At an IAS Part 88 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 31st day of July, 2019.

PRESENT:

HON. DAWN M. JIMENEZ-SALTA
Justice.

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ANDREW ZENSKY,

Plaintiff,

- against -

Index No. 501973/19

Mot. Seq. 1

CLIPPER EQUITY LLC, BREWSTER 2016 LLC, ROBEN MASHIVEV, AVI KLUGGMAN, ISABELLA NGUYEN and JOHN and JANE DOE NO. 1 through JOHN and JANE DOE NO. 5 (being fictitious as the true names of these defendants are not currently known to the plaintiff),

Defendants.

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The following papers numbered 1 through 6 read herein:	Papers Numbered:
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1-2
Opposing Affidavits (Affirmations)	3-4
Reply Affidavits (Affirmations)	5-6

Upon the foregoing papers in this landlord-tenant dispute, defendants Clipper Equity LLC (Clipper), Brewster 2016 LLC (Brewster), Roben Mashivev (Mashivev), Avi Kluggman (Kluggman) and Isabella Nguyen (Nguyen) move for an order: (1) changing the venue to the Supreme Court, New York County, pursuant to CPLR 510; (2) dismissing the fifth, sixth, seventh and eighth causes of action, pursuant to CPLR 3211 (a) (1), (a) (4) and (a) (7); and (3) striking plaintiff's demand for attorney's fees.

Background

The Parties

Plaintiff Andrew Zensky (Zensky) has allegedly been the tenant of unit 6J (Unit 6J) in the residential building at 21 West 86th Street in Manhattan (Building) since 1992, pursuant to a "rent regulated" lease (complaint at ¶¶ 28-29). While the complaint in this action alleges that defendants Clipper and Brewster have allegedly owned, operated, managed, maintained and controlled the Building since November 1, 2016 (*id.* at ¶¶ 15-24), a November 1, 2016 deed in the record reflects that the Building is owned by Brewster. Clipper manages the Building. Individual defendants, Mashivev, Kluggman and Nguyen (Individual Defendants), are allegedly agents, servants and/or employees of Clipper and/or Brewster (*id.* at ¶¶ 4-9).

The New York County Housing Court Proceedings

Zensky alleges that from "November 1, 2016 to date, BREWSTER and CLIPPER [have] maintained repeated frivolous landlord tenant lawsuit[s] against [him]" (*id.* at ¶ 35). The record reflects the following three landlord-tenant proceedings, all of which are or were pending in New York County Housing Court.

A. The Nuisance Holdover Proceeding[1]

In October 2016, 21 West 86 LLC, the prior owner of the Building,[2] commenced a residential holdover proceeding against Zensky (Nuisance Holdover Proceeding) by filing a verified petition alleging that Zensky continued in possession of Unit 6J after the expiration of his rental agreement on October 20, 2016. The Holdover Proceeding was based on an October 13, 2016 "Notice of Termination," by which Zensky was notified that the owner elected to terminate his tenancy on the ground that he committed a nuisance by repeatedly playing loud music late in the evening, which was disturbing his downstairs neighbor.

By a February 15, 2017 order, the Housing Court adjourned the matter, directed Zensky to pay $904.00 in use and occupancy, noted that Zensky "alleges that there is a violation for heat and that ventilation in the kitchen and the bathroom does not work" and directed Brewster "to inspect and repair as legally required . . ."

Eventually, the parties entered into a September 6, 2018 Stipulation of Settlement, pursuant to which: (1) Zensky signed a renewal lease for the period September 1, 2018 through August 31, 2019 providing for monthly rent of $923.07; (2) Brewster agreed to make specified repairs to the bathroom and kitchen in Unit 6J; (3) Brewster agreed to deliver Zensky's property from storage after the repair work in Unit 6J is completed; and (4) the Nuisance Holdover Proceeding was discontinued with prejudice.

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[1] *See 21 West 86 LLC v Zensky*, New York County index No. L&T 79389/16.

[2] By a December 13, 2016 order, Brewster was substituted in as the petitioner in the Nuisance Holdover Proceeding.

B. The 6H Holdover Proceeding[3]

Meanwhile, on or about December 1, 2017, Brewster commenced a holdover proceeding against Zensky (6H Holdover Proceeding) by filing a petition alleging that Zensky, a licensee entitled to use unit 6H as *temporary* storage for his property, refused to remove his property from the unit.

