Makris v Quartz Assoc., LLC
2022 NY Slip Op 32297(U)
July 14, 2022
Supreme Court, New York County
Docket Number: Index No. 101022/2010
Judge: Francis A. Kahn III
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. FRANCIS KAHN, III **PART 32**

Acting Justice

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INDEX NO. 101022/2010

ELENI MAKRIS,

MOTION DATE

Plaintiff,

MOTION SEQ. NO. 005, 006

- v -

QUARTZ ASSOCIATES, LLC, EMPIRE MANAGEMENT AMERICA CORP, DOV BENNISH, APARTMENTS BY OWNERS, INC., ABO VACATION RENTALS, DARREN LACHAR, MICHAEL EISENBERG and JOHN/JANE DOE NO. 6 through JOHN/JANE DOE NO. 10,

Defendants.

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DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 24-70, 73-89, 91-99, 123-127, 129-135, 137-142, 146-150; (Motion 006) 100-122, 128, 136, 143-145

were read on these motions/cross-motions for SUMMARY JUDGMENT.

Upon the foregoing documents, the motions and cross-motions are decided as follows:

In August 2008, Plaintiff Eleni Makris signed a one-year lease for Apartment C located on the first floor of the building at 213 East 31st Street, New York, New York with a term of September 1, 2008 to August 31, 2009. Plaintiff entered into this lease agreement with Defendant Quartz Associates, LLC., ("Quartz"), the owner of the building. Defendant Empire Management America Corp., ("Empire") managed the building. On July 15, 2009, Plaintiff left her apartment for a vacation. Before she left, Plaintiff paid her rent through August 31, 2009, to Empire but gave no indication that she would be renewing her lease. Upon her return to the apartment on August 24, 2009, Plaintiff found that many of her belongings were removed from the apartment.

During this time period, Defendant Apartment by Owners, Inc., ("A.B. Owners") sub-leased apartments in this building. Defendant Darren Lachar ("Lachar") is the president and principal of A.B. Owners that did business as Defendant ABO Vacation Rentals[1] ("ABO Vacation") which engaged in transient rentals of its sub-leased apartments. A.B. Owners employed Defendant Michael Eisenberg ("Eisenberg") who assisted in apartment rentals. One of the apartments A.B. Owners leased was apartment 1-C, one floor above Plaintiff's apartment. Defendant Dov Bennish ("Bennish"), as a licensed salesperson, sold and advertised apartments for A.B. Owners. In 2008, Bennish signed a two-year lease with Quartz for apartment 1-C, but he never resided in or paid rent for same. Instead, A.B. Owners paid the rent and subleased this apartment.

In August 2009, after the occupants of Apartment 1-C finish their short-term stay, Eisenberg had the apartment cleaned in preparation for the next subtenant. Around this same time, Empire assumed that Plaintiff

[1] According to Lachar's affidavit, "ABO [Vacation] never was registered, filed or formed as a formal legal entity – corporation, partnership, limited liability company, joint venture or otherwise."

was not renewing her lease and decided to prepare the apartment for a new tenant.[2] Despite the use of unique keys for the locks of these apartments so to prevent unauthorized entry, Plaintiff alleges that Empire/Quartz and/or A.B. Owners/ABO Vacation, wrongly entered Plaintiff's apartment and discarded her belongings. Plaintiff avers in her affidavit that she secured her apartment before she left for her vacation. Upon her return on August 24, 2009, the apartment was locked. She opened the door using her single key to discover her television, iPod, cell phone radio, jewelry, clothes, framed photographs, shoes, purses, and law school books and notes were gone. After Plaintiff discovered that her property had been removed she called the police.

In her amended complaint, Plaintiff asserts causes of action against the Defendants for negligence, trespass to chattels, trespass to land, breach of lease and covenant of quiet enjoyment, conversion, constructive eviction, statutory action for forcible or unlawful entry and intentional infliction of emotional distress. The named Defendants break into two groups, Quartz and Empire ("Quartz/Empire Defendants") in one group; A.B. Owners, ABO Vacation, Lachar, Bennish and Eisenberg ("A.B. Defendants") in the other. Each Defendant group answered wherein they asserted crossclaims for indemnification and contribution against the other Defendant group.

