SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JOHN J. KELLEY** **PART** **IAS MOTION 56EFM**

Justice

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NICOLA W. CICCHETTI,

Plaintiff,

- v -

TRNC ASSOCIATES, LTD., and 333 EAST 46TH ST. APARTMENT CORP.,

Defendants.

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INDEX NO. 154548/2019

MOTION DATE 09/09/2020

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 15, 16, 17, 18, 19, 20, 21, 22

were read on this motion to/for DISMISSAL.

I. INTRODUCTION

This is an action, inter alia, to recover for trespass and breach of contract, and for injunctive and declaratory relief, arising from a dispute over the placement of a partition wall between two outdoor apartment terraces. The defendant 333 East 46th St. Apartment Corp. (hereinafter the coop corporation) moves pursuant to CPLR 3211(a) to dismiss the complaint against it based on documentary evidence (CPLR 3211[a][1]), as time-barred (CPLR 3211[a][5]), and for failure to state a cause of action (CPLR 3211[a][7]). The plaintiff opposes the motion. The motion is denied.

II. BACKGROUND

On September 26, 2007, the plaintiff purchased shares in the coop corporation that had been allocated to Apartment 15C in a residential building located at 333 East 46th Street in Manhattan. At that time, Apartment 15C was occupied by a rent-stabilized tenant; hence, the

plaintiff became the holder of unsold shares in connection with that apartment. The defendant TRNC Associates, Ltd. (TRNC), is the holder of unsold shares referable the adjacent Apartment 15B. These two apartments share an outdoor terrace that is physically divided by a partition wall.

The offering plan for the cooperative included depictions of the dimensions and layouts of various apartments. The offering plan provided that

> "Some of the apartments may have been altered and thus do not conform to the layouts set forth in the typical floor plans set forth in Part II of the Plan, beginning at page 134. Subscribers are advised to physically inspect any apartment in which they are interested in purchasing prior to submitting a Subscription Agreement and down payment in order to determine actual dimensions, layout and condition. All apartments are being offered in their current 'as is' condition."

The plaintiff concededly did not avail himself of the opportunity of physically inspecting Apartment 15C prior to his purchase.

As an incident of the purchase of shares of stock in the coop corporation, the corporation issued the plaintiff a proprietary lease. Paragraph 7 of the proprietary lease provided that the plaintiff was granted exclusive use and enjoyment of the leasehold during the term of the lease.

In 2017, the plaintiff's rent-stabilized tenant died. Thereafter, the plaintiff physically inspected Apartment 15C for the first time and observed that the wall separating the terraces between Apartments 15C and 15B did not provide for equal-sized terraces, but instead left the terrace for Apartment 15B slightly larger than the terrace for Apartment 15C. According to the plaintiff, this type of allocation of terrace space was unique to those two apartments.

The plaintiff thereafter requested the coop corporation and TRNC to move the partition wall to equalize the terrace space allocated to the two adjacent apartments, contending that the allocation was different than other adjacent apartments furnished with outdoor terraces. The plaintiff also asserted, upon information and belief, that the defendants had apparently moved the wall sometime between the 2007 purchase date and the 2017 inspection date so as to

encroach on the terrace space that should have been allocated to Apartment 15C. The defendants declined the plaintiff's request. This action ensued.

III. DISCUSSION

In the complaint, the plaintiff asserts a causes of action alleging trespass, seeking a judgment declaring that the terrace partition is not installed in the correct location, requesting a permanent injunction compelling the defendants to relocate the partition wall, seeking to recover damages for breach of contract, and seeking to recover attorneys' fees pursuant to Real Property Law § 234. The coop corporation now moves, pre-answer, to dismiss the complaint against it.

A. ALLEGATIONS MADE UPON INFORMATION AND BELIEF

The crucial allegation in the complaint is the plaintiff's assertion that the defendants relocated the terrace partition wall after he purchased the shares allocated to Apartment 15C. The gravamen of the coop corporation's motion is that, inasmuch as the plaintiff only made that allegation "on information and belief," it is insufficient to sustain any of the causes of action asserted in the complaint, and renders the substantive causes of action time-barred.

