Edstrom v St. Nicks Alliance Corp.
2020 NY Slip Op 32604(U)
July 28, 2020
Supreme Court, New York County
Docket Number: 159450/2014
Judge: Nancy M. Bannon

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 42

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JAMES EDSTROM and JAMES BRAND,

Plaintiffs,

-against-

DECISION AND ORDER
Index No. 159450/2014
MOT SEQ 015

ST. NICKS ALLIANCE CORP. and 19 MAUJER STREET HOUSING DEVELOPMENT FUND CORPORATION,

Defendants.

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NANCY M. BANNON, J.:

I. INTRODUCTION

In this action alleging, *inter alia*, housing discrimination on the basis of race, disability, and sexual orientation in violation of the Fair Housing Law (FHA), the New York Executive Law (Executive Law), and the Administrative Code of the City of New York (NYC Administrative Code), the defendants, St. Nicks Alliance Corp. (St. Nicks) and 19 Maujer Street Housing Development Fund Corporation (19 Maujer,) move pursuant to CPLR 3212 for summary judgment dismissing the amended complaint.

The plaintiffs, James Edstrom (Edstrom) and James Brand (Brand) oppose the motion and cross-move (i) for leave to file a second amended complaint adding a demand for punitive damages to each of the causes of action in the first amended complaint, and conforming the amended complaint to the proof developed since

the original first amended complaint was filed, and (ii) for partial summary judgment on an unspecified portion thereof.

The motion is granted and the cross-motion is denied.

II. BACKGROUND

St. Nicks is a non-profit community development organization whose mission is to improve the quality of life for residents in Brooklyn by addressing economic, educational, health, housing, and social needs for low-income individuals. Pursuant to a contract with the New York City Department of Social Services of the Human Resources Administration (HRA), St. Nicks operates a 'scatter-site' program that provides residential units and supportive services to clients of the HIV/AIDS Services Administration (HASA), a division of the NYC Resources Administration. One of the scatter-site program locations was the residential building at 19 Maujer Street, in Brooklyn. St. Nicks is both a manager and general partner of 19 Maujer, the company that owns the building.

Edstrom, a HASA client, participated in the scatter-site program at 19 Maujer. From approximately September 27, 2012 until May 26, 2015. Edstrom lived in Apartment 105 and received financial support for the rent. Brand also lived there. As part of his participation in the 19 Maujer scatter-site program, Edstrom was required to sign an admissions agreement which

required all scatter-site participants, *inter alia*, to meet with case managers on a regular basis and provide medical records.

Edstrom claims that, while living at 19 Maujer, he was discriminated against regularly by the other tenants and the defendants protected the other tenants from repercussions from their actions. Specifically, Edstrom claims that (i) he was provided an uninhabitable apartment, inasmuch as the apartment was infested with mice, rats, and cockroaches, (ii) the tenants in the building harassed both him and Brand on the basis of their race and perceived sexuality, (iii) the defendants failed to respond to any of his complaints, and thereafter, actively encouraged the other tenant's behavior in order to force them out of the apartment, and, to that end, (iv) the defendants' assigned case manager to Edstrom, Ms. Rice, who regularly demanded medical records and that Edstrom see a mental health practitioner. Edstrom claims that Rice disclosed Edstrom's HIV/AIDS diagnosis to the other tenants and otherwise encouraged their harassment of Edstrom and Brand.

Based upon these allegations, the plaintiffs alleged six causes of action against the defendants. The *first* cause of action is for breach of the warranty of habitability in that the apartment was infested with vermin.

The *second* cause of action is for violations of the FHA and Executive Law relating to the defendants' alleged inaction in responding to the plaintiffs' complaints, which the plaintiffs contend is due to their perceived sexual orientation and race.

The *third* cause of action is for specific performance of a purported October 2013 agreement, under which the defendants' agreed to move them to an apartment on a higher floor in the building.

The *fourth* cause of action is for violations of the FHA, Executive Law, the NYC Administrative Code, and the Health Insurance Portability and Accountability Act (HIPAA), inasmuch as the defendants, in response to the plaintiffs' regular complaints about the habitability of the apartment and the harassment that they suffered, actively engaged in a conspiracy to force them from the building.

The *fifth* cause of action is for additional violations of the FHA, Executive Law, the NYC Administrative Code, and HIPAA, as well as defamation, based upon an allegation that Rice, in furtherance of the conspiracy to evict the plaintiffs, told the other tenants that they were racist.

