

Alvarez v Charles St. Owners Corp
2023 NY Slip Op 30112(U)
January 12, 2023
Supreme Court, New York County
Docket Number: Index No. 452276/2021
Judge: Paul A. Goetz
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

LILIA ADRIANA ALVAREZ, INDIVIDUALLY AND AS
EXECUTRIX OF THE ESTATE OF BENITO VIEITEZ AND
THE ESTATE OF BENITO VIEITEZ, AND AS THE
GUARDIAN OF HER MINOR CHILD N. F.,

Plaintiff,

- v -

CHARLES STREET OWNERS CORP, DIRECTOR JOHN
DOE, DIRECTOR JANE DOE, XYZ CORPORATION,
GEORGE ORTIZ, ARNOLDS S. WARWICK CO. LTD.,
EMILY PAIN, VERITAS PROPERTY MANAGEMENT,
ALLSTATE INSURANCE COMPANY, 84-88 CHARLES
STREET OWNERS CORP., ABRAHAM FAKHREDDINE
(A/K/A IBRAHIM FAKHREDDINE SAID) AND GINA
MONAHAN

Defendants.

-----X

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 217, 219, 220, 221, 222

were read on this motion to/for JUDGMENT - SUMMARY.

The following e-filed documents, listed by NYSCEF document number (Motion 004) 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 218, 223, 224

were read on this motion to/for PARTIAL SUMMARY JUDGMENT.

In this action, plaintiff Liliana Alvarez seeks an order requiring defendants to approve the assignment and transfer of the shares allocated to unit 1D at 88 Charles Street, New York, New York from the estate of Benito Vieitez to Alvarez and her husband, as well as monetary damages. Plaintiff asserts causes of action sounding in: (1) conversion; (2) fraud; (3) breach of contract; (4) breach of covenant of good faith; (5) discrimination; (6) harassment; (7) breach of warranty of habitability; (8) breach of covenant of quiet enjoyment; (9) trespass; (11) infliction

of emotional distress; (14) constructive eviction; (15) specific performance; and (16) legal fees.¹ Defendants 84-88 Charles St. Owners Corp. s/h/a Charles Street Owners Corp. (the co-op), the Directors of 84-88 Charles St. Owners Corp. s/h/a “Directors John Doe”/”Jane Doe” (the board), Arnold S. Warwick & Co. LTD (Warwick), Emily Paine, and Veritas Property Management, LLC (Veritas) move pursuant to CPLR 3212 for partial summary judgment dismissing the first, second, third, fourth, fifth, sixth, eleventh, fifteenth, and sixteenth causes of action asserted in plaintiff’s complaint and for a judgment of ejectment on their first counterclaim (Mot Seq No 003). Defendants separately move for rent, use and occupancy due, and attorneys’ fees (Mot Seq No 004). Plaintiff cross-moves to dismiss or stay defendants’ ejectment counterclaim.

BACKGROUND

Defendant 84-88 Charles St. Owners Corp. is a housing corporation that owns the buildings and improvements located at 84 Charles Street, New York, New York 10014 and 88 Charles Street, New York, New York 10014 (the premises) (Perna Aff, ¶ 3, NYSCEF Doc No 192). Shareholders of the housing corporation purchase discrete shares allocated to specific units in these buildings obligating the shareholders to execute a proprietary lease with the housing corporation (NYSCEF Doc No 192, ¶ 3).

On or about August 23, 1983, Benito Vieitez and Amalia Vieitez purchased the 134 shares allocated to unit 1D (the apartment) in the co-op and executed the proprietary lease appurtenant to the apartment (NYSCEF Doc No 192, ¶ 6). Amalia died and then on May 31, 2014, Benito died and pursuant to his will, plaintiff became the executrix of his estate and the apartment became an asset of his estate (NYSCEF Doc No 192, ¶¶ 7-8). Vieitez’s will

¹ Plaintiff fails to number her causes of action sequentially, skipping 10, 12, and 13. The numbers assigned in the complaint will be used herein (*see* Complaint, NYSCEF Doc No 194).

designated plaintiff as “a dear friend” and Alvarez verified the probate petition designating her legal status as a friend of the decedent (NYSCEF Doc No 192, ¶ 7).

