SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS** **PART 36**

Justice

----------X

ERICA EHRENBERG,

Plaintiff,

- v -

490 WEST END AVENUE APARTMENTS CORP., 490 WEST END APARTMENTS CORP., and ORSID REALTY CORP.,

Defendants.

----------X

INDEX NO. 152073/2021

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27

were read on this motion to/for **DISMISSAL**.

Plaintiff Erica Ehrenberg, occupant and/or shareholder of the subject cooperative apartment, located at 490 West End Avenue, Apt. PHC, New York, NY 10024, commenced this action against defendants 490 West End Avenue Apartments Corp. and 490 West End Apartments Corp. (collectively, "the co-op"), and Orsid Realty Corp. ("Orsid"), claiming, *inter alia*, that defendants have failed to maintain the subject building and have negligently caused and allowed said conditions to interfere with the use and enjoyment of her apartment (NYSCEF Doc. No. 3, *verified amended complaint*).

In this timely pre-answer motion to dismiss, defendants move, pursuant to CPLR 3211(a)(1), (a)(3) and (a)(7), for dismissal of the amended verified complaint.[1] (NYSCEF Doc. No. 3), in part or in its entirety. Specifically, Orsid moves to dismiss the entire amended complaint against it on the ground that Orsid is the agent of a disclosed principal and, thus, that it cannot be held liable for the claims asserted against it. The co-op moves to dismiss, in whole or in part, eight of the amended complaint's eleven causes of action: third cause of action (labeled negligence); fourth cause of action (labeled breach of contract/proprietary lease); sixth cause of action (labeled personal injury); seventh cause of action (labeled property damage and out-of-pocket expenses); eighth cause of action (labeled breach of covenant of quiet enjoyment); ninth cause of action (labeled disparate treatment); tenth cause of action (labeled breach of fiduciary duty); and, eleventh cause of action (labeled attorney's fees).

Plaintiff's opposition is based upon counsel's affirmation (NYSCEF Doc. No. 16, *aff. in opposition*), and documents attached as exhibits (NYSCEF Doc. Nos. 17-20). In opposition, plaintiff does not address that branch of the motion seeking to dismiss claims as against Orsid.

[1] Following her filing of her original summons and complaint as against defendant named as 490 West End Avenue Apartments Corp. (Doc. 1), plaintiff filed documents she describes as summons (amended) and complaint (amended) (NYSCEF Doc. Nos. 2, 3). These later documents add as a defendant in the caption 490 West End Apartments Corp. Accordingly, the court identifies the complaint as amended.

As to the causes of action against the co-op, while plaintiff initially states that she opposes the dismissal motion with respect to the third, fourth, sixth, seventh, ninth, and tenth causes of action as against it (opp aff ¶ 2), plaintiff substantively addresses only the third, fourth, sixth, seventh, tenth and eleventh causes of action. Plaintiff does not specifically address the eighth and ninth causes of action. The court notes that plaintiff did not seek leave to file, and does not attach a copy of, a proposed second amended complaint (*see* CPLR 3025[b]; *see also* CPLR 3025[a]). Defendants reply by way of attorney affirmation, memorandum of law, and exhibits (NYSCEF Doc. Nos. 23-27). The court shall consider the entirety of the amended complaint, including the facts set forth within the statement of facts (amended complaint ¶ ¶ 11-32). The court does not consider facts asserted in the submitted papers that are not set forth in or inferred by the amended complaint, and not supported by affirmations or affidavits based on personal knowledge.

Pursuant to CPLR 3211(a)(1), a party "may move for judgment dismissing one or more causes of action asserted against him on the ground that: . . . a defense is founded upon documentary evidence." It is defendant's burden to show that "the relied-upon documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Serv. v Fimat Futures USA, Inc.*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]). "A CPLR 3211 dismissal may be granted where documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 571 [2005] [internal quotation marks and citation omitted]). "A paper will qualify as 'documentary evidence' only if it satisfies the following criteria: (1) it is 'unambiguous'; (2) it is of 'undisputed authenticity'; and (3) its contents are 'essentially undeniable'" (*VXI Lux Holdco S.A.R.L. v SIC Holdings, LLC*, 171 AD3d 189, 193 [1st Dept 2019], quoting *Fontanetta v John Doe 1*, 73 AD3d 78, 86 - 87 [2d Dept 2010]). The motion "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co.*, 98 NY2d 314, 326 [2002], citing *Leon v Martinez*, 84 NY2d 83, 88 [1994]).

Pursuant to CPLR 3211(a)(3), a party "may move for judgment dismissing one or more causes of action asserted against him on the ground that: … the party asserting the cause of action has not legal capacity to sue."

