Chelsea 18 Partners LP v Sheck Yee Mak
2014 NY Slip Op 30464(U)
February 26, 2014
Supreme Court, New York County
Docket Number: 110264/10
Judge: Joan M. Kenney

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 8

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CHELSEA 18 PARTNERS LP,

Plaintiff

-against- Index No. 110264/10

SHECK YEE MAK, CHOI KUEN MAK, MICHAEL MAK, JOHN DOE and JANE DOE,

Defendants.

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JOAN M. KENNEY, J.:

Plaintiff Chelsea 18 Partners LP (the Landlord) owns the building located at 200 Mott Street, New York, NY, in which defendants Sheck Yee Mak (Sheck), his wife Choi Kuen Mak (Choi), and their son Michael Mak (Michael) have lived for many years, occupying two rent-controlled apartments. According to the Landlord's general partner, Arthur Kokot (Kokot), plaintiff purchased the building in 1999.

The amended complaint asserts eight causes of action against the Maks, including common-law nuisance and waste, and seeks both an order of ejectment and damages. In their answer to the amended complaint, the defendants assert five counterclaims alleging harassment by the Landlord, breach of warranty of habitability, and damages for failure to timely correct violations, diminished use and enjoyment, and retaliation.

In two separate motions, defendants Sheck, Choi, and Michael

move for summary judgment dismissing the complaint against them.[1] Plaintiff Landlord cross-moves for summary judgment granting ejectment against defendants on plaintiff's common-law nuisance and waste causes of action, and dismissing defendants' counterclaims.

To establish a cause of action for common-law nuisance "the plaintiff must sufficiently plead, and subsequently establish, the following elements: '(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act.'" *Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41 (1st Dept 2011), *quoting Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (1977). Reversing this court's October 22, 2010 decision dismissing the complaint, the Appellate Division concluded that, if accepted as true and given every favorable inference, as required on a motion to dismiss, the Landlord's allegations stated a cause of action for common-law nuisance. Both sides now move for summary judgment, and those allegations must be examined in light of the evidence submitted by the parties.

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[1] At the time defendants filed their motion, all three defendants were represented by pro bono counsel. After the motion was filed, pro bono counsel withdrew as counsel for Michael, who is now appearing pro se and has filed separate papers in support of his motion for summary judgment.

The Landlord essentially contends that the Maks withheld their rent without justification and filed complaints against the Landlord with city agencies for defects in the apartments that they themselves created, and then refused to give the Landlord access to their apartments to repair those defects. The Landlord also contends that the Maks harassed the Landlord's employees and contractors, preventing them from carrying out the repair work, harassed the owner of a ground floor business in the building as well as other tenants, particularly the market rent tenants in apartment 17, resulting in the latter tenants breaking their lease.

The court notes from the outset that a great many, if not most, of the Landlord's allegations are asserted against all three members of the Mak family, without distinguishing among the family members. It is, therefore, not surprising that the decision of the Appellate Division in this matter, which is based upon plaintiff's allegations, and which is repeatedly quoted by the Landlord in its briefs, also makes little distinction among "the Mak tenants."

Although the Landlord's cross motion was filed after the tenants' motion for summary judgment, because, as plaintiff, it is the Landlord's burden to establish its allegations of nuisance, the court will first consider its arguments, and the evidence it has submitted in support thereof.

Defendants Sheck and his wife, Choi live in apartment 13 and their son, Michael, lives in apartment 15. According to their deposition testimony, the parents have lived in apartment 13, for more than 40 years. At the time of their depositions, Sheck was 73 or 74 years old and Choi was nearly 65 years old. Choi has lived at 200 Mott Street from the time she came to the United States from Hong Kong, when she was 20 or 21 years old. Choi stopped going to school when she was 12 years old. Both Sheck and Choi are now retired. Before they retired, Sheck worked in a restaurant and was a driver, and Choi worked in a garment factory. Neither Sheck, nor Choi, speak fluent English and neither read English. Sheck has had two strokes which, he says, may have affected his memory. He testified that when he receives a letter in English he gives it to his son, Michael to read and summarize for him.

Michael, who is approximately 40 years old, has lived in apartment 15 since he was a young child, when he moved in with his grandfather Jin Gong Mak, who then occupied the apartment. *See* Sheck Mak Dep at 35. Michael received a bachelor's degree from Hunter college and after college worked at Dean Witter in the corporate communications department until Dean Witter merged with Morgan Stanley. According to Michael he is currently on disability, because he has been diagnosed with obsessive compulsive disorder (OCD) and with bipolar disorder, though he

testified that was taking medications and he no longer had the symptoms. Michael Mak Dep at 30-35.

THE LANDLORD'S CLAIMS

Nonpayment of Rent

The Landlord contends that the Maks withheld rent without justification, forcing the Landlord to bring three nonpayment proceedings against them in 2007, 2008, and 2009 for unpaid rent (including fuel costs) of (1) 2852.39 (14 months), (2) $1775.41 (8 months) and (3) $1434.53 (8 months) respectively. The Landlord contends that as a result it incurred legal fees for the three proceedings in the amount of $1860.00, $805.00 and $1385.00 respectively. *See Chelsea 18 Partners, L.P. v Sheck Yee Mak,* index No. 62256/07, Civ Ct, New York County August 15, 2007; *Chelsea 18 Partners, L.P. v Michael Mak,* index No. 65996/08, Civ Ct, New York County, Sept. 22, 2008, stipulation of settlement; *Chelsea 18 Partners, L.P. v Sheck Yee Mak*, index No. 99724/09, Civ Ct, New York County, Jan. 14, 2010, stipulation of settlement, affidavit of Arthur Kokot, Exh. 43. Those proceedings have apparently been resolved.

Defendants contend that any withholding of rent was justified. According to Choi, she withheld part of her rent because the kitchen ceiling was falling down and she was trying to get the Landlord to fix it. Choi Kuen Mak Dep at 130. Although the Landlord denied knowledge of any complaint regarding

the ceiling, on October 30, 2006, the Mak family wrote to Kokot, complaining that the tenants in apartment 17 had banged on their floor causing cracks in the ceiling and walls of their apartment and that they had also caused water damage to their ceiling and walls. *See* Letter from the Mak family to Arthur Kokot, affirmation of Andrew R. Podolin, Exh. S.

The Department of Housing and Community Renewal (DHCR) did, in fact, order reductions in rent for apartment 13 based on violations in that apartment and/or other building violations in response to at least some of the complaints made by Sheck and Choi. *See* Affirmation of Jami E. Holland, Exh. O. Furthermore, it appears that when the rent was restored after the violations were cured, the Maks were not necessarily aware of that restoration because, for some reason, the Landlord did not regularly send rent bills to them. *See* Email from Mark Nagel to bgilroy, dated Sept. 1, 2010 indicating that bills were not sent to the Maks, Podolin affirmation, Exh. U. Therefore, they may not have been aware that they were not paying the correct amount of rent. Furthermore, it appears from that email that, if the Maks attempted to pay their rent but it was not the correct amount, the checks would be returned. *See also* letter from Arthur Kokot to Sheck Mack, dated April 1, 2001 returning rent check as not the correct amount. Podolin affirmation, Exh. W.

In addition, after July 9, 2009, the Landlord repeatedly

refused to accept checks from Michael that contained his grandfather's name as well as his own, on the basis that the Landlord had a policy of refusing what it considered third-party checks, although such checks had previously been accepted. *See* Letters from Mark Nagel, property manager to Michael Mak dated July 20, 2009, November 5, 2009, December 15, 2009, January 7, 2010, and February 2, 2010, Podolin affirmation, Exhs. HH, JJ, KK, LL & MM. The court notes that the Landlord also returned at least one check to Sheck as a third-party check, apparently because the check, from the account of Sheck and his wife Choi, was signed by Choi. *See* Letter from Mark Nagel to Sheck Yee Mak, dated July 20, 2009, Podolin affirmation, Exh. E.

Finally, on March 9, 2010, the Landlord rejected a rent check from Michael because "we are not accepting payments at this time as this matter is in litigation." Letter from Mark Nagel to Michael Mak, Podolin affirmation, Exh. NN.

The Landlord also contends that the Maks rent overcharge complaints to DHCR constituted harassment, since some of their complaints with respect to apartments 13 and 15 were rejected by the agency. *See e.g.* Orders Determining Tenant's Challenge to Fuel Cost Report: 2009 & 2010 rejecting fuel overcharge complaint, Order Terminating Proceeding issued 9/02/2008 rejecting complaint regarding placement of circuit breakers and order rejecting complaint of decreased services issued 2/05/2010,

Kokot Aff., Exh. 46. However, at least two of the Maks' complaints based upon allegations of overcharge for fuel cost adjustment (FCA) were successful, and resulted in rent reductions. *See* Order Determining Tenant's Challenge to Fuel Cost Report: 2006, dated 1/24/2007 for Apt. 13 (collectible FCA is $37.84 per month and landlord charging $75.00 per month), Podolin affirmation, Exh. X; Order and Opinion Denying Petitions for Administrative Review upholding DHCR order dated 1/24/2007, Podolin affirmation, Exh. AA; *see also* DHCR Order Determining Tenant's Challenge to Fuel Cost Report: 2008 dated 8/21/2008 for Apt. 15 (collectible FCA is $56.22 per month and landlord is charging $63.75 per month). Podolin affirmation, Exh. Y. Furthermore, Kokot conceded that he was not aware of any other mechanism to challenge a fuel surcharge. Kokot Dep at 237.

Therefore, this court cannot conclude that defendants' complaints regarding housing code violations and fuel surcharge overcharges constituted harassment, even though some of those complaints were rejected by the city agencies.

Improper Plumbing Work

The Landlord contends that the Maks actually created some of the conditions that they complained of to DHCR that were later the subject of DHCR orders.

When DHCR inspected apartments 13 and 15, the agency found that the placement of the bathroom sink and bathtub were

improperly switched and that the work was not done in conformity with applicable codes. The Landlord asserts that the Maks actually did that improper plumbing work. Kokot, claims that Norbert Niwelt, the building superintendent since 2006, testified that the bathtub and sink were reversed in only two apartments in the building, apartments 13 and 15. Kokot aff, ¶ 76. Niwelt's testimony, however was far less clear, for in response to the question of whether in any apartments other than 13 and 15 the sink and bathtub were reversed, he merely stated "[n]ot that I know of." Kokot aff, Exh. 12, Niwelt dep at 155. Furthermore, Zbigniew Wanielista, the licensed plumber who came to correct the plumbing in Michael's apartment, testified that when he first saw the tub and sink he did not think that they were in their original positions, but he also testified that he had seen that configuration in a building where he was working at 510 East 13th Street, "because it is probably same time the building was erected." Zbigniew Wanielista Dep at 81.

