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

PRESENT: HON. EILEEN BRANSTEN Justice

PART 3

Index Number : 650413/2008

RAE REALTY HOLDINGS, LLC

VS.

PROTTAS, JOSH

SEQUENCE NUMBER : # 001

DISMISS COMPLAINT

INDEX NO. 650413-08

MOTION DATE 1/27/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

were read on this motion to/for CPLR 3211 dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	1
Answering Affidavits — Exhibits	2
Replying Affidavits	3

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK

IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM

RECEIVED
JUL 10 2009
IAS MOTION SUPPORT OFFICE
NYS SUPREME COURT - CIVIL

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

Dated: July 8, 2009

HON. EILEEN BRANSTEN J.S.C.

Check one: FINAL DISPOSITION X NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - - PART THREE

RAE REALTY HOLDINGS, LLC,
EAST VILLAGE DENTAL ASSOCIATE, PLLC,
and JEFFREY KRANTZ,

Plaintiffs,

- against -

JOSH PROTTAS, TODD V. HOLOUBECK, KATHLEEN PERKINS, SUZANNE ROSS, ROBERT GORDON, ESQ., 645 EAST 11TH STREET REALTY CORP., WORKING REALTY, LTD and JOHN DOE(S)(said name(s) being fictitious, it being the intention of plaintiffs to designate any and all board members of 645 East 11th Street Realty Corp. otherwise unnamed herein and presently unknown to plaintiffs),

Defendants.

Index No.: 650413/08
Motion Date: 1/27/09
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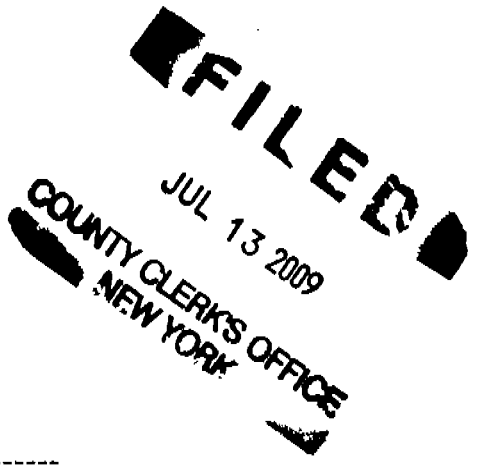

BRANSTEN, EILEEN, J.:

In this action, plaintiffs sue to recover damages resulting from defendants' alleged efforts to interfere with the business of plaintiffs Jeffrey Krantz ("Krantz") and East Village Dental Associate, PLLC ("East Village Dental"), and alleged conspiracy to force Krantz and East Village Dental to move out of their leased office space in defendants' East Village condominium building. Defendants now move to dismiss pursuant to CPLR 3211 (a) (1), (3), (5), (7), and (10).

Background

Plaintiff Rae Realty Holdings, LLC ("Rae Realty") owns a commercial condominium unit ("condo") in a building located at 645 East 11th Street in Manhattan. Plaintiff Krantz, a dentist who conducts his dental practice through East Village Dental, is the lessee of the condo. Defendants are the condominium association, the managing agent of the condominium building, and individual members of the condominium's Board of Managers ("Board Members").*

The complaint alleges that the Board Members and managing agent Josh Prottas are engaged in a conspiracy to drive Krantz and East Village Dental out of business and out of their leased premises by creating a nuisance and a hazardous condition that interferes with Krantz's business and use of the premises (Complaint, ¶¶ 12-14, 23, 37-40). More particularly, the complaint alleges that the board members, acting through the condominium association and the managing agent, removed, without notice to plaintiffs, steel security gates installed by plaintiffs on the exterior of the building in front of the condo, resulting in a loss of security and damage to personal property (*id.*,¶¶ 24-28); and started to perform renovation and repair work to the front facade of the building "in a manner that significantly interferes with the operation of the dental practice by causing patients to go elsewhere" (*id.*,¶¶ 31, 44).

* Robert Gordon, Esq., the attorney for defendants, was originally named as a defendant, but, after the instant motion was made, plaintiffs served and filed an amended complaint, which withdrew any claims against him.

Plaintiffs also allege that defendants, without justification or notice, damaged, removed and destroyed their personal property, including an awning and the steel security gates affixed to the building (*id.*,¶¶ 30, 51). The gravamen of plaintiffs' complaint is that the board members, acting out of ill will toward Krantz, and in retaliation for other lawsuits brought by him against defendants, have singled him and East Village Dental out for harmful treatment.