In determining a motion to dismiss pursuant to CPLR 3211 (a) (7), the court liberally construes the complaint, accepts the alleged facts as true, and accords plaintiff "the benefit of every possible favorable inference" (*Leon v Martinez*, 84 NY2 at 87). The motion "must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law" (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal quotation marks and citations omitted]). "Whether a plaintiff can ultimately establish [her] allegations is not part of the calculus in determining a motion to dismiss" (*EBC 1, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]). Affidavits submitted by a party "will almost never warrant dismissal under CPLR 3211, unless they establish conclusively that [the plaintiff] has no [claim or] cause of action" (*Lawrence v Graubard Miller*, 11 NY3d 588, 595 [2008], citing *Rovello v Orofino Realty Co.*, 40 NY2d 633, 636 [1976]). The court is not permitted to "assess the merits of the complaint or any of its factual allegations, but only to determine if, assuming the truth of the facts alleged, the complaint

states the elements of a legally cognizable cause of action" (*Skillgames, LLC v Brody*, 1 AD3d 247, 250 [1st Dept 2003] [internal citation omitted]). Nevertheless, "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible or clearly contradicted by documentary evidence are not entitled to such consideration" (*id.* [internal citation omitted]).

As an initial matter, that branch of the motion seeking to dismiss the amended complaint against Orsid, as it is the agent of a disclosed principal, is not alleged to have a separate contractual relationship with plaintiff, and is not plaintiff's landlord (see *Keskal v Modrakowski*, 249 NY 406, 408 [1928]; *City University of N.Y. v Finalco*, 93 AD2d 792, 794 [1st Dept 1983]), is granted, without opposition.

Plaintiff alleges, in the statement of facts (amended complaint ¶¶ 11-32), that, *inter alia*, she "contacted the New York City Department of Environmental Protections ("DEP"), which issued two violations of the noise code against defendants, both of which were unsuccessfully contested by defendants at OATH hearings" (*id.* ¶ 21). The third cause of action, which repeats and realleges the preceding allegations (*id.* ¶ 47), asserts that: defendants owe plaintiff "a duty to maintain the Subject Building in such a way that it does not adversely affect the lives, health, and safety of occupants and shareholders at the Subject Building" (*id.* ¶ 43); defendants "have acted negligently by allowing, causing and creating hazardous conditions, including, but not limited to, allowing elevator noise and vibrations to enter into Plaintiff's home, making it unfit for habitation" (*id.* ¶ 44); and "the conditions have caused danger to the life, health, and safety of the Plaintiff and guests" (*id.*). She further alleges that the value of plaintiff's apartment "has been severely diminished as a result of Defendants' negligence" and that she "has been damaged as a result" (*id.* ¶ 45), and that plaintiff is "entitled to a money judgment against Defendants for damages and for the diminishment of value" to her apartment "in an amount to be determined by the court" (*id.* ¶ 46).

Defendants argue that the negligence cause of action should be dismissed as duplicative of the contract cause of action. Defendants contend that plaintiff cannot pursue both a negligence and contract cause of action unless she can demonstrate that the tort claim springs from circumstances extraneous to the breach of contract claim (NYSCEF Doc. No. 12 at 11, *memo of law*). Defendants further argue that plaintiff "pleads a garden-variety negligence claim entirely based on the contractual obligations within the Lease at paragraphs 2 and 3, i.e., the obligation of maintaining the building in a safe manner and specifically, the duty to maintain the elevator so that it does not create noise and vibrations" (*id.*), and, accordingly, seeks dismissal.

In opposition, plaintiff contends that the amended complaint's detailed account of the facts and issues, including those set forth in the statement of facts and documents attached to the opposition, demonstrate that she has sufficiently pleaded the negligence claim, as well as the remaining causes of action. Plaintiff further argues that the negligence claim is not duplicative of the breach of contract claim because, "[i]t is well settled that two claims may be pleaded in the alternative" (opp aff, at 5). Additionally, she argues that, contrary to defendants' assertions, defendants "do in fact owe a duty to her as a lawful shareholder, to make repairs in common areas in such a way that they do not impact her quality of life and ability to live peacefully in her home" (*id.*).

Defendants reply that plaintiff "has not met her burden to show a separate duty upon which her negligence claim can be based" (NYSCEF Doc. No. 27, *reply memo of law*). Additionally, they argue that while plaintiff asserts there is an independent duty, she does not support this assertion. Moreover, they assert that plaintiff effectively concedes that the negligence claim is duplicative of the contract cause of action by pointing to provisions in the proprietary lease.