According to Choi, the tub and sink in apartment 13 were in the same position from the time that she moved in to the apartment and neither she nor her husband switched them. Choi Kuen Mak Dep at 106. Her testimony regarding the configuration of the tub and the sink is confirmed by her adult son, Edward Mak, who no longer lives in his parents' apartment. Edward Mak Dep at 85-90; *see also* Michael Mak Dep at 373-374 regarding the

position of the sink and tub in apartments 13 and 15.[2]

Niwelt also testified that Sheck admitted having reversed the sink and tub. According to Niwelt, Sheck complained about the length of time it was taking for the plumbers to reverse the sink and tub, stating, "he said it wasn't - it wasn't that long. He said 'it didn't take us that long last time around' when he did it." Niwelt Dep at 179 - 180. Niwelt further testified that when Michael heard the conversation between his father and Niwelt has started yelling at his father, who went into the other room and closed the door. *Id.* According to Niwelt, he had no idea when Sheck might have switched the sink and bathtub. *Id.*

The Landlord also relies on the testimony of Wanielista, who stated that the alteration was not a "professional way of doing things" "patch-up" job that is the kind of job that could be done by someone without plumbing background. Wanielista stated that he did not know when the work had been done in the bathroom, but indicated that he thought it was "not very very long [ago]." *Id.* at 24.

There is, however, no evidence that any of the Mak family had any knowledge of plumbing, let alone sufficient skill to

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[2] According to defendants Sheck Yee and Choi Kuen Mak's reply memorandum of law, Sheck also testified that the position of the tub and sink were not changed prior to the work done by the Landlord, however the relevant page of his testimony (page 59) cited by defendants was not contained in the exhibit annexed to the Polodin affirmation.

accomplish the job. At best, there is testimony that someone without plumbing experience might have been able to carry out such a job, not that the Maks were able to.

Moreover, in light of Wanielista's testimony that he had seen a similar configuration of tub and sink in another apartment building that was built around the same time as 200 Mott Street, Niwelt's less than decisive testimony regarding the configuration of the tub and sink in the other apartments at 200 Mott Street, and the testimony of not merely Choi and Michael, but Edward Mak as well that the tub and sink had been in the same configuration throughout their tenancy, questions of fact exist as to whether the plumbing violations for which the Landlord was cited were caused by the defendants.

Exposed Wiring

As with the plumbing, the Landlord contends that defendants were responsible for carrying out illegal and hazardous electrical work in apartments 13 and 15. According to Kokot, Fred Trammell, an electrician who replaced the improper wiring in apartments 13 and 15 testified that the "zip cord" wiring for which Department of Buildings (DOB) issued violations, was installed in the mid-1990's and the fixture which was improperly installed did not come out until that same time. Kokot aff, ¶ 77.

Kokot also stated in his affidavit that according to Niwelt,

apartments 13 and 15 were the only apartments with illegal electrical wiring. Kokot aff, ¶ 78. But again, Kokot overstates Niwelt's testimony, who, in response to the question of whether he saw exposed wiring in any apartment besides 13 and 15, merely stated "[n]ot that I know of." Niwelt Dep, at 216. Furthermore, in response to the question "was there any exposed wiring in apartment 1 before its demolition," Niwelt responded "I - I haven't noticed. Could have been, but I haven't noticed." *Id.*

Although the Landlord contends that there were no other apartments with illegal or exposed electrical wiring, there is evidence that at least two violations were issued by the Department of Housing, Preservation and Development (HPD) for exposed wiring in the ceilings of the public hallways on the 3rd and 4th story. *See* HPD Building Registration Summary Report, Affirmation of Jami E. Holland in support of defendants' motion for summary judgment, Exh. M, at page 3 of 7. Michael testified that to his knowledge no one in the family, or at the direction of family members, altered the electrical wiring in either apartment. Michael Mak Dep at 197-198. Furthermore, the Landlord provided no evidence establishing that either Sheck, Choi or Michael had the knowledge to make the alleged changes in wiring. In fact, when questioned about whether he saw anything which led him to believe that the Maks had made the electrical alterations in apartment 15, Billy Gilroy, the property manager

for the Landlord, testified, "I can't say the Maks did it." Gilroy Dep at 381. Finally, since Trammell testified that the improperly installed light fixture in apartment 15 was installed in the mid-1990's, prior to the time the Landlord purchased the building, the electrical work may have been done by, or at the direction of, the prior landlord. Therefore, again, the Landlord has failed to establish, sufficient for summary judgment that the defendants were responsible for creating the condition of the electrical wiring in apartments 13 and 15.

Intimidation, Yelling and Screaming, Obstruction, Videotaping

The Landlord quoted the Appellate Division as stating that "[t]he harassment by the Mak tenants allegedly extended to the landlord and its staff: the tenants allegedly physically obstructed work, videotaped, and threatened and intimidated the landlord's workers by yelling and screaming at them." Plaintiff's memorandum of law at 16, quoting *Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d at 42.

