Giacobbe v 115 Mulberry, LLC
2018 NY Slip Op 30415(U)
March 12, 2018
Supreme Court, New York County
Docket Number: 155436/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 35

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JON GIACOBBE,

Plaintiff, Index No.: 155436/2016

- against-

115 MULBERRY, LLC, STEVEN CROMAN, ANTHONY FALCONITE and ELIZABETH RODRIGUEZ,

Defendants.

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CAROL R. EDMEAD, J.:

Plaintiff Jon Giacobbe, a tenant in a rent-stabilized apartment, commenced an action against defendants 115 Mulberry, LLC, Steven Croman (Croman), Anthony Falconite (Falconite) and Elizabeth Rodriguez (Rodriguez), seeking monetary and punitive damages for an alleged breach of warranty of habitability, breach of the covenant of quiet enjoyment and nuisance. In addition, plaintiff is seeking declaratory and injunctive relief in the cause of action alleging tenant harassment. Plaintiff further asserts that the corporate veil must be pierced so that Croman can be held liable to the same extent as 115 Mulberry, LLC. Defendants now move, pursuant to CPLR 3211 (a) (7), for an order dismissing the complaint in its entirety as to Croman, Falconite and Rodriguez in their individual capacities.

BACKGROUND AND FACTUAL ALLEGATIONS

115 Mulberry, LLC is a domestic limited liability company (LLC) and is the owner and landlord of the building located at 115 Mulberry Street, New York, New York (the "building"). Plaintiff is the tenant of 5R, a rent-stabilized unit in the building. Croman is the head officer of

115 Mulberry, LLC and owns a majority stake. Rodriguez is the managing agent for the building. The complaint alleges that Falconite is a former police officer with the New York Police Department who was hired by Croman as a private investigator.

According to plaintiff, he commenced this action in response to harassment and other abuse he has been subjected to while a tenant in the building. Plaintiff alleges that he has been "victimized by Defendants ever since Mulberry LLC purchased the subject building in 2012." Complaint, ¶ 20. Plaintiff summarizes that, in general, "Croman encouraged the practice of buying out rent regulated tenants; and if they refused, he instigated a pattern of harassment intended to drive the rent regulated tenants out." *Id.*, ¶ 18.

Plaintiff further alleges that Falconite unlawfully harassed plaintiff and other tenants on Croman's behalf. For example, Falconite harassed plaintiff by making unannounced visits, asking when he would move out and offering to help plaintiff with a buyout. Falconite also purportedly spoke to plaintiff's mother in Queens and then threatened plaintiff with eviction, claiming that plaintiff did not reside in the unit, but in Queens.

Plaintiff contends that he was subject to frequent disruptive and dangerous construction zones in the building. For instance, on January 19, 2015, plaintiff states that he was injured while opening a glass door that had not been secured during construction. In addition, plaintiff indicates that he did not have heat in his apartment in 2013, and that defendants would not fix the heat, but only provide him with space heaters. He further claims that defendants subjected him to deplorable conditions, including a defective lock on his front-door, unfinished repairs for a broken stove, cracks in the wall and ceiling, and broken cabinets, among others.

Plaintiff alleges that when he complained about the conditions in his apartment,

defendants retaliated against him by commencing a baseless nonpayment proceeding against plaintiff and his brother, Nicholas, who is a tenant in another unit in the building.

Further, according to plaintiff, defendants would not cash his rent payments and would delay lease renewals, in an attempt to force plaintiff into taking a buyout. Plaintiff concludes that defendants' actions "were engineered to coerce Plaintiff, a rent stabilized tenant, into a buyout through intimidation, fear and the creation of incredibly stressful and dangerous conditions so that they could deregulate his apartment." *Id.*, ¶ 32.

Plaintiff's complaint contains seven causes of action. In the first cause of action, for harassment, upon a determination of a violation of harassment in violation of Administrative Code § 27-2005 (d), plaintiff seeks a declaratory judgment declaring that Class "C" immediately hazardous violations existed at the time of each act. Plaintiff is requesting that civil penalties be imposed and that the court issue an order restraining defendants from engaging in the violations.

The second cause of action for "veil piercing," is against Croman, and alleges that the "corporate veil must be pierced and [Croman] made liable to the same extent as 115 Mulberry LLC." *Id.*, ¶ 46. Among other things, plaintiff argues that Croman exercised total and complete dominion over 115 Mulberry, LLC and used this dominion to commit wrongs against plaintiff, including instructing his agents to harass plaintiff in an attempt to force a buyout.