The *sixth* cause of action seeks punitive damages relating to the defendants' alleged conduct.

In their answer, the defendants mostly denied the allegations of the complaint and asserted 19 affirmative defenses. Essentially, they denied any acts of harassment or unlawful discrimination, alleged that they complied with all applicable laws and regulations, and argued that the plaintiffs' claims were frivolous and without basis in law or fact.

III. DISCUSSION

It is well settled that the movant on a summary judgment motion "must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case." See Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 (1985). The motion must be supported by evidence in admissible form, see Zuckerman v City of New York, 49 NY2d 557 (1980), and the pleadings and other proof such as affidavits, depositions, and written admissions. See CPLR 3212. The "facts must be viewed in the light most favorable to the non-moving party." Vega v Restani Constr. Corp., 18 NY3d 499, 503 (2012) (internal quotation marks and citation omitted). Once the movant meets its burden, it is incumbent upon the non-moving party to establish the existence of material issues of fact. See id., citing Alvarez v Prospect Hosp., 68 NY2d 320 (1986).

In support of their motion for summary judgment, the defendants submit, *inter alia*, Edstrom and Brand's deposition testimony, their signed admission agreement approving them as participants in the 19 Maujer scatter-site program and documents reflecting extermination services performed in the plaintiffs' apartment while they resided there.

At his deposition in October 2016, James Edstrom testified that he works as a celebrity photographer and owns a gossip website, both of which generate revenue. At times, he received disability payments. He testified that HRA assisted in getting him an apartment in late 2012. He was interviewed by St. Nicks, but he did not know he was in St. Nick's scatter site program until after he moved into 19 Maujer. He did recall signing the agreement, however, and testified that he refused to initial the provision regarding weekly home visits. He also recalled that there was a no-pet clause in the agreement even though Brand had pet turtles. Edstrom understood that part of the rent would be subsidized but he would be required to pay 30% of his income toward the rent. The same rule applied in other supportive housing apartments he lived in before and after 19 Maujer.

Edstrom testified that he complained to the defendants of vermin infestation, drug dealing and harassment by other tenants. He believed that four or five of his fellow tenants

conspired with certain St. Nicks staff to drive him out of the apartment. He testified that one tenant, who was also HIV positive, hated him because he was white. She and others called him "white trash" and other names. Other tenants yelled and screamed outside his window. The super piled garbage just outside his apartment. Edstrom requested many repairs for the apartment- tiles, bathtub, vanity – and some were made but were inadequate. He testified that he had maintenance workers from St. Nicks in his apartment "dozens of times". Two different exterminator companies were sent, but the vermin problem persisted and he was bitten by a mouse. He believed the entire building had a vermin problem and characterized St. Nick's as a "slumlord." However, he tried to move into another apartment in the same building, to no avail. He accused Frank Lang, the housing director at St. Nicks, for discriminating against people with HIV/Aids. Edstrom testified that he complied with all requirements of the program, including the provision of medical records. He did not deny barring caseworkers from his apartment, claiming that they were abusive. He believed he was treated differently than other tenants in the building in that he was not permitted to hang pictures on the wall, or have carpeting, pets or a third lock on the door. St. Nicks offered him an apartment in another building but he declined because he considered it to be inadequate and "in the middle of nowhere."

At his deposition in 2016, James Brand testified that he was once homeless but was befriended by Edstrom, who planned to adopt him. Brand testified that caseworkers visited the apartment too often and he and Edstrom had refused to let them inside "thousands of times." He also recalled that Edstrom refused to initial the provision of the St. Nicks program agreement that required home visits by caseworkers, because they wanted privacy. Brand complained that the caseworkers repeatedly asked him to see a psychiatrist or therapist. Brand testified that other tenants in the building harassed him and Edstrom by calling them names using racist and homophobic slurs, loitering outside their windows, smoking crack and making noise. When he and Edstrom complained to St. Nicks of a vermin infestation, an exterminator and building super were dispatched to do repairs but the problem remained.

Also submitted are the deposition transcripts of Frank Lang of St. Nicks, Angie Herrera, director of property management for St. Nicks, and Teri Thorpe, assistant director of residential services for St. Nicks. These witness explained the scatter-site program and its requirements, and their interactions with the plaintiffs and the building.

