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

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HOWARD M. FAVER and DOREEN D. HAN-FAVER,

Plaintiffs,

Index No. 150368/12

-against-

DECISION/ORDER

12 EAST 97th STREET OWNERS, INC.,

Defendant.

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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
Affirmations in Opposition.....	2
Replying Affidavits.....	3
Exhibits.....	4

Plaintiffs Howard M. Faver and Doreen D. Han-Faver commenced the instant action against defendant 12 East 97th Street Owners, Inc. ("12 East") seeking to recover damages arising out of defendant's alleged failure to provide an adequate supply of cold and hot water to their apartment. Defendant now moves pursuant to CPLR § 3042(b) to strike the prejudicial allegations in plaintiffs' amended complaint. For the reasons set forth below, defendant's motion is granted in part and denied in part.

The relevant facts are as follows. The instant action arises out of a dispute between plaintiffs, the shareholders and proprietary lessees of Apartment 8D (the "subject apartment") in the cooperative building located at 12 East 97th Street, New York, New York (the "Building"),

and defendant 12 East, the fee owner of the Building and the lessor under the proprietary leases in the Building, including plaintiffs' lease (the "Lease"). Specifically, plaintiffs allege that they purchased the subject apartment in April 2005 and that since that time, they have experienced persistent problems with the lack of hot and cold water and insufficient hot water pressure in the subject apartment. Plaintiffs further allege that from 2005 through 2009, they reported such problems to the Building's superintendent and staff but that they were unable to correct the problem. Rather, plaintiffs allege that the Building's staff blamed the problem on faulty shower equipment in the subject apartment, which was installed by plaintiffs when they renovated the subject apartment after it was purchased.

In January 2010, 12 East retained a plumbing contractor to investigate the problem and after conducting a thorough review of the Building's hot water system, he concluded "that a systematic or local pressure drop is causing the problem" and recommended certain procedures to correct such problem. However, plaintiffs allege that 12 East failed to implement the plumbing contractor's recommendations and that they continued to experience and report to the Building's staff and managing agent problems with the hot water throughout 2010 and 2011. Thus, plaintiffs retained their own engineer who determined that certain problems existed with the Building's hot water system. Plaintiffs allege that 12 East continued to deny that there was any problem and at the March 2011 annual meeting of the Building's shareholders, the shareholders were advised that plaintiffs were the only residents who had complained of such problems. However, plaintiffs allege that in March and April 2011, they communicated with other Building residents who informed them that they also experienced similar problems with hot water in their apartments.

Plaintiffs allege that in early 2011, 12 East set out to terminate their Lease, sell the subject apartment and evict them from the Building, based on fabricated allegations that plaintiffs had engaged in "objectionable conduct" due to their complaints about the hot water issues and their request for documentation from the Building. Specifically, 12 East sent plaintiffs a letter in May 2011 stating that if the plaintiffs continued to engage in such "objectionable conduct," the Board intended to call a Special Meeting to determine whether plaintiffs' conduct made their occupancy in the Building "undesirable" and if there was an affirmative two-thirds vote of the Board, plaintiffs' Lease would be terminated. The letter stated that plaintiffs' activities, which included "repeated redundant requests to examine the books and records of the Corporation" and "unsubstantiated requests for investigations and repairs to the Building's plumbing system" are considered harassing and that such activities "are designed to impede the operation of the Co-op and - as such - is deemed...to constitute objectionable conduct."

Based on the above allegations, plaintiffs commenced the instant action in February 2012 against 12 East seeking (1) an order directing defendant to turn over all of its books and records pertinent to the problems plaintiffs were experiencing with the Building's hot water system; (2) damages pursuant to Real Property Law § 235-b based on a breach of the warranty of habitability; and (3) attorney's fees. In or around June 2012, 12 East installed a booster pump to increase the water pressure with respect to the delivery of hot water throughout the entire Building. However, plaintiffs allege that residual problems with the supply of hot water in the subject apartment persisted through the fall of 2013.

In or around April 2012, 12 East filed a pre-answer motion to dismiss the complaint's first cause of action for the injunction in its entirety, the complaint's third causes of action for

attorney's fees in its entirety and any portion of the second cause of action for breach of the warranty of habitability to the extent said claim is time-barred by the applicable six year statute of limitations. In a decision dated September 18, 2012, this court dismissed the first and third causes of action in their entirety and with respect to the second cause of action, dismissed any claims that may have accrued six years prior to the commencement of the action in February 2012, based on statute of limitations grounds. In October 2013, 12 East served its answer and thereafter, the parties exchanged discovery and conducted party depositions. At a compliance conference in October 2014, party discovery was completed and the court gave plaintiffs thirty days to file non-party subpoenas and extended their time to file the Note of Issue until the end of January 2015.

Thereafter, plaintiffs moved to amend their complaint to add the Board of Directors of 12 East 97th Street Owners, Inc. (the "Board") as a defendant in the action, assert three new causes of action and replead the previously dismissed cause of action for attorney's fees and costs. By Decision/Order dated December 19, 2014, this court granted the portion of plaintiffs' motion seeking to amend their complaint to add a cause of action against 12 East for breach of the Lease but otherwise denied those portions of plaintiffs' motion seeking to add the Board as a party and assert a claim for breach of fiduciary duty against them, seeking to add a cause of action against 12 East for a declaratory judgment and seeking to replead their previously dismissed cause of action seeking attorney's fees and costs.