The Landlord provides no evidence regarding any threatening or intimidating actions by Choi. Rather, Peter Praszkowicz, a contractor who worked at 200 Mott Street, testified that Choi had a calm demeanor and even tried to smooth things over when there were problems with Michael, describing one occasion when she assisted him in getting access to Michael's apartment to perform repairs. Praszkowicz Dep at 52-53; *see also*, Gilroy Dep at 77-78

("She's fine to me, I guess"); Trammell Dep at 85-85 ("I extremely like her. I think [Choi and Sheck] are nice people").

The Landlord provides only very limited evidence regarding aggressive actions taken by Sheck. Niwelt testified that he could remember one occasion when Sheck yelled "[d]o you want to fight me?" and stood with clenched fists right beside him. Niwelt Dep, at 182. Niwelt stated that he could not remember what preceded the incident or what year it occurred. *Id.* at 182-183. Describing Sheck's behavior Niwelt stated, "it's like a position to, I don't know, to intimidate you," and that Sheck was "yelling all the time but, you know" but Niwelt stated that "I never thought he was going to do anything, basically." *Id.* Trammell testified that Sheck had been angry at him, but he assumed it was because the job was taking so long, and that Sheck never raised his voice. He just had a "just aggressive, a certain mean face. It's slight but you know that he's mad." Trammell Dep at 86-87.

The one incident described by Niwelt, and the limited testimony of Trammell are hardly sufficient to establish the kind of threatening and intimidating behavior by Sheck that the Landlord contends constitutes a nuisance. Virtually all of the evidence submitted by the Landlord regarding alleged physical obstruction of repair work such as videotaping, or threatening and intimidating workers relates to actions of Michael, and not

actions of his parents.

It is undisputed that Michael videotaped workers, but Michael contends that he did so pursuant to a stipulation with the Landlord in which both sides agreed to permit videotaping, however, no such stipulation has been produced. Michael Mak Dep at 516-518. Michael also contends that he was subject to physical and verbal abuse from the Landlord's workers and that he was documenting that abuse. *Id.* at 533-555. For example, he testified that Peter Praskowicz and his brother Andre Praskowicz cursed at him (Michael Mak Dep at 333-340), and that Gilroy was passive aggressive and would respond disrespectfully and sarcastically to his inquiries about repair work and would fail to give him information when he inquired about the nature and timetable for repair work. Michael Mak Dep at 337-340.

At least one worker, Fred Trammell, the electrician who replaced the wiring in apartment's 13 and 15 complained that Michael's camera was so close that he complained to Michael saying "Come on, this is ridiculous. I can't even - you're stopping me." Trammell Dep at 94. Trammell further testified that he felt that Michael was baiting him. "What he does is he basically harasses everybody in there and then he pulls out a little camera from out of his back after he's cursed you out, after he's done every trick in the book to try to get me, or whoever he's doing, to try to get - to beat the hell out of him."

Id. at 96.

Niwelt testified regarding one incident when he was on a ladder in the hallway and noticed Michael videotaping him. Niwelt described "years of someone sticking camera in your face and humiliating you by signing these letters to perform anything, notarizing, signing your name correctly because he doesn't like the way I sign my name." Niwelt Dep at 197. Niwelt testified that, because of that history, he was upset when he saw Michael videotaping him in the building hallway, and he came down from the ladder where he was working and probably cursed and grabbed Michael's camera, because he did not want Michael to record him. Niwelt Dep at 196-197. According to Michael, he believed that Niwelt was making illegal alterations in the building as part of a renovation project in apartment 18, and that he had his camera trained on a hole in the ceiling where Niwelt was working. Michael testified that Niwelt came down from the ladder, pushed him 10 or 15 feet backwards and grabbed his arm, bruising him. Michael Mak Dep at 360-362. Though Niwelt did not recall squeezing Michael's arm, he testified that since he grabbed Michael's camera, Michael's arm may have been squeezed as a result. Niwelt Dep at 196-197.

The Landlord contends that when Michael videotaped workers attempting to correct violations in apartment 13 he was acting as an agent for his parents and that they, therefore, can be held

responsible for his actions. To the extent that Michael's conduct occurred in the building hallways, such as his videotaping of Niwelt, or when workers were attempting correct violations in apartment 15, his conduct cannot be attributed to his parents. Moreover, the conflicting testimony of Niwelt and Michael concerning the incident in the hallway constitutes a dispute of facts which cannot be determined on the basis of affidavits or depositions, but must be determined by the trier of fact.

Harassment of Other Tenants

With respect to threats against other tenants, the Landlord quotes the Appellate Division's statement "Further, the landlord alleges that the Mak tenants harassed other tenants on the floor to the point of driving out those tenants, thereby forcing the landlord to bear the expense and inconvenience of repainting and reletting the apartment." Plaintiff's memo of law, at 18, quoting *Chelsea 18 Partners, L.P.*, 90 AD3d at 42. However, the Landlord submits no evidence whatsoever that either Sheck or Choi harassed any other tenants.

The Landlord contends that Michael drove the tenants in apartment 17 to break their lease, by threatening them, leaning on their buzzer late and incessantly tapping on their door in the middle of the night. The Landlord submits the letters to the Landlord from the apartment 17 tenants, complaining about

Michael's conduct and the complaint that they filed with the police against Michael. *See* Kokot aff, ¶ 102, Exh. 47.

The Landlord also alleges that Michael harassed the owner of the Epistrophy Café, the building's sole commercial tenant, by attempting to prevent the café from obtaining a permit for outdoor seating based upon what Kokot described as "trumped up grounds that it would create a safety hazard." Kokot aff, ¶ 101. The Landlord fails to mention that eleven tenants, in addition to Michael and Sheck, signed a petition to Kokot at Provident Management complaining about "loud noise consist[ing] of music, talking, machinery, etc., [that] occurs at varying times late at night and well into the early morning hours, typically from 5 p.m. to 5 a.m. emanating from Epostrophy and apartment 17." *See* Petition to Stop Loud Noise at 200 Mott Street, affirmation of Andrew R. Polodin, Exh. EE. Nor does the Landlord mention that the New York City Department of Environmental Protection (DEP) issued two noise violations against Epistrophy. *See id.* at Exh. FF.

Michael denies having harassed the former apartment 17 tenants, though he does admit having knocked on their door sometimes during the night and sometimes during the day "when they were causing these problems which needed to be addressed." Michael Mak Dep at 138. According to Michael, the apartment 17 tenants made loud noise including heavy banging on the ceiling

directly above his parents' apartment, and they and their guests made loud noises in the hallway which he could hear from his apartment. *Id.*, at 135-147. In addition, Choi testified that the apartment 17 tenants disturbed her and other people in the building with parties, dancing, throwing cigarettes down to her apartment, and running up and down the stairways to the top floor of the building, and that when she complained to them, they responded that they paid more rent that she did. Choi Kuen Mak Dep at 115-119; *see also* Letter from The Mak Family, to Arthur Kokot, Podolin affirmation, Exh. S, complaining about behavior of tenants in apartment 17 and damages to apartment 13 caused by them. There is no evidence that the Landlord investigated or took any action in response to the petition complaining about the tenants in apartment 17 or the café. Thus, a conflict of facts exists as to both Michael's alleged actions and as to whether, if they occurred, there was justification for any or all of those alleged actions.

The Landlord also contends that Michael harassed Christina Mak, the tenant who lives directly above him in apartment 19, with her husband and children. According to Kokot, Michael complained of noise emanating from apartment 19, which Kokot dismissed, stating that it is perfectly normal to make some noise between 6:00 and 8:00 a.m. when people are getting ready for work (*see* Kokot Dep at 7), however Michael described the noise from

apartment 19 as stomping, turning on TV, and some kind of electrical device that makes noise "at random times, usually late at night." Michael Mak Dep at 94.

Michael testified that on one occasion he stood in the stairwell outside of apartment 19 recording noise from the apartment with his camcorder in the early morning when the door opened, Christina saw him there, closed the door and had a discussion with someone inside the apartment, reopened the door, called to him and when he turned around, struck him. According to Michael, he was using his camcorder to "get [his] evidence" of the noise allegedly coming from apartment 19. *Id.* at 104-105.

According to Michael, he believes that the Landlord is encouraging other tenants in the building to harass "tenants such as myself." *Id.* at 106. Michael testified that during the incident, Christina hit him twice in the neck area. *Id.* at 119. After Christina allegedly struck Michael, he filed a police report regarding the incident, but he does not know whether the police visited apartment 19 as a result of his complaint. *Id.* at 125. Michael testified that he recorded noise outside of apartment 19 on one other occasion. *Id.* at 122.

The court notes that there is no testimony from Christina or any evidence that Christina complained to the Landlord about Michael. Furthermore, since Christina appears to be one of the tenants that signed the petition circulated by Michael

complaining about noise emanating from the Café and from apartment 17, it is unclear whether she feels sufficiently harassed, intimidated or bothered by Michael to provide a basis for a nuisance claim against him. Thus, the court is left with questions of fact regarding the interactions between Michael and the tenants whom he allegedly harassed.

Attempting to Intimidate Plaintiff's Landlord-Tenant Attorney

The Landlord quotes the decision of the Appellate Division which states that

> "the tenants also threatened and intimidated the landlord's attorney, including following him out of court hissing and muttering. On another occasion, the tenants refused to leave the building manager's office after the landlord's attorney declined to renegotiate a stipulation, and the police were summoned."

Plaintiff's memorandum of law at 17, quoting *Chelsea 18 Partners, LP*, 90 AD3d at 42. The Landlord provides no evidence that either Sheck or Choi followed the Landlord's attorney, and though the attorney testified that Michael once followed him out of court making "hissing under his breath" he also stated that he did not remember what was said but that "[i]t was clearly meant to be menacing or unsettling. That's all." Jonathan D. Golby Dep at 130. With respect to the incident at the building manager's office, although Choi states that she went with her son to the building manager's office in an effort to pay her rent, Golby did not even have any independent recollection that Choi was present at the time, thus, there is no evidence that she was threatening

or intimidating. To the contrary, Golby testified that "the mother was a relatively quiet person. She wouldn't have been the one in my face." Golby Dep at 92.

With respect to Michael, although Golby stated that he called the police because Michael "showed up and, you know, clearly wanted to have a very open-ended discussion with the Landlord in an unprofessional manner" (Golby Dep at 103) and refused to leave his office. Golby further stated that when the police came and talked with Michael, they indicated that he would leave if Golby reduced his outstanding rent by $27. When Golby agreed to do so, Michael apparently left. *Id.* at 93.

Denial of Access

According to Gilroy, in response to complaints made by the Maks, in 2007 and 2008, over a period of less than 12 months, HPD inspected apartment 13 on 10 different occasions and issued dozens of violations. *See* HPD Building Info, Gilroy Affidavit, Exh. 5. Gilroy indicated that the Landlord could not arrange for access to apartments 13 and 15 to make repairs in the normal way, by phone or by having the building superintendent drop by and make arrangements. As a result, Gilroy would send letters requesting access and when access was denied, an additional letter would be sent, documenting the denial of access and setting another date and time for access. Sheck testified that he could not read English, therefore, when he received letters

from the Landlord he showed them to Michael. Sheck Yee Mak Dep at 53.

According to Gilroy, the Landlord repeatedly tried to obtain access to apartment 13, sending letters by both regular and certified mail but access was denied or the Landlord's workers were not permitted to carry out the work necessary to correct violations.[3] At deposition, Sheck denied that he refused access

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[3] *See* letter from Mark Nagel to Sheck Yee Mak dated April 27, 2007 confirming that a smoke detector and CO detector had been installed but that Sheck had refused to allow the super to repair ceiling and entrance door to the apartment and had demanded that they install a new entrance door and new wood flooring in the apartment, and scheduling repair of ceiling and door on May 4, 2007 between 9 a.m. and 5 p.m.; letter from Nagel to Sheck Yee Mak dated May 7, 2007 indicating that super came to the apartment on May 4, 2007, and was denied entrance; letter from Nagel to Sheck Yee Mak dated June 14, 2007 asking if he wished to arrange access prior to next court date so that landlord could correct violations; letter from Nagel to Sheck Yee Mak dated June 20, 2007 asking that Mak advise about a "convenient time" to allow access for repairs; letter from Nagel to Sheck Yee Mak dated August 23, 2007 confirming landlord's contractor talked with Mak in effort to arrange access to do repairs and reiterating that as per judge's instructions, the door was to be repaired rather than replaced; letter from Billy Gilroy to Sheck Yee Mak dated January 6, 2009 regarding violation relating to venting of the bathtub, confirming that Norbert Niwelt had been denied access to investigate and that violation had to be certified by January 26, 2009, and requesting access; letter from Gilroy to Sheck Yee Mak with cc to Michael Mak dated March 18, 2009 asking for convenient time to permit access and asking Michael Mak to call ASAP; letter from Gilroy to Sheck Yee Mack dated March 30, 2009 asking for access to though repairs and date; letter from Gilroy to Sheck Yee Mak dated April 8, 2009 notifying Mak that contractors will be at the apartment on April 14, 2009 to perform repairs; letter from Gilroy to Sheck Yee Mack dated April 14, 2009 noting that superintendent had come to apartment on April 14 as previously indicated and that no one opened the door and indicating that landlord would return on April 22, 2009 at 9 a.m. and requesting that Mak contact them if

stating that if people came to fix the apartment there was no reason not to let them in. Sheck Yee Mak Dep at 53-54. To the extent that it was Michael, rather than Sheck or Choi, who refused access to apartment 13, however, the Landlord argues that they were responsible, because they made Michael their agent for the purpose of dealing with the Landlord and his contractors.

According to Gilroy, similar letters were sent to Michael Mak to arrange access to his apartment for necessary repairs.[4]

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another time would be more convenient; unsigned handwritten letter to Michael Mak requesting access to apartment 13 for plumber during the week of May 11-15, 2009; letter from Gilroy to Sheck Ye Mak dated June 16, 2009 confirming Mak's message on 24-hour answering service cancelling plumber's appointment and rescheduling as per his request for June 18, 2009 at 2 p.m.; letter from Gilroy to Sheck Yee Mak dated October 16, 2009 requesting access to measure front door for replacement and indicating that if Mak did not call with a convenient date, landlord would come on October 27, 2009 at 3 p.m.; letter from Gilroy to Sheck Yee Mak dated October 29, 2009 confirming that landlord came to apartment on October 27, 2009 at 3 p.m. but no one answered the door and requesting access on November 10 at 12:00 p.m. Gilroy Affidavit, Exh. 4.

[4] *See* letter from Jonathan D. Golby to Michael Mak dated February 7, 2008 regarding Michael's complaint to HPD regarding his apartment and asking him to call Billy Gilroy to arrange for landlord to inspect and repair apartment as necessary; letter from Nagel to Michael Mak dated November 6, 2009 giving notice that Mak is required to move bars from window obstructing fire escape; letter from Gilroy to Michael Mak regarding electrical violation and requesting access for electrician on December 21, 2009 at 10 a.m. to assess work; letter from Gilroy to Michael Mak dated January 14, 2010 regarding DOB electrical violation and HPD violations based on Michael's complaints in November 2009 and January 2010 indicating that landlord would begin work on January 26, 2010 at 9 a.m., would work throughout the day and return each day until work completed and violations cleared; letter from Gilroy to Michael Mak dated May 10, 2010 requesting access on May 20, 2010 at 9 a.m. for landlord and contractors to correct and

The court notes that only two of those letters (dated May 10, 2010 and April 29, 2011) refer to incidents of denial of access. However, according to Gilroy, access to apartment 15 was also denied to him on December 21, 2009, January 26 & 28, 2010, June 1, 2 & 3, 2010. Affidavit of Patrick (Billy) Gilroy, dated September 24, 2013, ¶¶ 53-59.

