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

PRESENT: Hon Joan A. Madden PART 11

Justice

Index Number : 108860/2007

BISK, LAUREN

VS.

COOPER SQUARE REALTY, INC.,

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 108860-07

MOTION DATE ~~11-4-07~~ 1-31-08

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

Papers read on this motion to/~~for~~ dismiss + Forclosty

	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 is decided in accordance with the annexed Memorandum Decision and Order.

FILED
JUL 16 2008
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: July 11, 2008

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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LAUREN BISK,

Plaintiff,

-against-

COOPER SQUARE REALTY, INC., BOULEVARD HOUSING CORP., NORTH FORK BANK, JONATHAN MOGIL, and EDWARD VINCENT,

Defendants

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INDEX NO. 108860/2007

JOAN A. MADDEN, J.:

In this action for damages brought by plaintiff Lauren Bisk ("Bisk") a shareholder and apartment owner in a cooperative corporation ("the co-op"), against the co-op and others, defendants Boulevard Housing Corp.("Boulevard"), Jonathan Mogil ("Mogil") and Edward Vincent ("Vincent") (together "the Boulevard defendants") move to dismiss the intentional infliction of emotional distress and defamation claims in their entirety, the breach of fiduciary duty claim as to Vincent and the request for punitive damages. The Boulevard defendants also seek a stay of this action, pending the outcome of an appeal of a decision to dismiss the co-op's claim against Bisk for outstanding maintenance. Bisk opposes the motion, which is granted in part and denied in part.

BACKGROUND

The following recitation of the sequence of events between Bisk and defendants is based on the allegations of the verified complaint, and the documentary evidence before the court. For the purposes of this motion, the allegations of the complaint, which at times are confusing, must be accepted as true.

Bisk is an individual residing at 2373 Broadway, Apartment 1030 ("the Apartment"),

New York, New York ("the Building"). The Building was purchased by Boulevard, a cooperative corporation in 1989. In 1995, plaintiff's father purchased the Apartment and plaintiff began living there. In 1999, plaintiff purchased the Apartment from her father. Defendant Cooper Square Realty, Inc. ("Cooper Square") became the Building's managing agent in 2000, and was terminated in May 2007. Defendant North Fork Bank ("North Fork") is the co-op's bank. Mogil and Vincent are individuals residing at the Building; Mogil is an alternate member of the co-op's Board of Directors ("the Board"), and Vincent is a member of the Board and the Treasurer.

This dispute began in late 2002 and early 2003, when Bisk was notified by Cooper Square that she was required to pay a fee in connection with $15,000 renovation project in the Apartment. Since the project was about to begin, and Bisk had already paid her contractors, she paid the fee. Upon completion of the renovation in early 2003, Bisk wrote to the Board questioning the propriety of the fee charged. She received no response and the Board refused to investigate. In the meantime, Bisk was told by three Board members to stop inquiring about the fee.

Shortly after Bisk wrote the letter inquiring about the fees, it is alleged that "regular and persistent accounting irregularities started to plague the monthly account statements" received by Bisk from Cooper Square (Complaint, ¶ 16). Thus, the account statements would show a previous unpaid balance even though Bisk paid all her maintenance and assessment payments. In addition, Cooper Square would regularly fail to acknowledge the receipt of Bisk's payments or inaccurately document their receipt. In a few instances, Cooper Square treated the payments as debits by adding such amounts to a balance due instead of crediting her account, which resulted

in the assessment of late fees not due. Because of the period accounting errors in 2003 and 2004, the account continued to reflect a balance and late fees accrued. Throughout 2003 and 2004, Bisk made repeated requests in writing and via phone calls to correct the errors, but nothing was ever done.

As Cooper Square took the position that Bisk's account was in arrears, it revoked Bisk's membership to the Building's health club. In January 2005, Bisk sent copies of cancelled checks to Cooper Square to demonstrate that she had paid, but Cooper Square still failed to correct her account.

In June 2005, Bisk sought to sell the Apartment. As she was concerned that the co-op might slow down the approval process if her account was in arrears, she made numerous efforts to clear up the errors with respect to her account. Thus, in September 2005, she contacted Vincent to discuss the account, but he cancelled the meeting at the last minute and authorized Cooper Square to send her a 3-day notice demanding payment of monies and threatening legal action.