The third cause of action alleges that defendants breached the warranty of habitability when they were on notice of the hazardous conditions present in plaintiff's apartment, yet failed to remedy them. Plaintiff maintains that he has paid his rent in full. He argues that these conditions are rent impairing and seeks a rent abatement and/or cost of the damaged personal property or costs of protecting the property, in an amount not less than $100,000.

In the fourth cause of action, plaintiff refers to the prior allegations in the complaint, and asserts that defendants breached the covenant of quiet enjoyment. Plaintiff is seeking an abatement or refund of the rent payments he has made since June 2012.

The fifth cause of action, for nuisance, alleges that the construction in the building and the unrepaired conditions are hazardous to plaintiff's health. Plaintiff continues that, as defendants have failed to repair the conditions, they have impaired his use and enjoyment of the premises and the conditions constitute a private nuisance.

In the sixth cause of action, for attorneys' fees, plaintiff states that the lease between the parties contains a provision allowing the landlord to recover attorneys' fees in the event of a tenant's default. Pursuant to Real Property Law § 234, plaintiff maintains that he is entitled to be awarded attorneys' fees in the event of defendants' breaches.

In the seventh cause of action, plaintiff demands punitive damages as a result of being subjected to defendants' harassment.

Defendants do not argue that the complaint is insufficiently pled as against 115 Mulberry, LLC, but seek to have it dismissed as against the individual defendants. With respect to the first cause of action for harassment and the fifth cause of action for nuisance, defendants argue that plaintiff has not provided any basis for liability to attach to the individual defendants. According to defendants, as Rodriguez is not mentioned in the complaint, there is no basis to hold her liable. Further, defendants contend that the allegations against the individual defendants are not sufficiently pled, as they are stated "upon information and belief," and "piggy back" the

allegations made in the Attorney General's petition.[1] [2]

In addition, defendants maintain that plaintiff's allegations are conclusory and are insufficient to hold Croman liable under the theories of piercing the corporate veil or alter ego. They argue that, pursuant to section 609 (a) of the Limited Liability Company Law (LLC Law), defendants are shielded from liability. Further, defendants note that piercing the corporate veil is not a cognizable cause of action.

Defendants argue that the causes of action alleging a breach of warranty of habitability and a breach of the covenant of quiet enjoyment should be dismissed as against the individual defendants because they are not contractually bound to the lease agreement. Although the landlord and/or lessor has a statutory duty to plaintiff, defendants argue that, as third parties, they have no duty.

In opposition, plaintiff argues that he has sufficiently pled causes of action against the individual defendants. Plaintiff attaches information from the New York State Division of

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[1] Defendants do not address Falconite's liability and, several times in their memo of law, insert various unrelated and non-party names. Defendants do not oppose the sixth cause of action for attorneys' fees.

[2] In May 2016, the Attorney General of the State of New York (Attorney General) commenced a civil action against, among other respondents, Croman, Falconite, and the entities/buildings owned and operated by Croman (Landlord LLCs), including 115 Mulberry, LLC. In brief, the corrected verified petition (petition) alleged that, the "Attorney General's investigation into Croman's business operations has confirmed that Respondents engaged in - and continue to perpetuate - an illegal and fraudulent scheme that has victimized hundreds of tenants, pushed out long-time residents from their homes, and accelerated the loss of affordable housing . . .." Petition, ¶ 3. Some of the violations included unlawful tenant harassment and illegal construction practices. The petition stated that Falconite works for Croman and his main role is to secure buyouts from tenants. *Id.*, ¶ 143.

On December 20, 2017, Croman, his companies and Landlord LLCs (Croman Respondents) entered into a stipulation of settlement with the Attorney General. Part of the settlement required the Croman Respondents to make a payment of eight million dollars to the Attorney General's office, to be used as a Tenant Restitution Fund. Tenants are eligible to claim restitution if they resided in a rent-stabilized apartment owned by Croman between July 1, 2011 and December 20, 2017. As set forth in the consent decree, "this sum shall constitute the exclusive amount due and owing to Petitioner by the Croman Respondents, its employees, and management employees, and also shall be remitted as full compensation for any conduct alleged generally and/or specifically in the Petition which was filed by the OAG to commence the Action." Consent decree, ¶ 7.

