Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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SALOMON LEVY, SIGALIT MOFAZ-LEVY, SIGALIT MOFAZ-LEVY AS GUARDIAN FOR SOPHIE LEVY,
Plaintiffs

Index No.: 709388/18
Mot. Date: 9/14/21
Mot. Seq.: 4

-against-

103-25 68th AVENUE OWNERS, INC., JOHN P. LOVETT & ASSOCIATES, LTD a/k/a THE LOVETT GROUP, CHARLES CHOU, YOSHIDA MOTOKO, DAGMARA K. KRASA a/k/a D.K. KRASA-BESTELL, MICHAEL L. MARKS, BOARD PRESIDENT, PAT JENNINGS,

Defendants.

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The following papers were read on this motion by defendants 103-25 68th Avenue Owners, Inc., John P. Lovett & Associates, LTD (Lovett), Dagmara K. Krasa, Michael J. Marks and Pat Jennings for an order, pursuant to CPLR 3211 (a) (1) and (7).

	PAPERS NUMBERED
Notice of Motion-Affidavits-Exhibits.....	EF 114-127
Memorandum of Law in Support.....	EF 128
Answering Affidavits-Exhibits.....	EF 182
Memorandum of Law in Opposition.....	EF 143
Reply Affidavits-Exhibits.....	EF 162-163
Memorandum of Law in Reply.....	EF 164; 184
Amendment to Memo of Law in Opposition.....	EF 165

Upon the foregoing papers it is ordered that the motion by defendants 103-25 68th Avenue Owners, Inc., John P. Lovett & Associates, LTD (Lovett), Dagmara K. Krasa,

Michael J. Marks and Pat Jennings is granted in part and denied in part, as follows:

Plaintiffs Salomon Levy and Sigalit Mofaz-Levy allege in the complaint that they were former shareholders of unit 7N of a cooperative building owned by defendant 103-25 68th Avenue Owners, Inc. Plaintiffs Salomon Levy and Sigalit Mofaz-Levy resided there with their four children, including, daughter Sophie Levy. Plaintiffs allege that while they resided at the premises, defendants Charles Chou (Chou) and Yoshida Motoko (Motoko), shareholders of unit 6N, regularly harassed them by banging on their ceiling and door, complaining about excessive noise. Defendant Lovett is the managing agent/property manager for 103-25 68th Avenue Owners, Inc. Defendants Dagmara K. Krasa a/k/a D.K. Krasa-Bestell, Michael L. Marks, and Pat Jennings are members of the Board of Directors of the subject property. Based upon complaints by Chou and Motoko, the plaintiffs allege that a holdover proceeding was wrongfully commenced against them by the Cooperative's Board of Directors.

Defendants 103-25 68th Avenue Owners, Inc., John P. Lovett & Associates, Ltd, Dagmara K. Krasa, Michael J. Marks and Pat Jennings now seek to dismiss plaintiffs' Complaint against them, pursuant to CPLR 3211(a)(1) and (a)(7). Same is granted in part and denied in part.

The branch of moving defendants' application seeking dismissal, pursuant to CPLR 3211(a)(1), is denied.

CPLR 3211 provides in relevant part: "(a) Motion to dismiss cause of action. A party may move for judgment dismissing one or more causes of action asserted against him on the ground that: 1. A defense is founded on documentary evidence ***". In order to prevail on a CPLR 3211(a)(1) motion, the documentary evidence submitted "must be such that it resolves all the factual issues as a matter of law and conclusively and definitively disposes of the plaintiff's claim ***" (*Fernandez v Cigna Property and Casualty Insurance Company*, 188 AD2d 700, 702; *Vanderminden v Vanderminden*, 226 AD2d 1037; *Bronxville Knolls, Inc. v Webster Town Center Partnership*, 221 AD2d 248). "However, dismissal is warranted if the documentary evidence contradicts the claims raised in the complaint" (*Jericho Group, Ltd. v Midtown Development,* L.P., 32 AD3d 294 [1st Dept 2006][internal citations omitted]). "To some extent, 'documentary evidence' is a 'fuzzy' term, and what is documentary evidence for one

purpose, might not be documentary evidence for another" (*Fontanetta v John Doe 1*, 73 AD3d 78 [2d Dept 2010]). "[J]udicial records, as well as documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable, would qualify as documentary evidence in the proper case" (*Fontanetta v John Doe 1,* 73 AD3d at 84–85 [internal quotation marks omitted]). However, it is well-established law that affidavits and deposition testimony are not documentary evidence (*Id.*) "[T]o be considered 'documentary', evidence must be unambiguous and of undisputed authenticity" (*Id.*)(*internal citations omitted*).

The evidence submitted in the instant matter, which consists of a Management Agreement, a copy of the Proprietary Lease of the Co-Op, a copy of the Bylaws of the Co-Op, a copy of the House Rules of the Co-Op in effect prior to March 21, 2016, and a copy of a Notice sent by Lovett to all co-op members, on March 21, 2016, is insufficient to dispose of the plaintiffs' Amended Complaint. The documentary evidence that forms the basis of a 3211(a)(1) motion must resolve all factual issues and completely dispose of the claim (*Held v Kaufman* 91 NY2d 425 [1998]; *Teitler v Max J. Pollack & Sons*, 288 AD2d 302 [2001]). Such are insufficient to dispose of the Amended Complaint, as factual issues remain. The documents fail to conclusively establish a defense to the claims at issue. Thus, dismissal pursuant to CPLR 3211 (a) (1) is not warranted (*See Yue Fung USA Enters., Inc. v Novelty Crystal Corp.*, 105 AD3d 840 [2d Dept 2013]). As such, relief cannot be granted pursuant to CPLR 3211(a)(1).

As to the branch of moving defendants' motion seeking dismissal, pursuant to CPLR 3211(a)(7), same is granted in part and denied in part.

"It is well-settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference ***" (*Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999]); *Leon v Martinez* , 84 NY2d 83 [1994]). The court does not determine the merits of a cause of action on a CPLR 3211(a)(7) motion (*see Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc.*, *supra*), and the court will not examine affidavits submitted on a CPLR 3211(a)(7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see Rovello v*

Orofino Realty Co., Inc., 40 NY2d 633[1976]). Such a motion will fail if, from its four corners, factual allegations are discerned which, taken together, maintain any cause of action cognizable at law, regardless of whether the plaintiff will ultimately prevail on the merits (*Given v County of Suffolk*, 187 AD2d 560 [2d Dept 1992]). The plaintiff may submit affidavits and evidentiary material on a CPLR 3211(a)(7) motion for the limited purpose of correcting defects in the complaint (*see Rovello v Orofino Realty Co., Inc., supra; Kenneth R. v Roman Catholic Diocese of Brooklyn*, 229 AD2d 159 [2d Dept 1997]).

As an initial matter, the Court notes that the fourth and tenth causes of action in the Amended Complaint apply solely to non-moving defendants Chou and Motoko; the ninth cause of action applies to all defendants, but moving defendants make no arguments in support of dismissal of the ninth cause of action as against them; and the eleventh cause of action has already previously been dismissed by Order of this Court, dated February 5, 2020.

Regarding the first cause of action, same shall be dismissed.

The first cause of action consists of merely a hodge-podge of sentences, jargon, and statements that wholly fail to establish the elements of any cognizable cause of action.

As such, the first cause of action shall be dismissed.

Turning to the second cause of action, same shall NOT be dismissed.

The second cause of action asserts a claim for *ultra vires*. Plaintiffs assert that the Co-operatives Board of Directors engaged in conduct that was beyond the scope of its authority by, *inter alia*, putting the co-operative unit up for sale and selling it at less than market value. The Court finds that paragraphs 37-39 of the Amended Verified Complaint adequately plead a cause of action for *ultra vires*.

As such, the second cause of action shall NOT be dismissed.

Turning to the third cause of action, same shall be dismissed.

The third cause of action sounds in malicious prosecution. The third cause of action states, in relevant part, "The Management and the Cooperative Board, by commencing an action against the Plaintiffs in Civil Court to evict the Plaintiffs without justification, resulted in damage to the plaintiffs reputation, and incurring legal fees to

defend the action and legal fees paid to the cooperative for their malicious prosecution of the Plaintiffs."

In order to maintain an action for civil malicious prosecution, a party must demonstrate: "(1) the commencement of a judicial proceeding against the [party claiming the malicious prosecution], (2) at the insistence of the [party who prosecuted the judicial proceeding], (3) without probable cause, (4) with malice, (5) which action was terminated in favor of the [party claiming malicious prosecution,] and (6) to the [injured party's] injury" (*Furgang and Adwar, LLP v Fiber-Shield Industries, Inc.*, 866 NYS2d 250 [2d Dept 2008]). "To show a termination in its favor, the [party claiming malicious prosecution] must prove that the court passed on the merits of the charge or claim against it under such circumstances as to show its innocence or nonliability, or show that the proceedings were terminated or abandoned at the instance of the [party who prosecuted the action] under circumstances which fairly imply the [party claiming malicious prosecution's] innocence". *Id.*

The asserted cause of action fails to, *inter alia*, assert an allegation by the plaintiffs that an action was terminated in plaintiffs' favor. As all of the elements of malicious prosecution have not been alleged, a cause of action for same cannot stand.

As such, the third cause of action, sounding in malicious prosecution, shall be dismissed.

Turning to the fifth cause of action, same shall be dismissed.

The fifth cause of action sounds in discrimination in violation of various State and Federal laws. However, the plaintiffs have failed to set forth any facts or details which would support any of the elements of a discrimination claim. The allegation that movants actions "discouraged families with children from remaining in the building and discriminated against them" is wholly conclusory.

The elements of a discrimination claim have not been alleged. The criteria for establishing unlawful discrimination under section 296 of the Human Rights Law are the same as those controlling Title VII cases under the Federal Civil Rights Act of 1964. (*See, Mittl v New York State Div. of Human Rights*, 100 NY2d 326; *Ferrante v American Lung Assn.*, 90 NY2d 623.) Claims arising under the New York City Human Rights Law are generally controlled by the same federal standards (*See, Landwehr v Grey*

Advertising Inc., 211 AD2d 583; *Cruz v Coach Stores, Inc.*, 202 F3d 560). In order to prove a *prima facie* case of discrimination under the Human Rights Laws, a plaintiff must demonstrate (1) that he belongs to a class protected by the statute; (2) that his employer actively or constructively discharged him or took other adverse action against him; (3) that he had the qualifications to hold the position from which he was terminated or from which he experienced adverse action; and (4) that his employer discharged him or took adverse action against him under circumstances giving rise to an inference of discrimination. (*See McDonnell Douglas Corp. v Green, 411 US 792; Mittl v New York State Div. of Human Rights, supra; Ferrante v American Lung Ass'n, supra; Kent v Papert Companies, Inc.*, 309 AD2d 234; *Pramdip v Building Service 32B-J Health Fund*, 308 AD2d 523) . The main element of a Tile VII case is that the plaintiff was a victim of discrimination as the result of being part of a protected category (*see McDonnell, supra*). New York Courts have applied this requirement to various types of discrimination, including age discrimination and racial discrimination. Plaintiffs fail to allege that they have been the victims of discrimination due to their being part of a protected class of people.

As such, the fifth cause of action, sounding in discrimination, contains no viable claim and shall be dismissed.

Turning to the sixth cause of action, same shall be dismissed.

The sixth cause of action states, in relevant part:

48. The defendant, Dagmara K. Krasa a/k/a D.K. Krasa-Bestell, upon information and belief voted consistently to develop new rules that specifically affected the Plaintiffs, maliciously voted to evict the Plaintiffs without seeking shareholder approval, and was now purchasing the Plaintiffs apartment at a discounted price.

49. These actions were not only a conflict of interest and breach of the rukles and regulations and by laws of the cooperative, but she was intentionally responsible with other Board members for advancing the Board's desire to rid the building of families with children, as well as fraudulently using these actions to benefit her and her family by purchasing the Plaintiffs apartment at a reduced market value, upon information and belief, for her elderly mother to be near her and on the same floor in the building thereby forcing the Plaintiffs to leave the building and benefitting by it. Her actions on the Board

and individually were beyond the scope of its authority and did not act legitimately to further the corporate purpose and acted in bad faith.

The Court finds the sixth cause of action sets forth no individual tortious conduct of Dagmara K. Krasa a/k/a D.K. Krasa-Bestell. It is well-established law that in order to state a claim for bad-faith and fair dealing against an individual Board member, there must be an allegation that the individual Board member engaged in independent tortious conduct separate and apart from the board's collective action (*Hill v Murphy*, 63 AD3d 680 [2d Dept 2009; *Brasseur v Speranza*, 21 AD3d 297 [1st Dept 2005]). Here, the allegations pertain only to the board's *collective* activity. As no independent tortious conduct has been alleged, this cause of action cannot stand.

As such, the sixth cause of action contains no viable claim and must be dismissed.

Turning to the seventh cause of action, same shall be dismissed.

The seventh cause of action states, in relevant part:

52. The defendant Michael L. Mark, as a board member and individually acted beyond the scope of its authority and did not act legitimately to further the corporate purpose and acted in bad faith by instituting actions specifically to evict the Plaintiffs and support the illegal rules to discourage families with more than one child living in the building and to spy and investigate without basis the actions of the Levys, and other families and their guests in the building, thereby fostering and uncomfortable negative, hostile and unpleasant living environment for children in the building his actions wer win bad faith and damaged the plaintiffs.

The Court finds the seventh cause of action sets forth no individual tortious conduct of Michael L. Marks. As stated above, in order to state a claim for bad-faith and fair dealing against an individual Board member, there must be an allegation that the individual Board member engaged in independent tortious conduct separate and apart from the board's collective action (*See Hill supra*). Here, the allegations pertain only to the board's *collective* activity. As no independent tortious conduct has been alleged, this cause of action cannot stand.

As such, the seventh cause of action contains no viable claim and must be dismissed.

Turning to the eighth cause of action, same shall be dismissed.

The eighth cause of action states, in relevant part:

52. The defendant Pat Jennings as a board member and individually acted beyond the scope of its authority and did not act legitimataley to further the corporate purpose and acted in bad faith by instituting actions specifically to evict the Plaintiffs and support the illegal rules to discourage families with more than one child living in the building and to spy and investigate without basis the actions of the Levys, and other families and their guests in the building, thereby fostering and uncomfortable negative, hostile and unpleasant living environment for children in the building his actions were in bad faith and damaged the plaintiffs.

The Court finds the eighth cause of action sets forth no individual tortious conduct of Pat Jennings. As stated above, in order to state a claim for bad-faith and fair dealing against an individual Board member, there must be an allegation that the individual Board member engaged in independent tortious conduct separate and apart from the board's collective action (*See Hill supra*). Here, the allegations pertain only to the board's *collective* activity. As no independent tortious conduct has been alleged, this cause of action cannot stand.

As such, the eighth cause of action contains no viable claim and must be dismissed.

Additionally, the defendants have improperly sought to reach the merits of the complaint on this mere CPLR 3211 motion (*see Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs v Macy's East, Inc.*, 262 AD2d 607, 608 [2d Dept 1999]).

Accordingly, it is

ORDERED that the motion by defendants 103-25 68th Avenue Owners, Inc., John P. Lovett & Associates, LTD (Lovett), Dagmara K. Krasa, Michael J. Marks and Pat Jennings is granted in part and denied in part; in that: it is

ORDERED that the branch of moving defendants' application seeking dismissal, pursuant to CPLR 3211(a)(1), is denied; and it is further

ORDERED that the branch of moving defendants' motion seeking dismissal, pursuant to CPLR 3211(a)(7), is granted in part and denied in part, in that: it is

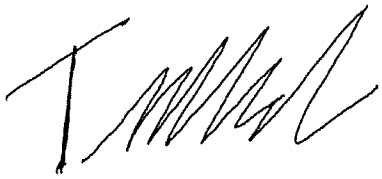
ORDERED that the first, third, fifth, sixth, seventh, and eighth causes of action shall be dismissed; and it is further

ORDERED that the second cause of action shall not be dismissed; and it is further

ORDERED that to the extent the movants seek to have the fourth, ninth, tenth, and eleventh causes of action dismissed, same is denied, for the reasons set forth above.

The forgoing constitutes the decision and order of the Court.

Dated: February 1, 2022



TIMOTHY J. DUFFICY, J.S.C.