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

PRESENT: HON. JUDITH J. GISCHE J.S.C. PART 10

Index Number : 108500/2010
OXMAN, ELLEN
VS.
1100 PARK AVENUE COOPERATIVE CORP.
SEQUENCE NUMBER : 001
DISMISS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

Motion is decided in accordance with annexed decision/order.

pc set for 1/13/11 @ 9:30 am.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: 11/29/10

HON. JUDITH J. GISCHE J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/ JUDG. ☐ SETTLE ORDER/ JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

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Ellen Oxman,

Plaintiff,

-against-

1100 Park Avenue Cooperative Corp., Wallack Management Company, Inc. Burton Wallack, William Mooney, John Kilgore and Peggy Ogden,

Defendant.

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DECISION/ORDER
Index#108500/2010
Mot. Seq. #001

Present:
Hon. Judith J. Gische
J.S.C.

Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

PAPERS	**NUMBERED**
Notice of Motion, PG Aff., FJH Affirm., exhibits	1
SA Aff.,	2
Dfdt Reply Affirm.	3

Gische, J.:

Upon the foregoing papers the decision and order of the court is as follows:

This action alleges claims of harassment and emotional distress, based on defendants making repeated and allegedly unfounded complaints of noise, and other disturbances, originating from plaintiff, Ellen Oxman's residence, Apartment 6D, at 1100 Park Avenue, New York, New York ("Building"). Defendant, Peggy Ogden ("Ogden") brings this pre-answer motion to dismiss the verified complaint against her for failure to state a cause of action. CPLR §3211(a)(1), (7).

Background

Plaintiff is the owner of cooperative apartment ("6B") in the Building and Ogden owns a cooperative apartment ("5B") in the same Building. Defendant 1100 Park Avenue Cooperative Corp., ("Park Avenue"), is a cooperative corporation organized in the State of New York, which owns the building, and defendant Wallack Management Company Inc. ("Wallack Inc.") is the managing agent. Defendant Burton Wallack is an officer, owner and director of Wallack Inc. Defendant William Mooney is the resident superintendent of the building and defendant John Kilgore is an employee of the managing agent.

Defendant Ogden's apartment, 5B, is located directly below plaintiff's apartment, 6B. Defendant Ogden began making noise complaints, first personally to plaintiff, and then subsequently to the building's management, starting in 1993 and continuing thereafter.

The following is alleged by plaintiff in her complaint:

Defendant Ogden made complaints regarding noise emanating from plaintiff's apartment that were untrue and as a result of Ogden's complaints, defendant Park Avenue allegedly sent plaintiff a threatening letter as well as a Notice to Terminate plaintiff's proprietary lease for her cooperative apartment. Plaintiff also alleges that defendants Mooney, Burton, Wallack and Park Avenue made improper demands that plaintiff allow their agents into her apartment to make "non-existent" repairs to the apartment.

Ogden argues that the action should be dismissed against her because plaintiff does not have, nor has she stated, any viable cause of action. In determining whether a

complaint is sufficient so as to withstand a motion to dismiss pursuant to CPLR § 3211 (a) (7) "the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." Guggenheimer v. Ginzburg, 43 NY2d 268 (1977). The facts as alleged must be accepted by the court as true, for purposes of such a motion, and are to be accorded every favorable inference. Morone v. Morone, 50 NY2d 481 (1980); Beattie v. Brown & Wood, 243 AD2d 395 (1st Dep't 1997).

Ogden argues that plaintiff's pleadings do not amount to a cognizable cause of action because harassment is not recognized in New York State. Additionally, Ogden notes plaintiff's failure to allege a nexus between Ogden's noise complaints and requests by the other named defendants for access to her apartment.

With respect to plaintiff's allegations of infliction of emotional distress, Ogden argues that these allegations, even if true, do not support a cause of action for intentional infliction of emotional distress against her, because the incidents are relatively tame and unremarkable.

Finally, defendant argues that plaintiff has failed to make an allegation of special damages, and therefore, cannot claim a cause of action based on prima facie tort.

Discussion

First Cause of Action

As to the first cause of action, to the extent that plaintiff seeks to recover based on allegations of harassment, this cause of action must be dismissed because New York does not recognize a common-law cause of action for harassment (see Edelstein v. Farber, 27 AD3d 202 [1st Dept 2006]). Whether or not plaintiff's claims are true, even if

she can prove them, is not relevant. Therefore, defendant's motion to dismiss this cause of action as to Defendant Ogden is granted.

