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

PRESENT: HON. JUDITH J. GISCHE PART 10

Justice

Index Number : 114557/2008

FOLEY, MARK

VS.

305/72 OWNERS CORP.,

SEQUENCE NUMBER : # 001

PRECLUDE

INDEX NO. 114557-08

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

were 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 IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

P/C Scheduled 7/11/09 @ 9:30 am Part 10, 60 Ctr @ 232

FILED MAY 26 2009 COUNTY CLERK'S OFFICE NEW YORK

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

Dated: May 20, 2009

HON. JUDITH J. GISCHE J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

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Mark Foley and Tina Larson,

Plaintiff (s),

-against-

305/72 Owners Corp., Century Management Services, Inc., and Daniel Rivera,

Defendant (s).

----------x

DECISION/ ORDER
Index No.: 114557/08
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	**Numbered**
Defs' amended n/m (3211) w/JPS affirm, DR affid, exhibits	1
Pltf MF affid in opp	2
Defs' reply w/JPS affirm	3
So-ordered stip 3/26/09	4

Upon the foregoing papers, the decision and order of the court is as follows:

Mark Foley and Tina Larson ("plaintiffs") have brought this action for, among other things, a declaratory judgment that they "own" or otherwise have rights to an outdoor area outside of their coop apartment ("2H") located at 305 East 72nd Street, New York, New York ("building"). The defendants are 305/72 Owners Corp., the cooperative corporation which owns fee title to the residential portions of the building (the "coop"), Century Management Services, Inc., the coop's managing agent ("managing agent"), and Daniel Rivera, the building superintendent ("super").

The coop, managing agent, and super (who are all jointly represented) have now

moved for the pre-answer dismissal of plaintiffs' 1st, 2nd, 4th and 6th causes of action only. To the extent that the remaining causes of action seek punitive damages, defendants move for the dismissal of those demands as well.

At oral argument, the parties agreed that this action is dismissed with prejudice against the managing agent, and the super ("So-Ordered" Stipulation 3/26/09). The 3rd cause of action against the super and all other claims against the super and managing agent are hereby severed and dismissed with prejudice, as the parties have agreed. The defendants have also agreed to the "removal of Exhibit J to plaintiff's complaint from all documents filed with the court, including the summons and complaint and defendants' motion to dismiss." This branch of their agreement is discussed later in the court's decision along with the remaining relief in defendants' motion to dismiss.

In determining whether a complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 (a) (7) "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 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st Dep't 1997). Where the motion to dismiss is based upon the existence of documentary evidence (CPLR § 3211 [a] [1]), such evidence must resolve all definitively dispose of all of plaintiff's claims. Goshen v. Mutual Life Insurance Co., 98 NY2d 314 (2002); Bronxville Knolls Inc. v. Webster Town Center Partnership, 221 AD2d 248 (1st Dep't 1995).

Facts Considered and Arguments Presented

Plaintiffs are the proprietary lessees of Unit 2HS ("2H") which is located on the second floor of the building. The building is a so-called "cond-op," meaning that the commercial space is considered one condominium "unit," and the residential apartments are considered part of a separate cooperative "unit." Non-party 305 East 72nd Street Associates (the sponsor) owns fee title to those portions of the building which constitute the commercial unit whereas fee title to the residential unit is held by the cooperative corporation (i.e. "coop"). These entities collectively own the entire fee simple interest in the land and building[1].

Directly outside apartment 2H (at times "plaintiffs' apartment") is an open outdoor area ("outdoor area"). The outdoor area is accessible solely through a doorway located within, and leading from, the dining room area of plaintiffs' apartment. Although defendants characterize this area as the "first floor roof area" because it is on top of the commercial condominium unit which is on the ground floor, plaintiffs call it the "2nd floor roof terrace." It is this outdoor area which is at the core of the parties' dispute.

