SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **Hon. James E. d'Auguste** **PART 55**

Justice

----------X

DENISE GALONSKY,

Plaintiff,

- v -

EAST 17TH LLC, BEACH LANE MANAGEMENT, INC., THE SCHARFMAN ORGANIZATION, and MARK SCHARFMAN,

Defendants.

----------X

INDEX NO.	159661/2019
MOTION DATE	01/13/2023
MOTION SEQ. NO.	002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 15, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70

were read on this motion to/for SUMMARY JUDGMENT.

Plaintiff Denise Galonsky moves for summary judgment on her only cause of action, for disability discrimination. Defendants cross-move for partial dismissal and/or summary judgment on plaintiff's cause of action asserted against defendants The Scharfman Organization (Scharfman Org) and Mark Scharfman (Scharfman). For the reasons stated below, the Court denies plaintiff's motion and defendants' cross-motion.

Background.

According to the complaint, defendants are the owners and managers of the building located at 135 East 17th Street in Manhattan (135 East 17th Street) (NYSCEF Doc. No. 34). Scharfman Org is allegedly the holding company of two of the defendants, East 17th LLC and Beach Lane Management Inc. (Beach Lane) (*id.*, ¶ 10). Scharfman is the head officer of East 17th LLC and, as such, purportedly controls the building (*id.*, ¶ 9).

Plaintiff has resided in apartment 5F in 135 East 17th Street for over 30 years. The building has an elevator, but there are three steps that lead down to the building's entrance.

Plaintiff asserts that she suffers from multiple disabilities that have greatly worsened over the years. Among other things, plaintiff contends that she has severe osteoarthritis and internal derangement in both knees, degenerative disc disease, neuritis with paresthesia in her left forearm and hand, reduced lung capacity, and reduced ambulatory status. Plaintiff alleges that she fell in July 2018, and that this ultimately caused deep venous thrombosis and a pulmonary embolism. In March 2019, plaintiff allegedly fell again, and this exacerbated her earlier injuries. The use of stairs allegedly increases plaintiff's pain and impedes the repair of any damaged tissue or muscle, and she will have to use a wheelchair or a scooter for the rest of her life. Presently, plaintiff is required to dismount her scooter to ascend or descend stairs. Plaintiff contends that the absence of a ramp makes the building inaccessible, thereby impeding her freedom and independence (NYSCEF Doc. No. 34, ¶¶ 26, 28)

In October 2019, plaintiff commenced this action asserting violations of the New York City Human Rights Law (NYCHRL) (Admin Code §§ 8-107 [5], [15]) based upon the assertion that the plaintiff was not provided with an accessible entrance to her apartment in the building. As relief, plaintiff seeks a declaration that defendants have violated the NYCHRL and an injunction requiring defendants to provide an accessible entrance to plaintiff at the front of the building, "[d]evelop, implement, and enforce a written policy for responding to reasonable accommodation requests," and provide all current and future building residents with a written notification of their right to seek reasonable accommodations under the NYCHRL (NYSCEF Doc. No. 34, *10, request for relief). Plaintiff seeks compensatory and punitive damages, along with reasonable attorney's fees (*id.*, * 10; ¶ 46 [citing Admin Code § 8-502 [a]).

Defendants' answer includes several affirmative defenses: 1) failure to state a claim; 2) failure to specify the time or place of the material elements of the alleged claim; 3) lack of

standing; 4) failure to satisfy any conditions precedent; 6) architectural impossibility; 7) technical infeasibility; 8) plaintiff is not a qualified individual within the meaning of the applicable law; 9) lack of discrimination; 10) failure of plaintiff to mitigate; 11) physical impossibility of compliance with the request; 12) defendants Scharfman Org and Scharfman are not proper parties; and 13) statute of limitations bars the action.[1] In addition, defendant asserts a counterclaim for attorney's fees under the lease (NYSCEF Doc. No. 35). Plaintiff has answered the counterclaim, arguing that because the action stems out of a purported civil rights law violation, the lease, including its provision on attorney's fees, does not apply in the case at hand (NYSCEF Doc. No. 36).