Second Cause of Action

It is unclear what cause of action plaintiff is actually asserting as her second cause of action. Assuming she means to assert a cause action for invasion of privacy, she has not set forth facts against Ogden to support that claim. Alternatively, if plaintiff means that she is seeking damages based on a claim of private nuisance, the elements of private nuisance are (1) an interference, substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with plaintiff's right to use and enjoy land, (5) caused by defendant's conduct. Copart Industries, Inc. v. Consolidated Edison Co., 41 NY2d 564, (1977). The burden is on plaintiff to establish the elements of the tort for private nuisance, and state the relevant facts with sufficient particularity to meet the burden for this cause of action. She has not, however, stated with any particularity what Ogden did which interfered with her use of the apartment, or why such conduct was "unreasonable." Therefore, defendant's motion to dismiss her second cause of action is granted and the second cause of action is dismissed.

Third Cause of Action

Plaintiff's third cause of action is for the intentional infliction of emotional distress. The elements of this cause of action are (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal conduct between the conduct and the injury; and (iv) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993).

Extreme and outrageous conduct is measured by the reasonable bounds of decency tolerated by a decent society. Marmelstein v. Kehillat New Hempstead, 11 NY3d 15 (2008). It is a rigorous standard that is difficult to satisfy because it is designed to filter out trivial complaints and assure that a claim of severe emotional distress is genuine. Howell, Seltzer v. Bayer, 272 AD2d 263 (1st Dept. 2000). Whether conduct complained of is outrageous in the first instance is for the courts to determine. Cavallaro v. Pozzi, 28 AD3d 1075 (4th Dept. 2006). Conduct giving rise to this cause of action is typically a deliberate, longstanding, malicious campaign of harassment or intimidation. Nader v. General Motors Corp., 25 NY2d 560, 569 (1970), Cavallaro v. Pozzi, *supra*; Seltzer v. Bayer, *supra*.

Plaintiff contends that defendant Ogden (and the other defendants) engaged in intentional and improper conduct. However, even accepting her factual claims (i.e. repeated, unfounded complaints) as true, they do not rise to the rigorous level of being extreme and outrageous, even when the complaints allegedly made are viewed cumulatively. Graupner v. Roth, 293 A.D.2d 408, 410 (1st Dep't 2002).

Plaintiff has not satisfied the second element of the test by factually alleging that the defendant Ogden's noise complaints were made intentionally to cause severe emotional distress to plaintiff.

On the third element, plaintiff claims that defendant Ogden made complaints with the knowledge that her actions "would be acted upon in some manner by all of the other defendants named in this action." This conclusion is without any alleged facts tending to show that defendant Ogden worked on her own, or in conjunction with the other defendants named, to intentionally wage a course of intentionally inflicted emotional

distress on plaintiff. Therefore, there is no nexus between the alleged conduct and the injury of which plaintiff complains.

Finally, plaintiff has failed to sufficiently allege the last prong of the test by identifying "severe emotional distress" that she experienced. She merely states in her complaint that she "suffered emotional distress and anxiety."

The requisite elements of a cause of action for prima facie tort are: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful. Freihofer v. Hearst Corp., 65 N.Y.2d 135, 142-43 (1985); Curiano v. Suozzi, 63 N.Y.2d 113, 117 (1984); Burns Jackson Miller Summit & Spitzer v. Lindner, 59 N.Y.2d 314, 332 (1983). Plaintiffs must allege that the defendants' allegedly tortious conduct consisted of an otherwise lawful act that was performed with the intent to injure or with a "disinterested malevolence." Curiano v. Suozzi, *supra* at 117, *citing* Burns Jackson Miller Summit & Spitzer v. Lindner, *supra* at 333; *see also* Gold v. East Ramapo Central School Dist., 115 A.D.2d 636 (2d Dept. 1985) (a necessary element for prima facie tort is a desire to harm).

While plaintiff suggests some elements of a prima facie tort cause of action of action in her answering affirmation, plaintiff does not claim that defendant's sole motivation was either due to her "disinterested malevolence" or provide other factual support for this claim. Plaintiff has failed to state a viable cause of action for prima facie tort and it is severed and dismissed against Ogden.

Accordingly, the motion to dismiss the verified complaint against defendant Peggy Ogden is granted as to plaintiff's first, second and third causes of action. These

claims against defendant Ogden are hereby severed and dismissed.

As to the remaining defendants in this action, they have appeared and answered the complaint, however they have not moved in connection with this motion. Since the remaining defendants take no position with respect to this motion, the claims set forth in plaintiff's verified complaint remain as against 1100 Park Avenue Cooperative Corp., Wallack Management Company, Inc., Burton Wallack, William Mooney, and John Kilgore. Therefore, these defendants are scheduled for a preliminary conference before this Court on January 13, 2011 at 9:30 a.m.

Conclusion

In accordance with the foregoing,

It is hereby:

ORDERED that defendant Peggy Ogden's motion to dismiss the verified complaint against defendant Peggy Ogden is hereby granted, and it is further

ORDERED that all remaining defendants shall appear before this Court for a preliminary conference on January 13, 2011 at 9:30 a.m.

Any requested relief not expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, New York
November 29, 2010

So Ordered:

HON. JUDITH J. GISCHE, J.S.C.