Housing and Community Renewal (DHCR) indicating that Rodriguez was the managing agent of the building from 4/18/2016 - 09/01/2016. Plaintiff's exhibit C. Plaintiff continues that, according to Rent Stabilization Code § 2526.1, an owner is responsible for any rent overcharges and Rent Stabilization Code § 2520.6 (i) defines owner as, in relevant part, an agent of the owner of the building. Thus, according to defendants, Rodriguez, as an agent of 115 Mulberry, LLC, may be potentially liable for any overcharges rendered as a result of the harassment, breach of covenant of quiet enjoyment and breach of warranty of habitability claims.

Plaintiff further believes that the allegations included in the Attorney General's petition regarding building managers makes it appropriate for Rodriguez to be included in the complaint.[3] He argues that defendants, as a "network, have committed egregious violations of housing code and fraudulent behavior." Mem of law at 4.

Plaintiff further argues that, while piercing the corporate veil is not a separate cause of action, it is necessary in this action. Plaintiff explains that Croman and Falconite, in their individual capacities, intimidated plaintiff and other tenants.[4]

DISCUSSION

Dismissal

On a motion to dismiss pursuant to CPLR 3211, "the facts as alleged in the complaint

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[3] The petition stated that Croman pressured property managers to coerce tenants into buyouts by offering them a few months of free rent. In return, the property managers would receive a bonus for each buyout they were able to orchestrate. If a tenant refused a buyout, Croman would "deploy[] his agents and employees to intimidate, stalk, and threaten rent-regulated tenants . . . file[] frivolous lawsuits . . . [and] turn[] buildings with rent-regulated apartments into hazardous construction zones." Petition, ¶ 2 (a-c). Rodriguez was not mentioned in the petition.

[4] Defendants do not contest the sufficiency of the pleadings as against 115 Mulberry, LLC in their motion. Nonetheless, plaintiff does not set forth the elements of any specific cause of action nor does he provide any case law in opposition. He merely broadly argues that the causes of action are sufficiently pled and that defendants' actions "clearly allow for the piercing of the corporate veil."

must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference," and the court must determine simply "whether the facts as alleged fit within any cognizable legal theory." *Mendelovitz v Cohen*, 37 AD3d 670, 671 (2d Dept 2007). However, "bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration." *Silverman v Nicholson*, 110 AD3d 1054, 1055 (2d Dept 2013) (internal quotation marks and citation omitted). "In assessing a motion under 3211 (a) (7), . . . the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one." *Leon v Martinez*, 84 NY2d 83, 88 (1994) (internal quotation marks and citations omitted).

Complaint is Dismissed As Against Rodriguez

Beyond identifying Rodriguez as the registered managing agent in the building between April 18, 2016 and September 1, 2016, plaintiff does not claim that he had interactions with Rodriguez and makes no specific allegations against her. Instead, plaintiff argues that the allegations in the Attorney General's petition against the building managers "set appropriate grounds for her inclusion." Plaintiff's mem of law at 4. However, plaintiff's arguments are unavailing, as generalized allegations pled in a different action cannot provide any basis for imposing liability on Rodriguez. "Indeed, it is elementary that the primary function of a pleading is to apprise an adverse party of the pleader's claim and to prevent surprise. Absent such notice, a defendant is prejudiced by its inability to prepare a defense to the plaintiff's allegations." *Cole v Mandell Food Stores*, 93 NY2d 34, 40 (1999) (internal citations omitted).

Plaintiff continues that he will "only be able to assess the culpability of each individual defendant after they have been appropriately deposed." Plaintiff's mem of law at 4.

Nonetheless, "plaintiff's unsubstantiated hope that discovery and time will help salvage [his] claims is insufficient to defeat the [motion to dismiss]." *Freeman v Brecher*, 155 AD3d 453, 454 (1st Dept 2017)(citations omitted).

Further, while in certain circumstances various housing statutes provide for multiple definitions of an owner, plaintiff has not adequately pled how Rodriguez can be held liable as an owner in his causes of action.[1]

Moreover, plaintiff has not pleaded that Rodriguez, as a managing agent and an employee of 115 Mulberry, LLC, acted outside the capacity of a managing agent or committed any independent tortious acts. *See e.g. Mendez v City of New York*, 259 AD2d 441, 442 (1st Dept 1999) (internal citation omitted) ("An individual acting solely in his capacity as agent of his corporate principal, without any showing of exclusively independent control of operations, cannot be held individually liable for alleged corporate wrongdoing").

Accordingly, the court finds that plaintiff has failed to state a claim against Rodriguez and the complaint must be dismissed as against her.

Piercing the Corporate Veil

In general, members of the LLC are personally exempt from the LLC's obligations. *See* LLC Law § 609 (a): "Neither a member . . . nor an agent of a limited liability company . . . is liable for any debts, obligations or liabilities of the limited liability company or each other . . . solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities . . . in the conduct of the business of the limited liability company."

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[1] The Rent Stabilization Code, as referenced by plaintiff, discusses an owner's liability in connection to a rent overcharge determination made by the DHCR.

However, plaintiff seeks to hold Croman responsible under the veil piercing theory, which applies to LLCs.[2] *See e.g. Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209, 210 (1st Dept 2005) ("Plaintiff seeks to avoid the statutory bar to such a cause of action by using the doctrine of piercing the corporate veil, which applies to limited liability companies").

"The corporate veil of a business entity may be pierced where a plaintiff sufficiently states that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury." *TIAA Global Invs., LLC v One Astoria Sq. LLC*, 127 AD3d 75, 90 (1st Dept 2015) (internal quotation marks and citation omitted). Courts do have the "authority to look beyond the corporate form where necessary to prevent fraud or achieve equity." *Worthy v New York City Housing Auth.*, 21 AD3d 284, 287 (1st Dept 2005) (internal quotation marks and citations omitted).

The complaint states the following, in pertinent part:

> "At the time of the unlawful harassment of Plaintiff, Mr. Croman was in direct and complete control and domination of the finances, policies, activities, business practices and transactions of 115 Mulberry LLC, to the extent that at the time of the above-pleaded harassment, 115 Mulberry LLC had no separate mind, will or existence of its own apartment from Mr. Croman." Complaint, ¶ 37.
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> * * *
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> "Such control and domination has been used by Mr. Croman to commit wrongs against the Plaintiff, including unlawfully harassing Plaintiff and instructing his agents, such as Mr. Falconite to continue the harassment to force a buyout." *Id.*, ¶ 42.

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[2] Although the complaint addresses piercing the corporate veil with respect to Croman only, plaintiff's memo of law is unclear and suggests that he is asserting this theory with every defendant.

* * *

> This domination and control proximately caused the Plaintiff to suffer damages as complained of herein." *Id.*, ¶ 44.

According to defendants, as 115 Mulberry, LLC owns the building, defendants are shielded from personal liability under the LLC Law. Defendants argue that plaintiff's allegations are insufficient to pierce the corporate veil and they "piggy back" the Attorney General's petition.[3]

The court finds that here, accepting the facts in the complaint as true, plaintiff has sufficiently alleged that Croman, through his domination and control over 115 Mulberry, LLC, used this domination to commit a wrong against plaintiff.

Nevertheless, "[p]iercing of the corporate veil is not a cause of action independent of that against the corporation; it is established when the facts and circumstances compel a court to impose the corporate obligation on its owners, who are otherwise shielded from liability." *Tap Holdings, LLC v Orix Fin. Corp.*, 109 AD3d 167, 174 (1st Dept 2013) (citation omitted). Accordingly, inasmuch as plaintiff pleads a separate cause of action against Croman to pierce the corporate veil, this cause of action must be dismissed.

Harassment - First Cause of Action

Pursuant to Administrative Code of the City of New York (Administrative Code) § 27-2005 (d), "[t]he owner of a dwelling shall not harass any tenants or persons lawfully entitled to

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[3] It is not surprising that plaintiff's complaint contains some of the same allegations as the Attorney General's petition. Croman owns a majority interest in plaintiff's building and it is included in the list of respondents/buildings. Nonetheless the court notes that plaintiff will ultimately have to rely on his own specific allegations against defendants, instead of incorporating what allegedly transpired between defendants and other tenants, including his brother, Nicholas. For example, plaintiff sets forth that Nicholas Giacobbe's case was mentioned as "a prime example of tenant harassment" in the petition. Complaint, ¶ 22.

occupancy of such dwelling as set forth in paragraph 48 of subdivision a of section 27-2004 of this chapter." Administrative Code § 27-2005 (d) "protects residential tenants from harassment by building owners," and was created "to address a perceived effort by landlords to empty rent-regulated apartments by harassing tenants into giving up their occupancy rights . . . ." *Aguaiza v Vantage Props.*, 69 AD3d 422, 423 (1st Dept 2010).

Pursuant to Administrative Code § 27-2004 (a) (48), harassment is defined as the following, in relevant part:

> "any act or omission by or on behalf of an owner that (i) 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 . . . : a. using force against, [or making threats] that force will be used against, any person lawfully entitled to occupancy . . . b. repeated interruptions or discontinuances of essential services . . . d. commencing repeated baseless or frivolous court proceedings against any person lawfully entitled to occupancy . . . 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 such person to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy."

As set forth in the complaint, plaintiff alleged that he was subject to harassment in that, among other things, defendants failed to repair defective conditions in the apartment, refused to correct a heating problem in the winter-time, threatened plaintiff with eviction, commenced a fabricated proceeding against him and repeatedly contacted plaintiff about a buyout. Accordingly, plaintiff has sufficiently pled that Croman, as owner, harassed plaintiff, or authorized agents to do so on his behalf, in an attempt to have plaintiff leave his rent-stabilized apartment.

However, plaintiff has not sufficiently pled that Falconite should be held individually

liable for tenant harassment in violation of Administrative Code § 27-2005 (d), and this cause of action is dismissed as against Falconite.[4]

Breach of the Warranty of Habitability-Third Cause of Action

Real Property Law § 235 - b (1) states the following, in relevant part:

> "In 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 and all areas used in connection therewith in common with other tenants or residents 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."

This statutory warranty has been described as "creating an implied promise by the landlord that the demised premises are fit for human occupancy." *Solow v Wellner*, 86 NY2d 582, 588 (1995) (citation omitted). As indicated in the statute, the warranty of habitability is part of the lease, or contract, between the landlord or lessor and the tenant. Non-parties to the contract, including the landlord's agents, are not bound to the warranty of habitability. *See Adler v Ogden Cap Props., LLC,* 42 Misc 3d 613, 622-623 (Sup Ct, NY County 2013) *affd in part*, 126 AD3d 544 (1st Dept 2015) (Managing agent defendants were not liable for breaches of the warranty of habitability because they were not parties to the plaintiffs' leases); *see also McCarthy v Board of Mgrs. of Bromley Condominium*, 271 AD2d 247, 247 (1st Dept 2000) (internal quotation marks and citations omitted) (No liability for defendant condominium corporation for breach of warranty of habitability "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

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[4] The court has already determined that all of the causes of action in the complaint must be dismissed as against Rodriguez and that plaintiff has sufficiently pled that Croman may be individually liable to the same extent as 115 Mulberry, LLC, on the basis of an alter-ego or corporate veil-piercing theory.

made no such warranty to plaintiff subtenant, with whom it had neither a contractual agreement nor landlord-tenant relationship").

Accordingly, as Falconite is not a party to the lease, plaintiff's breach of warranty of habitability claim must be dismissed as against him.

While not addressing the underlying merits of plaintiff's claims, defendants argue that the causes of action grounded in breach of contract should be dismissed as against the individual defendants because they were not parties to the lease between plaintiff and 115 Mulberry, LLC. However, contrary to defendants' contention, despite the contractual nature of the claim, plaintiff has adequately stated a cause of action to hold Croman individually liable under a theory of veil piercing. *See e.g. Ledy v Wilson*, 38 AD3d 214, 215 (1st Dept 2007) ("the individual plaintiffs can be held personally liable for the LLC's breach of contract if the officers took the challenged actions on the LLC's behalf and the breach involved bad-faith misrepresentations"); *see also Gateway I Group, Inc. v Park Ave. Physicians, P.C.*, 62 AD3d 141, 147 (2d Dept 2009) ("[s]ince the plaintiff seeks to hold the appellants liable under a theory of piercing the corporate veil, the fact that the appellants did not sign the subject lease does not establish that the plaintiff failed to state a cause of action . . .").

Breach of the Covenant of Quiet Enjoyment - Fourth Cause of Action

To establish a cause of action for breach of the covenant of quiet enjoyment, "a tenant must establish that the landlord's conduct substantially and materially deprived the tenant of the beneficial use and enjoyment of the premises." *Jackson v Westminster House Owners Inc.*, 24 AD3d 249, 250 (1st Dept 2005). A contractual agreement or landlord-tenant relationship is required to establish a claim for breach of the covenant of quiet enjoyment. *See Wright v*

Catcendix Corp., 248 AD2d 186, 186 (1st Dept 1998).

For purposes of this motion, the court must liberally construe the complaint and accept as true the allegations set forth in the complaint. *See 511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 (2002). As a result, plaintiff has sufficiently pled a cause of action against Croman for breach of the covenant of quiet enjoyment by alleging that he was unable to use certain areas and appliances in his apartment and building. Similar to the previous cause of action, as Falconite is neither the landlord, nor a party to the lease, plaintiff's breach of the covenant of quiet enjoyment claim must be dismissed as against him.

