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

PRESENT: _____ Justice _____ PART 35

Index Number : 114054/2004

THE WATERFORD ASSOCIATION, INC.,

VS.

SAMII, NEGAR

SEQUENCE NUMBER : # 004

LEAVE TO SERVE AN ANSWER

INDEX NO. 114054-04

MOTION DATE 6/12/08

MOTION SEQ. NO. #004

MOTION CAL. NO. _____

are 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

In accordance with the accompanying Memorandum Decision, it is hereby

ORDERED that the motion by defendants for leave to submit the proposed second amended verified answer to assert a counterclaim for punitive damages is denied.

This constitutes the decision and order of the Court.

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

Dated: 9/15/08

CAROL EDMEAD J.S.C.

J.S.C.

Check one: ☐ FINAL DISPOSITION ☑ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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THE BOARD OF MANAGERS OF THE WATERFORD ASSOCIATION, INC. suing on behalf of the Unit owners,

Plaintiff,

Index No. 114054-2004

-against-

NEGAR SAMII and NEGAR SAMII, as Executrix of the Estate of Mohammad Reza Samii,

Defendants.

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HON. CAROL ROBINSON EDMEAD, J.S.C.

MEMORANDUM DECISION

Defendant Negar Samii ("Negar") is a co-fiduciary of the estate of her late husband, Mohammad Reza Samii ('Mr. Samii"), which owns the combined apartments 28A and 28F (the "Unit"), located in a condominium apartment building ("Building"). Plaintiff, the Board of Managers of the Waterford Association, Inc. ("plaintiff"), is the governing body of the condominium building. Defendants' Unit has many control valves of the Building's plumbing system located within its ceiling. Return and drain valves for plumbing risers for the High-Zone apartments as well as feed risers for the Low-Zone apartments are located in the ceiling of the Unit.

This action arises out of a dispute between plaintiff and defendant, in which plaintiff complains that Negar has failed to permit plaintiff's staff immediate entry into the Unit during plumbing "emergencies." Plaintiff commenced this action against Negar in her personal capacity and as Executrix of the Estate of Mohammad Reza Samii ("defendants") alleging breach of contract, and seeking an injunction ordering defendants to allow plaintiff's staff to enter

defendants' Unit and a declaratory judgment as to plaintiff's rights under its By-Laws to enter the Unit. Plaintiff alleges that there are certain valves within the Unit which the staff can use to shut off the flow of water to specific parts of the Building during plumbing emergencies, and that Negar's refusal to grant access to the Unit during emergencies has caused damage to the Building and injured plaintiff financially.

In response, Negar alleges that the plaintiff has failed to maintain the common elements of the Building. Defects in the Building's plumbing system have led to a constant demand for access to her Unit over the last seven years and a series of devastating water leaks into the Unit itself, one or more of which gave rise to a mold condition under the floor and inside the wall of Negar's bedroom. The staff has deprived plaintiff and her son of the use and enjoyment of their home, damaged personal property in the Unit, damaged structures and fixtures in the Unit, and created a nuisance that has impaired the value of the Unit.

Motion

Defendants now move for an order granting leave to serve an amended counterclaim to demand punitive damages against plaintiff, on the basis of facts that have emerged during the course of discovery.

Discovery has revealed that hundreds of water leaks have occurred in the Building over the past 10 years. Plaintiff's logbooks indicate that approximately 14 to 61 water leaks occurred each year from 1998 through 2008, for a total of 343 in such 10-year period. Some of these leaks occurred in two locations in the Building: "dialectic Unions" (the "Unions") and heating coils in

the heating system.[1] According to the deposition testimony of James Colon, the Building's manager, the majority of repairs to water leaks in the Building result from leaks at the Union. Plaintiff's documents indicate that 17 of the 343 leaks were from Unions. Further, Freddy Alvarez, plaintiff's superintendent, testified that based on his conversation with plumbers, the gasket dries out and there is no way to prevent the Unions from leaking; their life expectancy could be twenty years or a month. Yet, plaintiff never retained any professional to determine the reason for the leaks from the Unions and has taken no action since 2001 to prevent any plumbing leaks. Plaintiff also has no intent of conducting an analysis of the Building's plumbing system in the future, but intends to access the valves twice a month indefinitely in order to shut the water during these emergencies.

