SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. VERNA L. SAUNDERS, JSC** **PART 36**
Justice

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BLANCHE ZELMANOVICH,
Plaintiff,

- v -

EASTMORE OWNERS CORP. and
ADAM G. SEIDEL,
Defendants.

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INDEX NO. 650443/2022

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 005) 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196

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

This action concerns allegations that defendants attempt to evict plaintiff from her cooperative apartment and terminate her shares, on the ground of baseless claims that her dog, Snowball, barks excessively. Defendant Eastmore Owners Corp. ("Eastmore" or "Co-op") now moves for an order, (i) pursuant to CPLR 3211(a)(1) and (a)(7), dismissing the underlying complaint for failure to state a claim, and on the basis of documentary evidence which directly refutes her allegations; or, in the alternative, (ii) *sua sponte* converting the instant application into one for summary judgment, pursuant to CPLR 3212, and granting Eastmore relief thereunder; and in addition thereto (iii) pursuant to the terms of plaintiff's proprietary lease, awarding Eastmore reasonable attorney's fees for plaintiff's default thereof (NYSCEF Doc. No. 161, *notice of motion*).

As relevant to this motion, the amended complaint asserts the following causes of action against Eastmore: (1) declaratory judgment; (2) violation of 42 USC 3601 of the Fair Housing Act; (3) violation of sections 8-102 and 8-107(8) of the New York City Administrative Code; (4) violation of sections 296(5) and 296(18)(2) of the New York Executive Law; (5) *Yellowstone* injunction; and (6) preliminary injunction (NYSCEF Doc. No. 164, *amended complaint*).

Plaintiff is a long-standing owner/corporate shareholder of Apartment 4N, located at 240 East 76th Street, New York, New York. She has held a proprietary lease to the apartment for approximately fourteen (14) years. In the spring of 2021, Eastmore, the Co-op, allegedly received complaints about plaintiff's dog barking. Plaintiff's dog is alleged to be a medically prescribed emotional support animal.

In its memorandum of law in support of its motion, Eastmore argues, *inter alia*, that plaintiff fails to assert a "reasonable accommodation" that could allow the unfettered barking of her dog to continue to the detriment of other shareholders/owners/residents. Eastmore further claims that it owes a fiduciary duty to all residents of the building and, therefore, the business judgment rule prohibits judicial inquiry into authorized actions taken by the board in good faith and in the exercise

of honest judgment. The board here, argues Eastmore, found and determined that the "[p]laintiff's dog's behavior was more than its shareholders could bear by virtue of the repeated complaints of noise which continue to date." It is Eastmore's contention that plaintiff's claims fail to establish how Eastmore discriminated against her regarding her dog, especially considering the logs of complaints and the audio recordings made of the dog's non-stop barking. Additionally, Eastmore argues that this court should grant it summary judgment against plaintiff because plaintiff has blatantly demonstrated that she has no intention of curing her breach, as is required under a *Yellowstone* injunction, as she has failed to cure the violations listed in the Notice to Cure, Amended Notice to Cure, and subsequent Notice of Termination. Insofar as this action is meritless, Eastmore argues it is entitled to attorney's fees pursuant to NYCRR § 130-1.1 (NYSCEF Doc. No. 163, *memorandum of law*).

In support of its motion, defendant submits, *inter alia*, this court's declination of plaintiff's application for *Yellowstone* injunction (NYSCEF Doc. No. 166); the order from the Appellate Division, First Department, entered June 30, 2022, affirming denial of the *Yellowstone* injunction (NYSCEF Doc. No. 167); and the Order from the Appellate Division, First Department, entered September 6, 2022, denying plaintiff leave to appeal the June 30, 2022 Order to the Court of Appeals (NYSCEF Doc. No. 168). Respondent also submits a decision and order issued in the underlying Civil Court proceeding, dismissing plaintiff's motion to dismiss the proceeding (NYSCEF Doc. No. 169).

