SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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7001 EAST 71st STREET, LLC,

Plaintiff,

-against-

MAIMONIDES MEDICAL CENTER, MILLENNIUM HEALTH SERVICES, MILLENNIUM PEDIATRICS, JORDAN MEYERS, M.D., DANIEL ABUELENIN, M.D., PEDRAM BRAL, M.D., ORRIN LIPPOFF, M.D. and JOHN DOES 1-10,

Defendants.

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MILLENNIUM HEALTH SERVICES, MILLENNIUM PEDIATRICS and JORDAN MEYERS, M.D.,

Third-Party Plaintiffs,

-against-

LORI FALCO-GREENBERG,

Third-Party Defendant.

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Index No. 151387/13

DECISION/ORDER

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for :_____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	1
Answering Affidavits.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiff 7001 East 71st Street, LLC ("7001") commenced the instant action against defendants Maimonides Medical Center ("Maimonides"), Millennium Health Services ("Health

Services"), Millennium Pediatrics ("Pediatrics"), Jordan Meyers, M.D. ("Dr. Meyers"), Daniel Abuelenin, M.D. ("Dr. Abuelenin"), Pedram Bral, M.D. ("Dr. Bral"), Orrin Lippoff, M.D. ("Dr. Lippoff") and John Does 1-10 to recover damages to plaintiff's premises stemming from defendants' alleged conduct during Superstorm Sandy. Plaintiff now moves for an Order pursuant to CPLR § 3025(b) granting it leave to amend its complaint to add new parties and to correct certain information asserted in the complaint about the existing defendants. Dr. Bral separately moves for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint and for attorney's fees. The motions are consolidated for disposition. For the reasons set forth below, plaintiff's motion is granted and Dr. Bral's motion is denied.

The relevant facts are as follows. Plaintiff owns the premises located at 7001-7023 Avenue U, Brooklyn, New York (the "subject premises"). Defendant Maimonides leased a portion of the subject premises from plaintiff (the "Lease") and subleased all or some of that space to other businesses, including the remaining defendants. Dr. Bral is a physician employed by Maimonides. On or about October 29, 2012, Superstorm Sandy substantially damaged the subject premises. On or about November 14, 2012, plaintiff was informed by licensed professional engineers that the electrical system at the subject premises had been seriously damaged and that it was unsafe to use any of the electrical system components. On or about November 15, 2012, plaintiff advised Maimonides that Consolidated Edison had cut off electrical service to the subject premises, that Maimonides should not energize the electrical system because it could cause an explosion and that no one was authorized to enter the subject premises without plaintiff's prior written consent. On or about November 20, 2012, plaintiff wrote to Maimonides enclosing a statement received from a licensed electrician setting forth

hazards at the subject premises and a report from an environmental consulting firm advising that the subject premises had become contaminated with fecal coliform, fecal bacteria and mold. The letter further demanded that Maimonides immediately cease and desist all activities at the subject premises and vacate the subject premises.

On or about December 7, 2012, plaintiff terminated the Lease and Maimonides later consented to the Lease's termination. Plaintiff alleges that defendants did not promptly vacate the subject premises but instead attempted to connect a portable generator into the existing lighting and power panel at the subject premises, which caused a substantial risk of harm and significant fire hazard. In or around February 2013, plaintiff commenced the instant action against defendants with the filing of a summons and complaint alleging causes of action for breach of contract, negligence, prima facie tort, nuisance and conversion and requesting damages in the amount of $1,000,000.00. Specifically, the Complaint alleges that defendants caused damage to the subject premises, distinct and separate from Superstorm Sandy, including, *inter alia*, leaving medical waste, including sharp disposal units and hazardous radiation equipment, illegally running a "jury-rigged" power cable, removing numerous fixtures, including electrical outlet covers and switch plates and completely destroying parts of interior plumbing and sanitation drains.

In May 2013, Dr. Bral moved to dismiss plaintiff's complaint in its entirety. In support of his motion, Dr. Bral submitted an affidavit in which he affirmed that he was not a subtenant of the premises. However, this court only granted that portion of Dr. Bral's motion to dismiss the complaint's first cause of action for breach of contract and the complaint's third cause of action for prima facie tort. In or around September 2013, Dr. Bral answered the remaining causes of

action in the complaint for negligence, nuisance and conversion. Subsequently, the parties conducted discovery, including the exchange of interrogatories and document requests and Dr. Bral's deposition, which was conducted in January 2014. Plaintiff now moves for leave to amend its complaint to assert new allegations against the existing defendants and to add four additional party defendants. Dr. Bral also moves for summary judgment dismissing the complaint's remaining causes of action and for attorney's fees.

The court first turns to Dr. Bral's motion for summary judgment dismissing the complaint and for attorney's fees. On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to "produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim." *Id.* The elements of a claim for negligence include: (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom. *Solomon by Solomon v. City of New York*, 499 N.Y.S.2d 392 (1985). The elements of a claim for nuisance are "(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 failing to act." *Berenger v 261 West LLC*, 93 A.D.3d 175, 182 (1st Dept 2012). "... [A] cooperative's failure to take action may constitute a nuisance in some cases..." *George v Board of Directors of One West 64th Street, Inc.*, 2011 NY Slip Op 32325U (Sup. Ct., New York Cty August 24, 2011). "[T]o establish a cause of action in conversion, the

plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and must show that the defendant exercised an unauthorized dominion over the thing in question...to the exclusion of the plaintiff's rights." *Fiorenti v. Central Emergency Physicians*, 305 A.D.2d 453, 454 (2d Dept 2003), citing *Independence Discount Corp. v. Bressner*, 47 A.D.2d 756, 757 (2d Dept 1975); *see also Fitzpatrick House III, LLC v. Neighborhood Youth & Family Servs.*, 55 A.D.3d 664 (2d Dept 2008).

In the instant action, Dr. Bral has established his prima facie right to summary judgment dismissing the complaint's remaining causes of action for negligence, nuisance and conversion as he has demonstrated that he (1) did not breach any duty owed to plaintiff; (2) did not interfere, intentionally or unintentionally, with plaintiff's right to the use and enjoyment of its premises; and (3) did not exercise any unauthorized dominion over plaintiff's property to the exclusion of plaintiff's rights. Specifically, at his deposition, Dr. Bral testified that he vacated the premises as soon as he was notified to do so and that he returned to the premises approximately two weeks after Superstorm Sandy only to get his personal belongings. He further testified that he did not bring in any generators to the premises and was not responsible for "cleaning out" the premises after Superstorm Sandy but only the area around his desk and his personal items. Specifically, he testified that the only items he took from the premises were personal items such as diplomas, medical charts, paperwork and his own "chachkas" and that he never removed from the premises or touched any of plaintiff's property.

However, in response, plaintiff has raised an issue of fact sufficient to defeat Dr. Bral's motion for summary judgment based on its assertion that discovery is outstanding pursuant to CPLR § 3212(f). "A determination of summary judgment cannot be avoided by a claimed need

for discovery unless some evidentiary basis is offered to suggest that discovery may lead to relevant evidence." *Rutture & Sons Constr. Co. v. Petrocelli Constr.*, 257 A.D.2d 614 (2d Dept 1999). A party seeking to oppose summary judgment on the ground that further discovery is needed must show "a substantial likelihood that additional persons sought for deposition possess[] information material and necessary to oppose the motion." *Hayden v. City of New York*, 26 A.D.3d 262 (1st Dept 2006). Here, plaintiff has established that Dr. Bral's motion for summary judgment should be denied on the ground that plaintiff intends to depose certain individuals including, *inter alia*, current non-party Benson Consulting Corp. ("Benson"), the company allegedly hired by defendant Maimonides to organize the moving of its property out of the premises after Superstorm Sandy, current non-party Jager LLP ("Jager"), a subtenant of Maimonides, and its principals Scott Andes, M.D., George Jager, M.D. and Gil Roter, M.D as well as Guy Spencer, a non-party independent contractor who was allegedly hired by Maimonides to move it out of the premises. Although Dr. Bral has provided affidavits from Mr. Spencer, Mr. Andes and Mr. Jager in which such individuals affirm that they do not have any knowledge as to whether Mr. Bral caused any damage to plaintiff's property, the remaining individuals may have relevant testimony as to whether Dr. Bral caused any of the alleged damage to plaintiff's property. Additionally, that portion of Dr. Bral's motion which seeks attorney's fees is denied as he has failed to provide a basis for such relief.

The court next turns to plaintiff's motion for an Order pursuant to CPLR § 3025(b) granting it leave to amend its complaint. Pursuant to CPLR 3025(b), "[m]otions for leave to amend pleadings should be freely granted, absent prejudice or surprise resulting therefrom, unless the proposed amendment is palpably insufficient or patently devoid of merit. On a motion

for leave to amend, [the party] need not establish the merit of its proposed new allegations, but simply show that the proffered amendment is not palpably insufficient or devoid of merit." *MBIA Ins. Corp. v Greystone & Co., Inc.*, 74 A.D.3d 499, 499-500 (1st Dept 2010) (internal citations omitted).

In the instant action, plaintiff's motion for leave to amend its complaint is granted. As an initial matter, that portion of plaintiff's motion for leave to amend its complaint to reflect that Dr. Abuelenin is no longer a party to the action as per the Stipulation of Discontinuance signed by the parties is granted without opposition. Additionally, that portion of plaintiff's motion for leave to amend its complaint to reflect that Dr. Lippoff is the principal of Benson is granted as such amendment is not patently insufficient or devoid of merit. Further, that portion of plaintiff's motion for leave to amend its complaint to reflect that Health Services is owned and controlled by Dr. Meyers and not Maimonides is granted as such amendment is not patently insufficient or devoid of merit. Additionally, that portion of plaintiff's motion which seeks to amend the complaint to correct the description of Dr. Bral to allege that he is an employee of Maimonides rather than a subtenant of Maimonides is granted as such amendment is not patently insufficient or devoid of merit and Dr. Bral is still a party to this action.

Finally, that portion of plaintiff's motion for leave to amend its complaint to add Benson and Jager, along with Jager's principals, Dr. Jager, Dr. Roter and Dr. Andes, as defendants is granted as the addition of such new parties is not patently insufficient or devoid of merit. Plaintiff alleges that Benson is the company that provided property management services at the premises and was owned by Dr. Lippoff and that Benson may have been responsible for the alleged property damage. Additionally, plaintiff alleges that Jager, along with its principals, is a

partnership of medical professionals that subleased space from Maimonides and may have been responsible for the alleged property damage. Plaintiff alleges that it was informed about the identification of the additional parties and the other information after depositions were conducted and discovery was exchanged. In opposition to plaintiff's motion, defendants assert that plaintiff may not allege breach of contract and prima facie tort causes of action against the additional parties on the ground that such causes of action are devoid of merit. However, the court need not address such assertion as the issue is now moot based on the amended complaint attached to plaintiff's reply papers in which plaintiff asserts a breach of contract cause of action against Maimonides only and removes the prima facie tort cause of action in its entirety.

Defendants' assertion that that portion of plaintiff's motion for leave to add Benson, Jager and Jager's principals as defendants should be denied on the ground that the existing party defendants would be unfairly prejudiced by such amendment is without merit. Specifically, defendants assert that they will be prejudiced by the addition of the new parties because the new parties must be given the opportunity to take depositions that have already been conducted which "would require unwarranted expenditure of time, money, and resources" and which "will invariably delay the trial of this matter." However, the fact that defendants may be burdened by further depositions that the new parties have the right to conduct is not a ground for denying plaintiff's motion to amend the complaint. Additionally, the fact that plaintiff failed to commence an action against these defendants at an earlier date does not preclude plaintiff from amending its complaint to add them as party defendants now as long as plaintiff is within the applicable statute of limitations, which it is.

Accordingly, it is hereby

ORDERED that that portion of Dr. Bral's motion for an Order pursuant to CPLR § 3212 for summary judgment dismissing the complaint's remaining causes of action asserted against him is denied; and it is further

ORDERED that that portion of Dr. Bral's motion which seeks attorney's fees against plaintiff is denied; and it is further

ORDERED that plaintiff's motion for an Order pursuant to CPLR § 3025(b) granting it leave to amend its complaint is granted in its entirety; and it is further

ORDERED that the Amended Verified Complaint, in the form annexed to plaintiff's reply papers, shall be deemed served upon service of a copy of this order with notice of entry upon all parties who have appeared in the action; and it is further

ORDERED that a supplemental summons and the Amended Complaint, in the form annexed to plaintiff's reply papers, shall be served, in accordance with the Civil Practice Law and Rules, upon the additional parties in this action within 30 days after service of a copy of this order with notice of entry; and it is further

ORDERED that the action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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7001 EAST 71ST STREET, LLC,

Plaintiff,

-against-

MAIMONIDES MEDICAL CENTER, MILLENIUM HEALTH SERVICES, MILLENNIUM PEDIATRICS, JORDAN MEYERS, M.D., PEDRAM BRAL, M.D., ORRIN LIPPOFF, M.D., BENSON CONSULTING

CORP., JAGER LLP, GEORGE JAGER, M.D., GIL ROTER, M.D., SCOTT ANDES, M.D. and JOHN DOES 1-10,

Defendants.

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MILLENIUM HEALTH SERVICES, MILLENIUM PEDIATRICS and JORDAN MEYERS, M.D.,

Third-Party Plaintiffs,

-against-

LORI FALCO-GREENBERG,

Third-Party Defendant.

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And it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the General Clerk's Office (Room 119), who are directed to mark the court's records to reflect the additional parties. This constitutes the decision and order of the court.

Dated: 5/19/14

Enter: _____
J.S.C.

CYNTHIA S. KERN
J.S.C.