

Silverman v Park Towers Tenants Corp.

2021 NY Slip Op 32423(U)

November 22, 2021

Supreme Court, New York County

Docket Number: 655867/2020

Judge: Barbara Jaffe

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. BARBARA JAFFE PART 12

Justice

-----X

INDEX NO. 655867/2020

ROBERT SILVERMAN and KARA SILVERMAN,

MOTION DATE _____

Plaintiffs,

MOTION SEQ. NO. 003

- v -

PARK TOWERS TENANTS CORP., DANIELLE
TOUSSIE, MICHAEL TOUSSIE, DEBORAH
TOUSSIE,

**DECISION + ORDER ON
MOTION**

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 73-77, 89-101, 103 were read on this motion to _____ dismiss _____.

In two actions consolidated in this court for discovery and trial (NYSCEF 78), next-door-neighbor shareholders of a Manhattan co-op are at loggerheads. The Toussies, defendants here, commenced an action against the parties' cooperative corporation, defendant Park Towers, Index no. 150841/2021, alleging essentially that it is wrongfully attempting to terminate their proprietary lease based on false complaints of loud noises and music emanating from their apartment which is resided in solely by defendant Danielle Toussie. They seek declaratory and injunctive relief, and attorney fees.

In the instant action, plaintiffs, who live next-door to Danielle, allege that she regularly plays music too loudly, slams her door and, along with her parents, defendants Michael and Deborah, engages in other harassing conduct toward them. They advance causes of action against Toussie defendants for nuisance and injunctive relief, against Danielle for intentional

infliction of emotional distress or negligent infliction of emotional distress, and against Park Towers for a variety of causes of action. (NYSCEF 10). In their answer, Toussie defendants set forth counterclaims for intentional infliction of emotional distress, negligent infliction of emotional distress, and injunctive relief, and name Mei Mak, another resident of the same floor, in each counterclaim. (NYSCEF 91).

By notice of motion, Mak moves pursuant to CPLR 3211(a)(7) for an order dismissing the claims against her. Toussie defendants oppose.

I. DEFENDANTS' ANSWER (NYSCEF 91)

Defendants allege in their first counterclaim for intentional infliction of emotional distress, as pertinent to Mak, that plaintiffs, since on or about January 27, 2017, “acting in concert with Mak, have subjected Danielle to a campaign of harassment and infliction of emotional distress by, among other things, repeatedly making false claims that [she] has been disturbing [plaintiffs] by playing loud music and making loud noises in her apartment, . . . in a deliberate, calculated and unlawful effort to pressure and coerce [defendant Park Towers Tenants Corp.] to take action to unlawfully terminate [defendants’] Proprietary Lease and have Danielle evicted from her home.” They claim that as a result of the plaintiffs’ and Mak’s false claims, in March 2018, Park Towers “unlawfully issued the first of a total of three purported notices of ‘objectionable conduct.’”

Toussie defendants additionally allege that plaintiffs and Mak spy on Danielle and, on information and belief, obtained unauthorized access to her private Instagram account for the purpose of tracking and monitoring her comings and goings, thereby intentionally harassing and stalking her. At plaintiffs’ instance, moreover, Mak registered false noise complaints against Danielle, and with plaintiffs, confronted and intimidated Danielle, intentionally causing her to

feel “unsafe and fearful in her own home,” resulting in severe emotional distress and resort to medical treatment.

In their counterclaim for negligent infliction of emotional distress, as pertinent to Mak, defendants allege that plaintiffs and Mak owe Danielle a duty of care to not interfere with her quiet enjoyment of her home, which duty they are alleged to have breached by unreasonably endangering Danielle’s physical safety and mental well-being by engaging in conduct that caused Danielle to fear for her safety in her own home.

In their third counterclaim, as pertinent to Mak, Toussie defendants claim that they live in constant fear that plaintiffs and Mak will continue to lodge false claims against them in their deliberate effort to force Park Towers to terminate their proprietary lease and have them evicted, and that plaintiffs, acting in concert with and aided and abetted by Mak, orchestrated and instigated Park Tower’s ongoing, three-year campaign of harassment against them. Absent an adequate remedy at law, Toussie defendants assert that it is necessary to enjoin and restrain plaintiffs and Mak from continuing to lodge false claims against them.

II. CONTENTIONS

A. Mak (NYSCEF 74)

Mak accuses Toussie defendants of dragging her into their feud with plaintiffs based on sparse “trivial and conclusory allegations,” which are bereft of facts setting forth how she stalked and harassed Danielle. Rather, she claims, the sole specific allegations about Mak is that she and one of the plaintiffs loudly spoke in the hall, falsely complained about Danielle, spied on her, gained unauthorized access to her Instagram account, and confronted and intimidated her, making her feel unsafe and fearful in her own home, none of which amounts to the extreme and outrageous conduct that must support a cause of action for intentional infliction of emotional

distress. And, that Mak engaged in some form of generic and conclusory harassment “in concert” with the plaintiffs, and absent an allegation of a causal connection to Danielle’s alleged injury, she maintains, also does not suffice to state a claim.

Mak argues that Toussie defendants cannot state a cause of action for negligent infliction of emotional distress as they allege no duty owed them by her, and she reiterates her argument that absent allegations demonstrating that her conduct was extreme and outrageous or that she was acting in concert with plaintiffs, they state no claim for negligent infliction of emotional distress. She also contends that Danielle’s allegations of fear are fatally conclusory.

In seeking a dismissal of Toussie defendants’ request for injunctive relief, Mak argues that such a claim constitutes a remedy, not a cause of action.

B. Toussie defendants

Affidavit of Danielle Toussie (NYSCEF 89)

Danielle alleges in an affidavit in support of her opposition to Mak’s motion that she lodged many complaints to Park Towers about Mak’s harassing and abusive conduct toward her, offering emails she had sent to the managing agent reporting on Mak’s conduct:

In an email dated October 17, 2019, Danielle informed the managing agent that Mak, plaintiffs’ best friend who lived on the same floor, had started to harass her, in that a few months earlier, she accosted her in the hallway as she exited her apartment and falsely and “rudely yell[ed] at [her] . . . to watch where [she was] going and that [she] almost knocked her over.” She also reported in the email that some time in September of 2019, Mak yelled at her, saying that she is a “terrible neighbor,” and then, on October 17, 2019, Mak slammed her door when she saw Danielle in the hallway, yelled at her “What’s your problem?” and continued to yell at her in the elevator. (NYSCEF 92).

By email dated February 10, 2020, Danielle expressed her suspicion that Mak's claim that loud noise emanated from her apartment, lodged soon after the October 17 email, was fabricated in an attempt to influence the Park Towers board which was soon to meet and vote. She also offered an explanation of why the accusations against her are false. (NYSCEF 93).

By email dated February 27, 2020, the managing agent advised Danielle that an umbrella had been left outside her apartment and asked that she remove it as it constitutes a violation of the city fire code. A photograph was attached. In response, Danielle denied that it was her umbrella and asserted that she was certain that the person who sent the photograph knew who owned it and she considered it harassment. Soon thereafter, she emailed the managing agent a photograph purportedly of a different umbrella outside a different apartment on her floor and queried whether the tenant of that apartment had received the same communication. (NYSCEF 94).

On February 8, 2021, Danielle emailed the managing agent that Mak, on seeing her in the hallway, slammed her front door "as loudly as possible that all the walls shook and I got an adrenaline rush from the shock of the sound." (NYSCEF 95). And by email dated February 27, 2021, she wrote that as she stood by her front door, Mak "happened to come out of her apartment to go downstairs" and "start[ed] trying to video or take Photos of me while her husband made rude comments to [her]." (NYSCEF 96).

In an email dated March 2, 2021, Danielle recounted to the managing agent her housekeeper's report that on February 21, 2021, as she rode the elevator with Mak, Mak "stared and glared at her and made her feel extremely uncomfortable," and continued to do so as the housekeeper entered Danielle's apartment. (NYSCEF 98).

And on August 27, 2021, Danielle complained by email to the managing agent that Mak

videotaped her through her front door which was open in anticipation of a friend's arrival. (NYSCEF 97).

Danielle also alleges that Mak used "highly offensive words when speaking with [plaintiffs] about her as a bad person and bad neighbor," and that she conspired with plaintiffs to use an incident with Robert Toussie as a predicate for terminating Toussies defendants' proprietary lease, and acting with plaintiffs in viewing her social media. As a result, Danielle maintains, she has taken her program director's advice to see the psychiatrist at the hospital where she works and is now treated by private therapists.

Based on this alleged conduct, Toussie defendants argue that having alleged "a systematic pattern of harassment and abuse by Mak, acting in concert with the Silvermans, over a period of several years . . . ," they have stated, *prima facie*, the elements of intentional infliction of emotional distress. (NYSCEF 101).

C. Mak reply (NYSCEF 102)

Mak denies Toussie defendants' assertion that because she engaged in the alleged conduct for an extended period of time, she may be held liable for intentional infliction of emotional distress, observing that according to the pertinent case law, it is the intensity of the conduct that is determinative, not its duration. She maintains that the allegation set forth in Danielle's affidavit that she acted in concert with plaintiffs is no less conclusory than her pleading and constitutes an improper attempt to "tag" her with plaintiffs' conduct absent specifics. And, as negligent infliction of emotional distress also requires as an element extreme and outrageous conduct, Mak contends that Toussie defendants fail to state a claim for it as well, and that they fatally fail to allege when, where, or how she endangered Danielle's physical safety, or caused Danielle to fear for her safety.

III. ANALYSIS

A. Intentional infliction of emotional distress

The elements of a cause of action for intentional infliction of emotional distress are “(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress” (*Chanko v Am. Broad. Companies Inc.*, 27 NY3d 46, 56 [2016], quoting *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). To be sufficiently outrageous, the alleged conduct must go “beyond all possible bounds of decency” and be “utterly intolerable in a civilized community.” (*Marmelstein v Kehillat New Hempstead*, 11 NY3d 15, 23 [2008], quoting *Murphy v Am. Home Prod. Corp.*, 58 NY2d 293, 303 [1983]; *see also Chanko*, 27 NY3d at 57, quoting *Howell*, 81 NY2d at 122 [standard for outrageousness so strict that of every claim considered by Court of Appeals, each has failed]). The element of outrageous conduct, moreover, “serves the dual function of filtering out petty and trivial complaints that do not belong in court, and assuring that plaintiff’s claim of severe emotional distress is genuine.” *Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; *164 Mulberry St. Corp. v Columbia Univ.*, 4 AD3d 49, 56 [1st Dept 2004] [conduct must consist of more than mere insults, indignities, and annoyances]).

While an individual act may be insufficiently extreme and outrageous to state a claim, “a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff” is actionable (*Seltzer v Bayer*, 272 AD2d 263, 264-65 [1st Dept 2000]), although the rigorous standard applied to individual acts does not apply to such a campaign (*Scollar v City of New York*, 160 AD3d 140, 146 [1st Dept 2018]).

Based on the foregoing, it must be determined whether Mak’s alleged conduct in

accosting and yelling at Danielle on three occasions between July and October 2019, falsely accusing her of leaving her umbrella outside her apartment in February 2020, glaring at her housekeeper in February 2021, twice photographing or taping her between February and August 2021, and acting in concert with plaintiffs in harassing her by speaking ill of her with them, attempting to use an incident involving defendant Robert Toussie as a basis for terminating Toussie defendants' proprietary lease, and monitoring her with plaintiffs by obtaining unauthorized access to her Instagram account constitutes a longstanding campaign of deliberate, systematic, and malicious harassment.

Here, the allegations, viewed in the light most favorable to Toussie defendants, reflect that Mak's acts were deliberate and, as they were somewhat regular and directed solely at Danielle, it cannot be said that they were not systematic and malicious given the alleged intent she shared with plaintiffs of terminating the proprietary lease and evicting Danielle. Thus, Mak does not sustain her burden of demonstrating that, as a matter of law, the facts alleged do not state a cause of action for intentional infliction of emotional distress or negligent infliction of emotional distress. There being alleged causes of action for which the remedy of a permanent injunction may be appropriate, Mak offers an insufficient basis for dismissing the cause of action for a permanent injunction.

11/22/2021
DATE


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BARBARA JAFFE, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> DENIED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
CHECK IF APPROPRIATE:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE