

**Ugweches v 600 W. 218 St. Assoc., LLC**

2001 NY Slip Op 30071(U)

December 20, 2001

Supreme Court, New York County

Docket Number: 120569-2000

Judge: Jane S. Solomon

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

PRESENT: JANE S. SOLOMON  
J.S.C. Justice

PART 55

Arguedes A  
- v -  
600 West 217th Ave  
LTC et al

INDEX NO. 120569-2000  
MOTION DATE 10/4/01  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to 6 were read on this motion to/for dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>5</u>
Replying Affidavits _____	<u>6</u>

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion is decided together  
with motion 02 in accordance with the annexed  
memorandum decision and order.

**SCANNED**  
1 JAN 02 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 12/20/01

JANE S. SOLOMON  
J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK, IAS PART 55

-----X

AUSTEN UGWECHES,

Plaintiff,  
-against-

DECISION AND ORDER

Index No. : 120569/00

600 WEST 218 ST. ASSOCIATES, LLC,  
SAMSON MANAGEMENT CORP., ARNOLD  
GOLDSTEIN, individually and as President  
thereof, MONTE CESTA, CESAR SANCHEZ  
and "MARIA RIVERA-APT. 3B",

Defendants.

-----X



JANE S. SOLOMON, J. :

Defendants 600 West 218 St. Associates, LLC ("600 West 218"), Samson Management Corp. ("Samson"), Arnold Goldstein ("Goldstein") individually and as President thereof, Monte Cesta ("Cesta") and Cesar Sanchez ("Sanchez") (collectively, "management defendants") move to dismiss the complaint under CPLR 3014, 3016 and 3211(a)(7). By separate motion (002), defendant Maria Rivera ("Rivera") also moves to dismiss the complaint and for summary judgment. This lawsuit arises from a dispute between plaintiff Austen Ugweches ("Ugweches") and the owners, management and a certain resident of a co-operatively owned apartment building in Manhattan in which Ugweches appears to be a non-owning tenant. The two motions are decided together herein.

600 West 218 owns the apartment building at 600 West 218<sup>th</sup> Street, where Ugweches resides. Samson is the managing agent. Goldstein is president of Samson; Cesta is employed by Samson as the manager for the building; and Sanchez is employed by Samson as the building superintendent. The claims against Goldstein, Cesta and Sanchez arise from their duties as employees

of Samson. Rivera is a resident in the building who lives in the apartment below Ugweches.

Ugweches complains that he had a dispute with Rivera, who allegedly makes a great deal of noise and causes foul odor to seep into his apartment. He alleges that she is doing this to force him to leave his apartment in apparent concert with the management defendants, who failed to prevent her behavior. He also is upset because he requested a parking space, and Sanchez did not rent him one. He complains that repairs in his apartment were not done, and repairs to other apartments irritated him. He complains that a security deposit he gave to Samson for a parking space is excessive, and the rent on his apartment was increased improperly. He complains that Sanchez and Rivera made defamatory comments about him. He makes other allegations about defendants in a similar vein.

A preliminary conference was held on June 25, 2001 and an order was made that set forth a discovery schedule. In opposition to the motion, Ugweches complains that discovery has not proceeded as ordered. However, at a conference on October 1, 2001, discovery was stayed pending these motions.

Defendants argue that Ugweches fails to state a claim. When a party seeks dismissal for failure to state a cause of action, that cause of action must be liberally construed in the plaintiff's favor, see, Rovello v Orofino Realty Co., Inc., 40 NY2d 633 (1976), and if it is at all possible for the plaintiff to recover under any allegation, the motion must be denied.

Guggenheimer v Ginzburg, 43 NY2d 268 (1977); Wiener v Lazard Freres & Co., 241 AD2d 114 (1<sup>st</sup> Dept 1998). The issues are limited to whether the pleading states any cause of action, not whether there is any evidentiary support for the complaint see, Bernstein v Kelso & Co., Inc., 231 AD2d 314 (1<sup>st</sup> Dept 1997), and the court is required to view every allegation as true and resolve all inferences in favor of the plaintiff, regardless of whether the plaintiff will prevail on the merits. Gay Teachers Association v Board of Education of the City School District of the City of New York, 183 AD2d 478 (1<sup>st</sup> Dept 1992).

Here, the complaint does not set forth any cause of action, but instead contains many allegations, leaving it to the court to discern what the claims may be. Four are discernable: Defamation as against Sanchez and Rivera, nuisance as against Rivera (due to noise and odor from her apartment), 600 West 218 and Samson (for suffering repairs to be made to a neighboring apartment), breach of contract as against 600 West 218, and breach of duty against 600 West 218 and Samson for failing to intervene in and resolve Ugweches's dispute with Rivera.

The defamation claim is dismissed because it fails to specify what the allegedly defamatory statement was, when made and to whom. CPLR 3016(a). The nuisance claim is dismissed as against all management defendants because the only activity alleged to have caused a nuisance was renovation of a nearby apartment in September 2000, which activity is not unreasonable and does not support a nuisance claim.

Rivera alternatively moves for dismissal and for summary judgment. In support of summary judgment, she argues that Ugweches's allegations regarding noise and odor are factually incorrect, and she refers to a report prepared by the fire department in response to a complaint by Ugweches that Rivera was burning toxic substances to force him out. The report states that a fire department investigator was met by Ugweches, who ranted about toxic fumes, but that the investigator noticed only the scent of incense and spicy cooking in Rivera's apartment. Ugweches argues that he has his own fire department report that supports his claim, but he is saving it for trial. He also states that the fire department report is unreliable because Rivera is romantically involved with a firefighter. A party opposing summary judgment must lay bear his proof or risk an adverse determination. Alvarez v Prospect Hosp., 68 NY2d 320 (1986). Here, Rivera's contention that she is not leaking toxic fumes into Ugweches's apartment is corroborated by the fire department report. The report is based upon the investigator's personal observations, so is admissible **as a** business record. Ugweches's statements in the report likewise are admissible as admissions, and the report states that he claimed that the incense and spicy food smells were toxic fumes, thereby discrediting his claims in the complaint about such fumes. Ugweches submits no proof in opposition except to suggest, without proof, that the report is the result of bias. Accordingly, the claim against Rivera regarding odors is

dismissed.

Rivera also argues correctly that she does not control Ugweches's water or other services, so his complaints regarding those problems also are dismissed. Further, she argues that his allegations of "harassment" must be referred to the NYS Division of Housing and Community Renewal ("DHCR") because it alone has jurisdiction over a tenant harassment claim made under Rent Stabilization Code § 2525 (which addresses harassment claims by rent stabilized tenants against their landlords). Rivera's argument is well founded, and his claim that Rivera is making noise as part of a concerted effort with the management defendants to harass him out of his apartment is not properly before this court.

With respect to Ugweches's breach of contract claim, his claim that he is entitled to a parking space is meaningless absent some agreement that 600 West 218 would provide it. There being no such allegation, no claim exists. His allegation that Sanchez refused his demand for a parking space is describing reasonable conduct by a managing agent's employee in the context alleged in the complaint.

To the extent that he claims that a security deposit was given to 600 West 218 or Samson for a parking space never provided, or that he incurred expenses to make repairs in his apartment that they were obligated to perform, he may have a claim assertable in small claims court. As for his allegation that he has been subjected to rent increases, there is no basis

for the claim in the absence **of** a lease providing for a particular rent. If he is a rent stabilized tenant, as suggested by the complaint's reference to the Rent Stabilization Code, then this court has no jurisdiction to determine the correct rent and his allegations are properly directed to the **DHCR**.

Finally, Ugweches alleges that the management defendants were reckless and negligent for failing to "correct the complained of conditions," by which it appears that he alleges that they had a duty to rectify his complaints against Rivera. In opposition to the motion, he fails to demonstrate that such a duty may be imposed on any of the individual defendants, and so that part of the complaint also is dismissed against them. With respect to this claim against 600 West 218 and Samson, although a landlord and managing agent may be obligated to take steps to prevent abusive conduct by one tenant against another in some circumstances, Ugweches does not allege that he sought their assistance. Absent an allegation that the landlord or managing agent have not responded to complaints regarding Rivera's conduct, no claim is stated.

In light of the foregoing, it hereby is

ORDERED that the motions to dismiss by **all** defendants (001 and 002) are granted and the complaint is dismissed without prejudice to proceedings at the DHCR or a new, clearly pleaded action in an appropriate forum with respect to plaintiff's claims against 600 West 218 and Samson to recover rent overcharges, excess security deposit and out of pocket repair costs, and the Clerk of the Court is directed to enter judgment accordingly with costs and disbursements as taxed upon submission of an appropriate bill of costs.

Dated: December 20, 2001

ENTER :

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