Paragraph 14 of the proprietary lease states that “[t]he Lessee shall not, without the written consent of the Lessor on such conditions as Lessor may prescribe, occupy or use the apartment or permit the same or any part thereof to be occupied or used for any purpose other than as a private dwelling for the Lessee and Lessee’s” family (Proprietary Lease, ¶ 14, NYSCEF Doc No 193). “In addition to the foregoing, the apartment may be occupied from time to time by guests of the Lessee for a period of time not exceeding one month, unless a longer period is approved in writing by the Lessor, but no guests may occupy the apartment unless one or more of the permitted adult residents are then in occupancy or unless consented to in writing by the Lessor” (NYSCEF Doc No 193, ¶ 14). Paragraph 15 of the proprietary lease forbids tenants from subletting the apartment without consent from the board and paragraph 16 requires consent of the board to assign or transfer the apartment’s shares (NYSCEF Doc No 193, ¶¶ 15-16).

On or around April 27, 2016, Vieitez’s estate submitted an application to the board seeking approval to transfer the shares allocated to the apartment to Alvarez in her individual capacity and to her husband Said Fakhreddine (NYSCEF Doc No 192, ¶ 9). By correspondence dated August 8, 2016, the board denied the application out of concern that applicants would be unable to meet their obligations to pay monthly maintenance and assessments if levied (*see* Declination Letter, NYSCEF Doc No 37; Perna Aff, ¶¶ 24-33, NYSCEF Doc No 165).

From around November 2019, the time this action commenced, to the present, the board believes Alvarez’s adult son, Abraham Fakhreddine, and his companion, Gina Monahan, occupy the apartment (NYSCEF Doc No 192, ¶ 13).

On February 25, 2020, a notice of default was served on Alvarez and Fakhreddine (Notice of Default Under Proprietary Lease, NYSCEF Doc No 99; *see also* NYSCEF Doc No 192, ¶ 17). The board then served a notice of termination, dated March 17, 2020, on Alvarez and Fakhreddine terminating the proprietary lease as of March 31, 2020 (Notice of Expiration of Proprietary Lease, NYSCEF Doc No 99). Defendants claim plaintiff is in arrears in the amount of \$30,684.16 for maintenance charges as of September 2022 (Williams Aff, ¶ 2, NYSCEF Doc No 191).

In July 2020, a holdover summary proceeding was commenced by the co-op; however, it was discontinued by the co-op on September 15, 2021 (Kaufman Aff, ¶ 8, NYSCEF Doc No 190). Defendants then made a motion in the instant action for leave to amend and supplement the answer to assert counterclaims against Alvarez and the apartment's occupants for ejection, use and occupancy, and attorneys' fees (NYSCEF Doc No 190, ¶ 9). The motion for leave to amend and supplement the answer was granted by order dated January 4, 2022 (NYSCEF Doc No 190, ¶ 9; *see also* Order Granting Motion for Leaving to Amend Complaint, NYSCEF Doc No 131).

Plaintiff alleges a host of wrongs exacted on her family and her by defendants, including summoning the police to her apartment and making false statements to the police, removing fixtures, ceilings, and walls from the apartment, removing money from plaintiff's personal bank account, breaking into the apartment, and permitting a mice infestation (Complaint, NYSCEF Doc No 194). Central to her claims is the allegation that defendants denied plaintiff shares to the apartment due to unlawful discrimination based on disability, race, national origin, and religion—Alvarez is of the Muslim faith, her husband and child are disabled, and her husband and children are “middle eastern” (NYSCEF Doc No 194, ¶ 44).