In addition, the Building experienced leaks from heating coils on various occasions from May of 1998 through November 2007. Water flows through certain heating coils located inside the units and provides heat for the units year round. According to the plaintiff's Minutes, in 2001, a plumbing company conducted the removal of a valve from each heating unit in the Building in an attempt to stop heating coils from bursting. However, leaks from heating coils continue. In October 2003, a major water leak occurred from the ceiling of Negar's son's room, after Gerardo Alberto, plaintiff's assistant superintendent, operated the valves there to repair a heating coil in another unit.

In November 2003, after a major water leak in the Unit, plaintiff retained an engineer who proposed a means of operating the valves without entering the Unit. According to a letter by

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[1] Unions are devices that connect heating system risers with branch lines that bring water from the risers into heating units inside residential apartments in the Building. The Unions have a gasket in the middle to prevent corrosion.

Frederick Dean, P.E. ("Dean"), dated November 21, 2003 (the "Dean Letter"), a "remote access panel" could be installed in the Building whereby plaintiff's staff could operate the valves without the need to enter the Unit. However, plaintiff took no action to investigate that option, never obtained a second opinion, failed to disclose to Negar the engineer's report, and instead, commenced this litigation. Defendants point out that plaintiff's Minutes for December 4, 2003 stated that it "was determined that there is no feasible way to relocate and/or electrify the valves. We have consulted our lawyer Joe Colbert to make sure we are able to gain access to the valves when necessary."

Document production by the plaintiff and nonparty witnesses also indicates that plaintiff submitted a false affidavit by Laura Rutkin, plaintiff's former President, (the "Rutkin Affidavit") in its motion to dismiss a New York City Civil Court action filed by Negar for an abatement of mold in the unit. Ms. Rutkin's affidavit, dated March 4, 2005, cited to a mold report prepared by Titanium Laboratories, Inc. dated January 13, 2005 (the "Final Titanium Report") and stated that the mold on the Unit's floor resulted from Negar's houseplant. Ms. Rutkin further stated that the water damage on the floor resulted from her failure to change the drip pan under her radiator. However, a previous January 20, 2005 invoice from Alklem Plumbing, Inc., signed by Ms. Rutkin, indicated that the source of the leak in Negar's bedroom was the dialectic union. And, a different mold report (the "Initial Titanium Report") dated the same date as the Final Titanium Report indicated that the leaks and mold condition in Negar's bedroom resulted from an ongoing leak in a pipe inside the wall of her bedroom.

Additional document production in March 2008 also indicates that plaintiff submitted a misleading affidavit in July 2005 in opposition to Negar's motion for contempt in the New York

City Civil Court action. At the Civil Court's direction, plaintiff hired Airtek Environmental Corp. ("Airtek") to conduct a mold test in Negar's bedroom in order to remediate the mold condition. After taking a sampling on May 17, 2005, Airtek found various types of mold and recommended the removal of mold-stained sheetrock. However, when Negar moved for contempt for plaintiff's failure to properly abate the mold condition, plaintiff submitted an affidavit from James Colon, the Building manager, stating that based on a "most recent report" from Airtek dated July 29, 2005, "the mold has been abated," and that "no additional mold testing" was necessary. The July 29, 2005 report stated that its conclusions were based on a subsequent "Sampling conducted on June 28th, 2005." However, discovery recently exchanged herein reveals that the July 29, 2005 report was based on Airtek's first sampling conducted on May 17, 2005 and simply revised to reflect compliance.

Plaintiff's ongoing and willful failure to investigate the cause of the leaks, decision not to investigate a proposed alternative to entering the unit, and submission to the New York City Civil Court of misleading affidavits sufficiently support a claim for punitive damages against the plaintiff.

The proposed claim for punitive damages is based on plaintiff's intentional or reckless creation and maintenance of multiple forms of a private nuisance and its severe interference with the ability of defendant and her son to use and enjoy their home over the course of approximately seven years. A private nuisance may exist solely based on the defendant's conduct in maintaining its property, and depends on the reasonableness of the defendant's conduct. Considering the actions that defendant took to avoid interfering with the plaintiff's use of land and the reduction of usable value of the property, defendant may claim punitive damages upon a

showing that defendant acted in knowing and intentional disregard of plaintiff's rights. The requirement for an award of punitive damages that a defendant's conduct be aimed at the public generally, does not apply where there is a fiduciary duty. And, it is well established that the board of managers of a condominium association owes a fiduciary duty to a unit owner as a matter of law. The discovery in this action clearly supports a claim for punitive damages based on the egregious conduct of the plaintiff and continuing interference with the use and enjoyment of the unit, when plaintiff owes a fiduciary duty to Negar as a matter of law. Therefore, leave to serve the proposed amended answer containing punitive damages should be granted.

Plaintiff's Opposition

Section 6.17-1 of plaintiff's By-Laws require unit owners to provide plaintiff with access to their unit so that work on the plumbing systems can be performed, and Negar is contractually bound to abide by the By-Laws. Defendants' motion is more than a simple motion to amend the answer; the proposed answer contains 59 new pages of allegations against the plaintiff and are made after all discovery in this action has been completed.

Punitive damages in a nuisance action should only be awarded where the party is guilty of "quasicriminal conduct," "utterly reckless behavior," " malicious intent. . .to injure" the other party, or " gross, wanton or willful fraud." There is nothing to indicate that the plaintiff here acted in bad-faith, let alone in a quasicriminal manner, which would permit the imposition of punitive damages.

The plaintiff's demand for access to the unit is not a nuisance, as access is a contractual right of the plaintiff which defendants are obligated to provide pursuant to the By-Laws. Although defendants assert that the plaintiff has an obligation to maintain and repair the

Building's plumbing system, Negar's actions actually contribute to the alleged nuisance. Negar's denial of access to the valves actually has the effect of weakening the system, as draining the entire system places undue stress on the piping and valves. Defendants cannot have it both ways.

Negar's late husband was an architect who personally designed the combination of apartments 28 A and F into one apartment prior to moving in. His design included installing access panels in the soffit ceiling specifically so that the valves could be accessed. Accordingly, Mr. Samii was clearly aware of the significance of the valves at the time that the apartments were purchased and combined.

Further, punitive damages are not appropriate even where a defendant failed to take steps to abate a continuing nuisance. The cases on which defendants rely to support their punitive damage claims, or factually dissimilar.

In 2003, plaintiff had engineers investigate whether there were any alternative methods of operating the water valves located in the unit without actually entering the Unit. These initiatives demonstrate that the plaintiff acted in good faith to accommodate defendants. However, plaintiff points out, the Board determined that the alternatives suggested by the engineer were not viable options. There was a debate among the Board members and the Board ultimately made a business determination that electrifying the valves was not a viable solution because (1) not all of the valves could be electrified and (2) even if electrified, the valves would require bi-annual maintenance which would necessitate access to the Unit. This determination is protected by the business judgment rule and does not support defendant's allegation that plaintiff acted in a quasicriminal manner or was wantonly reckless.

With respect to the Rutkin Affidavit, even though the Final Titanium Report contains

revisions as to the source of the mold, Rutkin's affidavit was based on the mold inspection conclusions reached in the Final Titanium Report, which were the same as those reached in the Initial Titanium Report. Ms. Rutkin had no personal knowledge of the source of the mold and was entitled to rely on the conclusions in Titanium's Final Report. Titanium's Final Report extrapolated as to the likely source of the mold on the bedroom floor, based on the shape of the discoloration and species of fungi detected. The clarification in the Final Titanium report did not, in any way, alter or manipulate the conclusion of Titanium's analysis. Rutkin's Affidavit also acknowledged that there was water damage to Negar's bedroom, that there was a water leak from a pipe in the ceiling of the Unit, and that the plaintiff's attempts to repair the damage were rebuffed by Negar's denial of access. There is nothing in Ms. Rutkin's Affidavit to suggest that plaintiff attempted to conceal the fact that a leak in the pipes caused water damage to Negar's bedroom and plaintiff acted with such a high degree of moral culpability as to warrant punitive damages.

And, although the May 17, 2005 sampling test was attached to Airtek's July 29, 2005 report, the July 29, 2005 report was not based on this earlier testing, but on testing performed on June 28, 2008. According to Clifford A. Cooper, the AirTech industrial hygienist who prepared the June 28, 2008 report, inspection and testing were performed in the Unit on June 28, 2005, and laboratory analysis was done on the samples taken thereat. Mr. Cooper determined that overall fungal levels were lower than outdoor levels and within the normal range for indoor environments. When the report was finalized on June 29, 2005,the May 17, 2005 results were mistakenly attached instead of the June 28 sample analysis. According to Mr. Cooper, this was a simple clerical error, and the results from the June 28th laboratory analysis fully support and

permit the conclusion that the mold levels in the Unit were unremarkable. Thus, this clerical error in attaching the wrong laboratory samples was inconsequential, and not an effort to fraudulently misrepresent Airtek's findings to the Civil Court in order to dismiss the violations.

Finally, the history of leaks in the Building does not warrant punitive damages. Courts have held that the board's failure to prevent or remedy plumbing conditions is not a bases for the imposition of punitive damages. There is no presumption here that the plaintiff acted with such "wonton dishonesty as to imply a criminal indifference" as would justify the assessment of punitive damages. In fact, the very nature of this action is to secure access to the Unit to enable plaintiff to perform occasional repairs to the plumbing system without having to drain the entire high or low zones of the system; every time defendant denies access and an entire zone is drained, the entire system is compromised and weakened, thereby creating more plumbing issues.

Although Negar alleges that over 300 leaks have occurred in the Building in the past 10 years, it should be noted that the Building is 48 stories and contains over 200 residential units. Even accepting the claims as to the number of leaks, that works out to be only one week per month for every 80 units, which can hardly be considered unusual for a building of this size. In addition, Negar fails to identify the cause of such leaks or whether they were the fault of the individual unit owners. At her deposition, Negar admitted that her son had clogged a toilet causing it to overflow, and offered to compensate the owner below her for any damages. Further, Negar fails to state the frequency of the access demanded by the plaintiff. Plaintiff only requires occasional access to the unit in response to plumbing emergencies. In fact, Negar admitted that the last time plaintiff required access to the Unit in response to a plumbing emergency was in September of 2007. Even assuming that the problems affecting the plumbing system are

systemic, the alleged failure to hire an expert to investigate the cause of the leaks does not rise to the level of moral culpability as would warrant the assessment of punitive damages.

Defendants' Reply

Plaintiff has not argued that allowing Negar to serve the proposed pleading with prejudice in any way.

Courts have found punitive damages appropriate with fiduciaries squandered assets and breached various agreements with those to whom fiduciary duties were owed. Thus, defendants are likewise entitled to punitive damages against plaintiff, which was on notice that water from a pipe that had burst in Negar's bedroom caused mold, but stated that the mold resulted from a plant, and failed to investigate the cause of hundreds of leaks in the Building and instead demanded the right to enter the Unit without end. As an example of the abuse which Negar has experienced, in 2000 when Alvarez became superintendent of the Building, he began demanding access to the Unit after midnight and continued to do so upwards of 15 to 20 times through October of 2003. In October of 2003, Alvarez came to the Unit and cursed her deceased husband in front of her son.

With respect to the By-Laws, section 6.17-1 limits the occasions on which plaintiff may enter the Unit. The evidence adduced in this case leads to a conclusion that plaintiff has demanded entry to the Unit far in excess of any right which the By-Laws provide to it. Plaintiff's long-standing awareness of at least two major types of leaks in the plumbing system and its admitted failure to take any steps to diagnose the condition of the plumbing system raise serious questions as to which, if any, of the various occasions on which plaintiff alleges that the staff sought access to the valves qualify as "emergencies" under section 6.17-1 of the By-Laws. The

plaintiff has no "absolute" right to enter the Unit.

There are no valid bases in the absence of a qualified expert opinion for concluding that Negar's denial of access to the valves actually has the effect of weakening the plumbing system. Any claim that Negar's conduct clauses leaks is pure speculation. Further, although there has been 38 leaks in 2007, which is roughly comparable to the number of leaks record in earlier years, there has been a drop in the number of demands for access to the Unit since 2006. This raises the question as to how plaintiff is addressing leaks without demanding access to the Unit, and a question as to plaintiff's good faith. And, although the Dean Letter shows that Dean proposed a remote access panel as a means of operating the vowels without entering the Unit, no one from the plaintiff ever contacted Dean to obtain any further information about his proposal.

Nor does the Rutkin Affidavit acknowledge the existence of any leak in Negar's wall. Instead, Rutkin's Affidavit refers to painting and plastering of a ceiling in Negar's son's bedroom. Further, the change in the text of the Initial Titanium Report as well as Ms. Rutkin's submission of a false affidavit, raise issues of credibility to be decided by the finder of fact at trial.

Plaintiff offered no excuses for waiting until now to produce Airtek's June 28th sampling report, and it has taken years for defendants to extract from plaintiff and nonparty witnesses the cause of the various leaks in the Building. Any allegations as to what Negar's husband knew are pure speculation.

Plaintiff's SurReply

After this motion was submitted, plaintiff obtained a purported affidavit dated November 1, 2004, by Negar filed in connection with another Civil Court action she filed against Major Air

Service Corp. In her affidavit, Negar claims that a certain damage to the floor in her bedroom and mold contamination thereat resulted from a defective air conditioner installed by Major Air Service Corp. Negar stated that "As a direct result of this leakage, going on for such a long period of time, my apartment was infested with mold, harming my son and be such that we still continue treatment today." Such affidavits tend to support Ms. Rutkin's subsequent March 4, 2005 Affidavit, as both affidavits posit that Negar's bedroom floor was damaged by a leak from her air-conditioner, and that the source of the mold in her bedroom was something other than the December 2004 leak. Since both affidavits are essentially in agreement as to the source of the floor damage in the mold, it is clear that Negar's claim that Ms. Rutkin's Affidavit establishes plaintiff's reprehensible motives, is wholly without merit.

Defendants' SurReply

Negar prepared the draft affidavit as a *pro se* litigant in small claims court against Major Air Service Corp. at the insistence of plaintiff's superintendent. She prepared the draft Affidavit in support of her motion to vacate a default judgment dismissing her case. Negar does not recall executing the affidavit or filing it in Court.

Further, Negar testified in this action that until the leak of December 20, 2004, she believed that her air-conditioner was the source of water leaks in her bedroom. Based on plaintiff's employees' advice to her in 2003, Negar believed that the cause of the leaks and water damage was a defect in her air-conditioner, and thus, she replaced her air-conditioner. It was only after the leak of December 20, 2004, that the wall of her bedroom was opened up and that a leaky pipe inside the wall causing the leak was discovered. This led Negar to conclude that the leaky pipe had been the cause of the previous instances of leaks and discoloration of the floor.

Negar commenced the Small Claims action against Major Air Service Corp. after plaintiff's employees convinced her that the leak subsequent to the air-conditioner installation by Major Air Service Corp. was the fault of Major Air Service Corp. Negar's draft affidavit does not prove that Ms. Rutkin's Affidavit was not made in bad faith.

Analysis

It is well settled that leave to amend an answer pursuant to CPLR §3025(b) should be freely granted provided there is no prejudice to and the nonmoving party (*Crimmins Contr. Co. v City of New York*, 74 NY2d 166 [1989]; *McCaskey, Davies & Assocs. v New York City Health & Hosps. Corp.*, 59 NY2d 755 [1983]; *Lambert v Williams*, 218 AD2d 618, 631 NYS2d 31 [1st Dept 1995]). Although leave to amend should be freely granted, the movant must make some evidentiary showing that the proposed amendment has merit, and a proposed pleading that fails to state a cause of action or is plainly lacking in merit will not be permitted (*Hynes v Start Elevator, Inc.*, 2 AD3d 178, 769 NYS2d 504 [1st Dept 2003]; *Tishman Constr. Corp. v City of New York*, 280 AD2d 374 [1st Dept 2001]; *Bencivenga & Co. v Phyfe*, 210 AD2d 22 [1st Dept 1994]; *Bankers Trust Co. v Cusumano*, 177 AD2d 450 [1st Dept 1991], *lv dismissed* 81 NY2d 1067 [1993]; *Stroock & Stroock & Lavan v Beltramini*, 157 AD2d 590 [1st Dept 1990]).

To recover punitive damages, a party must prove "(1) intentional or deliberate wrongdoing, (2) aggravating or outrageous circumstances, (3) a fraudulent or evil motive, *or* (4) a conscious act that willfully and wantonly disregards the rights of another" *(Don Buchwald & Assocs., Inc. v Rich*, 281 AD2d 329, 330, 723 NYS2d 8, 9 [1st Dept 2001][emphasis added]; *see also Morsette v "The Final Cal"*, 309 AD2d 249, 254, 764 NYS2d 416, 420 [1st Dept 2003]; *Swersky v Dreyer & Traub*, 219 AD2d 321, 328, 643 NYS2d 33, 38 [1st Dept 1996]).

"Punitive damages are awarded in tort actions '[w]here the defendant's wrongdoing has been intentional and deliberate, and has the character of outrage frequently associated with crime" (*Prozeralik v Capital Cities Communications, Inc.*, 82 NY2d 466, 605 NYS2d 218, 626 NE2d 34 [1993], *quoting* Prosser and Keeton, Torts § 2, at 9 [5th ed. 1984]). That author also teaches that: "Something more than the mere commission of a tort is always required for punitive damages. There must be circumstances of aggravation or outrage, such as spite or 'malice,' or a fraudulent or evil motive on the part of the defendant, or such a conscious and deliberate disregard of the interests of others that the conduct may be called wilful or wanton" (Prosser and Keeton, Torts § 2, at 9-10 [5th ed.1984]).

Thus, the harmful conduct must be "intentional, malicious, outrageous, or otherwise aggravated beyond mere negligence" (*McDougald v Garber*, 73 NY2d 246, 538 NYS2d 937 [1989]). Furthermore, an award of punitive damages must be supported by "clear, unequivocal and convincing evidence" (*Munoz v Puretz*, 301 AD2d 382, 753 NYS2d 463 [1st Dept 2003]).

The requirement that the party seeking punitive damages demonstrate that the tortfeasor's conduct was part of a pattern of similar conduct directed at the public generally (*New York University v Continental Ins. Co.*, 87 NY2d 308, 315-316 [1995]) is not required where a corporate officer commits wilfull, wanton and reckless misconduct and the threshold of moral culpability is satisfied (*Giblin v Murphy*, 73 NY2d 769, 536 NYS2d 54 [1988] *citing Welch v Mr. Christmas*, 57 NY2d 143, 150; *Cleghorn v New York Cent. & Hudson Riv. R. R. Co.*, 56 NY 44, 48; *see also, Whitney v Citibank*, 782 F2d 1106) [where jury found that defendants wrongfully diverted and squandered corporate assets, granted excessive credit, paid salaries to themselves]; *IDT Corp. v. Morgan Stanley Dean Witter & Co.*, 45 AD3d 419, 846 NYS2d 116

[1st Dept 2007] [the rule that an award for punitive damages must be limited to conduct directed at the general public applies in breach of contract cases, not tort cases for breach of fiduciary duty]).

At the outset, section 6.17 of the By-Laws gives plaintiff the right to "immediate" access the Unit in the case of an "emergency" in order to correct "any conditions originating in a Unit and threatening another Unit or all or any part of the Common Elements . . . or for the purpose of performing . . . repairs to the mechanical or electrical service or other portions of the Commons Elements within a Unit." Therefore, defendants were on notice that entry into Negar's Unit would be necessary in order to make repairs to Building or other Units.

Next, while the business related decisions of a corporate officer or director are protected by the business judgment rule, the rule was not intended to insulate an officer or director from his/her fraud, self-dealing, breach of fiduciary duty or decisions affected by an inherent conflict of interest (*Wolf v Rand*, 258 AD2d 401 [1st 1999]; *Simpon v Berkley Owner's Corp.*, 213 AD2d [1st Dept 1995]; *see also*, *Shapiro v Rockville Country Club, Inc.*, 22 AD3d 657 [2d Dept 2005]). The failure to completely abate the water leak condition does not fall within any of the categories of fraud, self-dealing, breach of fiduciary duty, or represent a conflict of interest.

Further, the award of punitive damages is unwarranted under the circumstances herein. Although punitive damages have been awarded where a party's actions demonstrated an indifference toward its obligation to address water leaks in a residential unit, the facts herein fail to indicate that plaintiff's alleged failure to abate the continuing nuisance was malicious or quasicriminal.

In *Walker v Sheldon* (10 NY2d , 405, 223 NYS2d 488), during the course of stair

demolition, the landlord caused the steps to be removed and failed to post any warning signs. Also, the tenants repeatedly complained of dust, sand and water leak problems. The Court found that such "wanton disregard for the safety of others" and the landlord's "indifference and lack of response" to the tenants' complaints "demonstrated a complete indifference to their health and safety and a lack of concern for the damage these conditions could cause to the tenants' valuable personal property." In holding that the landlord's indifference "must be viewed as rising to the level of high moral culpability," the punitive damages was sustained.

Similarly, in *Century Apartments, Inc. v Yalkowsky* (106 Misc 2d 762, 435 NYS2d 627 [N.Y.City Civ.Ct. 1980]), punitive damages in the amount of $1000 "for each apartment involved" was granted where the landlord's "delayed correction of the leaking terrace was a deliberate decision of the petitioner which was, in the words of the extremely qualified resident superintendent of the building, a 'management decision.'"

Defendants do not claim, and the record does not indicate that plaintiff ever delayed in correcting any of the water leaks in the Building or in Negar's Unit. Nor is there is any allegation that plaintiff engaged in any action, *i.e.*, construction, that resulted in exposing Negar to hazardous condition without warning. Further, it cannot be said that plaintiff never responded to the water leaks or attempted to reduce its need to access Negar's Unit.

Here, the record indicates that although over 300 leaks occurred in the Building from 1998 through 2007, only 17 were due to leaks in the Union and approximately six from heating coils. The record also indicates that contrary to defendant's contention that plaintiff did not investigate the reason for the leaks, Alvarez spoke with plumbers regarding the Unions, and learned that Unions could last either 20 years or one month. Plaintiff also hired engineers to

explore means by which its staff could operate the valves without entering into Negar's Unit. The engineer hired by plaintiff explored two alternatives: (1) relocating the valves into the hallway outside of Negar's Unit and (2) electrifying the valves so that they could be operated by remote means. The engineers determined that it would be impossible to relocate all of the valves outside of Negar's Unit. Further, the engineers concluded that electrifying the valves was possible, but at a considerable expense. According to the engineer's report, the "only way to operate these valves without entering the apartment would be provide new automatic electric control valves with a remote control panel located in the corridor." However, this alternative was not "full-proof" because (1) a "clearance space requirement of 8" - 18"" may not be available due to, *inter alia*, the raised ceilings in the Unit; (2) the work would cause major disruption in the Unit; (3) there is no guarantee that the valves will shut off completely when needed; (4) the valves would need periodic maintenance and access to the apartment; and (5) other apartments on the same floor will want this done for the same reason.

Due to these factors, the plaintiff decided against electrifying the valves, and there is no indication that plaintiff's decision was quasicriminal, or made with a malicious intent to injure Negar or with reckless disregard to her rights. Notably, electrifying the valves would not completely eliminate the need to access Negar's Unit.

With respect to the claim that plaintiff submitted false statements to the Court, it is clear that Ms. Rutkin relied on records generated by a third-party. Any discrepancies with the underlying documents upon which Ms. Rutkin relied give rise to issues of credibility, and do not indicate that she made her statements with malicious intent to injure Negar or that her reliance on the underlying documents was quasicriminal. The same holds true with respect to Airtek's June

29, 2005 report. Whether the June 29, 2005 report was based on a report of mold samples taken on June 28, 2005, or on a report of mold samples previously taken on May 17, 2005 and erroneously attached to the June 29th report raises an issue of credibility, and does demonstrate quasicriminal or malicious intent directed at Negar.

Based on the foregoing, it is hereby

ORDERED that the motion by defendants for leave to submit the proposed second amended verified answer to assert a counterclaim for punitive damages is denied.

This constitutes the decision and order of the Court.

Dated: September 15, 2008

Hon. Carol Robinson Edmead, J.S.C.