Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DARRELL L. GAVRIN IA Part 27
Justice

ARKADIA PROPERTIES, LLC, x

Plaintiff,

- against -

EDUARDO DANIEL MONTES DE OCA, et al.,

Defendants.
x

Index Number 708496 - 2018

Motion Date November 27, 2018

Mot. Cal No. 2
Mot. Seq. No. 1

The following numbered papers were read on this motion by defendants, Rong Fan and Fanping Kong, seeking, among other things, dismissal of plaintiff's complaint as against them, pursuant to CPLR 3211 (a) (1), (a) (3), (a) (5), (a) (7), (a) (8) and (a) (9), and further requesting the conversion of this motion into a motion for summary judgment, pursuant to CPLR 3211 (c); and a cross motion by defendants, Edwin Carl Holmer III and Mark J. Ng, seeking dismissal of plaintiff's complaint as against them, pursuant to CPLR 3211 (a) (3) and (a) (7).

	Papers Numbered
Notices of Motion and Cross Motion - Affirmations - Exhibits	E7-E14; E20-E25
Answering Affirmations	E32-E33
Reply Affirmations	E34-E37

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

Plaintiff is the owner of a first-floor commercial unit (Unit CF) in the condominium building located at 23-28 30th Drive, Astoria, New York (hereafter, Elm Street). Defendants, Fan and Kong, are married, and purchased the condominium Unit 3R as an investment property in 2011. They have resided in the People's Republic of China continuously since

that purchase, and never lived at the condominium property. Defendant, Holmer occupy Unit 4F, and defendant, Ng, occupies Unit 2F. Plaintiff brought suit against all of the owners of condominium units at Elm Street, contending that, since 2015, there has been "water leakage and drainage" from defendants' air conditioners, and "[d]efendants have breached their contractual duty under the Condominium by-laws to maintain the air conditioning equipment of their Units, resulting in continuing nuisance, damages to the Common Elements, and a hazard to the Plaintiff and its invitees."

Fan and Kong move to dismiss plaintiffs' complaint, as against them, pursuant to CPLR 3211 (a) (1), founded upon defenses based on documentary evidence; (a) (3), for lack of legal capacity; (a) (5), for violation of the statute of limitations; (a) (7), for failure to state causes of action; and (a) (8) and (9), for lack of jurisdiction; and requests conversion of this motion into a motion for summary judgment, pursuant to CPLR 3211 (c). Defendants, Holmer and Ng, cross-move for dismissal of the complaint, as against them, based on CPLR 3211 (a) (3) and (a) (7). Plaintiff opposes.

Initially, while Fan and Kong's motion was made prematurely (*see Bank of New York Mellon v Scura*, 102 AD3d 714 [2d Dept 2013]; *Rink v Fulgenzi*, 231 AD2d 562 [2d Dept 1996]; *Gelbard v Northfield Sav. Bank*, 216 AD2d 267 [2d Dept 1995]), plaintiff has failed to raise such issue in opposition; has failed to demonstrate, or even assert, a proper re-service of the summons and complaint within the 120-day period allowed to do so under CPLR 306 (b); and has failed to move for an extension of time within which to serve such pleadings. Therefore, the fact that the filing of the motion was premature has not been shown to have denied plaintiff "the absolute statutory right to effect valid service at any point within the first 120 days following the filing of the summons and complaint" on June 1, 2018 (*Gelbard v Northfield Sav. Bank*, 216 AD2d at 267; *see Bank of New York Mellon v Scura*, 102 AD3d 714; *Rink v Fulgenzi*, 231 AD2d 562), and will not be considered as a basis for denying the instant motion.

Addressing the branch of Fan and Kong's motion seeking to dismiss the complaint pursuant to CPLR 3211 (a) (8), on the ground that service of process was not properly effectuated on them, moving defendants submitted affidavits attesting to the fact that they have lived in the People's Republic of China for the entire period they owned the subject condominium unit; that they never lived at the subject condominium; and that they never received a copy of the summons and complaint in this action, except from their tenant, who claimed he or she was "personally served" with such pleadings at the condominium unit in mid-June 2018. Plaintiff has not filed a process server's affidavit of service with the court, nor has it submitted such an affidavit of service in opposition hereto. As plaintiff has the burden of proving, by a preponderance of the credible evidence, that the service was proper, and "as the record (herein) does not contain evidence giving rise to a presumption of proper

service upon that defendant" (*Baldeo v Majeed*, 150 AD3d 942, 944 [2d Dept 2017]; *see Monzon v Chiaramonte*, 140 AD3d 1126 [2d Dept 2016]; *Samuel v Brooklyn Hosp. Ctr.*, 88 AD3d 979 [2d Dept 2011]), this branch of Fan and Kong's motion is granted, and the complaint is dismissed against them.