Now, all parties move for summary judgment pursuant to CPLR §3212. By Motion Sequence 005, A.B. Defendants seek dismissal of Plaintiff's amended complaint and all crossclaims. Although not stated in their notice of motion, the A.B. Defendants further seek sanctions against Quartz Empire Defendants for spoliation of evidence. Quartz Empire Defendants cross-move for summary judgment on their crossclaims against A.B. Defendants and dismissal of A.B. Defendant's crossclaims. Plaintiff cross-moves for partial summary judgment on the issue of liability as against A.B. Defendants on her causes of action for negligence, trespass to chattels, trespass to land and conversion. By Motion Sequence 006, Quartz/Empire Defendants seek dismissal of Plaintiff's amended complaint.

"[T]he proponent of a summary judgment motion must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993] *citing Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]; *Zapata v Buitriago*, 107 AD3d 977 [2d Dept 2013]). Failure to make such a showing requires the denial of the motion, regardless of the sufficiency of the papers in opposition (*see Alvarez v Prospect Hospital*, 68 NY2d at 324; *see also Smalls v AJI Industries. Inc.*, 10 NY3d 733, 735 [2008]). Once a *prima facie* demonstration has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action (*see Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

As to the branch of Plaintiff's cross-motion on her negligence cause of action, Plaintiff was required to demonstrate the existence of a legally recognized duty owed by Defendants to her (*see Gilson v Metropolitan Opera*, 5 NY3d 574, 576 [2005]; *see Lauer v City of New York*, 95 NY2d 95, 100 [2000]), a breach of that duty and injury proximately resulting therefrom (*see Solomon v City of New York*, 66 NY2d 1026, 1027 [1985]; *Baptiste v New York City Transit Authority*, 28 AD3d 385, 386 [1st Dept 2006]).

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[2] Dimitria Magoulas, Empire's Leasing Coordinator, and Ramin Shalom, Empire's Property Manager, typically kept logs regarding conversations with tenants and other Empire personnel during the re-letting process but in this case, they discarded any notes they may have had without turning them over to the other parties in discovery.

Plaintiff asserts that A.B. Defendants breached the duty of care owed to her by sending their cleaning person "Hannah" into her apartment building unescorted with confusing apartment numbers and potentially with a master key. Plaintiff claims A.B. Defendants further breached their duty by not investigating when Hannah immediately called to report finding an abundance of property left in the apartment that she was sent to clean. Plaintiff further asserts Hannah was negligently selected and trained which resulted in Hannah wrongfully entering and removing Plaintiff's property from the apartment.

Robert Dress ("Dress"), a non-party, was deposed and testified he witnessed the removal of property from Plaintiff's apartment. Dress averred he lived in the building adjacent to Plaintiff's building. He stated that one morning in August 2009, he observed Plaintiff's belongings on the sidewalk. Dress testified he observed a woman go in and out of Plaintiff's apartment through a window. He briefly spoke to the woman as she was removing this property and placing it on the other side of a retaining wall, onto the sidewalk. Dress said she spoke limited English. He described her as Asian, five-feet, two-inches tall, 20 to 35 years old, with brown eyes. Dress also saw "a shiny apartment unit key" that bore a tag that read either "C" or "1-C." Later that day, he saw multiple photographs of Plaintiff and her boyfriend on top of stacks of books, notebooks and looseleaf papers along with some clothing out on the sidewalk.

Mohamed Moutraji ("Moutraji"), a non-party employed by A.B. Owners, testified that in 2009 he worked repairing and cleaning apartments that A.B. Owners subleased. During that year, he took orders from Lachar, Eisenberg, or the subtenant. Moutraji averred that he supervised four or five cleaning personnel, all female, including Hannah, whom he confirmed as Asian. He also described her to be in her twenties, five-feet, four-inches tall, skinny with black hair and spoke "a little bit" of English. He testified that Hannah worked at a nearby dry cleaners used by A.B. Owners and was hired in 2009 by Eisenberg when a position became available. Hannah only worked for A.B. Owners for a couple of weeks. On the day in question, Moutraji stated he used Lachar's car to pick up Hannah from the dry cleaners took her to 213 East 31st Street to clean apartment 1-C. Hannah brought sheets and towels as well as cleaning supplies that were provided by A.B. Owners. Moutraji stated he gave Hannah a key to the apartment. Thereafter, Moutraji testified that Hannah called and said there was "a lot of stuff in the apartment" and she didn't know what to do. Moutraji averred he called Eisenberg who stated he confirmed subtenants departed and said Hannah could resume cleaning. Moutraji testified that Hannah had never cleaned in any apartments in that building previously, that he never informed her Apartment 1-C was on the second floor and that Hannah was never instructed to bring any property found in the apartment to A.B. Owners' office. Neither he nor anyone else checked Hannah's work upon completion. Apparently, Hannah was terminated by Moutraji at the direction of Eisenberg.

