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

PRESENT: HON Joan A. Madden PART 11

Index Number : 650770/2010
PLAUTZ, ROBERT
VS.
EIDLIN-QUERE, IRENE
SEQUENCE NUMBER : 001
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

JUL 13 2011

Dated: July 13, 2011

J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

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

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

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ROBERT PLAUTZ,
Plaintiff,

-against-

IRENE EIDLIN-QUERE, PETER GOTTLIEB and
148 EAST 84TH STREET OWNERS CORP.,
Defendants.

----------X

Index No. 650770/10

Joan A. Madden, J.:

Peter Gottlieb ("Gottlieb") and 148 East 84th Street Owners Corp. ("84th Owners Corp.") move for an order dismissing the complaint against them for lack of personal jurisdiction based upon improper service of process pursuant to CPLR 3211(a)(8) or, in the alternative, for failure to state a cause of action pursuant to CPLR 3211(a)(7) (motion seq. no. 001). Defendant Irene Eidlin-Quere ("Eidlin-Quere") separately moves to dismiss for failure to state a cause of action (motion seq. no. 002).[1] Plautz opposes the motions and cross moves to extend the time to serve Gottlieb and 84th Owners Corp. pursuant to CPLR 306-b.

BACKGROUND

The following facts are based on the allegations in the complaint, which must be accepted as true for the purposes of this motion.

Plaintiff, Robert Plautz ("Plautz") has resided in Apartment 3C at 148 East 84th Street, New York, New York since securing the lease on October 1, 1976 (Compl. ¶ 1). Plautz's lease allows for renewal and is subject to the Rent Stabilization Laws under the New York City Administrative Code, Title 26, Chapter 4 (Id. ¶ 2-4). Gottlieb is the manager and President of 84th Owners Corp. and was the previous owner of Plautz's apartment as a member of a

[1] Motion seq. no. 001 & 002 are consolidated for disposition.

partnership, 84 Associates, which owned all the units in 148 East 84th Street ("the Building") (Id. ¶ 3). On or about February 1989, the partnership sought to convert the Building pursuant to General Business Law § 352e, *et seq.*, to a cooperative apartment building by acting as the sponsor and offering shares to prospective shareholders (Id. ¶ 11).

Starting in late 2005, various incidents occurred between Gottlieb and Plautz, which Plautz alleges were undertaken with the intent to intimidate and harass and to cause Plautz to surrender his lawful right to Apartment 3C under the Rent Stabilization Laws. The first incident occurred when Gottlieb approached Plautz with a publication and falsely asserted that the publication demonstrated it was possible for Plautz to be evicted if his apartment's shares were sold to a third-party who desired to live or reside in the apartment (Id. ¶ 18). The second incident occurred when Gottlieb reiterated, in a December 2, 2005 letter an allegedly false assertion about the possibility of Plautz's eviction if the shares were sold to a third party and Gottlieb also implied an offer to sell the shares to Plautz for a minimum of $320,000.00 (Id. ¶ 19-21).

Plautz did not purchase the shares and they were subsequently sold to Eidlin-Quere on or about June 2006 (Id. ¶ 2,22). Plautz was then informed of the sale and was directed to forward rent payments to Eidlin-Quere and to contact Gottlieb or the superintendent if the apartment required services or repairs (Id. ¶ 26).

Following the purchase of the shares, a series of interactions between Eidlin-Quere and Plautz occurred regarding the apartment, which Plautz alleges were done with the "intent to harass Plautz out of his lawful rights to Apartment 3C." (Id. 37). The first alleged incident occurred around late summer 2006, when Eidlin-Quere inspected Plautz's apartment and asked Plautz, "how long he intended to stay in the apartment." (Id. ¶ 28). During a telephone call of

September 27, 2007 and a letter of March 19, 2008, Eidlin-Quere falsely accused Plautz of not allowing the exterminator to enter his apartment (Id. ¶ 31-32). Also, in the letter, she falsely accused Plautz of maintaining the apartment in such a condition as to attract rodents and insects and that she would call the New York City Department of Health regarding the situation (Id. ¶ 33). Following the March letter, Eidlin-Quere again telephoned Plautz and repeated her false accusation and inquired for a second time about "how long he planned to stay in Apartment 3C." (Id. ¶ 36).

On April 17, 2008, without notice or pre-arrangement, Gottlieb inspected Plautz's apartment but nothing was found amiss during the inspection, which, according to Gottlieb, was conducted in response to complaints from residents about the condition of Plautz's apartment (Id. ¶ 39-40). Sometime in 2008, Gottlieb came to the apartment to fix Plautz's toilet, which had begun to leak and make loud noises. Both Gottlieb and Plautz had conversations with Eidlin-Quere regarding the leaking toilet but Eidlin-Quere did not send a plumber or take action to fix the issue, instead, Gottlieb had the toilet fixed (Id. ¶ 44-46). In November 2008, Eidlin-Quere was again contacted by Plautz regarding a maintenance issue – a leaking bathroom ceiling. However, Eidlin-Quere did not respond and therefore Gottlieb was contacted, and then investigated the issue and stopped the leaking for a period of time but a hole in the ceiling remains and "from time to time, in varying degrees" dripping has resumed and can be heard by Plautz (Id. ¶ 48-52). The superintendent of The Building, who is the agent of Eidlin-Quere and Gottlieb, informed Plautz that the leaking was due to conditions in the apartment above, Apartment 4C, and therefore nothing could be done to remedy the issue (Id. ¶ 53).

Moreover, Plautz began in the summer of 2009 to hear noise from hard soled and/or heeled shoes walking on the bare floor in the apart above, which "occurs at various times,

including times normally associated with sleep and quiet" (Id. ¶ 58, 76). Although the Building's House Rules provide that tenants are required to cover the floors of their apartments with carpeting or other effective nose reducing material to reduce sound, the noise continued and Plautz sent an email to Eidlin-Quere regarding the disturbance. Subsequently, Plautz was contacted and had a meeting with Eidlin-Quere's father, Sol Eidlin, who informed Plautz that Gottlieb had assured that proper floor covering was to be installed in the apartment above on December 7, 2009 (Id. ¶ 59, 61). However, the noise continued and no coverings were installed and Sol Eidlin informed Plautz that Gottlieb had lied to him (Id. ¶ 63).

In a December 14, 2009 conversation with Gottlieb, Plautz offered to pay for Apartment 4C's carpet installation but Gottlieb replied that it was not necessary as it was not Plautz's responsibility, and Gottlieb told him that a meeting would be held to resolve the issue with the other parties involved attending (Id. ¶ 68-70). The meeting was held on January 9, 2010 but the lawyer and tenants for the apartment above Plautz's did not attend as promised by Gottlieb. Additionally, on the same day as the meeting, Eidlin-Quere and her husband inspected Plautz apartment and "saw the hole in the bathroom ceiling caused by the leaks from Apartment 4C above" (Id. ¶ 81).

Following the meeting, the noise did not subside, therefore Plautz's counsel sent a letter to Eidlin-Quere informing that it was her duty to correct the problem and abate the nuisance (Id. ¶ 74-77). On January 27, 2010, Eidlin-Quere's responded in a letter stating that "the tenant's [sic] board" had assured her regarding installation of the floor covering. She also stated that Plautz kept his apartment "in a deplorable state and ' . . . as a result has substantially depreciated the value of the apartment'" and that "she [had] been informed by the 'building superintendent that the apartment and bathroom, in particular, are in horrendous condition'" (Id. ¶ 79).

The complaint, which was filed on or about June 16, 2010, contains causes of action for breach of quiet enjoyment that constitutes a nuisance, breach of the warranty of habitability, harassment, slander and libel.

Instead of answering the complaint, defendants now move to dismiss for failure to state a cause of action and improper service of Gottlieb and 84th Owners Corp. Plautz opposes the motion and cross moves to extend the time to serve Gottlieb and 84th Owners Corp. pursuant to CPLR 306-b.

In support of his motion, Plautz submits his affidavit, which on the whole restates the allegations stated in the complaint but also further alleges that the House Rules of the Co-op, which were given to Plautz by Gottlieb, was an explicit warranty and promise by Gottlieb and 84th Owners Corp that Plautz's right of quiet enjoyment of his apartment would be enforced (Plautz Aff. 6). Plautz also states that Gottlieb's recent request to not contact the Department of Health regarding a current rat problem in the Building is an indication that Eidlin-Quere's threat to report him to the agency was made solely to threaten him (Plautz Aff. 13-14). Plautz also states that he has continued to pay rent to Eidlin-Quere because he does "not want the issues in this matter to be cluttered with other issues; namely, what constitutes a *constrictive* eviction" (Plautz Aff. 14).