DISCUSSION

Defendants move to dismiss plaintiff's first, second, third, fourth, fifth, and eleventh causes of action based on statute of limitation grounds. "The [s]tatute of [l]imitations is an affirmative defense that must be pleaded and proved . . . either by a motion to dismiss or as a defense in the answer; a defendant who does neither waives it (*Mendez v Steen Trucking, Inc.*, 254 AD2d 715, 716 [4th Dept 1998] [internal citations and quotations omitted]; *see also Estate of Del Terzo v 33 Fifth Ave. Owners Corp.*, 136 AD3d 486, 487 [1st Dept 2016], *affd* 28 NY3d 1114 [2016] ["Defendant waived th[e] defense [of statute of limitations] by failing to raise it in its answer or in a pre-answer motion to dismiss the complaint."). Here, defendants preserved their statute of limitations arguments as an affirmative defense in their answer (*see* Answer, ¶ 112, NYSCEF Doc No 19).

Time Barred Causes of Action

First Cause of Action: Conversion

Actions for conversion are governed by the three-year statute of limitations (SOL) pursuant to CPLR 214 [3] and accrue "at the time of the alleged theft" (*Herman v Depinies*, 273 AD2d 146, 147 [1st Dept 2000]; *Maya NY, LLC v Hagler*, 106 AD3d 583 [1st Dept 2013]). Here, the SOL began to run on August 8, 2016, the date defendants sent plaintiff the declination letter denying plaintiff assignment of Vieitez's shares allocated to the apartment (*see* NYSCEF Doc No 37). Plaintiff commenced this action on November 22, 2019, more than three years and three months after the alleged conversion took place. Accordingly, plaintiff's conversion claim is untimely and must be dismissed.

Third Cause of Action: Breach of Contract; Fourth Cause of Action: Breach of Fiduciary Duty & Implied Covenant of Good Faith & Fair Dealing; Fifteenth Cause of Action: Specific Performance

Plaintiff alleges that defendants breached the proprietary lease and co-op bylaws, breached their fiduciary duty to the estate, and breached the implied covenant of good faith and fair dealing by failing to timely transfer title of the shares and that she is entitled to specific performance of an immediate transfer of the shares (NYSCEF Doc No 194, ¶¶ 28-30). Defendants argue plaintiff fails to plead a *prima facie* breach of contract claim because she does not identify a specific provision of the contract she contends was breached and nevertheless, the board has a contractual right of discretion to review her application under the proprietary lease. Defendants also argue that the board members do not owe plaintiff a fiduciary duty and that plaintiff does not have an automatic right to the apartment's shares (*see* NYSCEF Doc No 193, ¶¶ 14-16).

Whenever “a cooperative shareholder seeks to challenge a co-op board’s action, such challenge is to be made in the form of an article 78 proceeding” (*Musey v 425 E. 86 Apts. Corp.*, 154 AD3d 401, 403 [1st Dept 2017], citing *Katz v Third Colony Corp.*, 101 AD3d 652, 653 [1st Dept 2012] [“finding that the shareholder plaintiffs were prohibited from challenging the propriety [sic] of the amendments to the cooperative’s bylaws because they were required to have done so via a proceeding pursuant to CPLR article 78 within four months thereof”] [internal quotations omitted]). “An article 78 proceeding must be commenced within four months after the determination to be reviewed becomes ‘final and binding upon the petitioner’” (*id.* at 404, quoting CPLR 217 [1]). “A determination generally becomes binding when the aggrieved party is ‘notified’” (*Musey*, 154 AD3d at 404, quoting *Matter of Vil. of Westbury v Dept. of Transp.*, 75 NY2d 62, 72 [1989]). Here, plaintiff was notified of the board’s declination to transfer the apartment’s shares to her on August 8, 2016, yet this action was not commenced until November 22, 2019, well beyond the four-month statute of limitations (*see* NYSCEF Doc No 99).

Accordingly, all of plaintiff's claims challenging the board's determination to reject her application, to wit plaintiff's breach of contract, breach of fiduciary duty, breach of the implied covenant of good faith and fair dealing, and specific performance claims, must be dismissed as untimely.

