

Gonzalez v Post Apt. Corp.
2024 NY Slip Op 35490(U)
September 5, 2024
Supreme Court, Westchester County
Docket Number: Index No. 50017/2024
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

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

-----X
SUZETTE GONZALEZ,

Plaintiff,

-against-

POST APARTMENT CORP., GHASSAN SAYEGH;
ALAN R. GRAY, JR.; JERMAINE NICKS; KATHERINE
RAMJATTAN; ELISSA SANTANA; and FELIX RODRIGUEZ,

Defendants.

-----X
WOOD, J.

**DECISION & ORDER
Index No. 50017/2024
Seq No. 5**

In an action in which inter alia, plaintiff complains of excessive noise from apartment above in breach of warranty of habitability, New York State Courts Electronic Filing (NYSCEF) document numbers 106-127 were read in connection with the pre-answer motion by defendants Post Apartment Corp. ("Post"), Ghassan Sayegh, Jermaine Nicks, Katherine Ramjattan, Elissa Santana, and Felix Rodriguez ("defendants", this action has been discontinued against defendant Alan R. Gray, Jr.) to dismiss plaintiff's Amended Verified Complaint pursuant to CPLR 3211(a)(1), and (7) and CPLR § 3016, for failure to state a cause of action and failure to set forth the claims with the requisite specificity required to assert same; (ii) granting Defendants' costs, compensatory and punitive damages; (iii) sanctioning Plaintiff and her counsel for frivolous conduct.

According to the complaint, plaintiff, was, and still is, a shareholder of Post Apartment Corp., located at 60 Post Street in Yonkers ("the premises"), and a resident and proprietary lessee

at the premises owned by Post. Plaintiff had alerted Post of excessive noise emanating from Alan Gray's apartment above the one occupied by plaintiff, which said noise continued throughout the day and night affecting her ability to sleep, and well-being. These complaints were purportedly ignored by defendants. Plaintiff also claims that she has been injured "in her good name and reputation" arising from a special meeting of Post's shareholders ("the meeting") on or about January 14, 2023. At that meeting, plaintiff's removal from the premises was discussed due to her alleged objectionable conduct. Plaintiff was not present at said shareholders meeting and is thus, unaware of the exact language spoken by defendants, Sayegh, Gray, Nicks, Ramjattan, Santana and Rodriguez, who were the members of the Board of Directors of Post at that time. These defendants allegedly continued and condemned plaintiff and ostracized her to all attendees at said meeting with misrepresentations, and said malicious words were reduced to a writing.

Defendants contend that plaintiff is a residential tenant within a cooperative housing corporation, seeks to leverage her cooperative corporation and its Board members to credit her common charge arrears through false claims of various torts, breaches and purported damages.

Generally, a motion pursuant to CPLR 3211(a)(1) to dismiss the complaint on the ground that the action is barred by documentary evidence may be granted "only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]).

Additionally, pursuant to CPLR 3211(a)(7), a court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Boyle v N. Salem Cent. Sch. Dist.*, 208 AD3d 744, 745 [2d Dept 2022]).

As for plaintiff's First cause of action against defendants for Intentional Infliction of Emotional Distress, the elements that must be demonstrated 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 (*Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 710 [2d Dept 2012]). The subject conduct must be so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community (*id.* at 710). Mere insults, threats and annoyances are insufficient (*Ratto v Oliva*, 195 AD3d 870, 873 [2d Dept 2021]).

Plaintiff claims that defendants' conduct was outrageous in that it was undertaken for the purpose of denying plaintiff her rights in and to her apartment, and that she has been injured in her good name and reputation. Defendants argue that there is no allegation that any conduct was intentional, and that plaintiff has failed to allege any individual wrongdoing by the board members that was separate and apart from their collective actions taken in their capacity as board members and thus failed to state a claim for breach of fiduciary duty. Even if there was an assumed fiduciary duty, plaintiff still cannot prove misconduct by the individual board members or damages directly caused by a board member's misconduct. Accepting as true the allegations in the amended complaint, they would not be so outrageous in character, and so extreme in degree as to qualify as intentional infliction of emotional distress (*Bilitch v New York City Health & Hosps. Corp.*, 194 AD3d 999, 1005 [2d Dept 2021]).

The Second cause of action for gross negligence against defendants, needs to allege facts sufficient to constitute willful or reckless conduct that evidences an indifference to the rights of others (*Skywest Inc. v Ground Handling, Inc.*, 150 AD3d 922 [2d Dept 2017]). Further, "to

constitute gross negligence, a party's conduct must smack of intentional wrongdoing or evince a reckless indifference to the rights of others ” (*Seti v Carnell Assocs., Inc.*, 218 AD3d 509, 511 [2d Dept 2023]). The allegations asserted by plaintiff against defendants that by reason of its intentional conduct to not address violations of excessive noise, and the Board’s conduct at meetings towards her, has caused plaintiff injury to her good name and reputation, and she has suffered great physical and emotional pain and mental anguish and distress. Even if these allegations are considered to be true, they do no rise to the level of wanton conduct and reckless disregard necessary to sustain a gross negligence cause of action. Plaintiff failed to allege any facts constituting willful misconduct or gross negligence on the part of defendants.

In the Third Cause of action for breach of covenant of quiet enjoyment against Post, a tenant must show an ouster, or if the eviction is constructive, an abandonment of the premises (*Marchese v Great Neck Terrace Assocs., L.P.*, 138 AD3d 698, 700 [2d Dept 2016]). The tenant must also have performed all covenants which are a condition precedent to its right to insist upon the covenant, like in the instant matter the failure to pay all common charges (*Dance Magic, Inc. v. Pike Realty, Inc.*, 85 AD3d 1083, 1088 [2d Dept 2011]). Plaintiff complains that she has been unable to peacefully and safely reside in her apartment, in that she has been compelled to sleep away from her apartment at different times and to sleep on the floor in order to avoid the excessive and outrageous noise that was allegedly permitted by Post, thereby denying plaintiff the intended purpose of her apartment. Plaintiff alleges that the noise is emanating from another apartment above her apartment, not that Post has produced the noise. Even taking these allegations as true, plaintiff has not asserted the required requisite allegations to maintain a breach of the covenant of quiet enjoyment against Post.

As to the fourth cause of action for breach of warranty of habitability against Post, plaintiff failed to show that the noises she complained of were so excessive that she was deprived of the essential functions that a residence is supposed to provide (*Kaniklidis v 235 Lincoln Place Hous. Corp.*, 305 AD2d 546, 547 [2d Dept 2003]). Also, Post did not breach the warranty of habitability because the record shows that Post and its management company, Total Realty LLC ("Total Realty LLC") made attempts to meet and address plaintiff's noise complaints.

Lastly, this court also declines the invitation to award costs and impose financial sanctions against plaintiff, her attorney, or both, for purportedly engaging in frivolous conduct (22 NYCRR § 130-1.1 [a]-[b]). The court has considered the remainder of the factual and legal contentions of the parties and to the extent not specifically addressed herein, finds them to be either without merit or rendered moot by other aspects of this decision. This constitutes the decision and order of the court. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss the complaint is **granted**, on the ground that it fails to state a cause of action pursuant to CPLR 3211(a)(7), but **denied** as to costs and expenses, punitive damages, and any request for sanctions; and it is further

ORDERED that within twenty days after this decision and order is uploaded to NYSCEF, counsel for defendants shall serve a copy of this decision and order electronically with notice of entry, upon all parties and file proof of service on NYSCEF within five days of service. Case disposed. The Clerk shall mark his records accordingly.

Dated: White Plains, New York
September 5, 2024



HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF