| **Barros v Chelsea Hotel Owner, LLC** |
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| 2020 NY Slip Op 33643(U) |
| November 2, 2020 |
| Supreme Court, New York County |
| Docket Number: 162120/2019 |
| Judge: Lynn R. Kotler |
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# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

RITA BARROS

- v -

CHELSEA HOTEL OWNER, LLC et al.

INDEX NO. 162120/2019

MOT. DATE

MOT. SEQ. NO. 001

The following papers were read on this motion to/for dismiss

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|---|---|
| Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits | NYSCEF DOC No(s)._____ |
| Notice of Cross-Motion/Answering Affidavits — Exhibits | NYSCEF DOC No(s)._____ |
| Replying Affidavits | NYSCEF DOC No(s)._____ |

Defendants Chelsea Hotel Owner, LLC, SIR Chelsea LLC and Ira Drukier (defendants) move preanswer pursuant to CPLR 3211(a)(7) to dismiss plaintiff Rita Barros' (plaintiff or Barros) verified complaint. Plaintiff opposes the motion. The court's decision is as follows.

## FACTS

The following facts are alleged in the verified complaint. Plaintiff Barros is a rent stabilized tenant in apartment 1008 in the building located at 222 West 23rd Street, New York, New York (the Building), which is the Hotel Chelsea. Defendants Chelsea Hotel Owner (CHO) and SIR Chelsea LLC (SIR) are the owners of the Building that is located at 222 West 23rd Street in New York City and Defendant Ira Drukier (Drukier) is a principal of CHO. Plaintiff alleges that defendants have "willfully refused and failed to fix the damaged roof and rectify, eliminate and remedy this repeated water penetration into Apartment 1008 and the adjoining 10th floor corridor and public hallway, shafts, stairwells and electrical boxes" and that defendants were on notice of the situation." She references over fifty emails she sent to the defendants between 2017 and present. Plaintiff further claims that "for more than six (6) years [through the end of 2018], Apt. 1008 and the adjoining 10* floor corridor and public hallway, shafts, stairwells and electrical boxes of the Chelsea were repeatedly soaked, inundated and penetrated with water because water was regularly pouring into these locations from on or about the lower roof (12 F1 CO) of the building when it rained or when snow melted."

Defendants move to dismiss plaintiff's claims for 1) failure to state a claim for intentional infliction of emotional distress; 2) failure to state a claim for harassment; 3) failure to state a claim for private nuisance; and 4) failure to state a claim for breach of warranty of habitability. They characterize this lawsuit, which is related to a number of other actions that have been brought in this court (see Deborah Martin et al. v. Chelsea Hotel Owner LLC et al., Index Number 150594/2019 and Linda Jobe et al. v. Chelsea Hotel Owner LLC, Index Number 161445/2019) as "the latest in a string of litigation filed by

Dated: 11/2/20

HON. LYNN R. KOTLER, J.S.C.

**1. Check one:** ☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

**2. Check as appropriate: Motion is** ☐GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

**3. Check if appropriate:** ☐SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐FIDUCIARY APPOINTMENT ☐ REFERENCE

the same lawyers on behalf of a small minority of tenants in the Hotel Chelsea who will stop at nothing to prevent the building's rehabilitation, restoration, and preservation, despite the fact that the vast majority of tenants support the renovations and oppose the vocal minority's efforts to prevent the completion of the upgrades."

In support of the motion, defendants argue that plaintiff's allegations are too "vague and conclusory". They further assert that plaintiff is barred from litigating at least a portion of her claims asserted in the fourth cause of action because she settled those claims pursuant to a stipulation entered in a separate housing court proceeding entitled *Childs, et al., v. Chelsea Dynasty LLC, et al*. (Index No. HP 6219/11). The stipulation, which has been provided to the court by defendants, is dated April 29, 2016 (the stipulation"). Although plaintiff is not listed in the caption of that proceeding, pursuant to a separate consent order and so-ordered stipulation dated September 27, 2013 in the housing court proceeding, plaintiff was added as a petitioner to that proceeding by the Honorable Cheryl Gonzales.

Plaintiff opposes the motion and argues that "each of the four claims in the Verified Complaint states a cognizable cause of action under law. Further, plaintiff's counsel maintains that the fourth cause of action does not run afoul of the stipulation under a specific reservation of rights contained therein.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]. The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). A motion to dismiss the complaint for failure to state a cause of action "will generally depend upon whether or not there was substantial compliance with CPLR 3013." *Catli v Lindenman*, 40 AD2d 714, 337 NYS2d 46 [2d Dep't 1972] If the allegations are not "sufficiently particular to give the court and parties notice of the transactions or occurrences intended to be proved and the material elements of each cause of action", the cause of action will be dismissed. *Id.*

In their verified complaint, plaintiff asserts four causes of action against the defendants: [1] intentional infliction of emotional distress (IIED); [2] harassment; [3] private nuisance; and [4] breach of warranty of habitability.

**<u>Intentional Infliction of Emotional Distress</u>**

Defendants argue that plaintiff "fails to plead the required elements of IIED because the Complaint alleges no "extreme and outrageous conduct" by Defendants beyond a series of conclusory allegations". Defendants further argue that plaintiff fails to adequately pleads the intent and causation elements of IIED and instead rely on vague and conclusory allegations that Defendants "engaged in extreme and outrageous conduct, with intent to cause…severe emotional distress" and "maliciously harassed plaintiff so as to injure her in her capacity as a tenant". Defendants contend that plaintiff's claim for punitive damages fails for these same reasons.

Plaintiffs oppose the motion claim that she "details defendants' longstanding campaign of deliberate, systematic and malicious harassment of her, lasting years and that her claim "includes allegations of intent to cause…plaintiff to suffer injury in her capacity as a tenant…". Plaintiff contends that her emotional distress is detailed in 31 emails from her to Defendants from April 2029 to October 2019 and 56 other emails in 2017 and 2018 about the longstanding conditioning the building and plaintiff's apartment. Plaintiff further argues that there is "no decency in the course of conduct of defendants because of their deliberate failure and refusal to fix the building's leaking roof after years of flooding and leaks".

In order to assert a valid claim for IIED pursuant to New York law, a plaintiff must demonstrate the following elements: (i) extreme and outrageous conduct, (ii) an intent to cause, or disregard of substantial probability of causing, severe emotional distress, (iii) a causal connection between the conduct and the injury, and (iv) the resultant severe emotional distress. *Howell v. New York Post Co.*, 81 N.Y.2d 115,

121, 596 N.Y.S.2d 350 (N.Y. 1993). IIED claims are only viable when the plaintiff establishes that they were subjected to conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Murphy v. Am. Home Prods. Corp.*, 58 N.Y.2d 293, 303, 461 N.Y.S.2d 232 (N.Y. 1986)

Plaintiff's claim for intentional infliction of emotional distress fails. Here, plaintiff's claims that defendants failed to repair leaks over the course of years does not rise to the level ofconduct 'so outrageous in character, and so extreme in degree, and go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community'". *Fischer v. Maloney*, 43 NY2d 553, 557, quoting Restatement [Second] of Torts Sec. 46, comment d. The limited number of IIED claims that have been upheld were almost always supported by "allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff." *See Seltzer v. Bayer*, 272 A.D.2d 263, 709 N.Y.S.2d 21, 23 (1st Dep't 2000) Here, there are no facts to establish a course of conduct or "longstanding campaign" by defendants.

Based on the foregoing, plaintiff's 1st cause of action is severed and dismissed.

**HARASSMENT**

Plaintiff contends that she set forth "actual allegations" in the verified complaint and alleged in "great detail" that she was subjected to "intentional, willful and wanton harassment by defendant, for purposes of forcing her to vacate her apartment, and that such harassment included repeated flooding and interruption and discontinuance of essential services… and caused substantial interference with and disturbance to her…in her apartment".

Defendants argue that plaintiff's second cause of action alleging harassment should be dismissed because New York does not recognize a common-law cause of action for harassment. Defendant further contends that plaintiff's "purported claim for injunctive relief also fails because plaintiff does not plead a factual basis to support her claim and that "her vague and conclusory allegations that Defendants "intentionally and unreasonably…engaged in a campaign of deliberate, systematic and malicious harassment", are sufficient to state a claim of harassment. "

The court agrees. "New York does not recognize a common-law cause of action for harassment". *Edelstein v. Farber,* 27 AD3d 202 [1st Dept 2006] Plaintiff has failed to plead any facts showing that's defendants' alleged acts or omissions either caused or were intended to cause plaintiff to vacate her apartment. Moreover, if plaintiff's claims of harassment are based on "physical conditions of a dwelling or dwelling unit, such allegations must be based in part on one or more violations of record issued by the department [DHPD] or any other agency." NYC Administrative Code §27-2115(h)(2)(i). It is undisputed that the complaint does not allege that the Building has any violations of record. Plaintiff's reliance of section 27-2115(m) of the New York City Administrative Code that this court should "find that Class C immediately hazardous conditions existed" is rejected.

Based on the foregoing, plaintiff's 2nd cause of action for harassment is severed and dismissed.

**PRIVATE NUISANCE**

To prove private nuisance, plaintiff must allege "(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". *61 W. 62 Owners Corp. v. CGM EMP LLC*, 77 AD3d 330 [1st Dept. 2010] *aff'd as modified and remanded*, 16 NY3d 822 [2011]

To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land (*see* Restatement [Second] of Torts § 821D; *see also Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169 [1977]). The term "use and enjoyment" encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance (*see* Restatement [Second] of Torts § 821D, Comment b; *see also Nussbaum v Lacopo*, 27

N.Y.2d 311, 315, 317 N.Y.S.2d 347 [1970] However, not every annoyance will constitute a nuisance (*see* 2 Dolan, Rasch's Landlord and Tenant--Summary Proceedings § 30:60, at 465 [4th ed]). Nuisance imports a continuous invasion of rights--"a pattern of continuity or recurrence of objectionable conduct" *Frank v Park Summit Realty Corp.*, 175 A.D.2d 33, 34, 573 N.Y.S.2d 655 [1st Dept 1991], *mod on other grounds,* 79 N.Y.2d 789, 579 N.Y.S.2d 649 [1991]).

Here plaintiff argues that she has set forth factual allegation in the complaint pertaining to "defendant's persistent and recurring course of conduct of harassing plaintiffs. This course of conduct includes defendants' numerous refusals and failure to stop water from flooding and penetrating her apartment and the adjoining public hallway" and that "this harassing course of conduct was undertaken "intentionally" and unreasonably" by defendants for the purpose of having plaintiff to vacate her apartment, "that this course of conduct has "substantially interfered with plaintiff's comfort and safety in her apartment and building, and "that it has seriously impaired and continues to seriously impair plaintiff's use and enjoyment of the apartment". Plaintiff further argues that the portion of the motion that seeks to strike the demand for punitive damages must be denied.

The court disagrees. As defendant correctly points out, the complaint offers a "laundry list of purported defects but is silent on the impact that these defects had on Plaintiffs use and enjoyment of the building" and that the conditions have "seriously impaired and continue to seriously impair plaintiff's use and enjoyment". The court rejects plaintiff's claims that the dirty elevator, construction noise, ugly wires rise to the level of private nuisance. While these issues may be annoyances or inconveniences, not every annoyance constitutes a nuisance. Because plaintiff claims defendants' actions were "intentional" without factual basis, likewise, fails to rise to the level of willful acts and omissions required for punitive damages.

Based on the foregoing, plaintiff's 3rd causes of action are severed and dismissed.

**<u>Warranty of Habitability</u>**

To prove a claim for breach of the warranty of habitability, plaintiffs must show the extensiveness of the breach, the manner in which it affected the health, welfare or safety of the tenants, and the measures taken by the landlord to alleviate the violation. *See, Park W. Mgt. Corp.v. Mitchell,* 47 NY2d 316, 418 NYS2d 310[1979]. "A landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition". *Id* at 328

Defendants argue that plaintiff's claims for breach of warranty of habitability and demand for punitive damages fails to state a claim and should be dismissed because plaintiff does not allege the basic facts to give rise to a breach of warranty of habitably, much less punitive damages. Defendants further argue that plaintiff has settled "at least some of her breach of warranty of habitability claims against defendant and those portions of her claim covered by settlement should be dismissed" pursuant to CPLR 3211(a)(1).

Plaintiffs claim that "defendants conveniently disregard the actual allegations…as to how the numerous unsafe and unhealthy conditions that defendants forced upon plaintiff, including repeated flooding, water penetration, and prolonged deprivation of elevator and other basic services, impacted her health, safety and welfare". Plaintiff argues that there is no bass to strike her claim for punitive damages. Plaintiff further contends that defendants disregard the pertinent language of the stipulation, which provides in relevant part as follows:

> The parties agree that these rent abatements fully compensate the tenants for breaches of warranty that have occurred prior to the date of this stipulation and for the ongoing construction at the premises. However, this abatement does not include prolonged cut offs of electricity, internet service, water, heat, elevator or other basic services, or complications from landlord's contemplated work, including but not limited to pipes bursting, ceiling collapses or similar occl1rrcnces. In

> this agreement tenants reserve their rights to assert claims for breach of warranty or other claims if such conditions develop at the building.

Plaintiff does not argue that she is not bound by the stipulation. Indeed, the stipulation compensates plaintiff with a rent abatement for breaches of warranty that occurred prior to the date of the stipulation and for the ongoing construction at the premises. There can be no dispute on this record that even reading plaintiff's claims in the best light, her laundry-list of complaints do not delineate between claims that she settled vis-à-vis the stipulation and claims that she reserved her right to bring "if such conditions develop" as specified in the stipulation. Here, plaintiff alleges that "for more than six (6) years [through the end of 2018], Apt. 1008 and the adjoining 10* floor corridor and public hallway, shafts, stairwells and electrical boxes of the Chelsea were repeatedly soaked, inundated and penetrated with water because water was regularly pouring into these locations from on or about the lower roof." In the event plaintiff seeks to enforce the stipulation, she should bring an appropriate application for such relief.

The court will, therefore, dismiss the fourth cause of action with leave to replead her claims that she did not expressly settle and is therefore barred from asserting in this action within 30 days. Plaintiff's new pleading must plainly allege a breach of warranty of habitability that arose from conditions that developed due to either prolonged cut offs of services or complications from the landlord's contemplated work since the parties entered into the stipulation, or some other claim that was not expressly settled vis-à-vis the stipulation. Defendants shall answer or otherwise move to dismiss as per the CPLR.

Accordingly, it is hereby

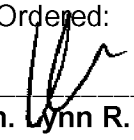
**ORDERED** that the motion is granted to the extent that the 1st, 2nd and 3rd causes of action are severed and dismissed; and it is further

**ORDERED** that the 4th cause of action is dismissed with leave to replead within 30 days from entry of this decision/order any claim for breach of warranty of habitability that plaintiff did not expressly settle in the April 29, 2016 stipulation that plaintiff entered into in *Childs, et al., v. Chelsea Dynasty LLC, et al.* (Index No. HP 6219/11). Defendants shall answer or otherwise move to dismiss as per the CPLR.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 11/2/20
New York, New York

So Ordered:



**Hon. Lynn R. Kotler, J.S.C.**