Even if plaintiff's claims had been timely there was not an enforceable agreement between the co-op and plaintiff, as an individual, "but merely an application by plaintiff to purchase . . . the apartment[] in defendant cooperative, which certainly had a right to insist—as a condition precedent to the contract—on the approval of the application by its board of directors" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Therefore, plaintiff cannot bring claims of breach of contract, breach of fiduciary duty, and breach of implied covenant of good faith and fair dealing in her individual capacity.

Even if the estate's claims had been timely the co-op met its burden to establish that its determination to reject plaintiff's application was reasonable. Defendant argues that the business judgment rule applies to its decision to deny the transfer of shares; however, "[t]he lease's directive that consent shall not be unreasonably withheld triggers application of the heightened standard of reasonableness to be applied in lieu of the usual business judgment rule" (*Matter of Kotler v 979 Corp.*, 191 AD3d 473, 474 [1st Dept 2021] [internal quotations omitted]). The burden thus shifted to the co-op to reasonably show that the proposed transferee is not "financially responsible" (*id.*) Deference is generally paid to the co-op's decision so long as it upholds its fiduciary duty to act in the best interest of its shareholders as well as "within the scope of its authority and in good faith" (*Stimmer v Epstein*, 162 AD3d 819, 820-21 [2d Dept 2018], quoting *40 W. 67th St. v Pullman*, 100 NY2d 147, 153 [2003]).

Here, the board met its burden by finding plaintiff's submissions inadequate to meet the obligations of monthly maintenance and assessments, if levied (*see* NYSCEF Doc No 165, ¶¶ 24-28). Defendants highlight that plaintiff's application showed minimal income of \$20,000 on her 2014 tax return, the absence of tax reporting to support alleged rental income of \$43,500 on her 2014 tax return, and production of only one year of tax returns when the requirement set by the board was at least two years (*see* NYSCEF Doc No 165, ¶¶ 24-28). The co-op had a lawful basis to deny the transfer to plaintiff because the board reasonably determined that plaintiff did not have sufficient financial resources. Additionally, plaintiff did not submit any evidence to contradict the board's determination as to plaintiff's financial resources (NYSCEF Doc No 165, ¶¶ 27-28 [the board requested Alvarez to supplement her application regarding the issues the board found with her reported income, purported rental income, and lack of income tax filings for 2015; however, she "failed to provide meaningful documentation to cure the deficiencies"]). Therefore, even if the breach of contract, fiduciary duty, and implied covenant of good faith and fair dealing claims had been timely brought, defendants sustained their burden of establishing entitlement to a judgment as a matter of law on these claims.

As to plaintiff's cause of action for specific performance, when a cooperative board's approval is required as a condition precedent to selling or transferring cooperative shares, "failure to obtain such approval preclude[s] plaintiff[] from bringing [an] action for specific performance" (*Pober v Columbia 160 Apts. Corp.*, 266 AD2d 6, 6 [1st Dept 1999]; *see also Plotch v 435 E. 85th St. Tenants Corp.*, 187 AD3d 614, 614 [1st Dept 2020] [denying specific performance of transferring shares to plaintiff due to provision in the proprietary lease granting the lessor discretion to sell only "to a reputable person of good financial standing"]). Since the board rejected the Vieitez estate's proposed assignment of shares to plaintiff due to plaintiff's

financial documentation (NYSCEF Doc No 168, pp 13-14), this withholding of consent is valid pursuant to the proprietary lease. Therefore, even if the specific performance claim was timely brought, defendants sustained their burden of establishing entitlement to a judgment as a matter of law on this claim.

Eleventh Cause of Action: Intentional Infliction of Emotional Distress

Actions for intentional infliction of emotional distress (IIED) are governed by a one-year SOL (CPLR 215 [3]; *see Gallagher v Directors Guild of Am., Inc.*, 144 AD2d 261 [1st Dept 1988]; *see also Winslow v New York-Presbyt./Weill-Cornell Med. Ctr.*, 203 AD3d 533 [1st Dept 2022]). A cause of action for IIED, like all tort claims, accrues when injury occurs (*see Kronos, Inc. v AVX Corp.*, 81 NY2d 90 [1993]). Here, the declination letter was sent in 2016 and this case was filed in 2019. No date or dates are provided for the alleged damages to the apartment. Accordingly, plaintiff's IIED claim must be dismissed as untimely.

Discrimination Related Causes of Action

Fifth Cause of Action: Discrimination

Plaintiff asserts that the board declined the transfer application based on her alleged disability, her son's alleged disability, her receipt of public assistance, and her family's ethnicity and religious faith as Middle Eastern Muslims. Specifically, plaintiff claims in the complaint that "herb [sic] husband has a disability and she has a minor son who is also disabled," adding that "defendants were made aware of these disabilities" (NYSCEF Doc No 194, ¶ 40). Plaintiff notes that she is "Hispanic and married to an individual who practices the Muslim faith" while alleging that defendants have told plaintiff "that they are not wanted because of said national origin and faith" (NYSCEF Doc No 194, ¶¶ 44-45). Plaintiff also states that herself, "her husband[,] and child all are on special disability programs, attend special programs and schools, and defendants

knew of these facts” (NYSCEF Doc No 194, ¶ 43). She alleges that “[d]efendants’ [sic] conduct . . . violated and continues to violate plaintiff’s [sic] civil rights, and violates each statute cited herein” without providing citation to any statute (NYSCEF Doc No 194, ¶ 41). Defendants argue that plaintiff cannot show she was qualified to acquire the unit nor that the circumstances under which the board issued its denial gave rise to an inference of discrimination.

Conclusory or speculative assertions of discrimination without any factual support are insufficient to raise triable issues of fact (*see Siino v Crown House Realty*, 2012 WL 1450411, *2 [ED NY, Apr. 25, 2012, No. 12-CV-1905 (MKP/VVP)], quoting *Ashcroft v Iqbal*, 556 US 662, 678 [2009], quoting *Bell Atl. Corp. v Twombly*, 550 US 544, 555 [2007] [internal quotations and ellipses omitted] [“Although plaintiff alleges that she was subjected to disability discrimination she does not provide facts to support this conclusion. A pleading that offers labels and conclusions will not do. Nor does a complaint suffice if it tenders naked assertions devoid of further factual enhancement.”]; *see also Sifonte v City of New York*, 194 AD3d 435, 436 [1st Dept 2021] [internal quotations and citations omitted] [“Even construing the complaint . . . liberally and affording it the benefit of every favorable inference . . . plaintiff has alleged in only conclusory terms that defendants had unidentified unlawful and unconstitutional policies, practices, procedures, and customs which operated to deprive her of her constitutional rights. This does not suffice.”]).

Here, plaintiff claims her family and she are disabled without stating her and her family’s disabilities. She alleges defendant knew of her family’s disabilities and receipt of public assistance without providing any factual basis for these conclusory statements. Plaintiff does not cite to any provision of law she claims defendants violated apparently in the hopes the court will determine which statutes apply. Simply put, plaintiff’s complaint is a collection of conclusory

statements and conjecture unmoored from any federal, state, or local statute. Accordingly, because the plaintiff's discrimination claim is completely inadequate the claim must be dismissed.

Sixth Cause of Action: Harassment

“New York does not recognize a common-law cause of action for harassment” (*Garza v Nunz Realty, LLC*, 187 AD3d 467, 467 [1st Dept 2020], quoting *Edelstein v Farber*, 27 AD3d 202 [1st Dept 2006]). Accordingly, plaintiff's harassment claim must be dismissed.

Second Cause of Action: Fraud

Plaintiff alleges fraud based on the claim that the co-op made material misrepresentations to the police department, such as, “smells like there is a dead body in the apartment” (NYSCEF Doc No 194, ¶ 22). Plaintiff further alleges that this caused the police to enter, damage, and change the locks to the apartment (NYSCEF Doc No 194, ¶ 25). Defendants do not address the incident involving the police, but counter that plaintiff cannot show what material facts were misrepresented and/or concealed from her as it relates to the board's declination of the assignment of the Vieitez estate's shares.