Plaintiff's Motion

Plaintiff states that she has set forth a prima facie claim of disability discrimination (NYSCEF Doc. No. 32, Mem in Support of Motion, at *10, citing *Jacobsen v New York City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014]). More specifically, she has alleged that she is disabled, that defendants knew of her disability, that the requested accommodation would have enabled her to enter and exit her building safely, and thus enable her to enjoy her apartment, and that defendants refused to accommodate plaintiff's request (NYSCEF Doc. No. 32, Mem in Support of Motion, at *11, citing *Matter of Mutual Apts., Inc. v New York City Commn. on Human Rights*, 203 AD3d 1154, 1157 [2d Dept 2022] [*Mutual Apts.*]). Plaintiff contends that all four allegations are undisputed. Therefore, plaintiff argues, defendants are obliged to provide the accommodation unless they show that it would create an undue hardship due to either financial hardship or architectural infeasibility (*see Romanello v Intesa Sanpaolo, S.p.A.*,22 NY3d 881, 884 [2013]).

[1] Defendants have withdrawn the fifth affirmative defense, which alleges financial undue hardship (*see* NYSCEF Doc. No. 15, Stipulation Regarding Discovery and Affirmative Defenses).

In support of her position that she requires an accommodation, plaintiff submits an unsworn letter from Dr. Polina Liss, which is dated April 5, 2019 (NYSCEF Doc. No. 37). Although this letter notes that plaintiff is unable to walk more than half a city block, in a conclusory manner, the doctor recommends that plaintiff not use stairs because "they exacerbate the injuries and the plain levels" (*id.*). Plaintiff also submits an unsworn letter from Keiko Yanai, a physical therapist, which is dated March 18, 2019. Although this letter notes that using steps is unsafe, it also confusingly further asserts that "it is otherwise unsafe, for her to have a slope into and out of her apartment to avoid possible accidents" (NYSCEF Doc. No. 38). Plaintiff also submits her own affidavit, detailing the physical and emotional hardships the lack of an accommodation has caused her (NYSCEF Doc. No. 48).

As plaintiff points out, defendants already have withdrawn their argument that the accommodation would cause a financial hardship (*see* NYSCEF Doc. No. 15, Stipulation Regarding Discovery and Affirmative Defenses, p 2, ¶ 1). To address the remaining question of architectural or structural hardship, plaintiff points to the report of James I. Moore, P.E., (Moore) of Moore Associates, L.L.C. (Moore LLC), the expert engineering firm retained by defendants (NYSCEF Doc. No. 42), along with the deposition testimony of Mitch Rothken (Rothken), a manager at Beach Lane Management (NYSCEF Doc. No. 43). The Moore LLC report notes that the lobby configuration could not be changed because of the lobby's fixed ceiling height. Instead, Moore explored installing a ramp or a lift outside of the building. The report states that there is sufficient space for a ramp, but that it would require the removal of a planter used for landscaping and for "a privacy buffer for the two ground floor apartments" (NYSCEF Doc. No. 42, *2). In addition, the planter contains window wells that provide ventilation for the wall-through air conditioner units in these apartments. Alternatively, Moore considered the

installation of a mechanical lift. The report states that the cost would be around the same as the $40,000 to $50,000 cost of installing a ramp, but that there would be the additional expenses of annual maintenance and inspections. Further, the report notes that lifts are "common targets for vandalism or just simple misuse" (*id.*, *3).

Although the report does not state that the planters would have to be removed if a lift were installed, at his deposition Rothken said that "to put a lift outside if you don't move the planter, [y]ou have to move the planter and be able to get to the lift" (NYSCEF Doc. No. 43, p 125 lines 13-16). When plaintiff's counsel asked whether the building could install a smaller lift, comparable to the types of lifts used indoors, Rothken replied, "I'm not so sure that [counsel's theory was] right" (*id.*, p 127 lines 20-21). Subsequently, when counsel asked whether a gated ramp could permit authorized access only, Rothken responded, "I have no idea. . . . This sounds like an interesting idea. I don't know if such a product is made or if it would be legal" (*id.*, p 134 lines 22-25).

Plaintiff also submits the report of her own expert, Sanford M. Berger (Berger) (NYSCEF Doc. No. 44). Berger, a licensed architect, is the principal of S.M. Berger Architecture P.C. After considering the pleadings, the Moore report, and pertinent photographs, and after visiting and inspecting the building, Berger concluded "that it is architecturally feasible to convert the main entrance of the Building to be accessible to person(s) with a disability" (*id.*, ¶ 8). Berger stated that there is enough sidewalk space for a ramp, especially as the Building Code provides exceptions for ramps and other specific encroachments. He also outlines the steps necessary for the removal of the planter and the installation of the ramp.

Further, Berger rejects Moore's statements that the installation in not feasible. First, he notes that the planter, which does not reach the height of the windows in the building, does not

provide privacy protection to the tenants in those apartments. Berger concedes that individuals who use the ramp would be closer to the apartments than they would if the planter remained, but notes that this would only be for short periods and that the building could install tinted windows which would provide additional privacy without forcing the tenants to use blinds and block all sunlight. Moreover, the pertinent windows have safety bars and, for additional security, the building could install a lock or fob-pass system to enter the ramp so that only residents could access it. Second, Berger states that any ventilation concerns are unwarranted. Indeed, he notes there are several ways that the ventilation can be improved without the planters. Among other solutions, he posits that "a renovated window well can provide an exhaust directly out of the Building . . . between the Building and the ramp" (*id.*, ¶ 28), the air could be redirected to another area of the building, or the apartments could use window air conditioners.

In opposition, defendants argue that summary judgment in plaintiff's favor is not appropriate. They emphasize that where experts provide conflicting statements, summary judgment should be denied (NYSCEF Doc. No. 51, defendant's affirmation in opposition, ¶ 6 [citing, inter alia, *Scholastic Inc. v Pace Plumbing Corp.*, 129 AD3d 75, 87 (1st Dept 2015)]). According to defendants, plaintiff's expert's belief that construction of a ramp is feasible is contradicted by their expert, who cite both privacy and ventilation issues with such construction.

In further support, they submit an affidavit by James Moore, who performed the earlier inspection (NYSCEF Doc. No. 52). Moore states:

> In my professional opinion, and based upon my knowledge and inspection of this building, Mr. Berger's conclusions are wrong, and his analysis is deficient. Given numerous atypical obstacles to the construction of a ramp that are unique to this building, it is not feasible to construct a ramp (*id.*, ¶ 6).

According to Moore, Berger, plaintiff's expert, acknowledges that there would be some loss of privacy when he suggests ways to mitigate such loss.

Moore additionally discusses the ventilation problem, stating "the slope of the ramp would cut diagonally across the face of the air conditioners" (*id.*, ¶ 10). He contends that Berger's proposed solution, moving the ramp an additional two feet away from the building, is not sufficiently specific. Among other things, Moore states that Berger does not explain how the extra space would be utilized or how it would resolve the problem. Moore also states that Berger does not consider aspects of the City's Building Code, and that he incorrectly assesses problems relating to the necessary steps for building the ramp.

In reply, plaintiff reiterates that she has established her right to summary judgment. She notes that defendants do not challenge the fact that she has set forth a prima facie case. Further, plaintiff contends that defendants have not satisfied their evidentiary burden by showing that material issues preclude judgment. She asserts that the court should disregard the Moore affidavit because "'it clearly appears that the issues are not genuine, but feigned'" (NYSCEF Doc. No. 70, plaintiff's reply memorandum, *3 [quoting *Glick & Dolleck v Tri-Pac Export Corp.*, 22 NY2d 439, 441 (1968)]). More precisely, plaintiff argues that the affidavit is a self-serving document that improperly attempts to correct the deficiencies of his initial report by adding new data and opinions that was available at the time Moore prepared the initial report.