Deborah Petti ("Petti"), a tenant who lived across the hall from Plaintiff in Apartment D, testified that the ground floor apartments were identified by a single letter and the second floor apartments were numbered with a 1 and a letter. She claimed that this caused confusion. Petti averred that shortly before Plaintiff returned from her vacation, she saw a man and a woman attempting to enter Plaintiff's apartment using keys that did not open her door. She claims they sought her assistance and told her that the landlord had given them the key. Later, she observed the door to Plaintiff's apartment was open and the doorknob had been removed and was on the floor. Thereafter, Petti claims she observed the doorknob had been reattached to Plaintiff's door.

Defendant Eisenberg testified he and Lachar are childhood friends and that he began working for A.B. Owners in 2007 after he graduated from New York Law School. Eisenberg testified he and Lachar were involved Plaintiff's leasing process. He stated that when apartment in the subject building became vacant, Empire would install a common cylinder lock on the unit that could be opened with a master key, typically the bottom lock. He confirmed A.B. Owners had a key to Apartment C and so long as Plaintiff or Empire never changed the lock after Plaintiff moved into Apartment C, A.B. Owners could still gain access to Plaintiff's

apartment with the master key. He did not know ABO Vacation Rentals. Eisenberg averred that Bennish leased Apartment 1-C, but never resided there. A.B. Owners paid the rent and sublet this apartment. Eisenberg could not recall his level of involvement in hiring cleaning ladies to clean this apartment. He did recall one person from the laundromat hired by Moutraji to clean Apartment 1-C. He described her as Asian and fluent in English. He stated that Lachar made the decision to terminate her employment after it was discovered the property was removed from Plaintiff's apartment. Eisenberg claimed that no employee of A.B. Owners ever instructed cleaning personnel how to perform their work.

Defendant Lachar testified that he formed A.B Owners in April 2004 and is its sole owner and director. The company conducted no business until he developed relationships with apartment landlords in order for his company to be able to rent their vacant apartments. Lachar averred he formed Corporate Acquisitions, Inc., in Florida as a management company to maintain apartments his companies rented. In addition to A.B. Owners, Lachar started multiple other companies to sublease apartments. In 2012, A.B. Owners became dormant when Lachar formed USA Stay, LLC in Delaware to continue his leasing enterprise. Lachar acknowledged Moutraji is currently an employee of Corporate Acquisitions. Lacher testified that in 2009 A.B. Owners paid Moutraji as an independent contractor to manage the apartments and keep them in good condition. This included making sure the apartments were cleaned before a new person moved in. Lacher stated Moutraji was supervised by Eisenberg and claimed he had no role in cleaning the apartments. It was left to Eisenberg to determine when apartments would be cleaned after a tenant vacated. Lachar stated he assumed cleaning people were hired as needed by Eisenberg and paid in cash. Lachar denied knowing anything regarding the subject incident. He averred that Eisenberg informed him that "someone was accusing [A.B. Owners of being] involved somehow in a burglary of some stuff being missing from a tenant who was with Empire Management." At the time of the incident, Moutraji called Eisenberg and said one of the apartments had some stuff in it. Lachar did not know what type of stuff was left. He did not know if this was Plaintiff's property. He had no idea what happened to these belongings. Lachar stated he "had no management oversight of this," as this was completely handled by Eisenberg and Moutraji. Subsequently, Lachar learned that these belongings ended up on the curb for trash collection. Lachar denied possessing master keys for any apartment. He stated that when apartments in Empire's building were rented, there would be a building key and a key to the individual apartment. However, for purposes of showing vacant apartments in an Empire building, Empire provided Lachar a master key. This key would only open the lower lock and not the deadbolt lock above. According to Lachar, once a new tenant rented an apartment, the landlord is required to change the lock. Lachar confirmed that Bennish signed the lease to Apartment 1-C, but that the rent was paid by A.B. Owner and then sub-leased by A.B. Owner.

Defendant Bennish testified he signed the lease for Apartment 1-C in 2008 and received $100.00 consideration from Lachar. Bennish admitted he never resided in Apartment 1-C and its purpose was for short-term rentals. Bennish stated his relationship with A.B. Owners was an independent contractor leasing apartments. He identified ABO Vacation Rentals as an entity that leased furnished apartments on a short-term basis which was operated by both Lachar and Eisenberg. Bennish testified A.B. Owners and ABO Vacation Rentals occupied the same office space, but he did not know which entity sub-leased Apartment 1-C. Bennish claims he had no involvement in subletting Apartment 1-C, installing partition walls therein or in the cleaning of the apartment.

With the above testimony, the issues of breach and causation are established. It is undisputed that Plaintiff's apartment was wrongfully entered and certain of her belongings removed. Likewise, the above testimony leaves no doubt Hannah was directly responsible for removing Plaintiff's belongings at the behest of Defendant A.B. Owner via Moutraji. What its less apparent is whether any Defendant is liable for Hannah's actions. Unlike an employee, a party is generally not liable for the negligent acts of an independent contractor (*see Kleeman v Rheingold,* 81 NY2d 270, 273 [1993]; *Perez v NES Medical Services of New York, P.C.,*

____AD3d____, 2022 NY Slip Op 02031 [2d Dept 2022]; *Lombardi v Alpine Overhead Doors, Inc.*, 92 AD3d 921 [2d Dept 2012]). "Control of the method and means by which the work is to be done is the critical factor in determining whether one is an independent contractor or an employee for purposes of tort liability" (*see Sanabria v Aguero-Borges*, 117 AD3d 1024, 1025 [2d Dept 2014]). However, when an employer is liable when it is negligent in selecting, instructing, or supervising the contractor (*see Begley v City of New York*, 111 AD3d 5, 28 [2d Dept 2013]). Further, a corporate employee who participates in the commission of a tort may be held individually liable (*see Komonaj v Curanovic*, 90 AD3d 305 [1st Dept 2011]; *see also Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012]).

While resolution of this issue normally raises a question for the trier of fact, where, as here, the evidence is derived from Defendants' uncontradicted deposition testimony, the issue may be determined as a matter of law (*see Lazo v Mak's Trading Co., Inc.*, 199 AD2d 165, 166 [1st Dept 1993]). Taken in a light most favorable to the Defendants, the testimony demonstrates that Hannah acted with little or no apparent prior experience, was not provided any training or guidance, possessed a limited ability to communicate, was given a master key, entered Plaintiff's apartment and removed her belongings. When presented with notice of the error, Eisenberg authorized Hannah to continue. As a result, A.B. Owners terminated Hannah. This evidence established Defendants A.B. Owners asserted sufficient control over Hannah to base liability and that Eisenberg facilitated same despite notice of the wrong.

As such, Plaintiff has made a *prima facie* case for negligence against Defendants A.B. Owners and Eisenberg. For purposes of this cause of action, it makes no difference how Hannah was able to gain entry into Plaintiff's apartment, whether with a master key or due to Quartz Empire Defendants tampering with the door. Likewise, it is not relevant for purposes of liability whether or not the A.B. Defendants continued to engage in transient rentals after legislation prohibited it in 2010, given that the subject incident occurred in 2009.

As to the other A.B. Defendants, ABO Vacation, Lachar and Bennish, failed to demonstrate they were negligent as a matter of law. At most, Bennish rented Apartment 1-C in 2008 which was possessed by and paid for by A.B. Owners and there has been no proof adduced ABO Vacation. As for Lachar, a question of fact remains as to whether he can be held personally liable for the actions of Hannah. Plaintiff's argument that the record supports piercing of the corporate veil of A.B. Owners is not established. "'Generally, a plaintiff seeking to pierce the corporate veil must show that (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the Plaintiff which resulted in Plaintiff's injury'" (*Johnson v Ortiz*, __AD3d__, 2022 NY Slip Op 02986 [2d Dept 2022] *quoting Cortlandt St. Recovery Corp. v Bonderman*, 31 NY3d 30, 47 [2018] *quoting Conason v Megan Holding, LLC*, 25 NY3d 1, 18 [2015] *citing Americore Drilling & Cutting, Inc. v EMB Contr. Corp.*, 198 AD3d 941, 946 [2d Dept 2021]). Contrary to Plaintiff's assertion, this record does not remove all questions of fact as to Lachar's involvement with the cleaning of A.B. Owners apartments or that his stewardship lead to fraud or wrong against Plaintiff.

A.B. Defendants' argument Plaintiff's cross-motion is untimely is without merit since it raises the same issues as in A.B. Defendants' timely motion for summary judgment (*see* CPLR §3212[a]; *Sikorjak v City of New York*, 168 AD3d 778, 780 [2d Dept 2019]; *Paredes v 1668 Realty Associates, LLC*, 110 AD3d 700, 702 [2d Dept 2013]). A.B. Defendants ~~also~~ failed to raise a triable issue of fact as to the mechanism of Plaintiff's property loss. Even "an old fashioned, good faith mistake", their characterization of A.B. Defendant's actions, can constitute negligence. Contrary to A.B. Defendants' arguments, A.B. Owners and Eisenberg did not "act reasonably" when they sent Hannah into the apartment building, and she went to Apartment C, instead of 1-C as directed. Further, regardless of whether Hannah is an employee or an independent contractor, the evidence shows that these Defendants assumed control of part of this clean up that triggers their liability. The failure of

A.B. Owners and Eisenberg to properly verify that Hannah was in the correct place when they directed Hannah to clean the apartment and their failure to safeguard Plaintiff's belongings imposes liability upon them.

Thus, this branch of Plaintiff's cross-motion is denied as to ABO Vacation, Lachar and Bennish regardless of the sufficiency of Defendant's opposition.

Regarding the branch of Plaintiff's cross-motion on the trespass to chattels cause of action, "[t]o establish a trespass to chattels, the Plaintiff must plead an intentional and physical interference with the use and enjoyment of personal property in the Plaintiff's possession, without justification or consent" (*Amos Financial, LLC v H & B & T Corp.*, 48 Misc3d 1205[A] [Sup Ct. Kings County, 2015] *quoting AGT Crunch Acquisition LLC v Bally Total Fitness Corporation,* 2008 NY Slip Op 30247[U], *9–10 [Sup Ct. New York County, 2008] *citing Sch. of Visual Arts v Kuprewicz,* 3 Misc3d 278, 281 [Sup Ct. NY Cty, 2003]). "The intent required is the intent to cause the interference, or to do an act with the knowledge that such interference is substantially certain to result, but intent merely to do the act is not sufficient" (*Verizon New York v Consolidated Edison, Inc.*, 2010 NY Slip Op 31464[U], *5 [Sup Ct. New York County, 2010]). Plaintiff proffered no evidence Defendants intended to dispose of Plaintiff's belongings or that circumstances demonstrate, as a matter of law, that any of A.B. Defendants knew that sending Hannah into the building was substantially certain to result in interference with Plaintiff's belongings.

Plaintiff's cause of action in trespass to land is similarly unsupported with evidence of the requisite intent to impose liability against any of the A.B. Defendants. Trespass to land is established with proof of "(1) intent or recklessness, (2) entry by a person or thing upon land, and (3) in the actual or constructive possession of another" (*Cetin v Choe*, 2019 NY Slip Op 30526[U] [Sup Ct. New York County, 2019] *citing Long Is. Gynecological Servs. v Murphy*, 298 AD2d 504, 504 [2d Dept 2002]; *see also Woodhull v Town of Riverhead*, 46 AD3d 802 [2d Dept 2007]). "To be subject to liability for trespass to land, the actor must intend to make physical contact with, or intend to remain on, or intend to cause a thing or person to make physical contact with or remain on, land that is in another's possession. The actor need not intend to violate another's possessory rights. Nor is it necessary for the actor to know, or to have reason to know, that the land is in the possession of the other" (*see* Restatement [Fourth] of Property, §1.5). Here all the evidence shows is that Moutraji and Eisenberg sent Hannah to clean Apartment 1-C and that Hannah entered the wrong apartment. This fails to demonstrate that "the act done must be such as will to a substantial certainty result in the entry of the foreign matter" (*Berenger v 261 West LLC*, 93 AD3d 175, 181 [1st Dept 2012]). As well, Plaintiff cannot establish a trespass by way of wrongful eviction (*see Weiss v Bretton Woods Condominium II*, 203 AD3d 1100 [2d Dept 2022]). As such, Plaintiff does not make a *prima facie* showing for trespass to land against any of the A.B. Defendants.

As to Plaintiff's conversion cause of action, that claim arises when someone, "intentionally and without authority, assumes or exercises control over personal property belonging to someone else, interfering with that person's right of possession" (*Halvatzis v Perrone*, 199 AD3d 785 [2d Dept 2021] *quoting Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43, 49-50 [2006]; see also *Lemle v Lemle*, 92 AD3d 494, 497 [1st Dept 2012]). The key elements of conversion are: "(1) Plaintiff's possessory right or interest in the property; and, (2) Defendants' dominion over the property or interference with it, in derogation of Plaintiff's rights" (*Core Development Group LLC v Spaho*, 199 AD3d 447 [1st Dept 2021] *quoting Colavito*, at 50). In order to sustain a cause of action for conversion, Plaintiff must show "legal ownership or an immediate superior right of possession to a specific identifiable thing" (*Komolov v Segal*, 101 AD3d 639, 640 [1st Dept 2012] *quoting Messiah's Covenant Community Church v Weinbaum*, 74 AD3d 916, 919 [2d Dept 2010]). "[T]o establish a conversion claim, it need only be shown that a Plaintiff had ... an immediate superior right of possession to the identifiable property and that Defendants exercised unauthorized dominion over the property

in question to the exclusion of Plaintiff's rights (*Bank of India v Weg & Myers*, 257 AD2d 183, 191 [1st Dept 1999]). In this case, the evidence demonstrates that Hannah, Eisenberg and A.B. Owners acted negligently, not intentionally, with respect to Plaintiff's apartment and personal property. Moreover, since the alleged conversion arose from the same facts as the trespass to chattels and seek the same damages, the conversion cause is duplicative and cannot stand (*see Calastri v Overlook*, 125 AD3d 554, 555 [1st Dept 2015]).

In support of the branch of Defendants' motion for summary judgment dismissing Plaintiff's complaint, Movants incorrectly posit that there is a lack of evidence that "any cleaner from ABO ever went into the wrong apartment." This is plainly contradicted by Dress' testimony. Nevertheless the A.B. Defendants have demonstrated that Bennish and ABO Vacation are not liable. Other than signing the lease to Apartment 1-C, Bennish had no involvement in this matter and never took possession of the leasehold. Likewise, there is no connection made between ABO Vacation and the cleaning of Apartment 1-C. As such, both Defendants have made a *prima facie* showing of entitlement to summary judgment (*see Jackson v Savoy Park Owner*, LLC, 183 AD3d 495 [1st Dept 2020]). As for A.B. Owners, Lachar and Eisenberg, these parties have failed negate all questions of fact necessary for summary judgment (*see Winegrad v NYU,* 64 NY2d 851, 853 [1985]; *Negron v 3131 Grand Concourse Owners Corp.*, 2013 WL 6702234 [Sup Ct. Bronx County, 2013]).

In opposition to this branch of this motion, neither Plaintiff nor Quartz Empire Defendants raise a triable issue of fact. The unsupported speculation proffered by them is insufficient to withstand summary judgment (*see Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). Therefore, the amended complaint and cross-claims are dismissed as against ABO Vacation and Bennish.

Plaintiff's motion papers raise for the first time the issue of "piercing the corporate veil" so to impose liability against Lachar. In the reply affirmation, A.B. Defendants seek to dismiss Plaintiff's belated claim of "piercing the corporate veil". The doctrine of "piercing the corporate veil" is not independent of the cause of action alleged against a corporation; instead, it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners (*Open Door Foods, LLC v Pasta Machines, Inc.*, 136 AD2d 1002, 1004 [2d Dept 2016] *quoting Matter of Morris v New York State Dept. of Taxation & Fin.*, 82 NY2d 135, 141 [1993]). In support of its motion, movant argues that the amended complaint fails to raise any "allegations concerning piercing the corporate veil" and that Plaintiff failed to cure this defect following the deposition of Lachar. Nothing pled in the amended complaint even suggests that Lachar acted other than in his capacity as president and owner of A.B. Owners. Entirely absent are any allegations that Lachar, as owner, abused the privilege of doing business in the corporate form (*see Sky-Track Technology Co. Ltd., v HSS Development Inc., Sky-Track Tech. Co. Ltd. v HSS Dev., Inc.*, 167 AD3d 964, 965 [2d Dept 2018], *quoting East Hampton U.F.S.D. v Sandpebble Bldrs., Inc.*, 66 AD3d 122, 127 [2d Dept 2009). In opposition, since Plaintiff failed to address this pleading issue, it is deemed abandoned (*see Blackman v Metropolitan Transit Authority*, ____AD3d____, 2022 NY Slip Op 03490 [2d Dept 2022]) and A.B. Defendants' motion to preclude Plaintiff from proving "piercing the corporate veil" is granted.

On the issue of Plaintiff's cause of action for intentional infliction of emotional distress, A.B. Defendants argue summary judgment is justified as Plaintiff failed to allege conduct that is extreme and outrageous and goes beyond the bounds of decency necessary for this claim. "The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Davydov v Youssefi*, ____AD3d____, 2022 NY Slip Op 03228 [2d Dept 2022] *quoting Klein v Metropolitan Child Servs., Inc.,* 100 AD3d 708 [2d Dept 2012]). Presently, the acts attributable to Defendants are not remotely extreme and outrageous enough (*see Benyo v Sikorjak,* 50 AD3d 1074, 1077 [2d Dept 2008]; *see also Fludd v City of New York*, 199 AD3d 894 [2d Dept 2021]). Plaintiff reliance on caselaw that involve

intentional behavior are inapposite and there is no showing that A.B. Defendants' acts were malicious and willful.

Concerning Plaintiff's claim for punitive damages, conduct must be alleged that is (1) egregious, (2) directed at the Plaintiff and (3) part of a pattern of similar conduct directed at the public at large (*see Rocanova v Equitable Life Assur. Soc.*, 83 NY2d 603 [1994]; *Eisenberg v Weisbecker*, 190 AD3d 549, 550 [1st Dept 2021]). "Punitive damages may be recovered in cases where a Defendant's conduct is morally culpable, or is actuated by evil and reprehensible motives, not only to punish the Defendant but to deter [it] as well as others who might otherwise be so prompted, from induling in similar conduct in the future" (*Seyaeve v Hudson Moving and Storage, Inc.*, 261 AD2d 168, 169 [1st Dept 1999] *quoting Walker v Sheldon,* 10 NY2d 401, 404 [1961]). Here, A.B. Defendants have shown that they did not possess the required intent and that the subject actions were not egregious enough to merit punitive damages.

A.B. Defendants also seek dismissal of Plaintiff's claim for attorney's fees. Customarily, "attorneys' fees are considered an incident of litigation and are not recoverable unless authorized by statute, court rule, or written agreement of the parties" (*Reif v Nagy,* 175 AD3d 107, 131 [1st Dept 2019] *citing Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491-492 [1989]; *Madison Park Dev. Assoc. LLC v Febbraro*, 159 AD3d 569 [1st Dept 2018]). Here, Plaintiff relies on Real Property Law §234 which provides, in pertinent part:

> Whenever a lease of residential property shall provide that in any action or summary proceeding the landlord may recover attorneys' fees and/or expenses incurred as the result of the failure of the tenant to perform any covenant or agreement contained in such lease, or that amounts paid by the landlord therefor shall be paid by the tenant as additional rent, there shall be implied in such lease 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, and an agreement that such fees and expenses may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant. A landlord may not recover attorneys' fees upon a default judgment. Any waiver of this section shall be void as against public policy.

This statute creates a reciprocal provision granting tenants the right to recover attorneys' fees from any action or summary proceeding as a result of any failure of the landlord to perform any covenant or agreement on its part to be performed under the lease provided that the lease agreement allows a landlord to collect attorneys' fees from any action or summary proceeding as the result of the failure of the tenant to perform any covenant or agreement contained in such lease. Here, the lease agreement between Plaintiff and Quartz does not contain a provision for the recovery of attorneys' fees. Additionally, none of the A.B. Defendants entered into a lease agreement with Plaintiff. As such, A.B. Defendants could not have breached any covenant or agreement so to trigger this statute.

The next branch of A.B. Defendants' motion is summary judgment dismissing Plaintiff's cause of action for forcible or unlawful entry pursuant to RPAPL §853. That statute reads:

> If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal

violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.

"A claim under [RPAPL 853] is only available to one evicted from property of which he or she was in actual possession" (*Weiss v Bretton Woods Condominium II*, 203 AD3d 1100 [2d Dept 2022] *quoting Gold v Schuster,* 264 AD2d 547, 550 [1st Dept 1999]). The A.B. Defendants assert that neither they nor their cleaner Hannah intentionally disseized, ejected or put Plaintiff out of possession. However, whether their action with respect to Plaintiff's occupancy were deliberate or inadvertent, the A.B. Defendants may still be liable since this statute was amended in 1981 to no longer require the element of force and to remedy such actions as "removing the tenant's possessions while he or she is out" (*Mayes v UVI Holdings, Inc.*, 280 AD2d 153, 156 [1st Dept 2001]). Thus, Movants failed to demonstrate *prima facie* this claim is not viable.

A.B. Defendants seek sanctions against Quartz Empire Defendants for their failure to preserve all relevant notes regarding Plaintiff renewing her lease and the steps taken to ready Apartment C for a new tenant. According to A.B. Defendants, the lost notebook of Ramin Shalom, Empire's property manager, and the discarded log book of Dimitria Magoulas, Empire's Leasing Coordinator in charge of renewals, may have contained notes regarding communications between Shalom and Magoulas, as well as conversations with Plaintiff on whether she would renew her lease. These books may also have notes regarding steps taken by Quartz Empire Defendants to ready the apartment for a new tenant.

A party seeking sanctions for spoliation of evidence must show: (1) that the party having control over the evidence possessed an obligation to preserve it at the time of its destruction, (2) that the evidence was destroyed with a "culpable state of mind," which would include negligence, and (3) that the destroyed evidence was relevant to, or would have supported, the seeking party's claim or defense (*see VOOM HD Holdings LLC v EchoStar Satellite LLC*, 93 AD3d 33, 45 [1st Dept 2012]). Other than an oral request made by Plaintiff's counsel at the deposition of Shalom, no formal discovery demand was made for the lost materials. Thus, movants failed to establish Quartz Empire Defendant's obligation to preserve these materials or that they possessed a culpable state in mind in failing to preserve them (*see Doe v Turnmill, LLC*, 193 AD3d 618 [1st Dept 2021]). A.B. Defendants also failed to articulate how this lost evidence impacts their case. The subject incident occurred before Plaintiff's lease expired making the issue of her lease renewal irrelevant. Hence, movants fail to make the required showing of relevance (*see Pegasus Aviation I, Inc., v Varig Logistica S.A.*, 26 NY3d 543, 554 [2015]).

The branch of A.B. Defendants' motion to dismiss the contribution and indemnification crossclaims is denied. Defendants A.B. Owners and Eisenberg have been held negligent as a matter of law. Therefore, A.B. Defendants cannot demonstrate that they are free of any negligence which precludes summary judgment as to the indemnification and contribution cross-claims (*see Sarago v Iroquois Fence, Inc.*, ____AD3d____, 2022 NY Slip Op 03654 [4th Dept 2022]; *Nieznalski v Rockledge Scaffold Corp.*, ____AD3d____, 2022 NY Slip Op 03452 [1st Dept 2022]; *Keojane v Littlepark House Corp.*, 290 AD2d 382, 383 [1st Dept 2002]).

The motion by Quartz Empire Defendants (Motion Sequence No 6) which seeks dismissal of Plaintiff's amended complaint is denied as untimely since it was made more than a year after the note of issue was filed and because the movant failed to demonstrate good cause for the delay in filing this motion (*see* CPLR §3212[a]; *Deutsche Bank National Trust Company Americas v Banu*, ____AD3d____, 2022 NY Slip Op 03231 [2d Dept 2022]; *see also Brill v City of New York*, 2 NY3d 648 [2004]).

Even if the motion was timely, Quartz Empire Defendants failed to establish a *prima facie* case for dismissal. Plaintiff averred she was able to open her apartment door using a single key originally given to her

despite the presence of two locks on the door. As such, Quartz Empire Defendants did not demonstrate that the cylinder lock was changed once Plaintiff signed the lease and thereby allowing a master key to still open of the apartment door. Additionally, Petti testified that she observed two individuals outside Plaintiff's apartment using a key given to them by the landlord and at one point observed the door knob removed from the door and the apartment door opened.

Finally, the cross-motion by Quartz Empire Defendants for summary judgment on their crossclaims against A.B. Defendants and for the dismissal of A.B. Defendant's crossclaims is denied as Quartz Empire has not proven they are free of negligence (*see Pimental v DE Freight LLC*, ___AD3d____, 2022 NY Slip Op 03353 [1st Dept 2022]; *Vitucci v Durst Pyramid LLC*, ____AD3d____, 2022 NY Slip Op 02968 [1st Dept 2022]).

Accordingly, it is

ORDERED that the motion for summary judgment by Defendants Dov Bennish, Apartments by Owners, Inc., ABO Vacation Rentals, Darren Lachar and Michael Eisenberg (A.B. Defendants) (Motion Seq No 5) is granted only to the extent that [1] all claims and crossclaims against Dov Bennish and ABO Vacation Rentals are dismissed, [2] Plaintiff is precluded from asserting a claim of "piercing the corporate veil," [3] Plaintiff's cause of action for intentional infliction of emotional distress and conversion are dismissed; [4] Plaintiff claims for punitive damages and attorneys' fees are dismissed, and it is

ORDERED that Plaintiff's cross-motion for summary judgment is granted only to the extent that Plaintiff is granted summary judgment on the issue liability on her negligence cause of action as against Defendants Apartments By Owners, Inc. and Michael Eisenberg only and is otherwise denied, and it is

ORDERED that the cross-motion by Defendants Quartz Associates, LLC and Empire Management America Corp, (Quartz Empire Defendants) are denied; and it is

ORDERED that the motion (Motion Seq No 6) by Quartz Associates, LLC and Empire Management America Corp is denied.

7/14/2022
DATE

FRANCIS KAHN, III, A.J.S.C.
HON. FRANCIS A. KAHN III
J.S.C.

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