"It is a well-established principle that a simple breach of contract is not to be considered a tort unless a legal duty independent of the contract itself has been violated" (*Dormitory Auth. of the State of NY v Samson Constr. Co.*, 30 NY3d 704, 711 [2018]). Restating or utilizing slightly different language to assert a negligence cause of action in addition to the breach of contract cause of action is insufficient (see *Clark-Fitzpatrick, Inc. v Long Is. R.R. Co.*, 70 NY2d 382, 389 [1987]; *See also 320 West 115 Realty LLC v All Building Constr. Corp.*, 194 AD3d 511, 512 [1st Dept 2021]); *Kordower-Zetlin v Home Depot U.S.A., Inc.*, 134 AD3d 556, 557 [1st Dept 2015]); *OP Solutions, Inc. v Crowell & Moring, LLP*, 72 AD3d 622, 622 [1st Dept 2010]. Where, however, a plaintiff alleges a negligence action based on a statutory independent duty, the court properly declines to dismiss the negligence action for failure to state a cause of action, particularly at an early stage of litigation (see *Gendell v 42 West 42 W. 17th St. Hous. Corp.*, 193 AD3d 644, 664-665 [1st Dept 2021]).

Liberally construing the amended complaint, accepting the alleged facts as true, and according plaintiff the benefit of every possible favorable inference (see *Leon v Martinez*, 84 NY2 at 87), the court declines at this procedurally early stage of the litigation to dismiss the negligence cause of action for failure to state a cause of action. The court discerns from the four corners of the amended complaint factual allegations, including a statutory duty in addition to the contractual duty, which manifest a negligence cause of action.

Turning to the fourth cause of action for breach of contract/proprietary lease, plaintiff alleges, *inter alia*, that defendants "have breached at least three paragraphs of the Proprietary Lease" including ¶ 3 "Services by Lessor," and a House Rule (amended complaint ¶ 48), and, as a result, she has "has suffered damages to her health, both physical and mental" (*id.* ¶ 49). She also alleges that she "is entitled to reimbursement for damages as well as an abatement of maintenance in an amount to be determined by the Court for the time period that the conditions described herein existed" (*id.* ¶ 50).

Defendants, while denying the allegations, contend that plaintiff cannot in any event recover the damages she seeks, as ¶¶ 12 and 29(a) of the proprietary lease provide that under these circumstances, shareholders are not entitled to a maintenance abatement. Defendants note in footnote 1 of their moving memorandum of law (at 7), that "[i]t is recognized that should Ehrenberg prevail on her statutory warranty of habitability claim, she can seek a maintenance abatement as damages recoverable under that claim."[2] Defendants also argue that damages for mental suffering and personal injuries are not recoverable for breach of contract. Plaintiff contends she is entitled to recover these damages within her contract cause of action, and defendants reply to the contrary.

---

[2] Plaintiff's alleges breach of the warranty of habitability as her fifth cause of action (NYSCEF Doc. No. 3, *Verified Complaint (Amended)*, p 14). Said claim is not a subject of the instant motion.

Within this breach of contract cause of action, defendants have shown that plaintiff cannot recover damages in the form of an abatement of maintenance. At this early stage of the litigation, however, the court declines to dismiss the other requested damages within this cause of action.

In the sixth cause of action, labeled "Personal Injury," plaintiff seeks damages for conditions in her apartment "which render it unfit for the use intended by the parties and which are dangerous to the life, health and safety of Plaintiff" (a/c ¶ 59). The alleged conditions (*id.* ¶ 59) are: "heightened risk of deadly fall as a result of inadequate height of parapet wall"; "risk of slip and fall accidents as a result of condensation beneath a skylight, which did in fact cause a knee injury for which Defendant was forced to reimburse medical bills"; "increased exposure to COVID-19 as a result of the noise and vibrations forcing Plaintiff out of her apartment as much as possible"; and, "head colds and flus due to inadequate heat." She alleges that the defendants' failure to correct these conditions, which lingered for years, caused her "to have to contact city agencies and suffer severe physical, emotional and mental anguish and damage" (*id.* ¶ 61), and that she is entitled to "damages as a result of Defendant's extremely reckless and negligent failure to remedy the excessive noise in the Subject Apartment and refusal to provide Plaintiff with a safe and habitable home" (*id.* ¶ 62).

Defendants contend that this cause of action should be dismissed for a number of reasons, including the following. It is not an independent cause of action; plaintiff has not identified a single injury she in fact sustained, except for the knee injury which, relying on exhibits, is time-barred and has been released; absent an injury in fact, plaintiff lacks standing to bring a cause of action for damages based on personal injuries and should be dismissed pursuant to CPLR 3211 (a)(3). Plaintiff argues that: defendants owe her a duty under both the proprietary lease and the warranty of habitability; it is entirely premature to dismiss the personal injury claim before discovery has even begun; and she adequately pleaded a cause of action for personal injury.