The court recognizes that it is improper to predicate an award of summary judgment upon an affidavit that alleges material facts and representations upon information and belief, and no statement is made therein as to the sources of the information or grounds of belief (*see Oswald v Oswald,* 107 AD3d 45, 49 [3d Dept 2013]; *Onondaga Soil Testing, Inc. v Barton, Brown, Clyde & Loguidice, P.C.*, 69 AD2d 984, 984-985 [4th Dept 1979]). Similarly, where an allegation is based only upon information and belief, "without the slightest reference to the source of the information or the grounds for the belief" (*Zelnik v Bidermann Indus. U.S.A.*, 242 AD2d 227, 228 [1st Dept 1997]), it is insufficient to constitute proof of facts necessary to support a motion for leave to enter a default judgment (*see id*; *see also Henriquez v Purins*, 245 AD2d 337, 338 [2d Dept 1997]).

Nonetheless, although an allegation made upon information and belief lacks evidentiary value in connection with default and summary judgment motions, in which proof in evidentiary form is obligatory, this action is only at the pleading stage. As such, under the circumstances of this action, the assertion of certain facts upon information and belief is not fatal, at this juncture, to the claims that are based upon those allegations.

The defendants correctly note that, where an allegation is made upon information and belief, and thus renders a complaint completely speculative, dismissal may be warranted even at the pleading stage (*see Elmrock Opportunity Master Fund I, L.P. v Citicorp N. Am., Inc.,* 155 AD3d 411, 412 [1st Dept 2017] [key allegation in fraud action concerning what the defendants knew about disputed leasehold interests was made upon information and belief]; *Schwarz v Consolidated Edison, Inc.,* 147 AD3d 447, 448 [1st Dept 2017] [plaintiff in employment discrimination action alleged upon information and belief that supervisor who made critical remarks about him impliedly referred to his criminal record]; *Facebook, Inc. v DLA Piper, LLP [US]*, 134 AD3d 610, 612 n 1 [1st Dept 2015] [allegation in action alleging malicious prosecution and attorney deceit that defendant's attorney gave advice about disputed contract was made upon information and belief]). These cases, however, involved allegations of fraudulent inducement, which are subject to a heightened pleading standard (*see* CPLR 3016[b]) and all of the cases required the plaintiff to establish the defendant's state of mind. Conversely, where, as here, the truth of an allegation that is made upon information and belief may be readily established or disproven with minimal discovery, dismissal at the pleading stage is not required. The allegation that the defendants moved the terrace partition wall after the plaintiff's purchase of the shares referable to Apartment 15C is provable or disprovable with testimony, building plans, building permits, and construction contracts.

Inasmuch as the purpose of discovery "is to determine if material relevant to a claim or defense exists" (*Forman v Henkin*, 30 NY3d 656, 664 [2018]), and discovery has yet to commence in this action, the plaintiff is entitled to seek information to support his contention that

the defendants relocated the partition wall after he purchased shares in the coop corporation, information that is solely within defendants knowledge (*see* CPLR 3211[d]). Thus, dismissal pursuant to CPLR 3211(a)(1), (5), or (7) is not warranted at this early stage of litigation.

B. CPLR 3211(a)(1)---DEFENSE BASED UPON DOCUMENTARY EVIDENCE

"Under CPLR 3211(a)(1), a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see Ellington v EMI Music, Inc.*, 24 NY3d 239 249 [2014]; *Heaney v Purdy*, 29 NY2d 157 [1971]). For evidence to qualify as "documentary," it must be "unambiguous, authentic, and undeniable" (*Fontanetta v John Doe 1*, 73 AD3d 78, 84-86 [2d Dept 2010]). Affidavits do not qualify as documentary evidence (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]; *Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d at 85; *Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]). Nor do e-mail messages or transcripts of trial testimony constitute documentary evidence (*see Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc.*, 10 AD3d 267, 271 [1st Dept 2004]). In other words, to be considered "documentary," evidence not only must be unambiguous, but of undisputed authenticity (*see* Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:10, at 21-22; *Fontanetta v John Doe 1*, 73 AD3d at 86). If the evidence contained in records may be controverted, the evidence cannot be considered "documentary" (*see Phillips v Taco Bell*, 152 AD3d 806, 807 [2d Dept 2017]).

The coop corporation relies upon its offering plan, the June 12, 1987 proprietary lease for Apartment 15C that had been issued to Opal Company, L.P. (Opal), the September 26, 2007 assignment of that proprietary lease to the plaintiff, the proprietary lease for Apartment 15B that was also issued to Opal, and the July 29, 1987 assignment of that proprietary lease to TRNC. None of those documents conclusively establishes the precise location of the terrace partition

wall separating Apartments 15B and 15C between 1987 and 2007, and none of them establishes that the defendants did not relocate the wall after September 26, 2007. Hence, the coop corporation's submissions do not warrant dismissal pursuant to CPLR 3211(a)(1).

C. CPLR 3211(a)(5)---STATUTE OF LIMITATIONS

To secure dismissal of the complaint as time-barred, the coop corporation had the initial burden of establishing that the action was commenced after the expiration of relevant limitation period. If the coop corporation satisfied its initial burden in this regard, the plaintiff was obligated to raise a question of fact as to whether the statute of limitations was tolled or was otherwise inapplicable, or whether he actually commenced the action within the applicable limitations period (*see Williams v New York City Health & Hosps. Corp*., 84 AD3d 1358, 1359 [2d Dept 2011]).

The limitations period applicable to causes of action alleging trespass to property is three years (*see* CPLR 214[4]; *Jemison v Chichlow*, 139 AD2d 332, 336 [2d Dept 1988]). To determine the statute of limitations for a declaratory judgment action, the court must "examine the substance of that action to identify the relationship out of which the claim arises and the relief sought" (*Solnick v Whalen*, 49 NY2d 224, 229 [1980]; *see Matter of Doorley v DeMarco*, 106 AD3d 27, 33 [4th Dept 2013]). If the rights of the parties may be resolved in a different form of proceeding for which a specific limitations period applies, then the court must apply that period (*see Solnick v Whalen*, 49 NY2d at 229-230). Inasmuch as the three-year limitations period for trespass actions applies to this action, the declaratory judgment action is also subject to a three-year limitations period. Nonetheless,

> "[i]f [an] action is deemed one for trespass, then the cause of action will accrue at the time the trespass occurs. Trespasses of a continuing character may be considered a continuing trespass which would give rise to successive causes of action each time there is an interference with a person's property so that relief would not be barred by the Statute of Limitations for interferences occurring within three years of the commencement of the action"

(*Sporn v McA Records*, 58 NY2d 482, 488 [1983]). In the first instance, inasmuch as the coop corporation submits no evidence demonstrating when the partition wall was initially erected, and no evidence from a person with knowledge showing either that it was never relocated, or was relocated prior to the plaintiff's purchase of Apartment 15C, it has failed to establish, prima facie, that the three-year limitations period applicable to trespass claims expired prior to the commencement of this action on May 2, 2019. In any event, a factual dispute exists as to whether the trespass is continuing for limitations purposes.

The limitations period applicable to actions to recover for breach of contract is six years from the date of breach (*see* CPLR 213[2]). The plaintiff alleges that the coop corporation breached the proprietary lease by leasing him a certain portion of the subject terrace and thereafter relocating the partition wall, or permitting it to be relocated, thus diminishing the contractually defined area of the terrace. He thus asserts that the coop corporation deprived him of the use and enjoyment of the entire terrace, in violation of the terms of the proprietary lease. As with the trespass cause of action, the coop corporation failed to adduce any evidence showing that the wall either was never relocated or, if it were relocated, that the task was completed more than six years prior to the date that the plaintiff commenced this action.

D. CPLR 3211(a)(7)---FAILURE TO STATE A CAUSE OF ACTION

When assessing the adequacy of a pleading in the context of a motion to dismiss under CPLR 3211(a)(7), the court's role is "to determine whether [the] pleadings state a cause of action" (*511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d 144, 151-152 [2002]). To determine whether a claim adequately states a cause of action, the court must "liberally construe" it, accept the facts alleged in it as true, and accord it "the benefit of every possible favorable inference" (*id*. at 152; *see Romanello v Intesa Sanpaolo, S.p.A*., 22 NY3d 881 [2013]; *Weil, Gotshal & Manges, LLP v Fashion Boutique of Short Hills, Inc*., 10 AD3d 267 [1st Dept 2004]; CPLR 3026). "The motion must be denied if from the pleading's four corners factual

allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co*., 98 NY2d at 152 [internal quotation marks omitted]; *see Guggenheimer v Ginzbu*rg, 43 NY2d 268 (1977).

Where, however, the court considers evidentiary material, the criterion becomes "whether the proponent of the pleading has a cause of action, not whether he [or she] has stated one" (*Guggenheimer v Ginzburg*, supra, at 275), but dismissal will not eventuate unless it is "shown that a material fact as claimed by the pleader to be one is not a fact at all" and that "no significant dispute exists regarding it" (*id*.).

1. TRESPASS

Interference with a person's property constitutes a trespass (see 61 NY Jur, Trespass, § 8, p 12; *Sporn v McA Record*s, 58 NY2d at 487). The elements of a trespass cause of action are an intentional entry onto the land of another without permission (*see Ivory v International Bus. Machines Corp*., 116 AD3d 121, 129 [3d Dept 2014]). This definition applies not only to land or a structure, but to a unit in a residential cooperative apartment building as well (*see Hill v Raziano*, 63 AD3d 682, 682-683 [2d Dept 2009]). The complaint states the necessary elements of a cause of action sounding in trespass to property. Moreover, the coop corporation has not established that a fact alleged by the plaintiff in connection with the trespass cause of action is not actually a fact, and there is a significant dispute regarding whether and when the partition wall was relocated. Hence, there is no basis upon which to dismiss the trespass cause of action for failure to state a cause of action.

2. DECLARATORY JUDGMENT

"'A motion to dismiss a declaratory judgment action prior to the service of an answer presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration'" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011], quoting *Staver Co. v Skrobisch*, 144 AD2d 449, 450 [2d Dept 1988]). "Thus, 'where a cause of action is

sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that cause of action should be denied'" (*DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725, 728 [2d Dept 2013], quoting *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150). Generally, a court may not summarily determine the merits of a properly pleaded declaratory judgment cause of action based on the pleadings alone (*see Matter of 24 Franklin Ave. R.E. Corp. v Heaship*, 74 AD3d 980, 980-981 [2d Dept 2010]). Nonetheless, a court may reach "the merits of a properly pleaded cause of action for a declaratory judgment upon a motion to dismiss for failure to state a cause of action where 'no questions of fact are presented [by the controversy]'" (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150, quoting *Hoffman v City of Syracuse*, 2 NY2d 484, 487 [1957]; *see Minovici v Belkin BV*, 109 AD3d 520, 524 [2d Dept 2013]). Under such circumstances, the motion to dismiss the cause of action for failure to state a cause of action "should be taken as a motion for a declaration in the defendant's favor and treated accordingly" (Siegel, NY Prac § 440 [5th ed]; *see Lanza v Wagner*, 11 NY2d 317, 334 [1962]; *Minovici v Belkin BV*, 109 AD3d at 524; *Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d at 1150).

In this instant matter, the allegations of the complaint are sufficient to make out a cause of action for declaratory relief, and there are clearly questions of fact presented by the controversy. Hence, dismissal of the declaratory judgment cause of action is not warranted at the pleading stage.

3. PERMANENT INJUNCTION

> "To sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a 'violation of a right presently occurring, or threatened and imminent,' that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor"

(*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014], quoting *Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]; *see Aponte v Estate of Rene Aponte*, 172 AD3d 970, 973-974

[2d Dept 2019]; *Lemle v Lemle*, 92 AD3d 494, 500 [1st Dept 2012], citing *Flow v Svenningsen*, 58 AD3d at 675). The complaint unambiguously alleges that the coop corporation is presently violating the plaintiff's property rights by maintaining the terrace partition wall several feet into the terrace area allocated to Apartment 15C, and that only a mandatory permanent injunction compelling the relocation of the terrace partition wall would afford the plaintiff an adequate remedy. To the extent that the plaintiff alleges that the wall encroaches on his property, and deprives him of the full use of that property, he has alleged irreparable harm absent the injunction. To the extent that the plaintiff asserts that the coop corporation wrongfully moved the wall so as to decrease the terrace space that should have been allocated to Apartment 15C, the balance of equities tips in the plaintiff's favor, inasmuch as the cost of the work to move the wall is alleged to be inconsequential. Hence, the complaint states a cause of action for permanent injunctive relief compelling the removal and relocation of the terrace partition wall (*see Arcamone-Makinano v Britton Prop., Inc.*, 156 AD3d 669 [2d Dept 2017] [awarding a permanent injunction compelling the removal of unauthorized encroachments on real property]). Whether the plaintiff ultimately will succeed on this cause of action is not before the court.

4. BREACH OF CONTRACT

The elements of a cause of action alleging breach of contract are the "formation of a contract between the parties, performance by the plaintiff, the defendant's failure to perform, and resulting damage" (*Flomenbaum v New York Univ.*, 71 AD3d 80, 91 [1st Dept 2009]). Where a proprietary lease provides that the owner shall not interfere with a tenant's use and enjoyment of a leasehold, and the owner nonetheless interferes by substantially and materially depriving the tenant of the benefit of such use and enjoyment, the owner has breached its contractual obligations (*see Drapaniotis v 36-08 33rd St. Corp.*, 48 AD3d 736, 737 [1st Dept 2008]; *cf. ZMoore, Ltd. v Kingman Mgt., LLC*, 154 AD3d 603, 604 [1st Dept 2017] [no breach of lease where landlord takes common space]). The complaint thus states a cause of action sounding in breach of contract. Moreover, the evidence submitted by the coop corporation does

not establish that a fact alleged by the plaintiff is not a fact at all, or that there is no significant dispute concerning it. Specifically, the coop corporation relies on the terms of the offering plan, pursuant to which a purchaser of shares takes a unit "as is." None of the evidence submitted by the coop corporation demonstrates what the layout, dimensions, or condition of the terrace was as of the September 26, 2007 purchase date, and none indicates the location of the terrace partition wall. Hence, that contractual clause does not defeat the breach of contract cause of action, inasmuch as the plaintiff alleges that, regardless of the condition of the terrace on the purchase date, the coop corporation altered its layout and dimensions.

5. ATTORNEYS' FEES

The plaintiff has also stated a cause of action to recover attorney's fees. Real Property Law § 234 implies into every lease of residential real property

> "a covenant by the landlord to pay to the tenant the reasonable attorneys' fees and/or expenses incurred by the tenant as the result of the failure of the landlord to perform any covenant or agreement on its part to be performed under the lease or in the successful defense of any action or summary proceeding commenced by the landlord against the tenant arising out of the lease"

(*see generally Troy v Oberlander*, 146 AD2d 460 [1st Dept 1989]). The plaintiff has alleged and shown that the proprietary lease provided for an award of attorney's fees to the coop corporation, as landlord, if the corporation prevailed in a proceeding against him. Since the coop corporation is contractually authorized to recover such fees in a dispute, the plaintiff has a right to recover such fees if he prevails here (*see Graham Ct. Owner's Corp. v Taylor*, 24 NY3d 742 [2015]). Contrary to the coop corporation's suggestion, New York recognizes a cause of action to recover attorneys' fees pursuant to a contractual provision (*see Medical Arts-Huntington Realty, LLC v Meltzer Rosenberg Devel., LLC*, 149 AD3d 824 [2d Dept 2017]; *Dee Cee Assoc. LLC v 44 Beehan Corp.,* 148 AD3d 636, 641-642 [1st Dept 2017]; *Yellow Book of N.Y., L.P. v Cataldo*, 81 AD3d 638 [2d Dept 2011]). Whether the plaintiff "has" such a cause of action must await the determination of which party, if any, is the prevailing party in this action.

IV. CONCLUSION

The court has no opinion at this juncture as to whether the complaint will survive a summary judgment motion after relevant discovery is conducted. The merits of the plaintiff's causes of action hinge on whether he can adduce any evidence that the defendants relocated the terrace partition wall between Apartments 15B and 15C after he purchased Apartment 15C on September 26, 2007. Until evidence regarding that issue is developed, however, there is no basis for dismissing the complaint on the grounds that documentary evidence provides a complete defense thereto, that the action is time-barred, that the complaint fails to state a cause of action.

Accordingly, it is,

ORDERED that the motion of the defendant 333 East 46th St. Apartment Corp. to dismiss the complaint as against it is denied; and it is further,

ORDERED that the defendant 333 East 46th St. Apartment Corp. shall serve and file an answer to the complaint in accordance with CPLR 3211(f); and it is further,

ORDERED that the parties shall appear for a remote preliminary conference via the Microsoft Teams application on December 8, 2020, at 11:00 a.m., and the court shall send counsel for the parties an email invitation containing the necessary link.

This constitutes the Decision and Order of the court.

10/1/2020
DATE

JOHN J. KELLEY, J.S.C.

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED	X	DENIED		GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE