agents (*id.* at ¶¶ 5-6). Plaintiffs allege that after countless complaints to the coop and the board about Spiro's conduct, they failed to sufficiently investigate and remedy the disturbances (*id.* at ¶¶ 7-8).

Spiro claims ever since he moved into his apartment, plaintiffs have conducted a harassment campaign against him (Spiro Aff, ¶¶ 51-57, NYSCEF Doc No 57). He claims that plaintiffs have filed many fake noise complaints against him, knowing that he was not home or possibly sleeping (*id.* at ¶ 19-22). He discovered plaintiffs posted statements about him on Facebook as well as streamed videos of their ceiling / his floor to a public Facebook group comprised of eighty of Spiro's neighbors (*id.* at ¶¶ 27-29, 31, 45, 54). And he alleges that plaintiffs defamed him by making many noise complaints against him to the coop and multiple complaints to 311, arguing that the complaints could potentially result in his eviction and criminal charges (*id.* at ¶ 26). Spiro notes that that he has tried to reduce the noise emanating from his apartment by covering approximately eighty percent of his apartment's flooring in carpet and that the board inspected the space multiple times, confirming compliance with the building's house rules (*id.* at ¶¶ 6-8).

On June 15, 2020, the board served plaintiffs with a Notice of Objectionable Conduct affording them the opportunity to cure their alleged misconduct, detailed as: pounding on the

ceiling and floor to communicate to neighbors, yelling obscenities at neighbors, and eaves dropping on neighbors' apartments (Notice of Objectionable Conduct, NYSCEF Doc No 73). The notice concludes: "[i]f you or your guests or invitees repeat the objectionable conduct referred above, then pursuant to the terms of Paragraph 31(f) of the Lease the Board of Directors . . . will call a special meeting of the Board for the purpose of determining whether to terminate your Proprietary Lease" (*id.*).

In a further attempt to address the noise complaints, during the period of July 31 through August 7, 2020, Ken Jacobs, the board's president, arranged for acoustic testing in plaintiffs' apartment (NYSCEF Doc No 50, ¶¶ 13-14). Plaintiffs claim Jacobs was fully aware Spiro was not in his apartment at the time (*id.* at ¶ 15). Shortly thereafter, the board installed soundproofing in plaintiffs' apartment, which lowered their ceiling by over three inches (*id.* at ¶ 19).

DISCUSSION

Plaintiffs' Motion to Dismiss Spiro's Defamation Claim

Plaintiffs move to dismiss Spiro's first counterclaim for defamation arguing that it is barred by the one-year statute of limitations for defamation, Spiro failed to sufficiently plead the exact words that are allegedly defamatory, plaintiffs' statements were not made in malice, Spiro cannot prove that the statements made by plaintiffs are false, and the statements made by plaintiffs are qualifiedly privileged. Spiro responds in opposition that the motion to dismiss must be denied even if some of the words are paraphrased.

Though plaintiffs argue pursuant to CPLR § 3211 (a) (5)-(6) that Spiro's claim for defamation is barred by the one-year statute of limitations for defamation (CPLR § 215), Spiro submits more recent allegations by way of his affidavit (NYSCEF Doc No 57) that occurred in 2022 after he filed his answer and as such, are within the one year statute of limitations period

(*Amaro v Gani Realty Corp.*, 60 AD3d 491, 492 [1st Dept 2009] ["a court may freely consider affidavits submitted . . . to remedy any defects in the (pleading)"]). Therefore, Spiro's defamation counterclaim is not time barred.

As to the substance of Spiro's defamation claim, "[d]efamation is defined as a false statement that exposes a person to public contempt, ridicule, aversion or disgrace. A party alleging defamation must allege that the statement is false . . . . Where the party alleging defamation is not a public figure, a showing of common law malice, or ill will, is necessary" (*Town of Massena v Healthcare Underwriters Mut. Ins.*, 98 NY2d 435, 445 [2002]). Here, Spiro's allegations that plaintiffs made false noise complaints about him to the police on May 1, 2022 and May 7, 2022 (NYSCEF Doc No 57 ¶ 43) are sufficient because he provides "sufficient specificity as to the exact words and the time and manner in which (the) assertions were made" (*Pezhman v City of New York*, 29 AD3d 164, 167 [1st Dept [2006]). Spiro further states that when the police arrived at his apartment on each occasion they found "no evidence of loud noises" (NYSCEF Doc No 57 ¶ 44).

Plaintiffs' argument that Spiro cannot show malice is unpersuasive since malice may be inferred by alleging plaintiffs lied to the authorities about him (*see Pellegrini v Duane Reade Inc.*, 137 AD3d 651 [1st Dept 2016] [defendant sufficiently inferred actual malice on the part of plaintiff by alleging that plaintiff lied to the authorities about defendant]; *see also Figueroa v DeStefano*, 2023 NY Slip Op 32763[U] [SC NY Co 2023]; NYSCEF Doc No ¶¶ 43-44).

Plaintiffs' argument that Spiro cannot prove that the statements made by plaintiffs are false is unavailing because on a motion to dismiss, the facts alleged in the pleading are deemed true and therefore, Spiro is not obligated to "prove" falsity at this stage (*Davis v Boeheim*, 24 NY3d 262 [2014]).

And plaintiffs' argument that the noise complaints are qualifiedly immune is unavailing since Spiro's allegations that plaintiffs acted out of malice is sufficient to overcome such immunity on a motion to dismiss (*see Pezhman v City of New York*, 29 AD3d 164, 168 [1st Dept 2006]).

Accordingly, that part of plaintiffs' motion seeking to dismiss Spiro's defamation counterclaim will be denied.

Procedural Issue: Cross-Motion Without An Affidavit

Plaintiffs argue that the coop defendants' cross-motion cannot be considered because they failed to submit an affidavit from a person with knowledge of the facts. Plaintiffs attach, by letter, a recent First Department case that was decided since they filed their motion (*see Tribbs v 326-338 E. 100th LLC*, 215 AD3d 480 [1st Dept 2023]). The coop defendants argue that the letter is an impermissible sur-reply and should not be considered. However, plaintiffs' letter is not introducing a new legal theory but simply supporting their argument by citing a more recent case.

CPLR § 3212 (b) states that "[a] motion for summary judgment shall be supported by affidavit[,]" an "affidavit or affirmation of an attorney, even if he has no personal knowledge of the facts, may, of course, serve as the vehicle for the submission of acceptable attachments which do provide 'evidentiary proof in admissible form,' e.g., documents, transcripts" (*Zuckerman v New York*, 49 NY2d 557, 563 [1980]). Here, though the coop defendants do not submit an affidavit supporting their cross-motion they attach an attorney affirmation as well as allege sufficient facts in their verified answer (*see* NYSCEF Doc Nos 67, 68). Therefore, the cross-motion will be considered.

Summary Judgment

Both parties move for summary judgment on plaintiff's fifth cause of action for breach of fiduciary duty, twelfth cause of action for residential tenant harassment, and thirteenth cause of action for tortious retaliation.

"It is well settled that 'the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact'" (*Pullman v Silverman*, 28 NY3d 1060, 1062 [2016], quoting *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Once such a prima facie showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof in admissible form sufficient to raise material issues of fact which require a trial of the action" (*Cabrera v Rodriguez*, 72 AD3d 553, 553-554 [1st Dept 2010]). "The court's function on a motion for summary judgment is merely to determine if any triable issues exist, not to determine the merits of any such issues or to assess credibility" (*Meridian Mgt. Corp. v Cristi Cleaning Serv. Corp.*, 70 AD3d 508, 510-511 [1st Dept 2010] [internal citations omitted]). The evidence presented in a summary judgment motion must be examined "in the light most favorable to the non-moving party" (*Schmidt v One New York Plaza Co. LLC*, 153 AD3d 427, 428 [2017], quoting *Ortiz v Varsity Holdings, LLC*, 18 NY3d 335, 339 [2011]) and bare allegations or conclusory assertions are insufficient to create genuine issues of fact (*Rotuba Extruders v Ceppos*, 46 NY2d 223, 231 [1978]). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied (*id.*).

Breach of Fiduciary Duty

Plaintiffs move for summary judgment on their fifth cause of action against the coop defendants for breach of fiduciary duty, arguing that the coop defendants deliberately failed to address plaintiffs' noise complaints, thereby failing to enforce the house rules and proprietary lease. The coop defendants cross-move for summary judgment to dismiss the claim arguing that they do not owe a fiduciary duty to individual cooperative members but rather owe a fiduciary duty to the cooperative as a whole, the business judgment rule protects their decision making in this instance, and the board cannot be held liable for any nonobservance or violation of the house rules or lease by another lessee or person. Plaintiffs reply that the board can intervene on behalf of an individual shareholder if it believes it is in the interest of the cooperative, and exceptions to the business judgement rule such as the board acting in bad faith apply.

> "[A cooperative] board owes its duty of loyalty to the cooperative—that is, it must act for the benefit of the residents collectively. So long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith, courts will not substitute their judgment for the board's. Stated somewhat differently, unless a resident challenging the board's action is able to demonstrate a breach of this duty, judicial review is not available.
>
> The business judgment rule protects the board's business decisions and managerial authority from indiscriminate attack. At the same time, it permits review of improper decisions, as when the challenger demonstrates that the board's action has no legitimate relationship to the welfare of the cooperative, deliberately singles out individuals for harmful treatment, is taken without notice or consideration of the relevant facts, or is beyond the scope of the board's authority"

(*Bregman v 111 Tenants Corp.*, 97 AD3d 75, 83 [1st Dept 2012], quoting *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 538 [1990]).

"Despite this deferential standard, there are instances when courts should undertake review of board decisions" (*40 W. 67th St. Corp. v Pullman*, 100 NY2d 146, 155 [2003]). "To

trigger further judicial scrutiny, an aggrieved shareholder-tenant must make a showing that the board acted (1) outside the scope of its authority, (2) in a way that did not legitimately further the corporate purpose or (3) in bad faith" (*id.*).

Here, plaintiffs argue that the board acted in bad faith in two key ways: (1) by failing to adequately investigate Spiro's complaints; and (2) by conducting an acoustic test when it knew Spiro was not present. However, pursuant to the lease between plaintiff Eskin and the coop, the coop "shall not be responsible to [Eskin] for the nonobservance or violation of [the] house rules by any other lessee or person" (*see* Lease, ¶ 13, NYSCEF Doc No 70) Therefore, under the coop's lease with Eskin, the coop defendants cannot be held liable for their alleged failure to investigate and enforce the house rules. And similarly, they had no affirmative duty to conduct an acoustic test. Therefore, plaintiffs' allegations are insufficient to support a claim that the coop defendants acted in bad faith and thereby breached their fiduciary duty.

Accordingly, the coop defendants' motion for summary judging dismissing plaintiffs' fifth cause of action for breach of fiduciary duty will be granted and plaintiffs' motion for summary judgment on the same claim will be denied.

Residential Tenant Harassment & Tortious Retaliatory Conduct

Plaintiffs move for summary judgment on their twelfth cause of action for residential tenant harassment under New York City Administrative (NYC Admin) Code §§ 27-2005, 27-2115 and thirteenth and fourteenth causes of action for tortious retaliatory conduct under Real Property Law (RPL) § 223-b arguing that defendants are liable based on the notice of objectionable conduct, unsolicited alterations made to plaintiffs' apartment, installation of sound recording equipment in plaintiffs' apartment, and allegedly harassing emails from defendants' attorneys. Defendants cross-move for summary judgment to dismiss these causes of actions as

well as plaintiffs' fourteenth cause of action based on tortious retaliatory conduct by arguing that plaintiffs do not allege much less establish in their summary judgment papers any of the prohibited actions listed by the NYC Admin Code and the notice of objectionable conduct is not a retaliatory notice to quit as outlawed by the RPL because the notice was intended to afford plaintiffs an opportunity to cure their objectionable conduct.

NYC Admin Code § 27-2115 provides for a "cause of action . . . to address a perceived effort by landlords to empty . . . apartments by harassing tenants into giving up their occupancy rights" (*Aguaiza v Vantage Props., LLC*, 69 AD3d 422, 423 [1st Dept 2010]). Section 27-2005 states that "[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling." Section 27-2004 defines harassment 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." The section goes on to list various conditions under which a rebuttable presumption is established that an act was undertaken with the intent to cause a tenant to surrender their leasehold: (1) using force or threats of force; (2) repeated interruptions or discontinuance of essential services; (3) repeated failures to correct hazardous violations of code; (4) commencing repeated frivolous court proceedings; (5) removing the tenant's possessions or the apartment entrance door; and (6) "other repeated acts or omissions of such significant as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit" (*id.* § 27-2004 [a] [48] [a]-[g]). Here, plaintiffs allege various actions that they characterize as harassing, however ultimately, they fail to meet their *prima facie* burden because none of the alleged actions fall within the statute's defined

categories of actionable harassing conduct. Therefore, NYC Admin Code § 27-2115 is inapplicable.

Accordingly, the coop defendants' cross-motion to dismiss plaintiff's twelfth cause of action for residential tenant harassment will be granted and the claim dismissed and plaintiffs' motion for summary judgment on the same claim will be denied.

RPL § 223-b provides that "[n]o landlord . . . shall serve an eviction notice to quit upon any tenant . . . in retaliation for" good faith complaints or actions of a tenant to enforce their rights under a lease or rental agreement. Here, the notice of objectionable conduct was specifically not a notice to quit but rather a notice to cure in order to preserve the lease as long as plaintiffs ceased their alleged objectionable conduct (*see* NYSCEF Doc No 23). Therefore, the notice of objectionable conduct does not qualify as a notice to quit pursuant to RPL § 223-b.

Accordingly, the coop defendants' cross-motion to dismiss plaintiffs' thirteenth and fourteenth causes of action for tortious retaliatory conduct will be granted and the claims dismissed and plaintiffs' motion for summary judgment on the same claims will be denied.

Negligence

Defendants cross-move unopposed for summary judgment to dismiss plaintiffs' tenth cause of action for negligence. It is well settled that a plaintiff may not pursue both a tort and breach of contract claim unless it can be demonstrated that the tort "spr[u]ng from circumstances extraneous to, and not constituting elements of, the contract" (*Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1972]). Stated differently, a negligence claim cannot also be pleaded as a tort claim unless it is demonstrated that "a legal duty independent of the contract itself has been violated" (*Ocean Gate Homeowners Assoc., Inc. v T.W. Finnerty Prop. Mgt., Inc.*, 163 AD3d 971, 973 [2d Dept 2018] [1985]). Here, plaintiffs allege that the coop and the board

breached their duty of reasonable care by not stopping the alleged nuisance coming from Spiro's apartment. These allegations specifically relate to defendants' duties under the lease and house rules. Therefore, plaintiffs' claims do not allege facts that would give rise to a duty owed to plaintiffs independent of the duty imposed by the parties' agreement.

Accordingly, the coop defendants' cross-motion to dismiss plaintiff's tenth cause of action for negligence will be granted and the claim dismissed.

Constructive Eviction

Defendants cross-move for summary judgment to dismiss plaintiffs' ninth cause of action for partial constructive eviction arguing that constructive eviction is purely defensive and regardless, plaintiffs do not allege abandonment of the premises. Here, since plaintiffs do not allege abandonment of the premises, they have failed to set forth a cognizable claim for constructive eviction (*see Elkman v Southgate Owners Corp.*, 233 AD2d 104 [1st Dept 1996]; *see also Jackson v Westminster House Owner, Inc.*, 24 AD3d 249, 250 [1st Dept 2005] ["if the eviction is constructive, there must have been an abandonment of the premises by the tenant"]).

Accordingly, the coop defendants' cross-motion to dismiss plaintiff's ninth cause of action for partial constructive eviction will be granted and the claim dismissed.

CONCLUSION

Accordingly, it is

ORDERED that the part of plaintiffs' motion seeking dismissal of Spiro's first counterclaim for defamation is denied; and it is further

ORDERED that the part of plaintiffs' motion for summary judgment on their fifth cause of action for breach of fiduciary duty, twelfth cause of action for residential tenant harassment, and thirteenth cause of action for tortious retaliatory conduct is denied; and it is further

ORDERED that the coop defendants' motion for summary judgment to dismiss plaintiffs' fifth cause of action for breach of fiduciary duty, ninth cause of action for constructive eviction, tenth cause of action for negligence, twelfth cause of action for residential tenant harassment, and thirteenth and fourteenth causes of action for tortious retaliatory conduct is granted and these claims are dismissed.

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9/22/2023
DATE

PAUL A. GOETZ, 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