The plaintiffs have asserted the following nine (9) causes of action: for a declaration that the outdoor space is a terrace and that a house rule passed in April 2007 is null, void and invalid (1st COA), tortious interference with business relations, involving plaintiffs' purchase application of an adjoining apartment (2nd COA), fraud (asserted against super only) (3rd COA), breach of the covenant of good faith and fair

[1]The "building" is actually two buildings: the "north" building and the "south building." For purposes of this motion, no distinction will be made between the buildings.

dealing/ breach of contract (4th COA), breach of fiduciary duty (coop let the plaintiffs be harassed) (5th COA), intentional infliction of emotional distress (6th COA), nuisance (exhaust vent) (7th cause of action), negligent hiring/supervision of super (8th COA), and negligence (base upon theories of *respondeat superior*) (9th COA). This motion only seeks the dismissal of the 1st, 2nd, 4th and 6th causes of action, and all demands for punitive damages in the 1st through 6th causes of action.

These (and other) factual allegations are asserted in the complaint:

The outdoor area is not just an unfinished roof membrane, but an actual "roof top terrace," appurtenant to unit 2H. Schedule "A" to the offering plan has the notation "T" alongside unit 2H and, according to the legend contained in that document, "T" stands for "TERRACE." The same notation ("T") appears alongside other apartments that (undisputably) have conventional outdoor space, i.e. "terraces." Examples of other units which have the "T" designation and a conventional "terrace" are units 16B, 15C, 15F and also the penthouse apartments.

Each unit in the "H" line apparently has seven (7) fewer shares than the unit above it. For example, unit 3H has 500 shares, 4H has 507 shares and 5H has 514 shares, etc. Unit 2H is different, however. It has 518 shares, or 18 more shares than the apartment directly above it. Plaintiffs contend that their apartment has greater shares (18+7=25) attributed to it because it has a "terrace," not just access to a "roof." Plaintiffs point to a similar pattern in the "I" line apartments.

The prior owner/occupants of unit 2H maintained a table, chairs and planters on the outdoor space, but the defendants took no action against them. In fact, the super would regularly water the plants in the outdoor space when the owner/occupants were

away. It was only after the plaintiffs pressed the coop about developing the outdoor space that the coop decided to crack down on plaintiffs' use of outdoor space. Plaintiffs allege that the board passed a house rule in April 2007 restricting plaintiffs' use of the outdoor space. Plaintiffs contend that not only did the board exceed its authority, it acted in bad faith. Furthermore, according to plaintiffs, this was a breach of contract because they were constructively evicted from the terrace.

Plaintiffs entered into an agreement to purchase unit 2I from its owners. Unit 2I is next door to unit 2H and is adjacent to the same outdoor space. Plaintiffs allege their purchase application was denied by the board, although they were financially qualified, and that this action was a tortious interference with their purchase agreement.

The complaint provides numerous examples of harassment plaintiffs have allegedly suffered at the hands of other unit owners, the super and management. Among the examples provided are exhaust vent outside their window which spews malodorous steam, the "Pigeon Lady" who throws bread from her window, etc., the super that threatened plaintiffs, and tricked them into using the "house" plumber, instead of letting them use a plumber of their choice.

Defendants urge the dismissal of action for declaratory judgment because the plaintiffs seek a declaration that they "own the second floor terrace." Defendants contend no unit owner can really "own" anything in a coop, but only has rights as a lessee under the proprietary lease. They argue that insofar as plaintiffs seek the invalidation of the house rule, they have failed to state a cause of action because the board's decision to implement this rule is protected under the business judgment rule.

Defendants point out the 1st floor roof is unfinished and consists of a membrane

which, if pierced, can have devastating results. They contend that the 1st floor roof is not part of any residential unit, but reserved for the sponsor who can develop it into a finished terrace under the "Roof Lease Agreement" in the offering plan.

Defendants deny any harassment by them, or their agents, and argue that plaintiffs fail to state a cause of action for the intentional infliction of emotional distress or for punitive damages in connection with any of the causes of action asserted. Defendants argue that, as a matter of law, plaintiffs' tort claim fails because the purchase agreement between the plaintiffs and the owners of unit 2I was subject to board approval, therefore until approved, the contract was contingent.

Defendants argue the constructive eviction/breach of contract action is without any factual support because the plaintiffs claims are that they found certain behavior by the defendants unsettling.

Discussion

Removal of Exhibit "J"

Civil actions and proceedings in New York are open to the public to ensure that court matters are conducted efficiently, honestly and fairly. Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd., 274 A.D.2d 1 (1st Dept 2000). In furtherance of this goal, the Uniform Rules for the Trial Courts provides that "[e]xcept where otherwise provided by statute or rule, a court shall not enter an order in any action ... sealing the court records, whether in whole or in part, except upon a written finding of good cause, which shall specify the grounds thereof. In determining whether good cause has been shown, the court shall consider the interests of the public as well as of the parties ..." 22 NYCRR 216.1[a].

Although both sides have agreed to completely remove the offending report about the super from the files maintained by the county clerk, the court is not a party to their agreement and not bound by it. The court did not have a chance to evaluate and independently decide whether there is "good cause" for the extreme measure the parties have agreed to. Removal of the report is tantamount to a sealing order since the public will never have access to it. *See* Danco Laboratories, Ltd. v. Chemical Works of Gedeon Richter, Ltd., 274 AD2d at 8 (wholesale redaction is like a sealing order). To strike a balance between the competing interests of the parties interest to keep certain matters private and the public's need to know, the court orders the following:

Once served with an entered copy of this decision and order, plaintiffs shall, in turn, be responsible for serving it upon the Office of the County Clerk. The court's decision and order shall be accompanied with two (2) redacted copies of exhibit "J" to the filed complaint and this motion. The information to be redacted from exhibit "J" is: the super's date of birth, all references to social security numbers (whether his or someone else's) and his license number. Plaintiffs shall also redact from exhibit "J" any references to addresses and account numbers. Once served on the Office of the County Clerk, the exhibit in its redacted form and the court's decision shall be the official document (i.e. exhibit "J" to the filed complaint and this motion). At that point, the original exhibit "J" originally filed by plaintiff with the complaint and in this motion shall be returned to the plaintiffs.

In making this decision on what to redact and what will remains in its un-redacted form, the court has examined exhibit "J" and determined that although it contains

certain personally identifying information about the super, other information is already available in the public domain (i.e. court index numbers, and schedules of assets, liabilities, etc.) Thus, there no "good cause" for the wholesale redaction (removal) of exhibit "J," as the parties have agreed, and that relief is denied.

Motion to Dismiss -1st Cause of Action

There are two branches to the 1st COA for a declaratory judgment. The first branch has to do with whether the outdoor space is a "terrace" appurtenant to their apartment and whether they own shares assigned to that outdoor area. The second branch of the 1st COA relates to whether the house rule passed on April 30, 2007 is invalid or should be invalidated.

Accepting plaintiffs' facts, they state a cause of action for a declaratory judgment on the issue of whether the outdoor area is a terrace and they have shares assigned to that outdoor area. Though defendants argue that the offering plan "clearly" resolves the parties' dispute, and the outdoor space is merely a raw, undeveloped space that belongs to the sponsor, this is not the case. The documentary evidence defendants offer does not fully resolve all of plaintiffs' claims and the plaintiffs have a presented colorable interpretation of defendants' documentary evidence. Therefore, defendants' motion for the dismissal of the 1st COA based upon documentary evidence is denied. The defendants will have to answer that branch of the 1st COA and assert their defenses.

Plaintiffs have not, however, provided any factual support for their claim that the April 30, 2007 is invalid or should be invalidated. Although plaintiffs allege that the house rule targets them specifically, the house rule simply requires that the use of

terraces be in conformance with rules and regulations proscribed by the Board. Under paragraph 7 of the proprietary lease, the board may enact any rules regulating the use of terraces they see fit ("[their use] is subject to such regulations as may, from time to time, be prescribed by [the] Directors.") Though plaintiffs allege the house rule singles them out, this is disproved by the language of the house rule itself; it applies to "an Apartment adjacent to a roof area on the second floor of the Building." Furthermore, the house rule sets conditions for the "use and placement of anything on the roof terrace" without "proper protection." Unit 2H is not the only unit this house rule applies to; it is not the only "apartment adjacent to a roof area on the second floor."

As a general rule, the court should not interfere in the management prerogative of the cooperative's board of directors. Plaintiffs assert no facts tending to show the board acted outside the scope of its authority, in a way that did not legitimately further the corporate purpose, or in bad faith. 40 West 67th Street v. Pullman, 100 NY2d 147 (2003). Nor are there any facts tending to show that the decision to protect the surface of the outdoor area from being damaged, was not an exercise of honest judgment on the part of the board to promote the lawful and legitimate interests of the coop. Horwitz v. 1025 Fifth Ave., Inc., 7 A.D.3d 461 (1st Dept 2004). Finally, plaintiffs' facts do not tend to show there was a discriminatory purpose in the enactment of the house rule they seek to have invalidated (*compare* Jones v. Surrey Co-op. Apartments, Inc., 263 A.D.2d 33 [1st Dept. 1999]).

Although there is factual support for that branch of the 1st COA based upon the definition of a "terrace" and apportionment of shares, etc., there is no factual support for the other branch of the 1st COA related to the house rule. Defendants' motion, for the

dismissal of the 1st COA to the extent it seeks the invalidation of the April 30, 2007 house rule is granted; that claim in the 1st COA is hereby severed and dismissed. However, the defendants' motion for the dismissal of the remaining relief in that cause of action is denied.

2nd Cause of Action

Defendants' motion, for the dismissal of plaintiffs' 2nd COA for tortious interference with business relationship is hereby granted in its entirety. To properly state a tortious interference with business relationship cause of action, the plaintiff must assert facts that the defendant interfered with the plaintiff's business relationships either with the sole purpose of harming the plaintiff, or by means that were unlawful or improper. 71 Pierrepont Associates v. 71 Pierrepont Corp., 243 A.D.2d 625 (2nd Dept 1997).

Absent illegal discrimination, fraud, self-dealing, etc., the board has the right to withhold its approval of the purchase or sale of an apartment, for any reason or no reason under the business judgment rule. Matter of Levandusky v. One Fifth Ave. Apt. Corp., 75 N.Y.2d 530, 537-538 (1990); Rossi v. Simms, 119 A.D.2d 137, 140 (1st Dept 1986). The plaintiffs have not presented any facts that the board would support its claim. Chapman v. 2 King Street Apartments Corp., 8 Misc.3d 1026(A) (N.Y.Sup.,2005). Though plaintiffs state they could afford the apartment and combined apartments are more valuable than separate apartments, hence in the best interest of all shareholders, these facts are insufficient to state this cause of action. Consequently, defendants' motion to dismiss the 2nd COA is granted. The 2nd COA is hereby severed and dismissed.

4th Cause of Action

Plaintiffs 4th COA is for constructive eviction/breach of contract ("quiet enjoyment") because the coop has prevented them from using (enjoying) the outdoor area. A constructive eviction occurs when a tenant, though not physically barred from the area in question, is unable to use the area for the purpose intended. Oresky v. Azzouni, 232 A.D.2d 218, 224 (1st Dept 1999). Where the eviction is constructive, the breach of the covenant of quiet enjoyment does not require a physical ouster, only that the tenant's abandonment of the premises was under pressure. Oresky v. Azzouni, 232 A.D.2d at 224. Plaintiffs' facts support the cause of action stated and defendants' motion to dismiss the 4th COA is hereby denied.

6th Cause of Action

Plaintiff's 6th COA for the intentional infliction of emotional distress. The elements of this cause of action are (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal conduct between the conduct and the injury; and (iv) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993). Although plaintiffs contend the defendants engaged in a "campaign of harassment," the events described (i.e. the pigeon lady, exhaust vent, threat by super, etc.), even when viewed cumulatively and assuming they can be proved do not amount to conduct even close to approaching the "threshold of outrageousness needed to support a cause of action for intentional infliction of emotional distress." Graupner v. Roth, 293 A.D.2d 408, 410 (1st Dep't 2002). Defendants' motion for the dismissal of this cause of action is granted; the claim for the intentional infliction of emotional distress is hereby severed and dismissed.

Punitive Damages

In the remaining causes of action plaintiffs seek punitive damages. Punitive damages, also known as "exemplary damages," may be awarded in circumstances where the defendant acted with such a high degree of bad faith, and its wrongful act was so wonton, reckless, or malicious, that its actions are intentional, deliberate and therefore reprehensible to society as a whole. *see*, Home Ins. Co. v. American Home Prods. Corp., 75 N.Y.2d 196, 200 (1990); Rivera v. City of New York, 40 A.D.3d 334, 344 (1st Dep't 2007); Freeman v. The Port Authority of New York and New Jersey, 243 A.D.2d 409, 410 (1st Dep't 1997); Aero Garage Corp. v. Hirschfeld, 185 A.D.2d 775 (1st Dep't 1992). Thus, the actions alleged must rise almost to the level of a crime. Liberman v. Riverside Mem. Chapel, 225 A.D.2d 283 (1st Dept 1996).

Affording the pleadings a liberal construction, accepting the allegations of the complaint as true and providing the plaintiffs the benefit of every possible favorable inference, the complaint neither alleges conduct of such an egregious nature, directed at the plaintiffs, nor a pattern of such conduct directed at the public in general, sufficient to sustain any of their demands for punitive damages. Grazioli v. Encompass Ins. Co. 40 A.D.3d 696, 696 (2nd Dept 2007). Defendants motion to dismiss the claims for punitive damages is granted; the demands for punitive damages are hereby severed and dismissed.

Defendants' time to answer the complaint is hereby extended; they shall answer the complaint within Ten (10) Days of being served with an entered copy of this decision and order.

Conclusion

It is hereby

ORDERED that defendants' motion for the partial dismissal of the complaint is granted with prejudice as to all claims against the super (Daniel Rivera) and the managing agent (Century Management Services, Inc.); those causes are hereby severed and dismissed with prejudice, pursuant to the parties' so-ordered stipulation of March 26, 2009; and it is further

ORDERED that the parties' agreement, that exhibit "J" will be removed from the filed complaint and this motion (i.e. from the court's files) will only be enforced to the extent (and for the reasons) provided in this decision/order; and it is further

ORDERED that plaintiffs shall serve a copy of this order upon the Office of the County Clerk with two (2) redacted copies of exhibit "J;" the information to be redacted from exhibit "J" is: the super's date of birth, all references to social security numbers (whether his or someone else's) and his license number; plaintiffs shall also redact from exhibit "J" any references to addresses and account numbers; and it is further

ORDERED that once served on the Office of the County Clerk, the redacted exhibit and the court's decision shall be the official document (i.e. exhibit "J" to the filed complaint and this motion) and the exhibit "J" originally filed with the complaint and this motion by plaintiff in the County Clerk's office shall be returned to the plaintiff; and it is further

ORDERED that the motion to dismiss is partially granted as to the 1st cause of action for a declaratory judgment; it is granted in its entirety as to the 2nd cause of action for tortious interference with business relationship and the 6th cause of action for

ORDERED that the motion to dismiss is partially granted as to the 1st cause of action for a declaratory judgment; it is granted in its entirety as to the 2nd cause of action for tortious interference with business relationship and the 6th cause of action for intentional infliction of emotional distress; it is, however, denied in its entirety as to the 4th cause of action for constructive eviction/breach of contract ("quiet enjoyment"); and it is further

ORDERED that defendants' motion for the dismissal of claims for punitive damages is granted and those claims are severed and dismissed; and it is further

ORDERED that defendants' time to answer the complaint is hereby extended; they shall answer the complaint within Ten (10) Days of being served with an entered copy of this decision and order; and it further

ORDERED that the preliminary conference is hereby scheduled for **JULY 11, 2009 at 9:30 a.m.** in Part 10, 60 Centre Street, Room 232; No further notices will be sent.

ORDERED any relief requested that has not been addressed has nonetheless been considered and is hereby expressly denied; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, New York
May 20, 2009

So Ordered:

FILED
MAY 26 2009
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Judith J. Gische, J.S.C.