DISCUSSION

On a motion to dismiss pursuant to CPLR 3211(a)(7), the complaint must be liberally construed in light most favorable to the plaintiff, and all factual allegations must be accepted as true. Goldman v. Metro. Life Ins. Co., 5 N.Y.3d 561, 570-71 (2005). When a complaint "states a cause of action, and . . . from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law," defendant's motion to dismiss will be

denied. Guggenheim v. Ginzburg, 43 N.Y.2d 268, 275 (1977). However, a complaint that consists merely of "bare legal conclusions" or "factual allegations which fail to state a viable cause of action" will not withstand a motion to dismiss. See Leder v. Spiegel, 31 A.D.3d 266, 267 (1st Dep't 2006), aff'd, 9 N.Y.3d 836 (2007), cert. denied, sub nom Spiegal v. Rowland, 552 U.S. 1257 (2008).

Breach of Quiet Enjoyment

The first cause of action for breach of quiet enjoyment alleges that the "[d]efendants have willfully and intentionally deprived Plaintiff of his right to the quiet enjoyment of his leasehold and constitute a nuisance" (Compl. ¶ 21). To state a claim for breach of quiet enjoyment, a plaintiff must allege: (i) constructive or actual eviction, and (ii) conduct by landlord that substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises. Jackson v. Westminister House Owners Inc., 24 A.D.3d 249, 250 (1st Dep't 2005), lv denied, 7 NY3d 704 (2006)(citation omitted). Here, the allegations in the complaint are insufficient to satisfy this standard.

"To make out a prima facie case of the breach of the covenant of quiet enjoyment . . . '[t]here must be an actual ouster, either total or partial, or if the eviction is constructive, there must have been an abandonment of the premises by the tenant.'" Bedke v. Chelsea Gardens Owners Corp., 27 Misc.3d 1212(A) (Sup. Ct. N.Y. Co. 2010) (citation omitted); See also Barash v. PA Terminal Real Estate Corp., 26 N.Y.2d 77, 83 (1970)("The tenant, however, must abandon possession in order to claim that there was a constructive eviction."(citation omitted)); 74 NYJur2d Landlord and Tenant, § 298 (2011).

Moreover, while "[a] constructive eviction does not require physical removal from the premises [it must be] demonstrate[d] that the lessee could not use the premises for the purpose(s)

intended and had to abandon the premises under the circumstances." Herbert Paul, CPA. v. 370 Lex, L.L.C., 7 Misc.3d 747, 750 (Sup. Ct. N.Y. Co. 2005) (citing Dinicu v. Groff Studios Corp., 257 A.D.2d 218, 224 (1st Dept 1999)). Thus, allegations of noise are only sufficient to state a claim for breach of the covenant of quiet enjoyment, when there are also allegations that the tenant has abandoned at least a portion of the apartment. See Yetnikoff v. Mascardo, 63 A.D.3d 473, 476 (1st Dept), lv denied, 13 NY3d 712 (2009); Bernard v. 345 East 73rd Owners Corp., 181 AD2d 543 (1st Dept 1992); Zamzok v. 650 Park Ave. Corp., 80 Misc2d 573 (Sup Ct NY Co. 1974).

Here, the allegations in the complaint indicate that Plautz remained in the apartment and showed no intent to leave the space or discontinue using it as his residence. Moreover, Plautz's argument that constructive eviction may be established, even if the tenant has not abandoned premises, under Real Property Actions and Proceedings Law ("RPAPL") § 755, is unavailing. RPAPL § 755 provides, "if the condition . . . constructively evict[s] the tenant from a portion of the premises occupied by him, or is, likely to become, dangerous to life, health, or safety, the court before which the case is pending may stay proceedings to dispossess the *tenant for non-payment of rent or any action for rent or rental value*." (emphasis added). Here, the allegations of the complaint are insufficient to demonstrate a condition contemplated under this provision. Moreover, this provision does not give rise to a claim for constructive eviction in the absence of a showing of abandonment, but simply provides for a stay of proceeding to collect rent in the event it is shown that there is a constructive eviction or a condition that endangers the health or safety of the tenant.

Plautz also contends that the standard for constructive eviction established by Barash v. PA Terminal Real Estate Corp., 26 N.Y.2d 77, which requires abandonment of at least a

substantial portion of the premises, applies only to commercial and not residential tenants. However, Plautz's narrow reading of Barash is unsupported by the case law which applies the Barash rule to residential tenancies. See e.g. Yetnikoff v. Mascardo, 63 A.D.3d at 476 (finding that tenant did not address "the undisputed fact that he continued to live in the apartment for almost a year without paying rent despite the allegedly intolerable noise"); See also Kaniklidis v. 235 Lincoln Place Housing Corp., 305 A.D.2d 546, 547 (2nd Dep't 2003) ("As to the covenant of quiet enjoyment, the plaintiffs failed to show that they were constructively evicted from the apartment."). Accordingly, the first cause of action must be dismissed.

Warranty of Habitability

Plautz's second cause of action for the breach of the warranty of habitability pursuant to Real Property Law § 235 is based on allegations that the defendants failed to stop the noise from the apartment and the dripping noise from the leaking ceiling and toilet.

Under Real Property Law § 235-b, "every written or oral lease or rental agreement for residential premises the landlord or lessor shall be deemed to covenant and warrant that the premises so leased or rented . . . are fit for human habitation and for the uses reasonably intended by the parties and that the occupants of such premises shall not be subjected to any conditions which would be dangerous, hazardous or detrimental to their life, health or safety." Section 235-b is not intended to make a landlord the "guarantor of every amenity customarily rendered in the landlord-tenant relationship" but instead is "designed to give rise to an implied promise on the part of the landlord that both the demised premises and the areas within the landlord's control are fit for human occupation at the inception of the tenancy and that they will remain so throughout the lease term." Park W. Mgmt. Corp. v. Mitchell, 47 N.Y.2d 316, 327, cert denied, 444 US 992 (1979).

A breach of the warranty of habitability has occurred "[i]f, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide...." Id. at 328. In addition, under the warranty, the landlord warrants that "there are no conditions that materially affect the health and safety of the tenants." Id. at 317. Examples of such conditions include "insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation . . . or similar services which constitute the essence of the modern dwelling unit." Id. at 328.

As a preliminary matter, Gottlieb and 84th Owners Corp. cannot be held liable for a breach of the warranty of habitability as they have no contractual arrangement or other responsibility to do so. Specifically, the Board of Directors and managing agent are not obligated under the House Rules to guarantee the warranty of habitability and it has been held House Rules are not a lease agreement and do not impose a contractual relationship of landlord-tenant. McCarthy v. Bd. of Managers of Bromley Condo., 271 A.D.2d 247, 247 (1st Dep't 2000) (citation omitted) ("Plaintiff's fourth cause of action premised upon an alleged warranty of habitability by defendant condominium corporation should have been dismissed since it is clear that defendant condominium did not extend a warranty of habitability to the individually owned unit in question, and, in any event, would have made no such warranty to plaintiff subtenant, with whom it had "neither a contractual agreement nor landlord-tenant relationship"); Wright v. Catcendix Corp., 248 A.D.2d 186 (1st Dep't 1998) (citation omitted) (the court "properly determined that plaintiffs, as subtenants, have no cause of action against defendant cooperative corporation Catcendix for . . . breach of the warranty of habitability since, between them and the cooperative, there was neither a contractual agreement nor landlord-tenant relationship").

In contrast, Eidlin-Quere as the owner of Plautz's apartment has an obligation to Plautz

to ensure the apartment's habitability. Moreover, this duty extends to conditions not caused by Eidlin-Quere. See Park W. Mgmt. Corp. supra, 47 N.Y.2d at 326; Elkman v. Southgate Owners Corp., 233 A.D.2d 104 (1st Dep't 1996).

Here, based upon Section 235-b and liberally construing the complaint in light most favorable to Plautz, the complaint states a cause of action against Eidlin-Quere for the breach warranty of habitability. The complaint alleges the "unreasonable noise" started sometime in the summer of 2009 and "occurs at various times, including times normally associated with sleep and quiet" and there have been "several times when the noise has awoken Plautz at night." (Compl. ¶ 15, 19). These allegations of excessive noise are sufficient to state a claim for the breach of the warranty of habitability. Armstrong v. Archives L.L.C., 46 A.D.3d 465, 465 (1st Dep't 2007) (internal citations and quotations omitted). See also, Nostrand Gardens Co-op v. Howard, 221 A.D.2d 637, 638 (2nd Dep't 1995) (citation omitted) (finding breach of warranty for "excessive noise emanating from an apartment that neighbored the respondents' apartment through the late night and early morning hours"). Accordingly, the second cause of action is sufficient to state a claim against Eidlin-Quere.

Harassment

The third cause of action for harassment alleges that defendants "willfully and intentionally harassed [Plautz] with the intent to cause [Plautz] to surrender or waive his rights in violation of the Rent Stabilization Laws" (Compl. ¶ 21). It is well established, as the defendants assert, that New York does not recognize a common law cause of action for harassment. Jacobs v. 200 E. 36th Owners Corp., 281 A.D.2d 281, 281, 722 N.Y.S.2d 137 (2001). However, Plautz argues that New York City Administrative Code § 27-2005(d) provides a basis for his harassment claim. Plautz's argument is unavailing.

NYC Administrative Code § 27-2005(d), also known as Local Law 7 of 2008, created a new cause of action "to address a perceived effort by landlords to empty rent-regulated apartments by harassing tenants into giving up their occupancy rights, using such tactics as 'commencing repeated baseless or frivolous court proceedings' against those tenants (§ 27-2004[a][48][d])." Aguazia v. Vantage Properties L.L.C., 69 A.D.3d 422 (1st Dep't 2010). It provides, in relevant part, that, "[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to occupancy of such dwelling as set forth in paragraph 48 of subdivision a of section 27-2004 of this chapter."

Paragraph 48 of subdivision 27-2004 (a), defines "the term 'harassment' to mean: (i) any act or omission by or on behalf of an owner that causes or is intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy, and (ii) includes one or more of the following...(b) repeated interruptions or discontinuances of essential services, or an interruption or discontinuance of an essential service for an extended duration or of such significance as to substantially impair the habitability of such dwelling unit...(g) other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy.[2] " (emphasis

[2]The other predicates to a claim for harassment are not even arguably implicated here. They include: (a) using force against, or making express or implied threats that force will be used against, any person lawfully entitled to occupancy of such dwelling unit, (c) failing to comply with the provisions of subdivision c of section 27-2140 of this chapter (concerning failure to comply with the conditions of a dwelling which render it unfit for human habitation as required by a vacate order), (d) commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit,(e) removing the possessions of any

supplied).

In this case, the complaint alleges that the defendants have demonstrated an intent to cause him to give up his right to Apartment 3C by sending letters to Plautz threatening eviction unless he buys his apartment, informing the Department of Health about the condition of his apartment, not fully repairing a leaky toilet and a leak in the ceiling and failing to remedy the noise problem. Assuming these allegations are true, they are insufficient to state a claim for harassment under the Administrative Code.

As a preliminary matter, to the extent Plautz complains of the physical conditions of his apartment, no claim for harassment is stated since under Administrative Code § 27-2115(h)(2)(i), such complaints must be based on a violation recorded with an agency, and there are no allegations of any recorded complaints. Moreover, while the complaint alleges that defendants engaged in conduct, including writing letters and threatening him, which were intended to give up his rent stabilized apartment, it does not specify any additional conduct needed to state a claim for harassment. Thus, for example, while Plautz alleges that defendants have threatened to evict him, he does not allege that any proceeding has been commenced by defendants as is required under § 27-2004(a)(48)(ii)(d)(defining harassment as "commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy of such dwelling unit"). Furthermore, allegations relating to intermittent noise from a neighboring apartment are insufficient to give rise to a harassment claim as defined under Paragraph 48 of subdivision 27-2004 (a)(48)(ii), particularly as there are not allegations that the noise was orchestrated by the defendants. Accordingly, the harassment claim must be dismissed.

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person lawfully entitled to occupancy of such dwelling unit, (f) removing the door at the entrance to an occupied dwelling unit; removing, plugging or otherwise rendering the lock on such entrance door inoperable; or changing the lock on such entrance door without supplying a key to the new lock to the persons lawfully entitled to occupancy of such dwelling unit"

Defamation

The fourth cause of action, for defamation, against Eidlin-Quere is based on the allegedly "willfully and intentionally false" statements in a letter from Eidlin-Quere dated January 27, 2010. Plautz relies on quoted statements from the letter that the apartment was in a deplorable state and "as a result has substantially depreciated the value of the apartment" and that she was informed by "the building superintendent that the apartment and bathroom, in particular, are in horrendous condition," along with descriptions of the claims made within the letter.

To state a claim for defamation a plaintiff must allege "a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum a negligence standard, and, it must either cause special harm or constitute defamation per se." Dillon v. City of New York, 261 A.D.2d 34, 38 (1st Dep't 1999) (citations omitted). CPLR 3016(a) requires that in a defamation action, "the particular words complained of ... be set forth in the complaint." Id. at 38. Additionally, the complaint must state "the time, place and manner of the false statement and to specify to whom it was made." Id. at 38.

Under this standard, even assuming arguendo that the statements in the complaint provide sufficient basis for a defamation claim, the claim must be dismissed for failure to allege special damages or defamation per se. Gurtler v. Union Parts Manufacturing Co., 1 N.Y.2d 5, 8 (1956) ("[A]bsent a sufficient allegation of special damage, the complaint fails to state a cause of action and was properly dismissed."). Plautz does not indicate that he has suffered any special damages that contemplate "the loss of something having economic or pecuniary value (citation omitted)." Liberman v. Gelstein, 80 N.Y.2d 429, 434-35 (1992). When as here, no special damages, are pleaded, a defamation claim may survive a motion to dismiss only if a plaintiff

shows one of the four exceptions that establishes defamation per se. The exceptions consist of statements that (i) charge plaintiff with a serious crime, (ii) tend to injury another in his trade, business or profession, (iii) indicate that plaintiff has a loathsome disease, or (iv) impute unchastity to a woman. Id. at 435. Plautz's complaint does not allege any of the four listed exceptions to satisfy defamation per se and therefore fails to state a cause of action.[3] Wehringer v. Allen-Stevenson School, 46 A.D.2d 641, 360 N.Y.S.2d 429 (1st Dep't 1974) ("The material alleged to be defamatory is not libelous per se and in the absence of special damages, the complaint cannot withstand defendants' motion to dismiss pursuant to CPLR 3211 (subd. (a), par. 7) for failure to state a cause of action."). Accordingly, the cause of action for defamation must be dismissed.

Finally, as the complaint is dismissed against Gottlieb and 84th Owners Corp., the Court need not reach whether Plautz should be permitted to extend the time to serve these defendants under CPLR 306-b.

In view of the above, it is

ORDERED that the motion to dismiss by defendants Peter Gottlieb and 148 East 84th Street Owners Corp. (motion seq. no. 001) is granted and the claims against these defendants are dismissed and the Clerk is directed to dismiss the complaint against these defendants; and it is further

ORDERED that the cross-motion by plaintiff Robert Plautz to extend the time to serve defendants Peter Gottlieb and 148 East 84th Street Owners Corp. is denied; and it is further

[3] Eidlin-Quere also argues that the fourth cause of action for defamation is deficient as it fails to allege that the defamatory statements were published to a third party. In response Plautz submits an affidavit with the January 27, 2010 letter showing it is carbon copied to a third party. However, as the complaint fails to adequately allege special damages or defamation per se, the Court need not reach whether the letter attached to Plautz's affidavit satisfies the publication requirement or should be allowed to supplement his complaint.

ORDERED that the motion to dismiss by defendant Irene Eidlin-Quere (motion seq. no. 002) is granted only to the extent of dismissing the first, third and fourth causes of action; and it is further

ORDERED that the remaining parties shall appear for a preliminary conference in Part 11, room 351, 60 Centre Street, New York, NY on August 11, 2011 at 9:30 a.m.

Dated: July 13 2011

J.S.C.