Subsequently, on or about December 23, 2014, plaintiffs filed their amended complaint, which contained two causes of action for (1) breach of the warranty of habitability; and (2) breach of the Lease. 12 East now moves to strike certain allegations contained in plaintiffs'

amended complaint on the ground that they are prejudicial and are irrelevant to plaintiffs' current claims. Specifically, 12 East seeks to strike ¶¶ 24-27, 31, 32 and 33 of plaintiffs' amended complaint.

Pursuant to CPLR § 3024(b), "[a] party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." "In reviewing a motion pursuant to CPLR 3024(b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." *Soumayah v. Minnelli*, 41 A.D.3d 390, 392 (1st Dept 2007); see also Siegel, Practice Commentaries, MicKinney's Cons Laws of NY, Book 7B, CPLR C:3024:4, at 323 ("In general, we may conclude that 'unnecessarily' means 'irrelevant.' We should test this by the rules of evidence and draw the rule accordingly. Generally speaking, if the item would be admissible at the trial under the evidentiary rules of relevancy, its inclusion in the pleading, whether or not it constitutes ideal pleading, would not justify a motion to strike under CPLR 3024(b)").

In the present case, the court finds that the allegations 12 East seeks to strike are not, at this point, relevant to plaintiffs' remaining claims for breach of the warranty of habitability and breach of the Lease. The subject allegations at issue are as follows:

> 24. Rather than address and correct the problems concerning the hot water system in the Building, the Cooperative and the Managing Agent resorted to threats to "Pullmanize" Plaintiffs, i.e., terminating their Lease, evicting them and selling their Apartment, based upon fabricated allegations that Plaintiffs engaged in "objectionable conduct," merely because they legitimately complained about a lack of essential services and requested to be provided with certain information concerning what efforts, if any, the Cooperative had made to correct such problems in the Building.
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> 25. Thus, although the Cooperative sent a letter, dated March 18, 2011, to Plaintiffs advising them that, as part of Defendant's purported "investigation" of Plaintiffs complaints of insufficient hot water the Cooperative needed to inspect Plaintiffs' Apartment, the letter enclosed a copy of Paragraph "31(f) of the Lease, which is the provision pursuant to which the Cooperative may terminate a shareholders' lease for

"objectionable conduct" by a two-thirds' vote of the Board.

26. Indeed, the purpose of such letter was to send a clear warning to Plaintiffs that the Cooperative would retaliate against them and seek to punish them, by declaring their tenancy "undesirable" and seeking to terminate their Lease for alleged "objectionable conduct," merely for making complaints concerning a lack of hot water in their Apartment and requesting that the Cooperative investigate the cause of the problem.

27. In accordance with the March 18, 2011 letter, the Cooperative conducted a site visit to Plaintiffs' Apartment.

31. Thereafter, by letter, dated May 5, 2011, the Managing Agent, acting on behalf of the Cooperative, turned around and accused Plaintiffs of having engaged "in disruptive and harassing conduct vis-a-vis the Co-op–which has resulted in needles Corporate expense and a waste of time for Douglas Elliman Property Management representatives, the Board Members and Building staff."

32. The May 5, 2011 letter further stated that the Board considered Plaintiffs' actions to be "objectionable conduct." And that if such conduct continued, the Board intended to call a Special Meeting to determine whether Plaintiffs' conduct, if repeated after the notice contained in the letter presented a situation which made Plaintiffs' occupancy at the Building undesirable.

33. The May 5, 2011 letter was also threatened that if , as a result of such a meeting, there were an affirmative two-thirds' vote of the Board, Plaintiffs' Lease would be terminated.

These allegations regarding 12 East's alleged attempt to terminate plaintiffs' Lease and evict plaintiffs from the Building are simply not necessary for the sufficiency of plaintiffs' causes of action for breach of the Lease or breach of the warranty of habitability. Rather, these allegations may instill undue prejudice in the jury. Indeed, this court denied plaintiffs' motion to amend to add causes of action relating to these allegations in its prior Order. To the extent plaintiffs' contend that the allegations are relevant to their cause of action for breach of the Lease to show the intentional nature of 12 East's breach and plaintiffs' resulting damages and that they are relevant to their cause of action for breach of the warranty of habitability to show 12 East's

breach of its duty to make repairs and provide essential services, such contention is without merit. The only issues presented on plaintiffs' remaining claims is whether or not 12 East fulfilled its obligations pursuant to the Lease and the warranty of habitability. Either they did or they did not. Thus, any purported animosity or threats by 12 East or the Board are entirely irrelevant and should be stricken from plaintiffs' amended complaint.

However, the portion of 12 East's motion seeking sanctions is denied as the conduct complained about simply does not rise to the level warranting sanctions.

Accordingly, it is hereby

ORDERED that 12 East's motion to strike is granted and plaintiffs shall, within 10 days from service of a copy of this order with notice of entry, serve a second amended complaint which shall not include the prejudicial matter set forth in the amended complaint (i.e. ¶¶ 24-27, 31, 32 and 33); and it is further

ORDERED that 12 East shall serve an answer to the second amended complaint or otherwise respond thereto within 20 days of service of such pleading; and it is further

ORDERED that 12 East's motion for sanctions is denied. This constitutes the decision and order of the court.

Dated: 3/31/15

Enter: _____
J.S.C.
CYNTHIA S. KERN
J.S.C.