The parties entered into a January 23, 2018 Stipulation of Settlement, pursuant to which: (1) Zensky consented to the entry of a judgment of possession for unit 6H and agreed to remove his property by January 29, 2018, otherwise the property would be deemed abandoned; (2) Brewster agreed to make certain upgrades to the bathroom and kitchen in Unit 6J; and (3) Brewster agreed to grant Zensky a one-year license for a 6th floor closet and a bicycle hook in the basement of the Building.

C. The Nonpayment Proceeding

Meanwhile, on November 29, 2018, Brewster commenced a nonpayment proceeding against Zensky (Nonpayment Proceeding) by filing a petition alleging that Zensky failed to pay $923.07 in monthly rent for Unit 6J from February 2018 through November 2018, totaling $8,563.87 in arrears.

The Instant Action

On January 28, 2019, six weeks after Brewster commenced the Nonpayment Proceeding against Zensky in New York Housing Court, Zensky commenced this action by

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[3] *See Brewster 2016, LLC v Zensky*, New York County index No. L&T 81730/17.

filing a summons and a verified complaint alleging, upon information and belief, that since November 1, 2016, Clipper and Brewster have "acted unlawfully and engaged in tactics designed to inflict a heavy psychological, physical and financial toll on [Zensky] and get [him] to abandon his tenancy rights to [Unit] 6J" (*id.* at ¶ 34).

Specifically, the complaint alleges that Clipper and Brewster: (1) "took [Zensky's] personal property . . ."; (2) "did not provide heat to [Unit] 6J"; (3) "failed to remove and/or properly install the air-conditioning unit . . ."; (4) "failed to install proper electrical wiring and circuits to support the use of electric heat in [Unit] 6J"; (5) "refused to pay Con Edison directly for the charges [Zensky] incurred in connection with heating and ventilation of [Unit] 6J"; (6) "refused to connect [Unit] 6J to [the Building's] central heating and ventilation system"; (7) "maintained surveillance cameras outside [Unit] 6J recording both audio and video"; (8) "repeatedly failed to make necessary repairs to [Unit] 6J . . ."; (9) "repeatedly provided to [Zensky] renewal leases that contained illegal riders"; (10) "included false and phony charges on [Zensky's] billing statements"; (11) "failed to cash or return [Zensky] his rent checks . . ."; (12) "failed to abate the noise, vibration, dust and dirt in [Unit] 6J which was caused by their renovation, repair and/or construction activity"; (12) "failed to provide soundproof[ing] for [Unit] 6J . . ."; and (13) "impeded and obstructed HPD access to [Unit] 6J by either falsely stating that [Zensky] was not home or by failing to give [Zensky] notice of the inspection" (*id.* at ¶¶ 40, 41, 46, 49, 50, 54, 56, 59, 75, 80, 83, 84, 86, 87 and 91).

The complaint asserts the following eight causes of action: (1) conversion; (2) false arrest; (3) malicious prosecution; (4) slander; (5) prima facie tort; (6) intentional infliction of emotional distress; (7) negligence; and (8) nuisance. Under each cause of action, Zensky seeks an award of attorney's fees (*id.* at ¶¶ 112, 132, 141, 151, 169, 174, 182 and 189).

Defendants' Pre-Answer Motion

Defendants now move to: (1) change the venue of this action to the Supreme Court, New York County "to ease the burden" on unidentified potential witnesses; (2) dismiss Zensky's fifth, sixth, seventh and eighth causes of action; and (3) strike Zensky's demands for attorney's fees on the ground that they "are not viable."

Defendants argue that dismissal of Zensky's fifth cause of action for prima facie tort is warranted because Zensky failed to plead special damages with specificity. Defendants contend that the sixth cause of action for intentional infliction of emotional distress is subject to dismissal because Zensky failed to allege that defendants engaged in extreme and outrageous behavior. Defendants assert that the seventh cause of action for negligence should be dismissed because Zensky fails to plead property damage that was proximately caused by their actions. Defendants argue that Zensky's eighth cause of action for nuisance is actually a claim for tenant harassment, which should be raised before the Housing Court.

Zensky, in opposition, argues that his fifth cause of action for prima facie tort is not subject to dismissal for failure to allege special damages because paragraphs 106, 152 and

166 of the complaint allege that Zensky sustained "pecuniary and non-pecuniary harm" because "defendants took but did not return his personal property."