Turning to the cross motion, defendants Holmer and Ng seek dismissal of the complaint as against each of them based on plaintiff's alleged lack of legal capacity to sue, and on plaintiff's failure to state a viable cause of action.

Defendants contend that plaintiff lacks the legal capacity, under CPLR 3211 (a) (3), to commence a lawsuit for damages to the common elements of the condominium. Defendants are correct. "Condominium ownership is a hybrid form of real estate ownership, created by statute" (*Board of Mgrs. of Vil. View Condominium v Forman*, 78 AD3d 627, 629 [2d Dept 2010]; *see* Real Property Law art. 9-B), in which each owner holds an exclusive possessory interest in his or her own unit, along with an undivided interest in the common elements/areas of the condominium, effectively making each unit owner a "tenant-in-common" with regard to the common elements (*see Forestal Condominium v Davydov*, 157 AD3d 866 [2d Dept 2018]; *Murphy v State of New York*, 14 AD3d 127 [2d Dept 2004]). "The rights of a tenant-in-common do not extend ... to suing individually for damages to the common interest" (*Caprer v Nussbaum*, 36 AD3d 176, 184 [2d Dept 2006]). Consequently, plaintiff lacks the capacity to commence an individual action for any alleged damages to the common areas of the condominium, while retaining the capacity to bring a cause of action to recover damages to its own unit. As such, the branch of the cross motion based upon plaintiff's lack of legal capacity to recover for damages to the common elements/areas, rather than to its own unit/property, is granted.

Cross-moving defendants further seek dismissal of the complaint against them founded on the failure of plaintiff to state a cause of action, pursuant to CPLR 3211 (a) (7). Initially, the sole criterion to dismiss a complaint is whether the pleading, and the factual allegations contained within its four corners, manifests any cause of action cognizable at law (*see Gaidon v. Guardian Life Ins. Co. of America*, 94 NY2d 330 [1999]; *Guggenheimer v Ginzburg*, 43 NY2d 268 [1977]). "To withstand dismissal, the requisite elements of the cause of action must be discernable from the pleadings, and the complaint must give notice of the transactions and occurrences to be proved" (CPLR 3013; *see Dolphin Holdings, Inc. v Gander & White Shipping, Inc.*, 122 AD3d 901[2014]).

On a motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7), for failure to state a cause of action, the court must afford the pleading a liberal construction, accept as true all the facts alleged therein, give the nonmoving plaintiff the benefit of all favorable inferences, and determine only whether the alleged facts fit within any cognizable legal

theory, and not whether plaintiff can ultimately prove such facts (*see Webster v Sherman*, 2018 NY Slip Op. 06590 [2d Dept. 2018]; *J.P.Morgan Securities, Inc. v Vigilant Ins. Co.*, 21 NY3d 324 [2013]; *People ex rel. Cuomo v Coventry First LLC*, 13 NY3d 108 [2009]; *Murphy v Department of Educ. Of the City of N. Y.*, 155 AD3d 637 [2017]; *Bank of New York Mellon Trust Co., N.A. v Universal Dev., LLC*, 136 AD3d 850 [2016]). A motion to dismiss merely addresses the adequacy of a pleading, and does not reach the substantive merits of plaintiff's cause of action (*see Kaplan v New York City Dep't. of Health and Mental Hygiene*, 142 AD3d 1050 [2016]; *Lieberman v Green*, 139 AD3d 815 [2016]). Whether the pleading will later survive a summary judgment motion, or plaintiff will ultimately prevail on the claims, is not relevant on a pre-discovery motion to dismiss (see *Lieberman v Green*, 139 AD3d 815; *Tooma v Grossbarth*, 121 AD3d 1093 [2014]).

In the case at bar, plaintiff has sufficiently asserted a First Cause of Action for breach of contract, warranting the denial of defendant's dismissal motion on that cause of action. To maintain a cause of action for breach of contract, plaintiff must only establish the existence of a contract between plaintiff and defendant, performance by plaintiff, failure to perform by defendant, and resulting damages (*see Bennett v St. Farm Fire & Cas. Co.*, 137 AD3d 727 [2d Dept 2016]; *JP Morgan Chase v J. H. Electric of New York, Inc.* 69 AD3d 802 [2d Dept 2010]). Construing the pleadings liberally, and giving the nonmoving plaintiff the benefit of all favorable inferences (*see Leon v Martinez*, 84 NY2d 83 [1994]; *Hampshire Properties v BTA Building & Developing, Inc.*, 122 AD3d 573 [2014]; *Carillo v Stony Brook Univ.*, 119 AD3d 508 [2014]), and prior to any opposition thereto, plaintiff has established, prima facie, through the Condominium Declaration nd By-Laws, "a manifestation of mutual assent" that all unit owners were "in agreement with respect to all material terms", thereby creating an alleged binding contract between them (*Zheng v City of New York*, 19 NY3d 556, 577 [2012], quoting *Matter of Express Indus. & Term. Corp. v New York State Dept. of Transp.*, 93 NY2d 584, 589 [1999]), and damages, potential and actual, resulting from defendants' alleged breach. Consequently, plaintiff's complaint pleads minimally sufficient facts to hold the individual unit-owner defendants liable for breach of contract (*see Allstate ATM Corp. v E. S. A. Holding Corp.*, 98 AD3d 541 [2d Dept.2012]), and the branch of defendants' motion to dismiss this cause of action, based upon CPLR 3211 (a) (7), is denied.. Again, whether plaintiff's said causes of action have merit is not determined pursuant to this section of the statute.

Similarly, plaintiff has sufficiently pleaded a Second Cause of Action sounding in private nuisance against cross-movant. The elements of a cause of action for private nuisance are an interference substantial in nature, intentional in origin, unreasonable in character, with a person's property right to use and enjoy land, which is caused by another's conduct in acting, or failing to act (*see Copart Industries, Inc. v Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564 [1977]; *Chen v Wang*, 164 AD3d 1299 [2d Dept 2018]; *Trulio*

v Village of Ossining, 153 AD3d 577 [2d Dept 2017]). An interference with another's use and enjoyment of land is intentional when the defendant acts for the purpose of causing it, or knows, or is substantially certain, that it will result from his conduct (*see Copart Industries, Inc. v Consolidated Edison Co. of New York, Inc.*, 41 NY2d 564; *Benjamin v Nelstad Materials Corp.*, 214 AD2d 632 [2d Dept 1995]).

Defendant's argument that this cause of action is time-barred by the three-year statute of limitations for such action, is without merit, as plaintiff has "raised a triable issue of fact as to whether the continuing harm exception applies to the allegations of nuisance asserted ... giv(ing) rise to successive causes of action" (*Sullivan v Keyspan Corp.*, 155 AD3d 804, 807 [2d Dept 2017]; *see Capruso v Village of Kings Point*, 23 NY3d 63 [2014]; *Izzo v Town of Smithtown*, 151 AD3d 1035 [2d Dept 2017]).

Plaintiff's Third Cause of Action, seeking a permanent injunction, is, also, adequately pleaded. On the cause of action seeking injunctive relief, the complaint must allege that there was a presently occurring violation of a right; that plaintiff had no adequate remedy at law; that serious and irreparable harm would result absent the injunction; and that the equities are balanced in plaintiff's favor (*see Swartz v Swartz*, 145 AD3d 818 [2d Dept 2016]). The complaint in the case at bar sufficiently asserts such facts.

As has been discussed, the issue of whether plaintiff's said causes of action have merit is not the subject of determination on a motion under this section of the statute. Correspondingly, defendant's contention that plaintiff cannot prove such causes of action is academic with regard to the instant cross motion.

Movant and cross-movant's remaining contentions and arguments either are without merit or need not be addressed in light of the foregoing determinations.

Accordingly, the motion by defendants, Fan and Kong, seeking dismissal of the complaint as against them, is granted. The cross motion by defendants, Holmer and Ng, seeking dismissal of the complaint as against them, is granted, solely with regard to any claims for recovery arising from damage to the common elements of the condominium, and, otherwise, denied.

Dated: March 28, 2019

DARRELL L. GAVRIN, J.S.C.

FILED
APR 18 2019
COUNTY CLERK
QUEENS COUNTY

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