

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: Honorable, ALLAN B. WEISS IAS PART 2  
Justice

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SIEGFRIED WYNER,

Plaintiff

-against-

ANITA TERRACE OWNERS, INC.,  
DONNA FABRIZIO, JOE WEINER, ACCOUNTING  
CHIEF and LAWYERS OF THE ANITA TERRACE  
OWNERS, INC.

Defendants.

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Index No: 5005/06

Motion Date:4/25/07

Motion Cal. No.: 30

Motion Seq. No.: 2

The following papers numbered 1 to 25 read on this motion by defendants for summary judgment dismissing the complaint

	<u>PAPERS NUMBERED</u>
Notice of Motion-Affidavits-Exhibits .....	1 - 5
Answering Affidavits-Exhibits.....	6 - 22
Replying Affidavits.....	23 - 25
Supplemental Affidavit-Exhibits(Defendants)....	26 - 28
Supplemental Affidavit-Exhibits(Plaintiff).....	29 - 30(6)

Upon the foregoing papers it is ordered that this motion is granted and the complaint is dismissed.

The plaintiff Siegfried Wyner, pro se, by his Father and Judicially Appointed Guardian, Ady Wyner, commenced this action against Anita Terrace Owners, Inc., (hereinafter the Coop), Donna Fabrizio, Joel Weiner, Accounting Chief and the Lawyers of the Anita Terrace Owners, Inc., on March 3, 2006 to recover money damages for the alleged aggravation of plaintiff's health problems and the destruction of his consulting business caused by the defendants' alleged "harassment, persecution and illegal actions". Plaintiff alleges the defendants have completely ignored and violated the Order of Judge Kramer, dated July 20, 2005, wherein, after trial, he determined the plaintiff's

maintenance is \$643.08 and not \$830.37. Plaintiff further asserts that despite Judge Kramer's determination, the Coop continues to bill and demand \$830.37 for maintenance, which is an "illegal" amount, that the Coop has served numerous three day notices, brought subsequent Housing Court proceedings to collect the "illegal" maintenance.

Defendants now move for summary judgment dismissing the complaint on the ground that it fails to state a cause of action and that there are no genuine issues of fact. By short form Order dated June 14, 2007, the motion was set for a conference to try to settle the action. After the conference, the parties were afforded the opportunity to submit further affirmations, affidavits, memorandums of law, and/or exhibits to supplement their previous submissions.

The plaintiff's claim for "harassment and persecution" must be dismissed inasmuch as New York does not recognize a common-law cause of action to recover damages for harassment (Daulat v. Helms Bros., 18 AD3d 802, 803 [2005]; see, Jacobs v 200 E. 36th Owners Corp., 281 AD2d 281 [2001]; Board of Mgrs. of Executive Plaza Condominium v. Jones, 251 AD2d 89, 90 [1998], lv dismissed 92 NY2d 1002 [1998]; General Motors Acceptance Corp. v. Desbiens, 213 AD2d 886, 888 [1995]).

On a motion to dismiss an action on the ground that it fails to state a cause of action, 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" (Leon v. Martinez, 84 NY2d 83, 87-88 [1994]; Guggenheimer v. Ginzburg, 43 NY2d 268, 275 [1977]). Bare legal conclusions as well as factual claims flatly contradicted by the record, however, are not entitled to any such consideration ( see McKenzie v. Meridian Capital Group, LLC, 35 AD3d 676 [2006]; Gershon v. Goldberg, 30 AD3d 372 [2006]). In addition, the court may use affidavits in determining whether the plaintiff has a cause of action (Guggenheimer v. Ginzburg, supra at 274-275 [1977]; Rovello v. Orofino Realty Co., 40 NY2d 633, 635 [1976]; see Fay Estates v. Toys "R" Us, Inc., 22 AD3d 712, 714 [2005]).

The complaint is insufficient to state any cognizable cause of action as against the defendants Donna Fabrizzio, accounting chief, Joe Weiner and the Lawyers.