Lang testified that five of the units at 19 Maujer were part of the scatter-site program. Whenever an incident was reported at 19 Maujer, St. Nick's employees would view the video from one of the two cameras on premises and file an incident report. If necessary, staff would speak with the offending tenants. There was also an evening security guard posted at the building. Lang was aware that another unit, on the sixth floor, was available for several months while Edstrom resided in the building. He explained that, as for any program participant, a particular vacant unit may not be available due to the waiting list procedure, which can take two to six months after the application is submitted, or due to ineligibility of the applicant for that unit, or because the unit required renovations. He recalled that Edstrom was provided an application for the sixth floor unit but never completed the application. Lang testified that all ground floor apartments were inspected and abatement was done by an exterminating company and no complaints were made by any other first floor tenant besides Edstrom.

Herrera testified that she upgraded the old security cameras at 19 Maujer in late 2013 or 2014. She was not aware of a problem with drug dealing in the building, which was part of the Free Hallways program allowing NYPD officers to patrol inside. She explained that a program participant in good

standing can request to transfer to another available apartment within the program if the person qualifies, but there is an application process and waiting list for such transfers. Not all units in a particular building are part of the program. Herrara testified that after Edstrom complaint of the conditions at Maujer, he was offered a similar apartment in Brooklyn but canceled an appointment to view it, stating that he wished to stay in the same neighborhood. She was aware of at least one occasion where Edstrom denied access to an exterminator sent to the apartment in response to his complaint of vermin. Thorpe similarly testified that St. Nick's responded to Edstrom's complaints of vermin but Edstrom often refused access to the exterminator. She spoke to Edstrom about the issue. He requested to move to a different apartment which was not part of the scatter-site program.

In opposition and in support of their cross-motion, The plaintiffs submit the deposition testimony of Debbie Rodriguez Ortiz, an HRA case manager, and Joseph Goodman, a manager at Guardian Security Services, the security contractor at 19 Maujer.

Ortiz testified that she had assisted Edstrom in securing supportive housing at the 15 Maujer building through St. Nick's, and witnessed him sign the program agreement. After moving in,

Edstrom made complaints to Ortiz about vermin in the apartment and offensive conduct of other tenants. In the site visits she made to the apartment, she saw mouse droppings but never witnessed the tenant harassment complained of by Edstrom.

Joseph Goodman testifed that Guardian provided security services at 19 Maujer from 5:00 pm to midnight. He identified the two security guards assigned during the time the plaintiffs resided there. One had left the company and the other was Hector Pierson who refused to testify. The plaintiffs submit an affidavit of a Margaret Clemson who claims that she spoke with Pierson in 2016 and he told her he was aware of the problems the plaintiffs were having in the building. [The defendants correctly object to the submission of this affidavit as hearsay.]

The plaintiffs also submit a Memorandum of Law which is often rambling. They submit a number of exhibits, including a June 15, 2015, e-mail from a pest control service to Edstrom reporting a finding of a rodent condition at the premises and a remedial plan, a transcript of the deposition of Copley Kemp, a former St. Nick's employee, who visited the plaintiffs twice on 2013 and observed a rodent condition at the building and observed other tenants harassing the plaintiffs through the window, and requested security cameras and extermination

services. The plaintiffs also submit a February 25, 2014, email from Edstrom's physician to an employee of St. Nick's stating that Edstrom presented at the clinic with a mouse bite and a February 15, 2013, "to whom it may concern" letter from the same physician relating that Edstrom was reporting a mice and rat infestation in his apartment, which, she opined, is particularly dangerous since he is at a high risk of infectious disease. The plaintiffs submit several 2012-2013 "Apartment Repairs Form" documents in which Edstrom complains of vermin and a work order receipt dated October 26, 2012, showing that Edstrom complained of rats and requested traps and steel wool to patch holes. They also submit several other work orders showing various repairs made to the apartment by St. Nicks at their request. The plaintiffs also attach various discovery demands and responses, and a court order and a news article concerning 1991 fraud conviction of Joseph Robles, President of St. Nicks, arising from a car towing business.