Nuisance - Fifth Cause of Action

"One is subject to liability for a private nuisance if his or her conduct is a legal cause of the invasion of an interest in the private use and enjoyment of land, and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities." *Murphy v Both*, 84 AD3d 761, 762-763 (2d Dept 2011).

At this stage, plaintiff's allegations regarding the constant construction and unfixed or dangerous conditions in the premises are sufficient to withstand a motion to dismiss as against Croman. However, plaintiff has failed to plead a cause of action grounded in private nuisance as against Falconite, and this cause of action is dismissed as against him.

Attorneys' Fees - Sixth Cause of Action

"In residential leases permitting the landlord to recover attorney's fees, [Real Property Law § 234] implies a reciprocal provision authorizing the tenant to recover attorney's fees incurred as the result of the failure of the landlord to perform any covenant or agreement on its

part to be performed under the lease." *Lynch v Leibman*, 177 AD2d 453, 454 (1st Dept 1991) (internal quotation marks omitted). Plaintiff does not provide a copy of the lease but contends that it contains an attorneys' fees clause in favor of the landlord. Although not specifically addressed by defendants, as Falconite is not a party to the lease, this cause of action must be dismissed as against him.[5]

Punitive Damages - Seventh Cause of Action

Plaintiff has set forth a separate cause of action for punitive damages. "[T]he cause of action is improperly pleaded as a separate cause of action." *Oates v New York Hosp.*, 131 AD2d 368, 370 (1st Dept 1987). Nonetheless, for purposes of this motion, this pleading error does not result in the dismissal of the claim for punitive damages, as they may be available if plaintiff is able to establish his underlying claim.[6] For example, pursuant to Administrative Code § 27-2005 (o), the court has the discretion to award punitive damages upon a determination of harassment, in violation of Administrative Code § 27-2005 (d). Further, punitive damages have been awarded in, for example, breach of warranty of habitability cases, "where the landlord's actions or inactions were intentional and malicious." *Minjak Co. v Randolph*, 140 AD2d 245, 249-250 (1st Dept 1988).

Accordingly, while the seventh cause of action seeking punitive damages is dismissed, this requested relief should be deemed included in the first cause of action. *See e.g. Laufer v*

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[5] Plaintiff maintains that Falconite in his individual capacity "terrorize[d] tenants such as Plaintiff." While there may be viable claims as against Falconite in his individual capacity for his alleged misconduct, plaintiff has not sufficiently established how, for the causes of action alleged in the complaint, Falconite can be held individually liable. Further, plaintiff never alleged that Falconite could be held liable as owner or agent for any of the causes of action.

[6] "We make no determination concerning the merits of the plaintiff's claims, as the motion dismiss was addressed solely to the sufficiency of the complaint." *Green v Leibowitz*, 118 AD2d 756, 758 (2d Dept 1986).

Rothschild, Unterberg, Towbin, 143 AD2d 732, 734 (2d Dept 1988) (internal quotation marks and citations omitted) ("Finally, we note that the request for punitive damages was erroneously set forth separately in the twelfth cause of action. Nevertheless, that cause of action insofar as asserted against the appellants need not be stricken. Rather, [the] relief sought . . . should be deemed part of the prayer for damages in the seventh cause of action").

CONCLUSION, ORDER AND JUDGMENT

Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted with respect to dismissing the complaint as against Anthony Falconite and Elizabeth Rodriguez and dismissing the second cause of action for piercing the corporate veil and the seventh cause of action for punitive damages, and the motion is otherwise denied; and it is further

ORDERED that the complaint is hereby severed and dismissed as against defendants Anthony Falconite and Elizabeth Rodriguez and the Clerk is directed to enter judgment in favor of said defendants; and it is further

ORDERED that the remainder of the action shall continue; and it is further

ORDERED that counsel for defendants shall serve a copy of this Order with Notice of Entry within twenty (20) days of entry on counsel for plaintiff.

Dated: March 12, 2018

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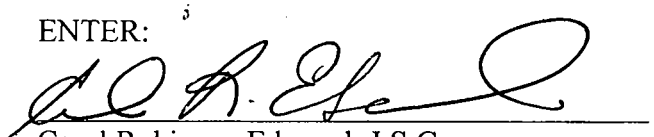

Carol Robinson Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.