Plaintiff opposes the application and cross-moves for sanctions. Plaintiff argues that, accepting the facts presented in the amended complaint as true, she has stated a cognizable claim for declaratory judgment because a controversy exists as to whether plaintiff breached the lease and/or cured same. Additionally, plaintiff posits that she has stated viable claims premised on disability discrimination because, assuming the noise complaints are valid, reasonable accommodations could be made to minimize any transfer of noise allegedly emanating from her apartment, short of removing the dog from the apartment. That branch of the motion premised on CPLR 3211(a)(1) must also be denied, claims plaintiff, because Eastmore waived the defense pursuant to CPLR 3211(e). Plaintiff argues that contrary to Eastmore's representation, the denial of a motion to dismiss in the Civil Court, and denial of plaintiff's motion for a *Yellowstone* injunction does not utterly refute plaintiff's allegations or conclusively establish a defense as a matter of law. The argument regarding the business judgment rule must also be rejected on this motion to dismiss, argues plaintiff, because this standard applies to summary judgment motions and, furthermore, the argument relies on the very documents Eastmore has yet to produce in discovery. Plaintiff argues that it has stated a claim for declaratory judgment and her claims premised on disability discrimination. As for the request that the instant motion be converted to one for summary judgment, plaintiff argues that the parties have not charted a course for summary judgment and, thus, said request is procedurally improper. She also argues that Eastmore provides no support for its request for summary judgment because it does not submit any proof or affidavit to substantiate the arguments raised herein. Should the court entertain the argument of converting the motion into a motion for summary judgment, plaintiff argues that judgment would be in her favor on her claim for declaratory judgment because Eastmore has failed to produce any evidence to substantiate the claim that she has breached her lease, aside from documents made by, and documents received by, Seidel or the upstairs Tenant. The only admissible evidence in the record — the sworn testimony of other neighbors denying that the dog causes excessive noise or any other disturbance (NYSCEF

Doc Nos. 27-35) — refutes the claim that plaintiff breached her lease. Lastly, plaintiff contends that Eastmore and its counsel should be sanctioned because their motion is frivolous and was strategically filed to cause delay and shield defendant from its discovery obligations. (NYSCEF Doc. No. 179, *memorandum of law in opposition*).

Defendants submit, *inter alia*, decision and orders issued by the Appellate Division, First Department on March 8, 2022, and June 30, 2022 (NYSCEF Doc. Nos. 183; 185); a discovery stipulation entered into between the parties, dated May 10, 2023 (NYSCEF Doc. No. 186); a letter dated August 3, 2023, wherein plaintiff requested that defendant withdraw its motion seeking to quash the subpoena served upon non-party residents of Eastmore Owners Corp (Mot. Seq. 004) (NYSCEF Doc. No. 187); a decision and order from this court dated, March 21, 2024, deciding defendant's Mot. Seq. 004 (NYSCEF Doc. No. 188).

In opposition to the cross-motion and in further support of the motion, Eastmore argues that petitioner erroneously presupposes that a single complaining witness is insufficient to find a breach of the underlying lease. It further reiterates that petitioner fails to state a claim for disability discrimination because she fails to identify any "reasonable accommodation" that would remedy the situation and only puts forth conclusory statements of discrimination. Eastmore also argues that petitioner's request for sanctions lacks merit because, although petitioner claims that discovery is outstanding, she fails to state her own failure to provide HIPAA-compliant authorizations or copies of any medical documents evidencing her alleged disability (NYSCEF Doc. No. 196).

Defendant submits, *inter alia*, its responses and amended responses and objections to plaintiff's request for production, dated June 2, 2023 and June 30, 2023 (NYSCEF Doc. Nos. 190; 193); plaintiff's first request for the production of documents, dated September 2, 2022 (NYSCEF Doc. No. 191); a fully executed discovery stipulation dated May 10, 2023 (NYSCEF Doc. No. 193); supplemental responses (NYSCEF Doc. No. 194); and a fully executed confidentiality agreement (NYSCEF Doc. No. 195).

In determining a motion to dismiss pursuant to CPLR 3211, "the pleading is to be afforded a liberal construction. [The 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." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994] [internal citations omitted].) A pleading may be dismissed, pursuant to CPLR 3211(a)(7) if plaintiff fails to identify a claim cognizable at law or where the plaintiff has identified a cognizable cause of action but has nevertheless failed to plead a material allegation necessary to establish it. (See CPLR 3211[a][7]; *Basis Yield Alpha Fund [Master] v Goldman Sachs Group, Inc.*, 115 AD3d 128, 134 [1st Dept 2014].) Furthermore, a motion for dismissal pursuant to CPLR 3211(a)(1) may only be granted if the documentary evidence utterly refutes plaintiff's allegations (see *1650 Broadway Assoc., Inc. v Sturm*, 228 AD3d 1, 4 [1st Dept 2024]).

As an initial matter, "since the record does not establish that the parties deliberately charted a summary judgment course" (*Wadiak v Pond Mgt., LLC*, 101 AD3d 474, 474 [1st Dept 2012] [internal quotation marks, brackets and citations omitted]), Eastmore's request to convert the instant motion into one for summary judgment is denied. Moreover, that branch of the motion seeking relief pursuant to CPLR 3211(a)(1) is denied because Eastmore's submissions, i.e., namely orders

issued by this court, the Appellate Division, and the civil court on discrete applications (NYSCEF Doc. Nos. 166-169), do not utterly refute plaintiff's claims such that dismissal is warranted under CPLR 3211(a)(1).

This court also denies that branch of the motion seeking dismissal pursuant to CPLR 3211(a)(7). While this court notes Eastmore's argument with respect to the business judgment rule, its reliance on same is unavailing *at this juncture*. Under the business judgment rule, the decisions of the board of directors are protected from judicial scrutiny, unless it is shown that "the cooperative's decision was rendered in bad faith or in furtherance of purposes other than those legitimately held by the cooperative corporation" (*Woo v Irving Tenants Corp.*, 276 AD2d 380 [1st Dept 2000], citing *Matter of Levandusky v One Fifth Ave. Apt. Corp.*, 75 NY2d 530, 537-538 [1990].) Accepting all the allegations in the complaint as true, affording a liberal construction to the pleadings herein and drawing all inferences in favor of plaintiff, as is required under CPLR 3211, this court finds that plaintiff has sufficiently alleged that there is no unreasonable noise emanating from her apartment and that Eastmore's reliance on the false complaints of a single tenant, defendant Seidel, to pursue eviction proceedings against plaintiff, was fueled by bad faith. Given plaintiff's claim of disability, there is, at the very least, a colorable claim that Eastmore's activities were discriminatory in nature, thus alleging a lack of good faith or unreasonableness. Moreover, this court rejects Eastmore's claim that dismissal of the discrimination claims is warranted since plaintiff fails to identify reasonable accommodations. Plaintiff denies the noise complaints but has nevertheless pleaded that Eastmore has failed to make reasonable accommodations for her disability and demanding that she either remove the dog from the apartment or cause the dog to entirely cease barking. Based on the foregoing, Eastmore's motion is denied in its entirety.

The cross-motion for sanctions is also denied as moot, insofar as plaintiff has moved separately for said relief (Mot. Seq. 006).

All other arguments have been considered and are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

ORDERED that defendant Eastmore Owners Corp.'s motion to dismiss the complaint is denied; and it is further

ORDERED that plaintiff Blanche Zelmanovich's cross-motion for sanctions is denied as moot.

This constitutes the decision and order of this court.

April 11, 2025

HON. VERNA L. SAUNDERS, JSC

CHECK ONE: ☐ **CASE DISPOSED** ☐ **GRANTED** ☒ **DENIED** ☒ **NON-FINAL DISPOSITION** ☐ **GRANTED IN PART** ☐ **OTHER**