On October 2, 2005, Bisk sent Cooper Square eight checks made out to Boulevard covering all the amounts alleged to be owed by her (for maintenance, assessments and fees) for July 2005, August 2005 and October 2005. The letter accompanying the checks stated that the charges were "in dispute" and related to Cooper Square's accounting errors but that Bisk was nonetheless paying the charges so that her account could be brought current and the matter closed. On October 21, 2005, Bisk received a voice mail from a representative of Cooper Square stating that the checks would not be deposited based on advice of counsel. Then, without notice to Bisk, Cooper Square deposited all eight checks on November 8, 2005. Three of the

checks cleared, but the other five were returned for insufficient funds. The checks were subsequently redeposited by Cooper Square on November 18, 2005 and cleared.

In late November 2005, Bisk accepted an offer to purchase the Apartment. During November 2005, despite having received and deposited all payments allegedly due from Bisk, Cooper Square and the co-op refused to eliminate the balance on Bisk's account. In addition, Vincent informed Bisk that she owed $2,253 in legal fees expended to have her balance reduced to zero. After speaking with Vincent, who confirmed her eight checks reduced her balance to zero, Bisk agreed to pay the $2,253 to resolve the account balance, since the sale of her Apartment was pending and Boulevard threatened to interfere with the sale unless the accounting issues were resolved.

On December 7, 2005, Bisk made the payment of $2,253, but her account balance was not reduced to zero, and in fact, her account statement reflected a prior balance of $4,462.42. Since Cooper Square and Boulevard did not keep their part of the agreement to reduce her account to zero, Bisk informed them, including in letters dated February 15, 2005 and March 24, 2006, that she would apply the $2,253.00 to maintenance payments for December 2005. By late December 2005, the sale of the Apartment fell through, and as the accounting issues had not been resolved, Bisk removed the Apartment from the market.

After Cooper Square and Boulevard failed to comply with their agreement to zero out the balance on Bisk's account, they "escalated the harassment campaign against Bisk" through forgery of her checks and fraudulent deposits. (Complaint, ¶ 32). In January 2006, Bisk was notified by her bank that checks totaling over $7,100 were deposited by North Fork, and that she did not have enough funds in her account to cover this amount. Thus, other checks Bisk had

written had to be returned, including checks made out to credit card companies that resulted in finance charges. After hours of investigation, Bisk learned that the checks that had been redeposited were the same eight checks that she had written to Boulevard in October 2005 and which had been deposited by Cooper Square in November 2005 and cleared in November 2005. Bisk subsequently learned that in an apparent attempt to defraud her, Cooper Square had directed North Fork to redeposit the checks into the account of Boulevard. North Fork did not examine the back of such checks which would have reflected that the checks were deposited and cleared. Instead, North Fork reproduced images of the front of the checks off of their image system, stamped the back of the checks to indicate that they were deposited a photocopy in lieu of the original and attempted to deposit them into the account of Boulevard.

Bisk was informed by her bank that re-depositing copies of her checks constituted bank fraud, and advised her to file a criminal complaint. After leaving messages for Vincent and Cooper Square, Bisk filed a criminal complaint.

On January 9, 2006, seven of the same eight checks amounting to approximately $5,500 were again deposited by North Fork into the account of Boulevard or Cooper Square at the request of Cooper Square. This second attempt to deposit the checks was in apparent retaliation for Bisk's complaints to the police. Bisk was notified by her bank that the same checks were deposited by North Fork. Bisk did not have enough funds to cover the amounts and the redeposited checks and they were returned for insufficient funds. Bisk again spent several hours trying to resolve the situation with her bank and North Fork. Bisk's bank subsequently put her account "on restraint" which meant Bisk was prohibited from using ATMs to withdraw money from her account and she was required to call the bank each morning to authorize the deposit of

her checks. The situation "caused extreme inconvenience to Bisk [and]... caused her significant mental distress and anguish" (Complaint ¶ 28).

The police investigated Bisk's complaint and closed the investigation in late January 2006. When Bisk informed the security department at her bank that the police had closed the case without bringing charges, the person related his belief that the redepositing of checks constituted fraud and advised her to contact the District Attorney's Office. In February 2006, Bisk contacted the District Attorney's Office.

By letter dated February 3, 2006 from Tom Padilla of Cooper Square, Bisk was informed that she owed $11,745.78 for maintenance and assessment costs for July 2005, August 2005 and October 2005. However, Bisk's eight checks that were deposited in November 2005 clearly stated that they covered the costs for such months and Bisk's cover letter explained this as well. At that time, Cooper Square knew that these checks covered this period. By letter dated February 15, 2006, Bisk wrote to Cooper Square explaining that her eight checks for maintenance and assessment costs for July 2005, August 2005 and October 2005 had cleared in November 2005, and that she believed the re-deposit of the checks in January 2006 had been done fraudulently. Bisk subsequently received a letter from Cooper Square stating that she still owed $2,253 for maintenance costs for December 2005.

Bisk responded by letter dated March 24, 2006, that she had requested that the $2,253 she paid as part of her agreement with Boulevard to zero out her account be used to pay her December 2005 maintenance bill after Boulvard failed to comply with the agreement. Bisk kept Boulevard informed of the problems she was having with Cooper Square but Boulvard took no action. Bisk informed Vincent that her account balance was never zeroed out despite her

payment of $2,253 in December 2005, and about the fraudulent redeposit of her eight checks, but Vincent took no action and did not respond for three weeks.

By letter dated March 28, 2006, Bisk wrote to Vincent and expressed her belief that the Board was breaching its fiduciary duties to her as a shareholder and had colluded with Cooper Square with respect to the fraudulent redeposit of her eight checks. She also requested certain information regarding Boulevard's dealings with Cooper Square but such information was never sent.

In April 2006, Boulevard's attorney wrote to Bisk and threatened to commence legal action against her if she did not meet with her and pay $4,571.04 for outstanding maintenance costs and assessments for December 2005 and April 2006 plus a later fee. However, when Bisk attempted to schedule a meeting with the attorney, the attorney would not meet with her.

In the meantime, North Fork acknowledged its role and fault in the January 2006 redeposits of the eight checks in a letter dated March 2, 2006. In that letter, North Fork apologized for its role in the incident, and the inconvenience caused to Boulevard, Cooper Square and Bisk, and stated that it would implement controls to make sure that the situation would not happen again. However, in May 2006, one of the eight checks that cleared in November 2005 was again redeposited an additional two times.

On two occasions, "Bisk was defamed and publicly embarrassed by members of the Board" by "false statements" that she was in arrears (Complaint, ¶ 51). At a January 31, 2006 Board meeting instead of responding to a question posed by Bisk the President of the Board stated, in substance that, "[i]f you were not [in] arrears, you might have standing to ask the question" (Id., ¶ 51). At another Board meeting held in June 2006, Mogil made a similar

comment when Bisk sought to ask a question.

Despite Bisk's efforts to resolve the accounting dispute, on June 2, 2006, Boulevard commenced a non-payment proceeding against Bisk in the Civil Court of the City of New York and sought to evict her from the Apartment (hereinafter "the Civil Court action") . The petition alleged that Bisk owed $7,225.30 for maintenance and assessments for December 2005, April 2006 and May 2006, plus late fees. After Boulevard presented its case on September 26, 2006, the court granted Bisk's motion to dismiss on the ground that Boulevard's evidence was insufficient to sustain its burden of proof. The court also agreed that Bisk was entitled to apply the sum of $2,253 she paid to her December 2005 maintenance since Boulevard had not zeroed out her account as agreed; Bisk was the prevailing party and, thus, was entitled to attorney's fees and costs in the amount of $31,778.75. Boulevard did not pay the judgment and has appealed the decision in the Civil Court action, causing Bisk to continue to incur attorney's fees.

The Civil Court action was "motivated by ill will and malice" as evidenced by the fact that in 2005 and 2006 approximately 60 units in the Building were in arrears but an eviction proceeding was only brought against Bisk (Complaint, ¶ 56).

As a result of the conduct of Boulevard and Cooper Square in refusing to clear up the accounting discrepancies, Bisk's account has been in arrears for four years. Consequently, Bisk's credit rating has suffered severe and irreparable damage; she has been prevented from obtaining financing to establish her psychology practice, and has been subjected to higher than normal interest rates. She has also expended numerous hours trying to resolve the accounting discrepancies, which has taken time away from her psychology practice, and incurred substantial attorney's fees. As a result of the Bord's action, Bisk has suffered from "extreme anxiety and

stress"which caused her to develop a lichen planus, a severe skin disease that covers her entire body, and the harassment has caused Bisk to suffer socially, and has alienated her from others in the Building.

Plaintiff commenced this action on September 17, 2007. The verified complaint contains the following causes of action: (1) fraud against Cooper Square and North Fork, (2) negligence against North Fork, (3) negligence against Boulevard and Cooper Square, (4) intentional infliction of emotional distress against Boulevard and Cooper Square, (5) defamation against Mogil and Boulevard, and (6) breach of fiduciary duty against Boulevard and Vincent. The verified complaint seeks compensatory and consequential damages and punitive damages in the amount of $5,000,000.

MOTION TO DISMISS

The Boulevard defendants now move to dismiss the causes of action for the intentional infliction of emotional distress and defamation in their entirety and the breach of fiduciary duty claim as against Vincent, and the demand for punitive damages.

When considering a dismissal motion based on the pleadings "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law..." Guggenheimer v. Ginzburg, 43 NY2d 268, 275 (1977)(citations omitted). The court must "construe the complaint liberally and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion and accord plaintiffs the benefit of every favorable inference." Richbell Informational Services, Inc. v. Jupiter Partners, L.P., 309 AD2d 288, 289 (1st Dept 2003), citing, 511 West 232nd Owners Corp. v. Jenifer Realty Corp., 98 NY2d 144, 152 (2002).

Intentional Infliction of Emotional Distress

With respect to the intentional infliction of emotional distress claim, the Boulevard defendants argue that the claim fails to state a cause of action since the alleged conduct does not rise to the level of extreme and outrageous conduct necessary to make out such a claim. They further argue that the claim is time-barred since any alleged conduct which could provide a potential basis for the claim occurred after the expiration of the applicable one-year statute of limitations.

Bisk counters that the acts of misconduct alleged in the complaint-- including the malicious failure and/or refusal to correct accounting irregularities with her account from 2003 to 2006, keeping her account in arrears to use as leverage from 2003 to 2007, the false and defamatory statements made against her in January and June 2006, and the commencement of a frivolous non-payment proceeding against her in June 2006, and the aggressive pursuit of such proceeding in September 2006 which continues to date with the appeal–are sufficient support of claim for the intentional infliction of emotional distress. In addition, Bisk argues that the intentional infliction of emotional distress claim is timely since the alleged course of conduct was continuous and took place over a period of years, and that September 2006 prosecution of the Civil Court action by Boulevard and its appeal in 2007 occurred within the one-year limitations period.

The tort of the intentional infliction of emotional distress has four elements, (i) extreme and outrageous conduct, (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress, (iii) a causal connection between the conduct and injury, and (iv) severe emotional distress. See, Howell v. NY Post Co., 81 NY2d 115, 121 (1993); see also

Murphy v. American Home Products Corp., 58 NY2d 293, 303 (1983), quoting Restatement of Torts, Second, Section 46[1], comment [d]).

To demonstrate outrageous conduct sufficient to support such a claim, it must be shown that the alleged conduct was "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." Murphy v American Home Products Corp., 58 NY2d at 303. In applying this standard to landlord-tenant disputes, the courts have held that multiple acts of misconduct by a landlord and/or managing agent are insufficient to constitute outrageous conduct (Graupner v. Roth, 293 AD2d 408, 410 (1st Dept 2002)), unless there is "a deliberate [and] continuous course of conduct" (Carter v. Andriani, 84 AD2d 513 (1st Dept 1981), appeal dismissed, 55 NY2d 877 (1982).

Thus, the courts have held that a single lawsuit by the landlord, even if brought maliciously and for the purpose of harassment, is inadequate to support a finding of outrageous conduct (Fischer v. Maloney, 43 NY2d 553 (1978);Artzt v. Greenburger, 161 AD2d 389 (1st Dept 1990)), but have reached the opposite conclusion when the landlord engages in a pattern of bringing multiple actions combined with other harassing conduct. Green v. Fischbein Olivieri Rozenholc & Badillo, 119 AD2d 345 (1st Dept 1986)(allegations that landlord and its law firm engaged in a course of conduct "without legal cause or justification' that was designed to "harass, intimidate, and interfere with plaintiff's tenancy" including the instituted five baseless eviction proceedings, the interruptions or discontinuance of services and the deterioration of plaintiff's living conditions were sufficient to state a claim for the intentional infliction of emotional distress); see also Meyer v. Park South Associates, 159 AD2d 337 (1st Dept 1990)(longstanding landlord tenant dispute alleging long-term campaign of harassment, reciting a litany of abuse

stated a cause of action for intentional infliction of emotional distress).

In this case, the separate acts of misconduct allegedly committed by the Boulevard defendants in connection with the dispute regarding the discrepancies in Bisk's account, the two statements at the Board meetings regarding Bisk being in arrears, the failure to investigate and remedy the fraudulent redeposiling of checks into Boulevard's bank account, the commencement of a single non-payment proceeding and the appeal of its outcome are insufficient to constitute a pattern of continuous harassment, and "fall short of the extreme and outrageous conduct necessary to support a cause of action for the intentional infliction of emotional distress" Hartman v. 536/540 E. 5th Equities St., Inc., 19 AD3d 240, 241 (1st Dept 2005).[1] Moreover, the failure to correct Bisk's account, even if continuous, cannot be said to be "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." Murphy v American Home Products Corp., 58 NY2d at 303; see also,. Walentas v. Johnes, 257 AD2d 352, 354 (1st Dept), lv dismissed, 93 NY2d 958 (1999).

In addition, a claim for the intentional infliction of emotional distress must be commenced within one year of the complained-of conduct. See Brasseur v. Speranza, 21 AD3d 297, 298 (1st Dept 2005); CPLR 215(3). Here, the majority of the alleged misconduct occurred more than a year before the commencement of this action on September 17, 2007. Moreover, contrary to Bisk's argument, the continuous tort doctrine which enables a "plaintiff to rely on wrongful conduct occurring more than one year prior to the commencement of the action, so long

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[1]Notably, beyond reference to a letter written by Bisk accusing Boulevard of colluding with Cooper Square in connection with the redepositing of the checks into Boulevard's account, the complaint is devoid of any allegations that Boulevard participated in the fraud and the fraud claims are asserted against Cooper Square and North Fork only.

as the final actionable event occurred within a year of the suit" (Shannon v. MTA Metro-North Railroad, 269 AD2d 218, 219 (1st Dept 2000)), is not applicable here. Even assuming arguendo that the complaint sufficiently alleged a continuous pattern and practice of actionable conduct, for the continuous tort doctrine to apply, the wrongful acts falling within the statute of limitations must be independently actionable. Id. See also, Dana v. One Park Marina, Inc., 230 AD2d 204, 210-211 (4th Dept 1997); Wolff v. City of New York Financial Services Agency, 939 FSupp 258, 264 (SD NY 1996); Commentaries, Alexander, Book 7B, McKinney's Consol. Laws of NY, CPLR 215, at 466-467.

Here, the only alleged conduct falling within the one-year statute of limitations is the Boulevard defendants' prosecution of the Civil Court action and their appeal of its outcome, and neither of these acts whether considered separately, or together, provide a basis for a claim for the intentional infliction of the emotional distress. See e.g. Fischer v. Maloney, 43 NY2d at 557 (allegations by tenant-shareholder that directors of cooperative corporation commenced a defamation against him to malign, harass and intimidate him are insufficient to state a claim for the intentional infliction of emotional distress); Spinale v. Guest, 270 AD2d 39 (1st Dept 2000)(commencement of ejection action even if done in retaliation for complaints by plaintiffs does not provide a basis for a claim for the intentional infliction of emotional distress); Artzt v. Greenburger, 161 AD2d at 399 (actions of defendant-landlord, including the landlord's bringing of an unsuccessful action for a declaratory judgment alleging that plaintiff's rent-regulated apartment was not his primary residence, "was not so outrageous as to support a cause of action for infliction of emotional distress").

Accordingly, the claim for the intentional infliction of emotional distress must be

dismissed as against the Boulevard defendants.