Regarding his sixth cause of action for intentional infliction of emotional distress, Zensky argues that the complaint alleges that defendants' conduct was sufficiently outrageous because defendants allegedly engaged in "a deliberate and malicious campaign of harassment," which was "particularly outrageous" since it "was occurring at his home." Zensky contends that defendants' conduct was "outrageous" because they allegedly: (1) ignored his calls; (2) failed to provide him with the key to the storage closet; (3) accused him of violating building policy; (4) took and failed to return his personal property; (5) had him arrested on false criminal charges; and (6) interfered with his observance of a Jewish holiday.

Zensky contends that his seventh cause of action for negligence adequately states a cause of action because the complaint alleges that defendants were reckless, careless and negligent in their ownership, operation and control of the Building resulting in "an electrical explosion . . . within 6J on or about October 14, 2017 and that 6J sustained dust and debris intrusions in the period January 29, 2016 to date."

Zensky argues that his eighth cause of action for nuisance is not subject to dismissal because "defendants cite no authority that landlords, but not tenants, have the right to maintain a private nuisance cause of action," and tenants "have successfully used a private nuisance cause of action to get relief either from building management, owner[s] or other entities that are interfering with their use and enjoyment of their apartments."

Discussion

(1)

Defendant's Motion to Change Venue

As a preliminary matter, that branch of defendants' motion seeking to change the venue of the instant action from Kings County to New York County to ease the burden on *unidentified* potential witnesses who work or reside in New York County is denied.

It is well settled that the party seeking a change of venue for the convenience of material witnesses, pursuant to CPLR 510 (3), must submit to the court "(1) the names, addresses, and occupations of the prospective witnesses, (2) the facts to which the witnesses will testify at trial, (3) a statement that the witnesses are willing to testify, and (4) a statement that the witnesses would be greatly inconvenienced if the venue of the action was not changed" (*Gangi v Daimler Chrysler Corp.*, 14 AD3d 482, 482 [2005]; *see also O'Brien v Vassar Brothers Hospital*, 207 AD2d 169 [1995]). "A presumption that a witness will be inconvenienced merely because the courthouse is located in a different county is unwarranted" (*Pittman v Maher*, 202 AD2d 172, 177 [1994]). Moreover, where the change of venue would result in the action merely being moved from one county to an adjacent county "courts have declined to find that any particular inconvenience will result" from retaining venue in the original county (*id.* at 177; *see also Losicco v Gardner's Village, Inc.*, 97 AD2d 535 [1983]).

In addition, conclusory allegations of inconvenience will not suffice; rather, a statement must be submitted specifying how the witnesses would be inconvenienced if venue is not changed (*see Pittman,* 202 AD2d at 176; *see also Scott v Ecker Manufacturing Corp.*, 161 AD2d 347, 348 [1990] [it was an improper exercise of trial court's discretion to grant motion for change of venue where there was no specific showing that the witnesses in question, who resided in Westchester County, would be any more inconvenienced by having to travel to the Bronx County Courthouse, located in the adjacent county, rather than to the Westchester County Courthouse]; accord *Kurnitz v New Rochelle Hospital Medical Center*, 166 AD2d 390 [1990]).

Here, defendants have not demonstrated that any inconvenience will inure to witnesses working or residing in New York County if this action remains in Kings County. The court notes that New York County is located adjacent to Kings County. Moreover, defendants have failed to provide the requisite information concerning names and addresses of witnesses, the willingness of such witnesses to testify, the facts to which said witnesses will testify at trial and the materiality of such testimony. Consequently, defendants' motion to change venue to New York County is denied.

(2)

Defendants' Dismissal Motion

A dismissal motion under CPLR 3211 (a) (7) requires determining whether the plaintiff has stated a cause of action, but "[i]f the court considers evidentiary material, the criterion then becomes 'whether the proponent of the pleading has a cause of action'" (*Sokol v Leader*, 74 AD3d 1180, 1181-1182 [2010] [emphasis added] [quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). A court considering a dismissal motion on the basis of failing to state a cause of action generally must accept the facts alleged in the complaint as true and make any possible favorable inferences for the plaintiff (*Sokol*, 74 AD3d at 1181), even when such allegations are "upon information and belief" (*Roldan v Allstate Ins. Co.*, 149 AD2d 20, 40 [1989]). However, legal conclusions and factual claims flatly contradicted by the evidence will not be presumed true (*Sweeney v Sweeney*, 71 AD3d 989, 991 [2010]).

The Fifth Cause of Action – Prima Facie Tort

"The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal" (*Diorio v Ossining Union Free Sch. Dist.*, 96 AD3d 710, 712 [2012]). "An element of a prima facie tort cause of action is that the complaining party suffered specific and measurable loss, which requires an allegation of special damages" (*id.*). Special damages "must be alleged with sufficient

particularity to identify actual losses and be related causally to the alleged tortious acts" (*Luciano v Handcock*, 78 AD2d 943, 943 [1980]).