This cause of action is dismissed. As argued by defendants, it is not a distinct cause of action and the possibility of an injury, as pleaded here, is not sufficient (see *Frank v DaimlerChrysler Corp.*, 292 AD2d 118, 121 [1st Dept 2002]. The court additionally notes that this cause of action is subsumed within plaintiff's causes of action for breach of contract, negligence, and breach of the warranty of habitability.

As for the seventh cause of action for property damage and out-of-pocket expenses, plaintiff alleges that "[d]ue to Defendant's negligence, breach of the Proprietary Lease, and breach of the Warranty of Habitability, Plaintiff suffered significant property damage and out-of-pocket expenses for expert reports and legal fees" (amended complaint ¶ 63). Defendant argues that this cause of action should be dismissed, as it is not recognized as an independent cause of action and/or is subsumed into the fourth cause of action for breach of contract (NYSCEF Doc. No. 12, at 15). Plaintiff argues, in essence, that as she may plead in the alternative, this cause of action should not be dismissed.

As argued by defendants and contrary to plaintiff, this claim for property damage and out of pocket expenses does not state a distinct cause of action. It merely restates that plaintiff is seeking monetary damages under cause(s) of action already set forth in the amended complaint

(see *Michel v 14 Beekman Place Corp.*, 2016 NY Slip Op 31001[U], **10-11 [Sup Ct, NY County 2016]). Accordingly, the seventh cause of action is dismissed.

Inasmuch as plaintiff fails to raise any substantive opposition to dismissal of the eighth and ninth causes of action, for breach of covenant of quiet enjoyment and disparate treatment, respectively, that branch of the motion seeking dismissal of these claims is granted.

The tenth cause of action, premised on breach of fiduciary duty, is also dismissed. It is well-settled that a residential cooperative housing cooperation does not owe a fiduciary duty to its shareholders (see *Kleinerman v 245 East 87 Tenants Corp.*, 105 AD3d 492, 493 [1st Dept 2013]); *Peacock v Herald Square Loft Corp.*, 67 AD3d 442, 443 [1st Dept 2009]). Here, the amended complaint names only the co-op defendants and Orsid as parties in this action and does not name as defendants the board of directors. Accordingly, the court does not reach plaintiff's opposing arguments and the co-op's reply to arguments as to whether and to what extent, if any, a pleading could assert a viable cause of action for breach of fiduciary duty as against unnamed party defendant(s).

Lastly, plaintiff's cause of action for attorney's fees, the eleventh cause of action, is dismissed, as a claim for attorney's fees may not be maintained as a separate cause of action (*Pier 59 Studios, L.P. v Chelsea Piers L.P.*, 27 AD3d 217, 217 [1st Dept 2006]). The amended complaint does not seek attorney's fees within a viable cause of action or within the prayer for relief, and, therefore, plaintiff's reliance on her cited cases is misplaced. The court does not address whether plaintiff's request for attorney's fees, properly pleaded, would remain viable or undisturbed (see *La Porta v Alacra, Inc.* 142 AD3d 851, 853 [1st Dept 2016]); *Pier 59 Studios, L.P.*, 27 AD3d at 217). Accordingly, it is

ORDERED that defendants' motion to dismiss the amended complaint as against defendant Orsid Realty Corp. is granted, and the amended complaint in its entirety is dismissed as against defendant Orsid Realty Corp; and it is further

ORDERED that defendants' motion to dismiss the amended complaint pursuant to CPLR 3211(a)(1), (a)(3), and (a)(7), as against defendants 490 West End Avenue Apartments Corp. and 490 West End Apartments Corp., is granted solely to the extent that the sixth, seventh, eighth, ninth, tenth, and eleventh causes of action are dismissed; the fourth cause of action stands, however plaintiff is unable to recover damages in the form of an abatement of maintenance, and the motion is otherwise denied; and it is further

ORDERED that the remaining causes of action asserted against defendants 490 West End Avenue Apartments Corp. and 490 West End Apartments Corp. are severed and shall continue; and it is further

ORDERED that defendants 490 West End Avenue Apartments Corp. and 490 West End Apartments Corp. shall file an answer to the remaining causes of action in the amended complaint within thirty (30) days of service of this decision and order, with notice of entry; and it is further

ORDERED that defendants shall serve a copy of this order with notice of its entry on plaintiff and on the Office of the County Clerk (by the means set forth in the court's e-filing protocol, the e-filing page of the court's website), which shall enter judgment accordingly; and it is further

ORDERD that this matter is scheduled for a preliminary conference on June 4, 2025, details which shall be provided by this court no later than June 2, 2025.

This constitutes the decision and order of the court.

April 9, 2025

HON. VERNA L. SAUNDERS, JSC

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