Defamation

The Boulevard defendants assert that the defamation claim is time-barred as the allegedly defamatory statements were made more than a year before the commencement of this action. They further assert that the defamation claim is not pleaded with sufficient specificity as required by CPLR 3016(a) since the particular words complained of are not adequately identified, and that in any event, the statements at issue, which were made at a shareholder's meeting, are subject to a qualified privilege.

Bisk argues that defamation claim is not time-barred since the statements at issue were not proven to be false until the conclusion of the trial in the Civil Court action in September 2006. Bisk further argues that the defamation claim is adequately pleaded and that it is premature to dismiss the defamation claim based on the qualified privilege defense.

A claim for defamation is governed by the one-year statute of limitations. See CPLR 215 (3). Moreover, contrary to Bisk's argument, the statute of limitations on a defamation claim begins to run upon the utterance of the defamatory statement and not when such statement is proven to be false. Rand v. New York Times Co., 75 AD2d 417, 424 (1st Dept 1980)("[i]n an action for slander the Statute of Limitations runs from the time of the utterance, not the discovery of the slanderous matter); Seymour v. New York State Electric & Gas Corp., 215 AD2d 971, 972 (3d Dept 1995)(same).

Furthermore, Lewisohn v. Dial Press, Inc., 264 AD 370 (1st Dept), appeal dismissed, 265 AD 804 (1942), on which Bisk relies is not to the contrary. In Lewisohn, the court held that statute of limitations did not run on plaintiff's libel claim until the report regarding plaintiff's

fitness for the guardianship of her child, which was previously supported by the facts, was no longer true based on a reversal of court decision denying plaintiff custody. Unlike in Lewisohn, here the allegedly defamatory statements at issue were false when made, so that the limitations period began to run upon their utterance. Rand v. New York Times Co., 75 AD2d at 424. Furthermore, contrary to Bisk's argument, the "uncommon remedy" of equitable estoppel does not apply to extend the statute of limitations since there is no allegation that defendants committed fraud or intentionally concealed facts which caused Bisk to refrain from filing this action. See generally, Ross v. Louise Wise Services, Inc., 8 NY3d 478, 491, 492 (2007).

Thus, since the allegedly defamatory statements were made at Board meetings in January and June 2006, which is more than one year before this action was commenced in September 2007, the defamation claim must be dismissed as untimely.

Breach of Fiduciary Duty

The Boulevard defendants argue that the breach of fiduciary duty claim must be dismissed as against Vincent since there are no allegations that Vincent committed a separate tortious act.

Bisk counters that Vincent can be held liable for breaching fiduciary duties owed to Bisk as a shareholder and it is not necessary to plead that he acted in his own self-interest. Moreover, Bisk asserts that the complaint adequately alleges that Vincent committed acts of misconduct separate from the collective action of the Board.

"The directors of [a] co-op owe a fiduciary duty to plaintiffs-shareholders, requiring the directors to act solely in the best interests of the shareholders...It is not necessary to plead the directors acted in self-interest; pleading unequal treatment of shareholders will suffice." Bryan v.

West 81st Street Owners Corp., 186 AD2d 514, 515 (1st Dept 1992). At the same time, however, "individual directors cannot be held liable for a breach of fiduciary duty absent an allegations of tortious conduct separate" from that of the Board. Messner v. 112 East 83rd Street Tenants Corp., 42 AD3d 356, 357 (1st Dept), appeal dismissed, 9 NY3d 976 (2007); see also, Brasseur v. Speranza, 21 AD3d 297 (1st Dept 2005)(dismissing breach of fiduciary duty claim against individual board members when there was no allegation that they "breached a duty other than, and independent of, those contractually imposed upon the board").

Here, giving the complaint the benefit of every reasonable inference, allegations that Vincent committed separate acts of misconduct by cancelling a meeting with Bisk, coercing Bisk into agreeing to paying to zero out her balance and then refusing to honor the agreement and failing to investigate her allegations that Cooper Square fraudulently redeposited checks, are sufficient to state a breach of fiduciary duty claim against Vincent individually.

Accordingly, the motion to dismiss the breach of fiduciary duty claim against Vincent is denied.

Punitive Damages

The Boulvard defendants also argue that the demand for punitive damages should be dismissed as such damages are inappropriate in this action which does not seek to vindicate a public right, and that Bisk has not alleged the kind of "egregious, wilful or morally capable" conduct that would warrant an award of punitive damages. Munoz v. Peretz, 301 AD2d 382 (1st Dept 2003).

Bisk contends that its demand for punitive damages should not be dismissed since allegations in the complaint that the conduct of Cooper Square and Boulevard were motivated by

it is not necessary to allege that the acts of misconduct were aimed at the public.

In a tort action, unlike a claim based on a contractual relationship, it is not necessary to show that the harm was aimed at the general public "so long as the very high threshold of moral culpability is satisfied." Giblin v. Murphy, 73 NY2d 769, 773 (1988)(citations omitted); Pirrotti & Pirrotti, LLP v. Estate of Warm, 8 AD3d 545, 546 (2d Dept 2004). To support a demand for punitive damages the facts alleged must establish "gross, wanton, or willful fraud, or other morally culpable conduct." Cohen v. Mazoh, 12 AD3d 296 (1st Dept 2004);see also, Putter v. Feldman, 13 AD3d 57, 58 (1st Dept 2004)(affirming trial court's dismissal of plaintiff's demand for punitive damages "for failure to allege facts showing willful, wanton, and reckless misconduct").

Here, at least with respect to the Boulevard defendants, the allegations in the complaint are insufficient to support a request for punitive damages as even if their failure to correct the accounting discrepancies and errors committed by Cooper Square was willful and malicious, their conduct does not rise to the level of culpability needed to warrant an award of punitive damages, and there are no allegations that the Boulevard defendants committed fraud in connection with the accounting discrepancies or the redeposit of Bisk's checks. Accordingly, the demand for punitive damages must be dismissed as against the Boulevard defendants.

MOTION FOR A STAY OF PROCEEDINGS

The Boulevard defendants move, pursuant to CPLR 2201, to stay the disposition of any claims not dismissed pending a decision on the appeal in the Civil Court action. Bisk opposes the motion for a stay, which is denied.

As indicated above, the judge in the Civil Court action dismissed Boulevard's claim for

As indicated above, the judge in the Civil Court action dismissed Boulevard's claim for the non-payment of rent (i.e. maintenance) and found that Bisk was the prevailing party and entered a judgment in her favor for attorneys' fees. Notably, however, the Civil Court judge dismissed Bisk's counterclaims for breach of fiduciary duty based on allegations similar to those in the complaint here as beyond the scope of that court's jurisdiction. Boulevard appealed the decision,[2] and argument was held before the Appellate Term in April, 2008.

Under CPLR 2201, "the court in which an action is pending may grant a stay of proceedings in a proper case, upon such terms that are just." In general, "it is only where the decision in one action will determine all questions in the other action, and the judgment on one trial will dispose of the controversy in both actions that a case for a stay is presented." Pierre Associates, Inc. v. Citizens Cas Co., 32 AD2d 495 (1st Dept 1969)(citations and internal quotations omitted); see also, Asher v. Abbott Laboratories, Inc., 307 AD2d 211 (1st Dept 2003)(holding that trial court should have grant stay of state action where there was substantial identity between state and federal actions).

Here, while the decision on the appeal of the Civil Court action will impact on the merits of certain of Bisk's claims, such as the claim for breach of fiduciary duty against the Boulevard defendants, the claims in this action are not identical to, and extend beyond, those on appeal in the Civil Court action, including those relating to the alleged fraud by Cooper Square and North Fork, neither of which are parties to the Civil Court action. Under these circumstances, the motion for a stay should be denied, and Boulevard defendants required to file an answer and to

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[2]Bisk claims that the dismissal of the claims for maintenance was not appealed, but the Boulevard defendants assert that they are pursuing this aspect of the appeal.

CONCLUSION

In view of the above, it is

ORDERED that the motion to dismiss by the Boulevard defendants is granted to the extent of dismissing (i) the fourth cause of action for the intentional infliction of emotional distress as to the Boulvard defendants, (ii) the fifth cause of action for defamation, and (iii) the demand for punitive damages as against the Boulevard defendants; and it is further

ORDERED that the motion for a stay is denied; and it is further

ORDERED that the Boulevard defendants shall answer the complaint within 20 days of the date of this decision and order, a copy of which is being mailed by my chambers to counsel to the parties; and it is further

ORDERED that a preliminary conference shall be held on August 7, 2008 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

DATED: July 11,2008

J.S.C.