“To state a cause of action of fraudulent misrepresentation, a plaintiff must allege a misrepresentation or a material omission of fact which was false and known to be false by defendant, made for the purpose of inducing the other party to rely upon it, justifiable reliance of the other party on the misrepresentation or material omission, and injury” (*Gomez-Jimenez v New York Law Sch.*, 103 AD3d 13, 17-18 [1st Dept 2012], quoting *Mandarin Trading Ltd. V Wilenstein*, 16 NY3d 173, 178 [2011] [internal quotations omitted]). “[A] claim of third-party reliance requires an allegation that the third party acted as a conduit to relay any false statements to the plaintiff, who then relied on the misrepresentation to its detriment” (*New York Tile*

Wholesale Corp. v Thomas Fatato Realty Corp., 153 AD3d 1351, 1354 [2d Dept 2017] [internal quotations omitted]). Here, plaintiff does not allege how she relied to her detriment on the alleged material representations defendants made. Accordingly, plaintiff's fraud claim must be dismissed.

Sixteenth Cause of Action: Attorneys' Fees

Attorneys' fees are only recoverable by the prevailing party when provided for by statute or contract (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]). Since plaintiff does not cite a specific statute under which she is entitled to receive attorneys' fees her only option would be looking to the proprietary lease. Plaintiff, in her individual capacity, is not a party to the proprietary lease (*see Harris*, 79 AD3d at 426) so she cannot claim entitlement to any provision in it. To the extent that the estate is seeking attorneys' fees, it is not the prevailing party. Accordingly, plaintiff's claim for attorneys' fees must be dismissed.

Seventh, Eighth, Ninth, and Fourteenth Causes of Action: Breach of Warranty of Habitability, Breach of Covenant of Quiet Enjoyment, Trespass and Constructive Eviction

Because defendant did not move for summary judgment to dismiss causes of action seven, eight, nine, and fourteen, they will be severed and continued.

Dismissing Defendants: Individual Board Members, Warwick, Paine, and Veritas

Defendants move to dismiss all causes of action asserted by plaintiff against the co-op's individual board members, Warwick, Paine, and Veritas.

Individual Board Members: "John Doe"/"Jane Doe"

"In the context of cooperative dwellings, the business judgment rule provides that a court should defer to a cooperative board's determination so long as the board acts for the purposes of the cooperative, within the scope of its authority and in good faith" (*40 W. 67th St. Corp.*, 100

NY2d at 153 [internal quotations omitted]). Plaintiff may not seek to hold the individual directors personally liable for any alleged injuries unless the board members acted outside the scope of their duties (*Pine St. Homeowners Assn. v 20 Pine St. LLC*, 109 AD3d 733, 735-36 [1st Dept 2013] [“[T]he breach of fiduciary duty claim against the individual board members was properly dismissed [T]he complaint does not allege any individual wrongdoing by the members of the board separate and apart from their collective actions taken on behalf of the condominium.”]). Here, plaintiff does not allege any action that an individual board member took outside of the scope of their duties, but rather alleges discrimination based on the board’s collective decision-making. Accordingly, the individual board members must be dismissed from this matter.

Warwick and Paine

Warwick was the management company that managed the premises until June 2018 (Paine Aff, ¶ 1, NYSCEF Doc No 166). Paine, an employee of Warwick, was assigned as the property manager of the premises until June 2018 (NYSCEF Doc No 166, ¶ 1). “[A]n agent for a disclosed principal will not be held personally bound unless there is clear and explicit evidence of the agent’s intention to substitute or superadd his personal liability for, or to, that of his principal” (*Savoy Record Co. v Cardinal Export Co.*, 15 NY2d 1, 4 [1964] [internal quotations omitted]; *see also Bank of Am., N.A. v ASD Gem Realty LLC*, 205 AD3d 1 [1st Dept 2022]). According to Paine, Warwick and Paine did not hold themselves out to plaintiff in any capacity as personally liable for their principal, the co-op, nor did they have any input on the board’s rejection of plaintiff’s application (NYSCEF Doc No 168, ¶ 5). Warwick and Paine only gathered application materials and presented them to the board, serving as an intermediary (NYSCEF Doc No 168, ¶ 5). Accordingly, Warwick and Paine must be dismissed as defendants

because they did not hold themselves out to plaintiff as personally liable for the actions of their principal, the co-op.