The plaintiffs' submission also include a "Step II" Case Meeting Report dated April 6, 2015, which states that Edstrom "was advised that [St. Nick's] was not a real estate company" but St. Nick's nonetheless "agrees to show Mr. Edstrom's attorney another scatter site apt. on 4/8/2015." The same report states that Edstrom had been "offered another apartment within the program but declined the offer." The report further

states that Edstrom was advised by HRA to seeks his own independent living apartment and submit the lease to HRA, but that Edstrom refused to sign an agreement with HRA. The report includes an "Agenda" for the meeting listing several items under "Breach of Admission Agreement", including non-compliance by failing to provide updated medical and mental health records and "not allowing home visits as required by St. Nick's Alliance." The meeting was attended by Edstrom and his attorney, Teri Thorpe and other St. Nick's and HRA personnel, including Debbie Rodriquez Ortiz.

A. First Cause of Action - Breach of the Warranty of Habitability

In the first cause of action, the plaintiffs allege a breach of the warranty of habitability, inasmuch as the apartment provided by the defendants was infested with vermin.

To establish summary judgment dismissing a claim for a breach of the warranty of habitability, a defendant must show either 1) that conditions in the premises were fit for human habitation, or 2) that any conditions within the premises were neither dangerous, hazardous or detrimental to the life, health or safety of the tenant. See Real Property Law § 235-b; Park West Mgt. Corp. v Mitchell, 47 NY2d 316 (1979).

An implied warranty of habitability exists in every residential lease or rental agreement. See Kent v 534 E. 11th

St., 80 AD3d 106 (1st Dept. 2010). However, a landlord is not a guarantor or insurer of the rental property. See Park West Mgt. Corp. v Mitchell, supra. To the extent that a landlord is prevented from rendering certain services for reasons beyond its control, performance may be excused. See id.

In support of the portion of their motion seeking to dismiss the first cause of action, the defendants rely upon documents reflecting extermination services performed in the plaintiffs' apartment and Edstrom's deposition transcript. The defendants' submissions demonstrate that (i) extermination services were regularly provided to the 19 Maujer apartment complex, (ii) extermination services were regularly sent to Edstrom's apartment in response to his complaints, and (iii) the exterminator was often denied access to the apartment, as Edstrom would either decline services or fail to answer his door. Additionally, the defendants submit an inspection report of plaintiffs' apartment on February 26, 2014 by the extermination company, on an occasion when it successfully gained access, which states: "We found no evidence of any sort of pests, holes or entry ways for mice." The defendants further submit a report of a HASA-performed audit of the plaintiffs' apartment from March 2014 stating that no deficiencies were found in the apartment. As such, the defendants establish, *prima facie*, that the conditions within the apartment were fit for

human habitation and that, even if vermin were present, the defendants attempted to remedy the problem whenever Edstrom complained or requested an exterminator.

In opposition, the plaintiffs make no attempt to refute the defendants' allegations, submissions or arguments on this cause of action, but rely upon Edstrom's affidavit and other of their submissions describing the vermin and other conditions in and around the building. However, these are insufficient to defeat this branch of the motion. The plaintiffs also appear to argue that the verbal harassment they purportedly suffered should be considered a breach of the warranty of habitability. However, since the alleged acts of harassment do not constitute a 'condition within the premises', the argument is without merit. See Real Property Law § 235-b; Park West Mgt. Corp. v Mitchell, supra.

B. Second Cause of Action - Violations of FHA and Executive Law for Failing to Respond to Harassment Claims

In the second cause of action, the plaintiffs allege that the defendants, in failing to respond to their claims that they were being harassed by other tenants of the building, violated both the FHA and the Executive Law.

i. FHA Claims

There are three theories under which a plaintiff can bring a claim for discrimination under the FHA: "'(1) intentional discrimination; (2) disparate impact; and (3) failure to make a reasonable accommodation.'" Quad Enters. Co., LLC v Town of Southold, 369 Fed Appx 202, 205 (2nd Cir. 2010). Plaintiffs do specify the theory under which they bring their claim. However, none would be viable here.

Courts assess FHA claims of discrimination "under the burden-shifting analysis established in McDonnell Douglas Corp. v Green, 411 US 792." Human Res. Research & Mgt. Group v County of Suffolk, 687 F Supp 2d 237 (EDNY 2010). If the plaintiff establishes a *prima facie* case, the burden shifts to the defendant, who must provide a legitimate, nondiscriminatory reason for the adverse action. See id. If the defendant meets the minimal burden of production, the burden shifts back to the plaintiff, who must prove that the defendant intentionally discriminated on a prohibited basis and that the offered reason is merely pretextual. See id.

To establish a prima facie case of housing discrimination, plaintiffs must show that "(1) that they are members of a protected class; (2) that they sought and were qualified to rent or purchase the housing; (3) that they were rejected; and (4) that the housing opportunity remained available to other renters or purchasers." Mitchell v Shane, 350 F3d 39, 47 (2nd Cir. 2003).

Additionally, "for disparate treatment cases, '[t]o establish a prima facie case of discrimination under the FHA[], the plaintiffs must present evidence that animus against the protected group was a significant factor' in the position taken by the defendant." L.C. v LeFrak Org., Inc., 987 F Supp 2d 391, 400 (SDNY 2013).

Here, the defendants correctly argue that the plaintiffs cannot establish a *prima facie* case of intentional discrimination under the FHA because they cannot establish the third or fourth elements. Neither Edstrom nor Brand was rejected or prevented from renting or purchasing housing at 19 Maujer. The plaintiffs do not even make such an allegation. As such, the plaintiffs cannot establish intentional discrimination under the FHA. Indeed, in opposition to the motion, the plaintiffs do not expressly address that deficiency. Rather, they contend that the terms of their lease with defendants, pursuant to the scatter-site program, establishes discriminatory intent inasmuch as it imposes additional rules on its tenants, *i.e.* weekly visits with case workers, and submission of medical records annually. As observed by the defendants, these additional rules are requirements set by a government funding program to aid persons with HIV or AIDS. As such, plaintiffs' claim for disparate treatment under the FHA fails. See Mitchell v Shane, supra at 47 [noting that, in the context of a claim for housing

discrimination under the FHA, "(s)ummary judgment is appropriate if no reasonable jury could find that a defendant's actions were motivated by discrimination."].

Moreover, to the extent that the plaintiffs are alleging a failure to make a reasonable accommodation in that the defendants failed to move them to a different apartment to minimize interaction and confrontations with the other tenants, their claim also fails. "Under the FHA, an entity engages in discrimination if it refuses to make 'reasonable accommodations in rules, policies, practices or services, when such accommodations may be necessary to afford a [handicapped person] equal opportunity to use and enjoy a dwelling.'" Taylor v Harbour Pointe Homeowners Assn., 690 F3d 44, 50 (2nd Cir. 2012).

To establish "a claim of discrimination based on failure to reasonably accommodate in the housing context, a plaintiff must demonstrate that: (1) he suffers from a handicap as defined by the FHA; (2) defendants knew or reasonably should have known of the plaintiff's handicap; (3) accommodation of the handicap may be necessary to afford plaintiff an equal opportunity to use and enjoy the dwelling; and (4) defendants refused to make such accommodation." Picaro v Pelham, 1135 LLC, 2014 US Dist LEXIS 132198, *6 (SDNY 2014).

Here, the plaintiffs were not requesting a reasonable accommodation so that they can have an equal opportunity to use

and enjoy their apartment. Rather the plaintiffs were requesting an entirely different apartment. This request is unrelated to any handicap within the meaning of the FHA.

ii. Executive Law Claims

The plaintiffs also assert a violation of New York's Executive Law. The gravamen of this portion of the plaintiffs' complaint again is that (i) the requirements of the scatter-site program applied to their apartment that did not apply to other building residents who were not in that program, and more importantly, (ii) they had a ground floor unit while at 19 Maujer and were not moved to a higher level as requested. They wished to move since they claim that they were harassed by other tenants calling Edstrom offensive names and that, despite receiving notice, the defendants took no action against the offending tenants. However, as correctly noted by the defendants, while such name-calling and verbal harassment are certainly offensive and unacceptable, the allegations have nothing to do with prohibited housing discrimination under the Executive Law. The Executive Law prohibits discrimination in connection with publicly assisted housing on the basis of race, disability, and sexual orientation. See Executive Law § 296 (2-a)(a),(b). More particularly, it makes it an unlawful practice to "refuse to sell, rent or lease or otherwise to deny to or withhold" publicly assisted housing accommodations "from any

person" because of his "race," "disability," or "sexual orientation." Executive Law § 296 (2-a)(a). The statute likewise makes it an unlawful practice to "discriminate against any person because of his...race...disability [or]...sexual orientation...in the terms, conditions or privileges of any publicly-assisted housing accommodations or in the furnishing of facilities or services in connection therewith." Executive Law § 296 (2-a)(b).

Here, the defendants have neither refused to sell, rent, or lease, nor denied nor withheld housing accommodations to plaintiffs. Indeed, as noted above, the defendants provided the plaintiffs with an apartment at 19 Maujer and the plaintiffs lived there for more than two years. Nor is there any indication that the defendants discriminated against the plaintiffs in the terms, conditions, or privileges of residing at 19 Maujer or in the furnishing of facilities or services in connection therewith. The plaintiffs' primary complaints, that fellow tenants harassed them and that Rice demanded medical records and asked Edstrom to see a psychologist, fall outside the statute.

C. Third Cause of Action - Specific Performance

In their third cause of action, the plaintiffs allege that "in October 2013 the Defendant agreed with the HRA to allow the

plaintiffs to apply and to move to one of several then vacant apartments on an upper floor, away from the street," but that the defendants refused to honor that agreement. The plaintiffs assert that they are thus entitled to specific performance of that agreement and "the right to move to the first two-bedroom apartment to become available in the building above the first floor." This claim must be dismissed.

First, the claim is moot inasmuch as the plaintiffs moved from the 19 Maujur Street building to 1-55 Borden Avenue in Long Island City on May 26, 2015. Indeed, the plaintiffs did not oppose this branch of the defendants' motion for summary judgment. See Gary v Flair Beverage Corp., 60 AD3d 413 (1st Dept. 2009). The claim would be dismissed in any event. It is well-settled that "'specific performance is an equitable remedy for a breach of contract, rather than a separate cause of action.'" Warberg Opportunistic Trading Fund, L.P. v GeoResources, Inc., 112 AD3d 78, 86 (1st Dept. 2013). Here, the plaintiffs have not established the existence of an underlying contract between them and defendants which entitled them to change apartments. As such, there is no underlying breach of contract claim whereby the plaintiffs can assert specific performance. In this regard, it should be noted that, notwithstanding any requirement to do so, the defendants offered the plaintiffs another apartment on at least one occasion, and they declined.

D. Fourth Cause of Action - Violations of FHA, Executive Law, NYC Administrative Code, and HIPAA for Attempting to Force the Plaintiffs from the Building

The fourth cause of action alleges that the defendants violated the FHA, Executive Law, the NYC Administrative Code, and the Health Insurance Portability and Accountability Act (HIPAA), inasmuch as the defendants, in response to the plaintiffs' regular complaints about the habitability of the apartment and the harassment that they suffered, actively engaged in a conspiracy to force them from the building.

However, as correctly noted by the defendants, the new allegations contained in the fourth cause of action fail to plead a cause of action for violations of the FHA and Executive Law for the reasons already discussed herein.

i. NYC Administrative Code

With regard to their claims that the defendants violated the NYC Administrative Code, the plaintiffs allege that, due to their repeated complaints about other tenants and the habitability of their apartment, the defendants wished to evict them and started that process by appointing Ms. Rice, who in turn demanded medical records, instructed that they visit a psychologist, spoke of Edstrom's medical condition, and told other tenants that the plaintiffs are racist.

The NYC Administrative Code prohibits essentially the same behavior as that which is prohibited in the Executive Law. The NYC Administrative Code § 8-107 (5)(a)(1) makes it "an unlawful discriminatory practice" to "refuse to sell, rent, lease, approve the sale, rental or lease or otherwise deny to or withhold" housing accommodations from any person based on "race," "disability," or "sexual orientation." It is likewise an unlawful discriminatory practice to "discriminate against any such person or persons in the terms, conditions or privileges of the sale, rental or lease of any such housing accommodation or an interest therein or in the furnishing of facilities or services in connection therewith." NYC Administrative Code § 8-107 (5)(a)(1)(b).

Therefore, like the plaintiffs' claim under the Executive Law, their claims under the NYC Administrative Code must also fail. While the "New York City Human Rights Law [NYCHRL]" "was designed to be more protective than its State and Federal counterparts" (Tu v Loan Pricing Corp., 21 Misc3d 1104[A] [Sup Ct NY County 2008]), it does not change the result here. "Even if the NYCHRL 'was intended to be more protective than the state and federal counterparts' and even if its 'legislative history contemplates that the Law be independently construed with the aim of making it the most progressive in the nation,' the NYCHRL

still must be interpreted on its plain meaning." Makinen v City of New York, 30 NY3d 81, 88 [2017] [citations omitted]).

The plain meaning of the NYCHRL prohibits discrimination in the sale or rental of housing based on race, disability, and sexual orientation. The defendants demonstrate that they did not discriminate against plaintiffs on this basis, and the plaintiff fail to raise any triable issue in that regard.

ii. HIPAA

The plaintiffs further allege a violation of HIPAA. Specifically, the plaintiffs allege that Ms. Rice, an employee of St. Nicks, violated that statute when she "informed one or more tenants" of "Edstrom's medical condition and of the fact that the plaintiffs are in the scatter-site program."

However, this claim fails because no private cause of action exists under HIPAA. See Romanello v Intesa Sanpaolo S.p.A., 97 AD3d 449 (1st Dept. 2012); see also Machie v Rosenberg, 2018 US Dist LEXIS 141845, *4 (D DC, August 20, 2018). Thus, even if the plaintiffs' allegations are true, the claim is not viable. Indeed, the plaintiffs do not oppose the defendants' motion for summary judgment dismissing the HIPAA claims. Therefore, the fourth cause of action is dismissed.

D. Fifth Cause of Action -Violations of FHA, Executive Law, NYC Administrative Code, HIPAA, as well as Defamation

The fifth cause of action alleges that the defendants violated the FHA, Executive Law, the NYC Administrative Code, and HIPAA, inasmuch as the defendants, in response to the plaintiffs' regular complaints about the habitability of the apartment and the harassment that they suffered, actively engaged in a conspiracy to force them from the building, specifically inasmuch as Rice is alleged to have told other tenants that the plaintiffs are racist, purportedly to further the harassment against the plaintiffs by the tenants. The fifth cause of action also pleads a claim for defamation based upon the same grounds.

However, as correctly noted by the defendants, the new allegations contained in the fifth cause of action fail to plead a cause of action for violations of the FHA, Executive Law, the NYC Administrative Code, and HIPAA, for the reasons previously discussed herein. As such, the only new claim is one for defamation. During their depositions, when cataloging their grievances, neither plaintiff sought to identify any allegedly defamatory statements by defendants. Instead, they complained about name-calling by fellow tenants of the building.

In any event, to the extent that plaintiffs are claiming that Rice, as a representative of defendants, made a defamatory statement about plaintiffs, this claim must be dismissed. "To

prove a claim for defamation, a plaintiff must show: (1) a false statement that is (2) published to a third party (3) without privilege or authorization, and that (4) causes harm." Stepanov v Dow Jones & Co., Inc., 120 AD3d 28, 34 (1st Dept. 2014). As falsity is a required element of a defamation claim, only statements of fact can be the subject of a defamation claim. See Galanos v Cifone, 84 AD3d 865 (2nd Dept. 2011); see also Celle v Filipino Reporter Enters., Inc., 209 F3d 163 (2nd Cir. 2000) (a statement is only potentially actionable if it contains a "defamatory statement of fact concerning the plaintiff."). Accordingly, "[e]xpressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation." Mann v Abel, 10 NY3d 271, 276 (2008), cert denied 555 US 1170 [2009]; see also Sandals Resorts Intl. Ltd. v Google, Inc., 86 AD3d 32, 39-40 (1st Dept. 2011).

Defamation law has long recognized that non-actionable opinion includes insults and "rhetorical hyperbole." Greenbelt Coop. Publishing Assn. v Bresler, 398 US 6, 14 (1970); see Immuno AG v Moor-Jankowski, 77 NY2d 235 (1991). As such, "[l]oose, figurative, or hyperbolic statements, even if deprecating the plaintiff, are not actionable." Dillon v City of New York, 261 AD2d 34, 38 (1st Dept. 1999). The case law is replete with examples of pejorative accusations that have been

determined to be protected opinions. See e.g., Gross v New York Times Co., 82 NY2d 146, 155 (1993) (New York courts have "held that assertions that a person is guilty of 'blackmail,' 'fraud,' 'bribery,' and 'corruption' could, in certain contexts, be understood as mere, nonactionable 'rhetorical hyperbole' or 'vigorous epithet(s)'"); Joseph v Joseph, 107 AD3d 441, 442 (1st Dept. 2013) (calling someone a "'scorned' woman" with "maniacal rage" who "went into 'terroristic binges'" was not actionable); Farber v Jefferys, 103 AD3d 514, 516 (1st Dept. 2013) (calling someone a "liar" was not actionable); Galasso v Saltzman, 42 AD3d 310, 311 (1st Dept. 2007) (calling someone "no good" and a "criminal" was opinion and not actionable as a matter of law). In light of this authority, Rice's purported statement to other tenants of the building that the plaintiffs were racist, is an opinion, not a statement that can be proved true or false.

Moreover, even assuming the purported statement was made and was not mere opinion, it cannot be attributed to these defendants under the doctrine of *respondeat superior.* The doctrine holds that an employer is vicariously liable for the torts of an employee acting within the scope of her employment. See Riviello v Waldron, 47 NY2d 297 (1979). Any defamatory statement by Rice cannot be deemed to be an act performed within the scope of her employment. Rice was a case manager for St. Nicks whose responsibilities included meeting with participants

in the scatter-site program, monitoring and reassessing the participants' needs, identifying new or potential problems of the participants, and reviewing the participants' financial obligations. Her purported statement would clearly not fall within the direction or control of St. Nicks and was not in furtherance of St. Nicks interests. See Johnson v Daily News, Inc., 34 NY2d 33, 35-36 (1974) ("To bring th[e] doctrine [of respondeat superior] into play the employee must be performing some act in furtherance of a duty he owes the employer and where the employer is, or could be, exercising some control, directly or indirectly, over his activity"); see also Sims v Bergamo, 3 NY2d 531, 533 (1957). For these reasons, the plaintiffs' claim for defamation must be dismissed.

E. Sixth Cause of Action - Punitive Damages

Inasmuch as the court has dismissed the first through the fifth causes of action, the sixth cause of action seeking punitive damages must be dismissed. Punitive damages is not an independent cause of action, and the plaintiffs has no underlying substantive cause of action upon which an award of punitive damages may be grounded. See Rocanova v Equitable Life Assur. Soc. of U.S., 83 NY2d 603 (1994); Mayes v UVI Holdings, Inc., 280 AD2d 153 (1st Dept. 2001).

F. Cross-Motion - Leave to Amend and Partial Summary Judgment

The plaintiff's cross-motion to for leave to amend the complaint for a second time to add punitive damages to each count, and to conform it to the proof developed since the amended complaint was filed is denied.

First, the motion is untimely. The original amended complaint was filed in 2014, more than four years prior to the instant cross-motion. Discovery is complete, and the Note of Issue has been filed. Nor have the plaintiffs offered a "reasonable excuse for [their] long delay in seeking amendment." Inwood Tower Inc. v Fireman's Find Ins. Co., 290 AD2d 252, 252-53 (1st Dept. 2002). Such a lengthy and unexcused delay warrants denial of motion for leave to amend. See Wassfam LLC v Palacios, 107 AD3d 493 (1st Dept. 2013); Oil Heat Inst. v RMTS Assocs., L.L.C., 4 AD3d 290 (1st Dept. 2004). Indeed, it was "[o]nly when defendants moved for summary judgment" that plaintiffs sought leave to amend. Hanford v Plaza Packaging Corp., 284 AD2d 179, 180 (1st Dept. 2001).

Secondly, given that the amended complaint is being dismissed, and the proposed second amended complaint alleges no new facts or theories of law that would not similarly be subject to dismissal for the same reasons, the proposed amendment is palpably insufficient and patently devoid of merit. See CPLR

3025(b); JPMorgan Chase Bank, N.A. v Low Cost Bearings NY, Inc., 107 AD3d 643 (1st Dept. 2013). Since there will be no second amended complaint, the branch of the plaintiffs' cross-motion which seeks partial summary judgment on the proposed amended complaint is denied as moot.

IV. CONCLUSION

Accordingly, it is hereby,

ORDERED that the motion of the defendants St. Nicks Alliance Corp. and 19 Maujer Street Housing Development Fund Corporation pursuant to CPLR 3212 seeking to dismiss the first amended complaint as against them is granted; and it is further,

ORDERED that the cross-motion of the plaintiffs' James Edstrom and James Brand seeking leave to file a second amended complaint and for partial summary judgment thereon is denied, and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the court.

NANCY M. BANNON, J.S.C.
HON. NANCY M. BANNON

Dated: July 28, 2020