

**Levy v 103-25 68th Ave. Owners, Inc.**

2019 NY Slip Op 32900(U)

August 2, 2019

Supreme Court, Queens County

Docket Number: 709388/18

Judge: Timothy J. Dufficy

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This opinion is uncorrected and not selected for official publication.

**ORIGINAL**

**Short Form Order**

**NEW YORK SUPREME COURT - QUEENS COUNTY**

**PRESENT: HON. TIMOTHY J. DUFFICY**  
**Justice**

**PART 35**

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**SALOMON LEVY, SIGALIT MOFAZ-LEVY,  
SIGALIT MOFAZ-LEVY AS GUARDIAN FOR  
SOPHIE LEVY,**

**Index No.: 709388/18  
Mot. Cal. Date: 1/29/19  
Mot. Seq.: 1**

**Plaintiffs**

**-against-**

**103-25 68<sup>th</sup> AVENUE OWNERS, INC., JOHN P.  
LOVETT & ASSOCIATES, LTD a/k/a THE  
LOVETT GROUP, CHARLES CHOU, YOSHIDA  
MOTOKO, DAGNARA K. KRASA a/k/a D.K.  
KRASA-BESTELL, MICHAEL L. MARKS,  
BOARD PRESIDENT, PAT JENNINGS,**

**FILED  
AUG -7 2019  
COUNTY CLERK  
QUEENS COUNTY**

**Defendants,**

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The following numbered papers were read on this motion by defendants Charles Chou (Chou) and Yoshida Motoko (Motoko), pursuant to CPLR 3211 (a) (1) and (7), seeking the dismissal of the fourth and ninth causes of action of the complaint; and the cross-motion by plaintiffs Salomon Levy (Salomon), Sigalit Mofaz-Levy (Sigalit), and Sigalit Mofaz-Levy, as guardian for Sophie Levy (Sophie), seeking leave to amend the complaint to add causes of actions and to join Sigalit, as guardian for Hila Levy (Hila), as an additional plaintiff.

**PAPERS  
NUMBERED**

Notice of Motion-Affidavits-Exhibits.....	EF 9-11
Cross Motion-Affidavits-Exhibits.....	EF 22-28
Answering Affidavits.....	EF 29-30
Reply Affidavits.....	EF 31

Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

Plaintiffs Salomon Levy (Salomon) alleges in the complaint that he was a former shareholder of unit 7N of a cooperative building owned by defendant 103-25 68<sup>th</sup> Avenue

Owners Inc. Salomon resided there with his wife, Sigalit Mofaz-Levy (Sigalit), Sophie Levy (Sophie), Hila Levy (Hila) and two other children. Plaintiffs allege that while they resided at the premises, defendants Charles Chou (Chou) and Yoshida Motoko (Motoko), shareholders of unit 6N, regularly harassed them by banging on their ceiling and door, complaining about excessive noise. Based upon complaints by Chou and Motoko, the plaintiffs allege that a holdover proceeding was wrongfully commenced against them by the Cooperative's Board of Directors (Board).

A motion pursuant to CPLR 3211 (a) (1) may only be granted when the documentary evidence refutes a plaintiff's factual allegations, thereby establishing a defense as a matter of law. (*See Schottland v Brown Harris Stevens Brooklyn, LLC*, 107 AD3d 684 [2d Dept 2013]; *Mendelovitz v Cohen*, 37 AD3d 670 [2d Dept 2007].) Chou and Motoko fail to directly address this argument and merely attach an excerpt of the proprietary lease to their motion papers. In any event, review of the full copy of the lease, submitted by the plaintiffs, reveals that this document fails to conclusively establish a defense to the claims at issue. Thus, dismissal pursuant to CPLR 3211 (a) (1) is not warranted. (*See Yue Fung USA Enters., Inc. v Novelty Crystal Corp.*, 105 AD3d 840 [2d Dept 2013].)

Furthermore, in deciding a motion to dismiss, pursuant to CPLR 3211 (a) (7), the court must accept the allegations in the plaintiffs' complaint as true and provide the plaintiffs with the benefit of every possible inference. (*See Halliwell v Gordon*, 61 AD3d 932 [2d Dept 2009].) Although the pleading is inartful, upon review of the fourth and ninth causes of action, it appears that the only cognizable claim against Motoko and Chou is one for private nuisance.

An essential feature of private nuisance is the interference with the use and enjoyment of one's land and includes 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." (*Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 [1977]; *see Taggart v Costabile*, 131 AD3d 243 [2d Dept 2015]; *Broxmeyer v United Capital Corp.*, 79 AD3d 780 [2d Dept 2010]; *cf. Anderson v Elliott*, 24 AD3d 400 [2d Dept 2005].) The complaint alleges that Chou and Motoko created a private nuisance, interfering with the plaintiffs' quiet use and enjoyment of their apartment, by

continuously banging on their ceiling and door and blasting a television and radio at all times of day. (See *Nostrand Gardens Co-Op v Howard*, 221 AD2d 637 [2d Dept 1995]; cf. *Kaniklidis v 235 Lincoln Place Hous. Corp.*, 305 AD2d 546 [2d Dept 2003]; *Shamalzadeh v Ralco Realty LLC*, 2017 NY Slip Op 31551(U) [Sup Ct, Queens County 2017].) It is further alleged that Chou and Motoko made false complaints, which prompted the Board to commence a holdover proceeding to rescind their proprietary lease.

Plaintiffs oppose Chou and Motoko's application and cross-move, pursuant to CPLR 3025, to amend the complaint to add three causes of action and join Hila as an additional plaintiff. Plaintiffs also seek to add a tenth cause of action, asserting a claim for private nuisance against Motoko and Chou; an eleventh cause of action, asserting a claim for abuse of process against all parties; and a twelfth cause of action, asserting a claim for negligent infliction of emotional distress solely against Motoko and Chou, on behalf of Sophie and Hila. Inasmuch as the plaintiffs seek to amend their complaint to plead their cause of action for private nuisance with greater specificity, the Court grants the plaintiffs' application to amend the complaint to add the tenth cause of action. To the extent that the fourth and ninth causes of action set forth additional allegations, they may remain in the complaint. Thus, defendants Chou and Motoko's application seeking the dismissal of the fourth and ninth causes of action of the complaint is denied.

With regard to plaintiffs' request to add the eleventh cause of action, the three elements of abuse of process are: "1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective." (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]; see *Board of Education v Farmingdale Classroom Teachers Asso.*, 38 NY2d 397 [1975].) The essence of the tort of abuse of process is the improper use of process after it is issued. (See *Goldman v Citicore I, LLC*, 149 AD3d 1042 [2d Dept 2017].) The mere commencement of a civil action is not considered an abuse of process, regardless of a malicious motive. (See *Curiano*, 63 NY2d 113; *Goldman*, 149 AD3d 1042.) As there is no allegation in the complaint that supports the improper use of process after it was issued, the proposed amendment is patently insufficient to state a cause of action for abuse of process. (See CPLR 3025; *Lynn v McCormick*, 153 AD3d 688 [2d Dept 2017]; *Greco v Christoffersen*, 70 AD3d 769 [2d Dept 2010].)

Similarly, the complaint fails to support the proposed twelfth cause of action for negligent infliction of emotional distress, on behalf of Sophie and Hila. Although physical injury is not a required element, a claim for negligent infliction of emotional distress is based upon a breach of a duty owed to the plaintiffs that “unreasonably endanger the plaintiff’s safety or cause her to fear for her safety.” (*See Crispino v Greenpoint Mortg. Corp.*, 2 AD3d 478 [2d Dept 2003].) Here, the plaintiffs’ claims are actually premised upon the alleged intentional conduct of Chou and Motoko. However, the plaintiffs have not sought leave to assert a cause of action premised on intentional conduct nor would the alleged improper conduct rise to the level of “extreme and outrageous” to support a cause of action alleging intentional infliction of emotional distress. (*See Video Voice, Inc. v Local T.V., Inc.*, 156 AD3d 848 [2d Dept 2017].) Even if this Court were to consider a claim for negligent infliction of emotional distress, the proposed pleading fails to include an allegation that Sophie and Hila were caused to fear for their physical safety as a result of the negligent conduct of Chou and Motoko. (*See Taggart*, 131 AD3d 243; *Shamilzadeh*, 2017 NY Slip Op 31551(U).) The proposed amendment for negligent infliction of emotional distress is palpably devoid of merit. (*See E.B. v Liberation Pubs., Inc.*, 7 AD3d 566 [2d Dept 2004].) As such, the plaintiffs’ request to join Hila as a party is denied as no other allegations are asserted on her behalf in the proposed pleading.

Accordingly, it is

**ORDERED** that the motion by defendants Chou and Motoko seeking the dismissal of the fourth and ninth causes of action of the complaint is denied; and it is further

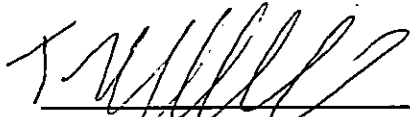
**ORDERED** that the branch of plaintiffs’ cross-motion to join Hila as a party is denied; and it is further

**ORDERED** that the branch of plaintiff’s cross-motion seeking to add a tenth cause of action, asserting a claim for private nuisance against Motoko and Chou is granted; and it is further

**ORDERED** that the branch of plaintiffs' cross-motion seeking to add a twelfth cause of action, asserting a claim for negligent infliction of emotional distress solely against Motoko and Chou, on behalf of Sophie and Hila is denied; and it is further

**ORDERED** that the plaintiffs are directed to serve an amended pleading, in conformance with this decision, within twenty (20) days after service of a copy of this Order with Notice of Entry.

**Dated: August 2, 2019**

  
TIMOTHY J. DUFFICY, J.S.C.

FILED  
AUG -7 2019  
COUNTY CLERK  
QUEENS COUNTY