Plaintiff further argues that the Moore affidavit does not effectively discredit the Berger affidavit because defendants cannot transfer the burden of proving feasibility to plaintiff, and because Moore does not dispute any of Berger's material findings. For example, she asserts that Berger agreed that the planter provides additional privacy to the ground floor tenants because pedestrians cannot get close to the windows. However, plaintiff states the ground-floor tenants

already have reduced privacy and there are additional ways that they can compensate for the partial loss once the planter is gone. In addition, plaintiff alleges that these privacy issues are outweighed by her need to enter and exit the building (NYSCEF Doc. No.70, citing *Matter of Commission on Human Rights ex rel Ronnie Ellen Raymon v 325 Coop., Inc.*, 1999 WL 156021, at *8 [Jan. 12, 1999], adopted by 1999 WL 152526 [Comm on Human Rights, NYC Jan. 12, 1999]). She contends that Moore's statement that a second retaining wall may not leave sufficient space for ventilation because of the likelihood that trash and debris will pile up in the gap is conclusory – and, moreover, it ignores the fact that cleanup will resolve any problems with trash buildup. Similarly, plaintiff asserts that there is no evidentiary support for Moore's position that unnamed, atypical factors make the construction of a ramp infeasible. She argues that Moore's asserted problems due to the retaining wall and potential excavation do not affect the project's architectural feasibility.

Analysis.

As stated, plaintiff asserts her claim under the City's Human Rights Law. This law affords protections broader than the State's Human Rights Law and, as such, the law is interpreted liberally to accomplish its "uniquely broad and remedial purposes" (*Romanello*, 22 NY3d at 884-885 [internal quotation marks and citations omitted]). As plaintiff notes, and defendants acknowledge, "the purpose of the New York City Human Rights Law is to ensure that all people, regardless of their membership in a protected class, be able to fully enjoy all of the rights, privileges and advantages that this great city has to offer in a manner that is equal and unsegregated. Nowhere is that as important as in an individual's home'" (*Matter of Rose v Co-op City of New York,* N.Y. C. Commn. Human Rights, OATH Index No. 1831/2010 at 2 [Nov, 2010] [avail at 2010 WL 8625897]). Thus, under the NYCHRC, landlords must "make

reasonable accommodation to the needs of persons with disabilities" (Admin. Code § 8-107 [15]). Therefore, as is relevant here, "it is an unlawful discriminatory practice for any person prohibited by [pertinent provision of the NYCHRL] from discriminating on the basis of disability not to provide a reasonable accommodation to enable a person with a disability to . . . enjoy the right or rights in question" (*id.*). A "reasonable accommodation" is one that does not cause undue hardship" (*Mutual Apts.*, 203 AD3d at 1156-1157). Further, the burden is on the landlord to show undue hardship (*id.* at 1157). Defendants do not question whether plaintiff, who has statements from her doctor and physical therapist attesting to her lack of mobility, suffers from a disability that makes it difficult for her to get into and out of her building. Thus, the parties properly limit their discussion to the issue of undue hardship in the context of the feasibility of an accommodation.

After careful consideration, the Court concludes that there are issues of fact that preclude summary judgment because there is an issue of fact as to whether the installation of the ramp is infeasible. The Moore affidavit, read in the light most favorable to the non-movant, would allow a fact finder to determine that it may be impossible to provide necessary ventilation to the ground floor apartments (NYSCEF Doc. No. 52, ¶ 10). It is for this reason that disputes involving battles of the experts often require a trial to resolve (*see Bossert v New York Univ. Langone Med. Ctr. – Tisch Hosp.*, 213 AD3d 547, 548 [1st Dept 2023] [issue as to whether problems with ramp proximately caused accident]). In making this determination, the Court rejects plaintiff's position that defendants cannot submit a supplemental affidavit using information that was available to Moore when he issued his report as lacking in merit. In support, plaintiff relies on *Singh v PGA Tour, Inc.* (2017 NY Slip Op 31078 [U], *3 [Sup Ct, NY County 2017], *appeal dismissed*, 162 AD3d 556 [1st Dept 2018]). However, that decision was relying on Rule 13(c) of

the Supreme Court, New York County, Commercial Division, which states that an expert report must "include 'a complete statement of all of the expert witness' opinions and the data the expert considered in forming those opinions'" (*see id.* [citing Rule 13(c)]). This rule is not at issue here and plaintiff has not presented any other arguments in favor of rejecting the affidavit.

Defendants' Cross-Motion.

Defendants cross-move under both CPLR § 3211 (a) (7) and CPLR § 3212 for an order dismissing the lawsuit as against Scharfman Org and Scharfman. According to defendants, The Scharfman Organization is a fictitious entity, and thus cannot be sued. In addition, defendants state that under the Limited Liability Company Law, Scharfman is not responsible for the acts of owner East 17th LLC. Specifically, they quote Limited Liability Company Law § 609 (a), which states, as is relevant here, that:

> "Neither a member of a limited liability company, a manager of a limited liability company managed by a manager or managers nor an agent of a limited liability company . . . is liable for any debts, obligations, or liabilities of the limited liability company or each other . . . solely by reason of being such member, manager or agent or acting (or omitting to act) in such capacities or participating (as an employee, consultant, contractor or otherwise) in the conduct of the business of the limited liability company" (NYSCEF Doc. No. 51, ¶ 12 [quoting section 609 (a)]).

To the extent that he is a corporate officer of Beach Lane, moreover, defendants state that Scharfman is not liable for Beach Lane's obligations (NYSCEF Doc. No. 51, ¶ 13 [citing, inter alia, *T.D. Bank, N.A. v Halcyon Jets, Inc.*, 99 AD3d 431, 431 [1st Dept 2012] [*TD Bank*]).

When it considers a CPLR § 3211 (a) (7) motion, the Court "must accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion" (*Engelman v Rofe*, 194 AD3d 26, 33 [1st Dept 2021]). Here, plaintiff proceeds under the NYCHRL, which provides that it is unlawful for "'the owner, lessor, [] managing agent of, or other person having

the right to sell, rent or lease or approve the sale, rental or lease of a housing accommodation'" to violate the statute (NYSCEF Doc. No. 54, *5 [quoting Administrative Code § 8-107 (5)]). Plaintiff has sued Scharfman as the chief executive officer of Beach Lane and, on "information and belief . . . the Head Officer of Defendant East 17th LLC, and [in control of] The Scharfman Organization" (NYSCEF Doc. No. 34, ¶ 9). The complaint states that plaintiff sent her letter requesting an accommodation to Scharfman and East 17th LLC (*id.*, ¶ 31), that defendants collectively denied her request by letter (*id.*, ¶ 34), and that defendants did not provide a reasonable accommodation despite plaintiff's two requests (*id.*, ¶ 38). In addition, as plaintiff further notes, the complaint alleges that defendants, including Scharfman, unlawfully and willfully discriminated against plaintiff (NYSCEF Doc. No. 54, *7). Accepting these allegations as true, plaintiff has pled a prima facie case against Scharfman. Similarly, the complaint pleads a viable claim against the Scharfman Org. Plaintiff has sued the Scharfman Org as "the parent holding company of . . . Defendants East 17th LLC and Beach Lane" (NYSCEF Doc. No. 34, ¶ 8). Additionally, the paragraphs the Court cited above, alleging that the defendants violated the NYCHRL, also apply to the Scharfman Org.

Plaintiff opposes the prong of the cross-motion that rests on CPLR § 3212 based on its timeliness. She refers to the parties' August 23, 2022, stipulation regarding scheduling, which this Court so-ordered (NYSCEF Doc. No. 30). The stipulation extended the dispositive motion deadline from March 31, 2021, to October 28, 2022. Plaintiff filed her motion on October 28, 2022, so just within the applicable timeframe. However, defendants filed their cross-motion on December 8, 2022, almost six weeks late. Further, they did not justify their lateness with a showing of good cause. Accordingly, plaintiff states that the Court should refuse to consider the

cross-motion (NYSCEF Doc. No. 54 [citing, e.g., *Rahman v Domber*, 45 AD3d 497, 497 [1st Dept 2007]).

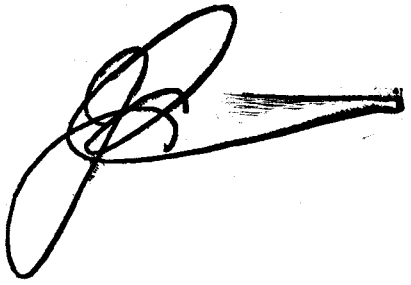
In response, defendants state that while plaintiff's argument applies to an untimely summary judgment motion, in the case at hand a cross-motion is at issue. Therefore, defendants contend that *Rahman* is inapplicable. Defendants state that where a party makes a cross-motion made in response to a timely summary judgment motion, the Court may consider the motion (NYSCEF Doc. No. 66, ¶ 3 [citing *Osario v BRF Constr. Corp.*, 23 AD3d 202, 203 (1st Dept 2005)]).

Where the Court sets a deadline for summary judgment motions, the parties must abide by this deadline (CPLR § 3212 [a]). Courts deny untimely motions for summary judgment absent a showing of good cause for the delay (*see id.*; *Crawford v 14 E. 11th St., LLC*, 191 AD3d 461, 461 [1st Dept 2021]). "'[G]ood cause' requires . . . a satisfactory explanation for the untimeliness—rather than simply permitting meritorious, nonprejudicial filings, however tardy" (*Brill v City of New York*, 2 NY3d 648, 652 [2004]). Further, "[n]o excuse at all, or a perfunctory excuse, cannot be 'good cause'" (*Baram v Person*, 205 AD3d 470, 471 [1st Dept 2022] [internal quotation marks and citation omitted]). Here, defendants do not assert that there is good cause for their delay in their supporting papers or in their reply. Therefore, the Court denies the cross-motion as untimely (*see id.*; *Cooper v Metropolitan Transp. Auth.*, 201 AD3d 565, 566 [1st Dept 2022]).

As defendants note, an exception may arise in the context of an untimely cross-motion made in response to a timely summary judgment motion (*see Osario*, 23 AD3d at 203). However, this principle applies to responsive cross-motions only – that is, the cross-motion must rest on the same grounds as the original motion. If the cross-motion does not raise issues

"'nearly identical' to those raised by [the moving party] in [a] timely motion," it is not a true cross-motion and the exception is inapplicable (*see Crawford*, 191 AD3d at 461). Thus, in *Jarama v 902 Liberty Ave. Hous. Dev. Fund Corp.*, 161 AD3d 691, 691-692 [1st Dept 2018]), the Court considered the untimely motion to the extent that it raised the same issues that the plaintiff raised in the timely motion, but refused to consider the issues that were not "nearly identical to those raised in the [underlying] motion." Here, defendants' untimely cross-motion raises issues that plaintiff did not put before the Court. Hence, the exception is inapplicable, and defendants will have to raise these arguments before the factfinder.

Accordingly, it is ordered that the motion and cross-motion are denied. This constitutes the decision and order of this Court.



12/15/2023
DATE

James d'Auguste, J.S.C.

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

159661/2019 GALONSKY, DENISE vs. EAST 17TH LLC
Motion No. 002