Here, the complaint alleges that Zensky incurred "pecuniary and non-pecuniary harm" because defendants took Zensky's personal property and failed to return it (*see* complaint at ¶¶ 106 and 166). Dismissal of the fifth cause of action for prima facie tort is warranted because the complaint fails to allege that Zensky suffered special damages with specificity.

The Sixth Cause of Action – Intentional Infliction of Emotional Distress

"The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Brunache v MV Transp., Inc.*, 151 AD3d 1011, 1014 [2017] [internal quotations omitted]). Even accepting as true the allegations made in support of Zensky's sixth cause of action, and according him the benefit of every possible favorable inference, defendants' alleged conduct was not so outrageous or extreme to support an actionable claim for intentional infliction of emotional distress. Consequently, dismissal of Zensky's sixth cause of action for intentional infliction of emotional distress is warranted.

The Seventh Cause of Action – Negligence

"In order to prevail on a negligence claim, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom" (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016]).

Zensky's seventh cause of action for negligence alleges that his property was damaged, an electrical explosion occurred in Unit 6J and "6J sustained dust and debris intrusions" as a result of defendants' reckless, careless and negligent ownership, operation and control of the Building (*see* complaint at ¶¶ 176-180). Zensky's complaint adequately states a cause of action for negligence.

The Eighth Cause of Action – Nuisance

"To recover damages based on the tort of private nuisance, a plaintiff must establish an interference with the use or enjoyment of land, substantial in nature, intentional or negligent in origin, unreasonable in character, and caused by the defendants' conduct" (*Anderson v Elliott*, 24 AD3d 400, 402 [2005]). According to the Court of Appeals, "[n]uisance imports a continuous invasion of rights – a pattern of continuity or recurrence of objectionable conduct" (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 124 [2003] [internal citations omitted]).

Here, the complaint alleges that "[i]n the period January, 2016 to date the owner[']s and managing agent[']s . . . aforesaid conduct substantially interfered with plaintiff's right to use and enjoy, obtain pleasure from and be free of annoyance in living at [the Building]" (complaint at ¶ 185). Dismissal of the eighth cause of action for nuisance is warranted because the complaint fails to allege a continuous pattern of objectionable conduct that substantially interfered with Zensky's use of enjoyment of Unit 6J. While defendants' alleged conduct may have been an "annoyance," it does not rise to the level of a nuisance.

Zensky's Demand for Attorney's Fees

Finally, that branch of defendants' motion seeking to strike Zensky's demand for an award of attorney's fees is granted, except with regard to his third cause of action for malicious prosecution. "Under the general rule in New York, attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties" (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379 [2010]; *see also Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *Rosenthal v Rosenthal*, 151 AD3d 773, 774 [2017] [same]). "However, "[a]s a general rule, the plaintiffs in a malicious prosecution action may recover in damages for whatever are the direct, natural and proximate results of the criminal prosecution . . . including . . . counsel fees and expenses *in defending the criminal prosecution*" (*Loeb v Teitelbaum*, 77 AD2d 92, 104-105 [1980] [emphasis added], *amended*, 80 AD2d 838 [1981]; *see also Mastic Fuel Serv., Inc. v Van Cook*, 55 AD2d 599, 599 [1976] [holding that "(a)ttorneys' fees are recoverable as a measure of damages in tort actions where malice is an element of the tort"]). Zensky fails to identify any basis for an award of attorney's fees in connection with any of his causes of action except malicious prosecution. Thus, Zensky's demand for attorney's fees are stricken except for his demand for attorney's fees for his third cause of action for malicious prosecution. Accordingly, it is

ORDERED that the branch of defendants' motion seeking to change the venue to Supreme Court, New York County is denied; and it is further

ORDERED that defendants' dismissal motion is granted to the extent that the fifth (prima facie tort), sixth (intentional infliction of emotional distress) and eighth (nuisance) causes of action are hereby dismissed, pursuant to CPLR 3211 (a) (7), and defendants' dismissal motion is otherwise denied with respect to the seventh cause of action (negligence); and it is further

ORDERED that the branch of defendant's motion seeking to strike Zensky's demands for attorney's fees is granted, and those demands are stricken, except for Zensky's demand for an award of attorney's fees in connection with his third cause of action for malicious prosecution.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.

Hon. Dawn Jimenez-Salta

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KINGS COUNTY CLERK
FILED