Analysis

It is well settled that on a motion to dismiss pursuant to CPLR 3211, the pleadings are to be afforded a liberal construction. The court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also 511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144 [2002]). When documentary evidence is considered, "a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon*, 84 NY2d at 88; *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 [2001]). However, "the court is not required to accept factual allegations that are plainly contradicted by the documentary evidence or legal conclusions that are unsupportable based upon the undisputed facts" (*Robinson v Robinson*, 303 AD2d 234, 235 [1st Dept 2003]).

The complaint includes five causes of action. The first cause of action alleges prima facie tort against all defendants. The second alleges civil conspiracy against the individual board members. The third alleges tortious interference with business relations against all defendants. The fourth and fifth allege trespass to chattel, and conversion, respectively, against all defendants.

Prima Facie Tort

The allegations are insufficient to assert a claim for prima facie tort. Prima facie tort requires a showing of "'the infliction of intentional harm, resulting in damage, without excuse or justification, by an act or a series of acts which would otherwise be lawful'" (*ATI, Inc. v Ruder & Finn, Inc.*, 42 NY2d 454, 458 [1977][citations omitted]). "One of the essential elements of the cause of action is an allegation that plaintiff suffered specific and measurable loss" (*Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, 586 [1st Dept 1982], *affd* 59 NY2d 688 [1983]; *see Freihofer v Hearst Corp.*, 65 NY2d 135, 142 [1985]). Thus, "an action sounding in prima facie tort may not be maintained in the absence of an allegation of special damages" (*Wehringer*, 91 AD2d at 586), which must be "fully and accurately stated with sufficient particularity as to identify and causally relate the actual losses to the allegedly tortious acts" (*Broadway & 67th St. Corp. v City of New York*, 100 AD2d 478, 486 [1st Dept 1984]; *see Lincoln First Bank of Rochester v Siegel*, 60 AD2d 270, 280 [4th Dept 1977]).

Here, plaintiffs have not alleged special damages with sufficient particularity to identify actual losses. Rather the complaint variously asserts in general terms that plaintiffs suffered damages "believed to be in excess of" $500,000, $1,000,000, or $10,000.

Further, "there is no recovery in prima facie tort unless malevolence is the sole motive for defendant's otherwise lawful act" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983]). Here, it is not disputed that there was a need for repair and renovation of the building facade, which, at least in part, motivated defendants' actions.

Tortious Interference With Business Relations

Plaintiffs' claim for tortious interference with business relations (third cause of action), rests entirely on their allegations that defendants "have begun to renovate the front facade of the Building in a manner that significantly interferes with the operation of the dental practice" (Complaint, ¶ 31). Plaintiffs' conclusory assertion that defendants have "created an environment which would deter business at East Village Dental and cause Dr. Krantz' existing patients to go elsewhere for their dental care" (Complaint, ¶ 44), is insufficient as there are no facts alleged to support this cause of action.

In any event, the renovation work on the building, which was necessary, would not provide a basis for plaintiffs' claim of tortious interference with business relations. New York courts have recognized that tortious interference with contractual relations and tortious

interference with business relations "can both be torts, but that the elements of the two torts are not the same" (*Carvel Corp. v Noonan*, 3 NY3d 182, 189 [2004]). While "'a plaintiff may recover damages for tortious interference with contractual relations even if the defendant was engaged in lawful behavior'" (*id.*, at 189-190, quoting *NBT Bancorp. Inc. v Fleet/Norstar Fin. Group, Inc.*, 87 NY2d 614, 621 [1996]), when a claim is based on "interference not with 'contract rights' but only with existing or prospective economic relations ... the plaintiff must show that defendant's conduct was not 'lawful' but 'more culpable'" (*Carvel Corp.*, 3 NY3d at 190). That is, "as a general rule, the defendant's conduct must amount to a crime or an independent tort" (*id.*) An exception to the general rule has been recognized "where a defendant engages in conduct for the sole purpose of inflicting intentional harm on plaintiffs" (*id.* [internal quotation marks and citation omitted]). That exception does not apply in this case. As discussed above, defendants' conduct arose from the undisputed need for repairs to the facade of the building. Thus, plaintiffs' cause of action for tortious interference with business relations is dismissed.

Civil Conspiracy and Claims Against Board Members

It is well settled that "'a mere conspiracy to commit a [tort] is never of itself a cause of action'" (*Alexander & Alexander of New York, Inc. v Fritzen*, 68 NY2d 968, 969 [1986], quoting *Brackett v Griswold*, 112 NY 454, 467 [1889]; *see Solovay v Greater New York Sav.*

Bank, 198 AD2d 27 [1st Dept 1993]). "Allegations of conspiracy are permitted only to connect the actions of separate defendants with an otherwise actionable tort" (*Alexander & Alexander*, 68 NY2d at 969).

Plaintiffs' cause of action for civil conspiracy (second cause of action) must be dismissed. Even assuming that there are "otherwise actionable torts" alleged, this cause of action fails in the absence of any allegations of specific, independent tortious acts by any of the individual defendants, which are required to sustain a claim against individual Board Members (*see Pelton v 77 Park Ave. Condominium*, 38 AD3d 1, 6 [1st Dept 2006]; *Konrad v 136 East 64th St. Corp.*, 246 AD2d 324, 326 [1st Dept 1998]). Similarly, the remaining claims, for trespass to chattel and conversion, must be dismissed as against the individual Board Members.

Trespass to Chattel and Conversion

As to the causes of action for trespass to chattel and conversion (fourth and fifth causes of action, respectively), plaintiffs allege that their property, including the steel security gate and an awning, was intentionally removed without notice or justification, and was damaged and/or destroyed by defendants. These allegations are sufficient to withstand the instant motion to dismiss.

Defendants argue that there can be no trespass to chattel or conversion because the security gates were illegally installed and the condominium association had the right to remove them in order to make building repairs. Defendants also argue that, in any event, the security gates belonged to the condominium, because, pursuant to the Declaration of Condominium, anything affixed to the exterior facade of the building becomes the property of the condominium. Neither of these arguments address the facial sufficiency of the pleadings. Contrary to defendants' contention, the court did not previously dispose of these claims. Nor do the documents submitted by defendants conclusively establish a defense.

It is not disputed that the exterior facade of the building is a common area, owned by and subject to the control of the condominium, or that the board of managers of 645 East 11th Street Condominium Associates, s/h/a 645 East 11th Street Realty Corp., is responsible for the management of the condominium building, pursuant to the condominium's bylaws and Declaration of Condominium. Among other things, the Declaration of Condominium, on which defendants rely, provides that the owner of the commercial unit has the right to alter the exterior as long as it does not jeopardize the soundness or structural integrity of the building (*see* Declaration of Condominium, Ex. E to Gordon Aff. in Support, ¶ 10 [c] [i] [D]; *see also* ByLaws of the 645 East 11th St. Assocs. Condominium, Ex. E to Gordon Aff. in Support, § 5.2 [B]). The bylaws also provide that unit owners who violate any provisions of the "Condominium Documents" shall be given written notice to cure the violation. *See*

ByLaws, § 9.1. These provisions raise issues, not properly addressed on a motion to dismiss, as to whether Rae Realty, as the owner of the commercial unit, was permitted to install the security gates, whether it received proper notice prior to removal of the gates, and whether plaintiffs therefore may recover for damage to their property.

In a related matter (Index No. 102264/07), the court ruled that during the time that renovation of the building facade continues, plaintiffs have no right to have an exterior security gate, because it would compromise the integrity of the building (*see* Transcript of October 21, 2008 Proceedings, Ex. C to Gordon Aff. in Support, at 34-37). The court expressly declined, however, to make a determination as to whether plaintiffs had a right before the renovation work began, or will have a right after the facade work is completed, to install a security gate outside the commercial unit (*see* Transcript at 39, 30). Further, the court did not decide then, nor can it decide on this motion, what monetary value, if any, the property has.

The business judgment rule also does not warrant dismissal of these claims. Plaintiffs allege that defendants acted in bad faith in removing the security gate and awning, with the intent to retaliate against Krantz and to force him out of business (see *generally Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530 [1990]). Defendants' other arguments--that plaintiffs have no capacity to sue and have failed to name a necessary party--are unavailing.

Defendants offer no proof that 645 East 11th Street Realty Corp., even if incorrectly named, is not a proper party.

Accordingly, it is

ORDERED that the first, second, and third causes of action are dismissed in their entirety; and it is further

ORDERED that the fourth and fifth causes of action are dismissed as against individual defendants Todd V. Holoubeck, Kathleen Perkins, Suzanne Ross, and John Doe(s); and it is further

ORDERED that the remaining claims against the remaining defendants shall continue; and it is further

ORDERED that defendants' request for sanctions and attorneys' fees is denied.

Dated: July 8, 2009

ENTER:

Hon. Eileen Bransten

FILED
JUL 13 2009
COUNTY CLERK'S OFFICE
NEW YORK