Gilroy also described his efforts to obtain access to apartment 13 to correct violations after a November 19, 2009 DHCR hearing which the Maks initiated by filing harassment claims against the Landlord. At the conclusion of that hearing, the DHCR attorney memorialized an agreement of the parties in a detailed letter dated November 23, 2009, indicating the work to be conducted by the Landlord and setting out a detailed schedule for access to the apartment to correct the violations. The

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repair bathtub and sink vent line and replace gas line from the meter to the stove, and requesting access to complete work as per court stipulation dated March 24, 2010 for which access had been denied; letter from Gilroy to Michael Mak dated May 17, 2010 regarding NYC Department of Health and Mental Hygiene Inspection Report dated May 6, 2010 and requesting access for landlord and contractors on May 27, 2010 from 9 a.m. - 5 p.m. to perform work; letter from Gilroy to Michael Mak dated August 17, 2010 requesting access for plumber and Con Ed on August 19, 2010 at 3 p.m. as per court stipulation (with handwritten note by Norbert Niwelt indicating he had put letter under Mak's door and given a copy to Mak's mother, Choi Kuen Mak; letter from Gilroy to Michael Mak dated April 29, 2011 indicating that Bestco General Electric had come to his apartment on April 25, 2011 in accordance April 13, 2011 letter to perform work and that he had refused to answer door for 15 minutes, refused to let electrician in for another 15 minutes and then interfered with electrician's work and notifying him that the electrician would return on May 9, 2011 at 9 a.m. Gilroy Aff., Exh. 4.

letter noted that the tenants in apartment 13 were withholding partial rent payments claiming entitlement to abatement for deficient conditions and that the tenant in apartment 15 owed the Landlord $270. Gilroy Aff, Exh. 2.

According to Gilroy when he went to apartment 13 on November 23, 2009 with repair personnel, as per the DHCR letter, Michael Mak was in the apartment acting on behalf of his parents, was loud and abusive, insisted that Gilroy sign a notarized protocol of work to be done and refused access to the apartment until Gilroy called the DHCR attorney who spoke to Michael. Then, when Gilroy returned on November 30, 2009 with the building superintendent to do repairs, Sheck and Michael "charged at us with their fists clenched" and screamed at them. According to Gilroy, he and the Superintendent backed out of the apartment into the hall, followed by Sheck and Michael, and only when an upstairs tenant warned them she would call the police if they did not stop screaming, did they stop and return to the apartment, but did not open the door for an hour, when they began negotiating "pre-conditions" before they would let the work crew into the apartment. Gilroy states that, even after access was granted, Michael Mak interfered with the workers by intimidating, humiliating, provoking and videotaping them and insisted on detailed signed and notarized protocols and access logs. Gilroy Aff, ¶¶ 5-9.

Michael testified that he never denied access and claimed that there were a number of incidents when the Landlord's workers were physically or verbally abusive to him, and that if he was frightened, he would chain his door. Mak Dep at 325.

Despite Michael's testimony to the contrary, it does appear from the testimony and voluminous correspondence that access to both apartments 13 and 15 was repeatedly denied, the remedy for that denial is discussed further below.

Extortion

The Landlord alleges that, knowing about court-imposed deadlines to cure violations, the Maks refused to permit the workers into their apartments to correct defects in an attempt to "extort" extra work and/or conditions of work from the Landlord. Among their alleged "demands" were the installation of a bathtub of Choi's choice rather than the bathtub the Landlord intended to install, installation of a specific type of sink, and a new entrance door for apartment 13, and a penalty of $50,000 if repairs are not done to code or if repair personnel fail to show up for work by 9:30 a.m. for work in apartment 15. In both instances, the demands were made by Michael.

There is no evidence that the bathtub or the sink cost more than those that the Landlord intended to install and the "demand" for those items does not appear to constitute more than a minor inconvenience for the Landlord. With respect to the "demand" for

a new (rather than repaired) entrance door for apartment 13, the court notes the HPD notice of violation sent on 10/10/2007 directing the provision of an "approved one-hour-fire resistence rated self-closing door with key-operated dead bolt & latch set, peep hole & chain guard at main entrance to in the entrance located at apt 13...." *See* Building Registration Summary Report, supra. While there appears to be no legal basis for Michael's "demand" for penalties of $50,000, he apparently dropped that "demand" when Gilroy contacted DHCR for assistance in obtaining access to apartment 15.

Finally, extortion has come to be understood as a criminal, not a civil offense. *Minelli v Soumayah,* 41 AD3d 388 (1st Dept 2007). There is no indication that the Landlord has filed any sort of criminal charges against Michael or his parents in connection with Michael's "demands" described above. The court, therefore, concludes that the Landlord's use of the term "extortion" is primarily for rhetorical purposes. In any case, while certainly Michael's "demands" may have constituted an annoyance, they did not constitute actionable "extortion."

LAW GOVERNING PRIVATE NUISANCE

To reiterate, in order to establish common-law private nuisance the plaintiff must show "'(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to

use and enjoy land, (5) caused by another's conduct in acting or failure to act.'" *Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d at 41, quoting *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d at 570.

In *Frank v Park Summit Realty Corp.* (175 AD2d 33, 35 [1st Dept], *affd as mod* 79 NY2d 789 [1991]), on which the Landlord relies, the court stated that "[a] nuisance is a condition that threatens the comfort and safety of others in the building." *See also CHI-AM Realty, Inc. v Guddahl*, 7 Misc 3d 54, 55 (App Term, 2d Dept 2005), *affd* 33 AD3d 911 (2d Dept 2006). Here, at least with respect to Sheck and Choi, there is no evidence that their conduct has threatened the health and safety of others in the building. As the court stated in *17th Holding, LLC v Rivera* (21 Misc 3d 55, 56 [App Term, 2d Dept 2008], citing *Domen Holding Co. v Aranovich*, 1 NY3d 117, 123-124 [2003]) also relied on by the Landlord, "not every annoyance will rise to the level of a nuisance." Rather, "a high threshold of proof would be required for eviction." *Domen Holding Co. v Aranovich*, 1 NY3d at 124.

Examining the evidence submitted by the Landlord concerning the alleged actions of Sheck, Choi and Michael Mak, the court concludes that while there is little question that some of those actions constitute a substantial annoyance, questions of fact exist with respect to many of the allegations, which require a trial.

With respect to defendants' nonpayment of rent and filing of complaints with city agencies concerning both apartment 13 and 15, in light of the rent reduction orders and the orders to correct building violations issued by DHCR and or HPD, and DOB, as well as the Landlord's apparent practice of rejecting rent checks sent by the defendants and the failure of the Landlord to send regular rent bills to the tenants, the court concludes that the actions of Sheck, Choi and Michael Mak do not support a finding of nuisance. Furthermore, questions of fact exist with respect to the Landlord's allegations that the Maks actually created the plumbing and electrical violations which the Landlord was required to remedy.

The most extensive evidence submitted by the Landlord relates to allegations of denial of access to apartments 13 and 15 to make repairs to cure violations. The Landlord cites several cases in which tenants were evicted, at least in part, because of a denial of access to cure defects, however, in at least three of those cases, access was denied after more than one situation of flooding causing damage to the apartment below. *See e.g. CHI-AM Realty, Inc. v Guddahl,* 7 Misc 3d 54, *affd* 33 AD3d at 912 (refusal to allow landlord to investigate source of five occurrences of flooding into downstairs apartment over a fifteen month period); *17th Holding, LLC v Rivera,* 21 Misc 3d 55 (testimony of six to eight incidents of heavy floods and numerous

small leaks coming from tenant's apartment); *Ocean Neck Apts. Co., LLC v Weissman,* 14 Misc 3d 21 (App Term, 2d Dept 2006)(four occasions of flooding into the apartment below within seven weeks).

Here, there are no allegations that the denial of access to apartments 13 or 15 caused harm to the apartments of other tenants. Thus, the court concludes the various incidents in which access was delayed or denied do not justify an order of eviction requested by the Landlord. Whether those incidents justify an award of damages for expenses incurred by the Landlord should be determined by the trier of fact.

The Landlord cites *Frank v Park Summit Realty Corp.* (175 AD2d at 33), in which the Appellate Division, First Department held that a landlord was entitled to evict an elderly rent stabilized tenant who periodically permitted his sister and her 37-year old schizophrenic son to reside with him in his apartment after "detailed incidents of nudity in public places in the hotel; verbal abuse, profanity and vulgarity toward hotel guests and staff; hazard to health and safety of others by maintenance of unsanitary conditions and lack of attention to personal hygiene; and veiled threats of physical and sexual assault, as well as actual assaults on [the tenant] and his sister." The Landlord contends that this case is far more compelling than *Frank* because, it argues, there, the mentally ill nephew was

merely an occasional guest of the tenant and here, Sheck and Choi "(1)acted together with Michael and (2) permitted Michael to act on their behalf to create and permit a nuisance in their apartment." Plaintiff's reply memorandum at 40.

Here, however, even assuming Sheck and Choi can be held responsible for Michael's conduct with respect to the denial of access to their apartment or the alleged harassment of workers who were attempting to cure violations in apartment 13, that conduct does not constitute the type of threat to other residents of the building found to have occurred in *Frank*.

This court concludes that the evidence submitted by the Landlord with respect to Sheck and Choi does not rise to the level that would justify eviction. Questions of fact exist with respect to whether Sheck and Choi were responsible for altering the plumbing and electrical wiring, either before or after the Landlord purchased the building in 1999, and the extent to which the alleged interference with access to apartments 13 and 15 created additional expense for the Landlord for which they should be held liable. These facts must be determined at trial.

With respect to Michael Mak's conduct, questions of fact exist with respect to his interactions with the former tenants in apartment 17 and the building superintendent and contractors hired by the Landlord, and whether those interactions and his alleged denial of access to apartments 13 and 15 constitute a

nuisance and satisfy the high threshold to justify eviction or possibly a less drastic remedy. *See Domen Holding Co. v Aranovich*, 1 NY3d 117.

Because these questions of fact exist, summary judgment must be denied to all parties.

Accordingly, it is hereby

ORDERED that the motion for summary judgment of defendants Sheck Yee Mak and Choi Kuen Mak is denied; and it is further

ORDERED that the motion for summary judgment of Michael Mak is denied; and it is further

ORDERED that the cross motion for summary judgment of Chelsea 18 Partners LP is denied.

Dated: February 26 2014

ENTER:

J.S.C.
JOAN M. KENNEY
J.S.C.