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

PRESENT: PAULA J. OMANSKY PART 47

Justice

Richard + Sandra Jackson

- v -

INDEX NO. 115879/01

MOTION DATE 2/22/02

MOTION SEQ. NO. 001

MOTION CAL. NO. 6

The following papers, numbered 1 to w ere read on this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion

Motion decided in accordance with accompanying memorandum

MAY 02 2002

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Dated: 4/29/02

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 47

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RICHARD AND SANDRA JACKSON

Plaintiffs,

Index No. 115870/01

DECISION AND ORDER

-against-

WESTMINSTER HOUSE OWNERS, INC., MAXWELL-KATES, INC., MARK McANDREWS, DR. CHARLES BRENNER, JUDY KADOORY, MICHAEL MILLER, JAY NEWMAN and MICHAEL PLOTTEL,

Defendants.

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PAULA J. OMANSKY, J.:

Defendants move to dismiss the complaint and for sanctions; plaintiffs cross-move for sanctions.

FACTS

Plaintiffs, the proprietary lessees of apartment 14 E at the subject premises, WESTMINSTER HOUSE (Westminster), seek damages and a rent abatement in connection with their alleged inability to use their terrace and for damage to plants and planters during the course of repairs undertaken by Westminster. According to the affidavit of Alvin Elias, an employee of MAXWELL-KATES, INC. (Maxwell), the property manager, the building was required to make emergency repairs to the facade in July, 1998, which was found to be in danger of collapsing. Elias states that the proprietary lease gives Westminster the right to erect equipment on the roof and terraces to perform repairs, and

affords it the right of access to effecutuate those repairs.

Plaintiffs withheld maintenance in protest of the continued use of their terrace and damage to their property, allegedly dating back to 1996, accumulating approximately $15,000 in arrears.

On April 10, 2001 plaintiff Richard Jackson (Jackson) wrote to Maxwell and submitted a maintenance arrears check for $10,191. He stated that in the absence of a settlement offer from management, he intended to bring litigation "to redress [his] injuries...[that] said lawsuit will focus on the breach of the covenant of quiet enjoyment and the resulting nuisance" over a course of years, in addition to seeking redress for the "wanton destruction" of plaintiffs' property. Jackson also expressed his intention to seek punitive damages.

Defendants allege that a letter dated April 30, 2001 from Maxwell to Jackson which states:

> In accordance with the Board's agreement with you, the June maintenance bill will reflect the following credits: 1. $1,700.00 for planters, 2. $300.00 for planting soil.

constitutes an accord and satisfaction of the entire matter. They argue that said amount had been deducted from the outstanding maintenance arrears owed by plaintiffs, and that plaintiffs paid the balance of outstanding maintenance arrears at that point. Elias states that it was the understanding of all of the parties that the $2,000 settlement resolved all of the issues regarding the planters and damage to plants. Plaintiffs deny having

accepted any settlement, and state that Emigrant Savings, the mortgagee, accepted the maintenance reduction in order to preserve their collateral which was threatened by a non-payment proceeding; that there was never an accord and satisfaction. Jackson states that neither he nor his wife ever agreed to accept the **$2,000** in settlement of all of their claims; that he had been in the habit of spending many hours tending to his prized collection of 10-foot high juniper trees and and hybrid rose bushes ranging in height from 4 to ***6*** feet and which had required custom planters; that work which was to have been completed by **1998** was not completed until 2001, and that thus he had been deprived of his gardening pursuits; that the workmen were using the plaintiff's terrace as a staging area, storing heavy equipment there, and were actually performing welding on large metal pieces for use elsewhere, causing extensive dust and noise which disturbed him and his wife. With regard to damage to his plants and trees, Jackson states that management assured him that his trees and plants would not be harmed; that the plants and furniture on the terrace did not have to be removed and would be protected; that subsequently, defendants advised plaintiffs that the planters would have to be removed, and that the management would pay for the soil and the planters, but that plaintiffs were to be given the opportunity to transfer the rosebushes for safekeeping. However, Jackson states that in September 2000, without notice to plaintiffs, and without having agreed to an amount for compensation, defendants removed their 46 rosebushes

and destroyed the planters. He added that four juniper trees were severly damaged and had to be repaired with clamps by a tree surgeon and that their survival is in jeopardy.

The complaint in this action alleges breach of contract, breach of warranty of habitability, breach of fiduciary duty, partial constructive eviction, trespass and nuisance, and negligence.

DISCUSSION

Defendants' motion to dismiss the complaint is granted to the extent detailed below, with leave granted to plaintiffs to replead certain matters.

With regard to Maxwell's argument that plaintiffs' complaint against it must be dismissed because it is an agent for a disclosed principal, the law is that a managing agent, although an agent for a disclosed principal, can be held liable for non-feasance in a case in which it is in exclusive and complete control of the management and operation of the building (see. *Keo* v *Kimball Brooklands Corp.*, 189 AD2d 679,680 [1st Dept 19931). Moreover, a managing agent can be held liable for affirmative acts of negligence (see, *Lennon* v *Oakhurst Gardens Corp.* 229 AD2d 897,898 [3rd Dept 19961). The instant case is not one of non-feasance, unlike the lead abatement case cited by defendants, *Juarez* v Wavecrest *Mgt.* (88 NY2d 628 [1996]. It is rather a case in which the facts indicate that the managing agent allegedly inflicted much of the harm plaintiffs claim to have suffered. Only Maxwell oversees the the day-to-day management of

the building, and Jackson's dealings regarding the requested rent abatement were with Maxwell (see, Exs **D** and E to notice of motion). Maxwell allegedly was in charge of the reconstruction alleged to have caused damage to the plaintiffs. Maxwell was directly involved and control in all aspects of the alleged negligent and intentional actions leading to this lawsuit, and the complaint would not be suibject to dismissal on that ground (see, *Lennon* **v** *Oakhurst Gardens Corp.* supra). However, as defendants argue, the complaint alleges no specific acts done by Maxwell, but refers to acts committed by "defendants". This may be cured by repleading and plaintiffs are given leave to replead against Maxwell.

Defendants also argue that the underlying dispute had already been resolved completely by the $2,000 maintenance abatement reflected in the June, **2001** rent, barring the within action . However, their unsubstantiated assertion of accord and satisfaction as a complete defense to the action in support of their motion to dismiss is not persuasive. The April 30, **2001** letter refers to an agreement, but fails to describe any terms. No writing that indicates plaintiffs' assent to the terms of Maxwell's letter April 30, **2001**, and in any event, as stated by Jackson in his affidavit, plaintiffs already had been promised compensation for the planters which had to be destroyed. Jackson's letter of April **10**, **2001** seeks not only recompense for the destroyed property, but contemplates litigation seeking far more extensive damages, including

punitive damages, related to the plaintiffs' having been deprived of the use of their terrace and for the "wanton destruction" of property. The motion to dismiss insofar as it based on accord and satisfaction is denied.

With regard to the causes of action alleged in the complaint for unspecified breaches of fiduciary duty against the individual members of the board named as defendants, under the business judgment rule,

> absent a showing of discrimination, self dealing or misconduct by board members, corporate directors are presumed to be acting "in good faith and in the exercise of honest judgment in the lawful and legitimate furtherance of coroprate purposes"

(See, Jones v Surrey Coop *Apts.*, 263 AD2d 33, 36 [1st Dept. 19991 citing Matter of Levandusky v One Fifth Avenue Apartment *Corp.*, 75 NY2d 530, and quoting *Auerbach* v Bennet, 47 NY2d 629,629). Here, plaintiffs' unspecified allegations of misconduct, made on information and belief, ie., that the "defendants wrongfully and maliciously withheld the truth from the plaintiffs about the way their terrace wuould be used and about the length of time plaintiffs would be denied the use of their terrace" and by "intentionally refusing to give plaintiffs a rent abatement" (see, complaint at ¶76) are insufficient to allege a cause of action against them individually (see, Jones v Surrey Coop Apts. supra).

Plaintiffs leave to replead their their first cause of action alleging breach of contract with respect tothe

proprietary lease as against Westminster only, since the proprietary lease is between plaintiffs and Westminster, not Maxwell or the board members. . Paragraph 4-b of that lease provides for a rent abatement in the case of damage so extensive "as to render the apartment partly or wholly untenantable" which is to continue until the the apartment is again rendered "wholly tenantable". Arguably, defendants' acts which are alleged to have partially deprived plaintiffs of the use of part **of** their space warrant an abatement pursuant to that provision. Further, plaintiffs have alleged a breach of the covenant of quiet enjoyment. The claim is not time-barred under the six-year statute of limitations for contract actions.

Plaintiffs' cause of action for partial constructive eviction (mischaracterized by defendants as "forcible eviction") cannot stand. A claim of constructive eviction may only be asserted defensively (see, ***Elkman v*** *Southgate Owners* ***Corp*** , 233 AD2d **104,105** [1st Dept. ***19961***).

However, plaintiff's breach of warranty of habitability (Real Property Law §235-b) claims may stand, subject to a three-year statute of limitations period (see, CPLR 214 (2)). The measure of damages due to a breach **of** warranty of habitability in a coop situation is the difference between the maintenance paid by the plaintiffs and the rental value of the premises, as opposed to loss of value of the selling price of the shares, during the breach (see, *Mastrangelo v Five Riverside Corp.*, 262

AD2d 218 [1st Dept. 19991).

Defendants' application to dismiss plaintiffs' cause of action for trespass and nuisance is granted. The proprietary lease at ¶25 grants the defendants the right of access to the plaintiffs' terrace in order to perform repairs to the building.

As to nuisance, the court finds that the the bare bones conclusory allegation that the "defendants' conduct constituted a continuing trespass and nuisance" fails to state a cause of action for private nuisance (see, *Copart Industries v Con Ed.,* 41 NY2d 254 [1977]).

Plaintiffs' sixth cause of action for negligence and for destruction of their property may stand. The allegations of wanton destruction of property and negligent treatment of plaintiffs' juniper trees, requiring plaintiffs to seek extensive tree surgery to repair the damage, constitute an independent tort and do not allege merely the negligent performance of contractual duties. Where it can be found that the defendant landlord had a duty to a plaintiff, breached that duty and thus caused injury to that plaintiff in the course of construction work, plaintiff has a cause of action sounding in negligence (see, *P.W.B. Enterprises, Inc. v Moklam Enterprises, Inc.*, 221 AD2d 184,185 [1st Dept. 1995]). Here, the facts as alleged by Jackson indicate that the the defendants assured plaintiffs that their property would be safeguarded and allegedly breached that duty by causing damage to the juniper trees, and by destroying the rosebushes before giving plaintiff an opportunity

to transfer them to another location for safekeeping.

As to the seventh cause of action for attorneys fees pursuant to Real Property Law §234, the cause of action may stand in light of the courts' sustaining causes of action based upon breach of the lease.

Additionally, the court finds that the plaintiffs' allegations to misconduct do not warrant their prayer for punitive damages (cf., *Minjak* ***v*** *Randoplh,* 140 AD2d 245,249 [1st Dept. 1988). Further, both parties' applications for sanctions are denied.

Accordingly, the defendants' motion to dismiss is granted only to the extent delineated above, and the court grants plaintiffs leave to serve an amended complaint as indicated. Therefore it is

ORDERED that the motion to dismiss the complaint is denied, and it is further

ORDERED that the plaintiffs are to serve and file a copy of the amended complaint within **10** days of service of a copy **of** this order with notice of entry; and it is further

ORDERED that the defendants are to serve and file the answer the amended complaint within ten days of service of said amended complaint, and it is further

ORDERED that the plaintiffs' cross-motion for sanctions is denied, and it is further

ORDERED that the parties are to appear for a preliminary conference on June 21, 2002 at 71 Thomas street, Room 205 at 11:00AM.

This constitutes the decision and order of the court.

DATED: 4/24 , 2002

PAUL A. J. OMANSKY
J.S.C.