The board of directors, the governing body responsible for running the day-to-day affairs of the cooperative (see, 40 West 67th Street Corp. v. Pullman, 100 NY2d 147, 158 [2003]; Levandusky v. One Fifth Avenue, 75 NY2d 530, 536 [1990]) have a

fiduciary duty to the corporation and the shareholders and, under the business judgment rule, ( see, Ackerman v. 305 E. 40th Owners Corp., 189 AD2d 665, 667 [1993]), they may not be subjected to personal liability absent allegations that they committed separate tortious acts ( see, Murtha v. Yonkers Child Care Assn., 45 NY2d 913, 915 [1978]; cf. Bank of N.Y. v. Berisford Intl., 190 AD2d 622 [1993]). All of the allegations of misconduct in the complaint are directed at the Coop. No independent tortious conduct attributable to any of the individually named defendants is alleged (see DeRaffele v. 210-220-230 Owners Corp., 33 AD3d 752 [2006]). In addition, there is no factual allegation that the managing agent, the attorneys or any other individually named defendants acted outside the scope of their employment or authority.

With respect to the claim asserted against the Lawyer, New York does not recognize any liability of a lawyer to third parties where the factual allegations forming the basis of the claim do not fall within any recognized tort or contract liability (Drago v. Buonagurio, 46 NY2d 778, 779-780 [1978]). No facts to support an independent tort or contractual liability are pleaded. Nor is an attorney liable to third parties for negligence in performing services for his client, absent circumstances giving rise to a duty of care owed to the third-party (see, AG Capital Funding Partners, L.P. v. State Street Bank, 5 NY3d 582 [2005]; Spivey v. Pulley, 138 AD2d 563 [1988]; Viscardi v. Lerner, 125 AD2d 183 [1986]; Drago v. Buonagurio, 61 AD2d 282, 285, rev'd on other grounds 46 NY2d 778, supra). No such circumstances are alleged here.

A party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact (Alvarez v. Prospect Hosp., 68 NY2d 320, 324 [1986]; Winegrad v. New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Zuckerman v. City of New York, 49 NY2d 55 [1980]). Once 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 establish material issues of fact requiring a trial of the action (see Alvarez v. Prospect Hosp., supra; Zuckerman v. City of New York, supra).

The defendant, Coop has established, prima facie, its entitlement to judgment as a matter of law, by submitting, inter alia, a copy of Judge Kramer's Order, dated July 20, 2005, which demonstrate that it is not in violation of that Order or any other Order of any court. In opposition, the plaintiff has failed to raise a triable issue of fact (see Alvarez v. Prospect Hosp., supra; Zuckerman v. City of New York, supra).

The plaintiff's complaint is based on his claim that Judge Kramer, by Order dated July 20, 2005, determined that the plaintiff's maintenance is \$643.08, therefore, defendants' conduct, inter alia, of continually billing and demanding \$830.37 for maintenance and continually serving three day notices and bringing the Housing Court proceedings are illegal and in violation of Judge Kramer's Order. Plaintiff further contends that Judge Pinckney denial of the Coop's motion to vacate the dismissal of the non-payment petition also demonstrates that the Coop's acts are illegal.

The plaintiff is mistaken as to the meaning and effect of Judge Kramer's and Judge Pinckney's Orders. There has been no determination by either Judge Kramer or any other Housing Court Judge as to whether the plaintiff's maintenance was raised by the Coop. Judge Kramer merely found that, at the trial of the summary non-payment proceeding before him, the Coop, petitioner, did not submit sufficient evidence to establish its claim that the maintenance was raised by the Coop. As a result he granted the Coop a judgment for the assessment ordered by the Bankruptcy Court and for unpaid maintenance at the rate of \$643.08 per month, without prejudice to petitioner recovering the amount of any increase in maintenance over and above the amount he awarded.

The Coop commenced a subsequent non-payment proceeding which was dismissed when petitioner was not ready for trial. When the Coop moved to vacate the dismissal, Judge Pinckney, by Order dated March 9, 2007, denied the motion, without prejudice, on procedural grounds, and pointed out that petitioner could and should have commence a new non-payment proceeding rather than make the motion. The Coop has commenced another non-payment proceeding which is now pending.

The plaintiff has failed to submit any evidence to support his claim of illegal or improper conduct by the Coop or anyone acting on its behalf or to raise a triable issue of fact in this regard. Accordingly, the defendants' motion for summary judgment dismissing the complaint is granted.

Dated: October 30, 2007  
D# 32

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J.S.C.