Veritas

Veritas has served as the management company of the premises since June 18, 2018 (NYSCEF Doc No 191, ¶ 4). It had no role regarding plaintiff's transfer application.

Accordingly, Veritas must be dismissed as defendants.

Ejectment Counterclaim

Defendants move for summary judgment on their first counterclaim for ejectment. When a tenant dies, his leasehold interest passes to the estate as personal property, which remains liable for the payment of rent (*Schnee v Jonas Equities Inc.*, 109 Misc 2d 221, 222 [2d Dept 1981]). Executrix, “in h[er] individual capacity, [i]s not entitled, without the landlord's consent, to occupy the apartment of the deceased tenant with h[er] family” but rather only acquires rights to the leasehold in a representative capacity (*Joint Props. Owners*, 113 AD2d 691, 695 [1st Dept 1986]). Additionally, “[t]hough the leasehold interest is part of the estate an executrix does not . . . have the unrestricted right to sublet the premises or assign the lease” (*id.* at 694). If the landlord unreasonably refuses consent, the proprietary lease “shall be deemed terminated[;]” however, if the landlord reasonably refuses consent, the proprietary lease “shall continue in full force and effect” (Real Property Law 236).

Here, since plaintiff placed a “stranger to the lease,” *i.e.*, her family and herself, in her individual capacity, in possession of the apartment “in contravention of the specific terms of the lease,” *i.e.*, without the landlord's consent, she “violated a substantial obligation of tenancy, as a matter of law, and the landlord is entitled to a judgment of possession” (*Joint Props. Owners*, 113 AD2d at 695; *see* Proprietary Lease, NYSCEF Doc No 193, ¶ 14 [“Lessee shall not, without

written consent of the Lessor on such conditions as Lessor may prescribe, occupy or use the apartment. . . for any purpose other than as a private dwelling for the Lessee” and his family.]; *see also* NYSCEF Doc No 193, ¶ 15 [“the Lessee shall not sublet the whole or any part of the apartment or renew or extend any previously authorized sublease, unless consent thereto shall have been duly authorized by” the board]; *see also* NYSCEF Doc No 193, ¶ 16 [“The Lessee shall not assign this lease or transfer the shares to which it is appurtenant or any interest therein” unless approved by the board.]). The occupation of plaintiff, her family members, and others in the apartment directly violated the proprietary lease and therefore, terminated the proprietary lease. Accordingly, defendants’ motion for summary judgment on their first counterclaim for ejectment will be granted.

Rent, Use, & Occupancy Counterclaim

The co-op next moves for summary judgment on their second counterclaim for rent and use and occupancy, seeking a money judgment against plaintiff for failure to pay rent and use and occupancy for the apartment from March 2020 to September 2022. A holdover tenant is obligated to pay for use and occupancy of the premises during the holdover tenancy and the award should include retroactive use and occupancy arrears (*see Marbru Assoc. v White*, 114 AD3d 554 [1st Dept 2014]). “The award of use and occupancy during the pendency of an action or proceeding” may also be granted to “accommodate[] the competing interests of the parties in affording necessary and fair protection to both and preserve[] the status quo until a final judgment is rendered” (*MMB Assoc. v Dayan*, 169 AD2d 422, 422 [1st Dept 1991] [internal quotations and citations omitted]; *see also 10E53 Owner LLC v Bruderman Asset Mgt.*, 202 AD3d 609 [1st Dept 2022]).

The rental rate in effect prior to the termination of the tenancy is the appropriate measure of monthly use and occupancy to be paid *pendent lite* (see *Eli Haddad Corp. v Cal Redmond Studio*, 102 AD2d 730, 731 [1st Dept 1984] [“[W]e find error in the failure of Special Term to direct defendants to pay use and occupancy at the rate currently provided for as rent on each rental due date.”]; see also *Marbru Assoc.*, 114 AD3d at 555 [“The amount sought . . . is the amount of monthly rent under the last lease effective between the parties, and, as such, is fair.”]).

Here, an appropriate measure of the rental rate prior to the termination of the tenancy is the monthly maintenance charge of \$2005.43 (NYSCEF Doc No 198, p 5). Such a rate, as agreed to by lessor and lessee in the proprietary lease, is fair and accumulates throughout the pendency of this litigation. Accordingly, the co-op’s motion for summary judgment on their second counterclaim for rent and use and occupancy will be granted in the amount of \$30,684.16 (NYSCEF Doc No 191, ¶ 2).

Attorneys’ Fees Counterclaim

Defendants’ lastly move for summary judgment on their third counterclaim for attorneys’ fees as a result of the Vieitez estate’s default under the proprietary lease. “[C]ase law establishes that where a landlord has a right to recover attorneys’ fees pursuant to a lease provision, the recoverable fees are those that are reasonable” (*Solow Mgt. Corp. v Tanger*, 19 AD3d 225, 226 [1st Dept 2005]).

Here, paragraph 28 of the proprietary lease provides that:

“If the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) . . . in instituting any action or proceeding based on such default, or in defending or asserting a counterclaim in any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys’ fees and disbursements shall be paid by the Lessee to the Lessor”

(NYSCEF Doc No 193, ¶ 28). Since plaintiff defaulted in her capacity as executrix of the Vieitez estate by violating the proprietary lease, defendants are entitled to recover reasonable attorneys' fees under paragraph 28 of the proprietary lease from the estate. Accordingly, defendants' motion for summary judgment on the third counterclaim for reasonable attorneys' fees will be granted.

Cross-Motion to Dismiss or Stay Ejectment

Plaintiff cross-moves to dismiss or stay the ejectment counterclaim due to a prior action pending in the Civil Court. This Court already permitted defendants to file leave to amend their answer to assert a counterclaim for ejectment after defendants discontinued their holdover proceeding in Housing Court (*see* First Department Order, Oct. 25, 2022, NYSCEF Doc No 228 [the First Department ruled, "Contrary to plaintiff's contention, there is no pending Civil Court holdover proceeding. The Notice of Petition and Petition in that proceeding were never served, and defendant served and filed a Notice of Discontinuance in Civil Court before any responsive pleading was served (CPLR 3217 [a] [1].)"). Accordingly, plaintiff's cross-motion to dismiss or stay the ejectment counterclaim will be denied.

CONCLUSION

Upon the foregoing, it is hereby

ORDERED that defendants' motion for partial summary judgment dismissing plaintiff's first, second, third, fourth, fifth, sixth, eleventh, fifteenth, and sixteenth causes of action is granted and these causes of action are dismissed; and it is further

ORDERED that plaintiff's cross-motion to dismiss or stay the ejectment counterclaim is denied; and it is further

ORDERED that defendant’s motion for summary judgment on its counterclaim for ejection is granted; and it is further


ADJUDGED that defendants are entitled to possession of unit 1D located at 88 Charles Street, New York, New York 10014 as against plaintiff, her family members, and any other occupant living in the apartment, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place defendant in possession accordingly; and it is further

ADJUDGED that immediately upon entry of this Order and Judgment, defendants may exercise all acts of ownership and possession of the premises including entry thereto, as against plaintiff; and it is further

ORDERED that defendants shall recover from plaintiff the amount of \$30,684.16 with interest and attorneys’ fees, costs and disbursements and the Clerk shall enter judgment accordingly; and it is further

ORDERED that within 30 days of entry, defendants shall submit an affirmation in support of its request for attorneys’ fees via NYSCEF and email to SFC-Part47-Clerk@nycourts.gov and any opposition is due 10 days thereafter; and it is further

ORDERED that plaintiff’s remaining causes of action are severed and continued.


20230112142210PG0ETZ112A4FD305FC24E638630A66B5450569

01/12/2022
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:

CASE DISPOSED
 GRANTED DENIED

NON-FINAL DISPOSITION
 GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE