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2022-03-10

### Alibasic v. Leonardo Realty Corp.

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[\*1]

<b>Alibasic v Leonardo Realty Corp.</b>
2022 NY Slip Op 50191(U)
Decided on March 10, 2022
Civil Court Of The City Of New York, Queens County
Guthrie, J.
Published by <a href="#">New York State Law Reporting Bureau</a> pursuant to Judiciary Law § 431.
As corrected in part through March 15, 2022; it will not be published in the printed Official Reports.

Decided on March 10, 2022

Civil Court of the City of New York, Queens County

**Isein Alibasic, Zuhra Alibasic, Petitioners-Tenants,**

**against**

**Leonardo Realty Corp., Respondent-Owner, and Department of  
Housing Preservation and Development, Respondent.**

Index No. HP 6159/21

Attorneys for Petitioners:

Whitley V. Smith, Esq.

Samuel Goldberg, Esq.

Goldberg & Lindenberg, P.C.

6 East 45th Street, 14th Floor

New York, NY 10017

Attorneys for Respondent-Owner:

Michael Littman, Esq.

Sidrane, Schwartz-Sidrane, Perinbasekar & Littman, LLP

119 North Park Avenue, Suite 201

Rockville Centre, NY 11570

For Respondent:

Department of Housing Preservation and Development

Housing Litigation Bureau  
100 Gold Street  
New York, NY 10038

Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent Leonardo Realty Corp.'s motion to dismiss pursuant to CPLR § 3211(a)(7) for failure to state a [\*2] cause of action:

**Papers**

**Numbered**

Notice of Motion & Affirmation/Affidavits/Exhibit Annexed 1 (NYSCEF No.10-22)

Affidavit in Opposition & Exhibits Annexed 2 (NYSCEF #23-28)

Affirmation in Reply & Affidavit/Exhibits Annexed 3 (NYSCEF #29-33)

Upon the foregoing cited papers, the decision and order on respondent's motion is as follows.

**PROCEDURAL HISTORY**

This harassment HP action was commenced by pro se order to show cause in November 2021. Attorneys appeared for both petitioners and respondent-owner in November 2021. Following adjournments on consent, respondent-owner filed the instant motion to dismiss in January 2022. After the submission of opposition and reply papers, the court heard argument on the motion (via Teams) on January 31, 2022 and reserved decision.

**DISCUSSION & CONCLUSION**

On a CPLR § 3211(a)(7) motion, the petition "is to be afforded a liberal construction, the facts alleged are presumed to be true, the [petitioner] is afforded the benefit of every favorable inference, and the court is to determine only whether the facts as alleged fit within any cognizable legal theory." [\*Watts v. City of New York\*, 186 AD3d 1577](#), 1578 [2d Dept 2020]. When evidentiary material is offered and considered on such a motion, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one[.]" *Guggenheimer v. Ginzburg*, 43 NY2d 268, 275 [1977]. The court notes at the outset that it has not converted the motion into one for summary judgment (*see* CPLR § 3211(c)), so since both sides have submitted evidentiary materials, including affidavits, the court will consider the motion under the *Ginzburg* standard.

Respondent-owner argues in its motion that the petition does not state a cause of action for harassment under the relevant law (NYC Admin. Code §§ 27-2005(d) and 27-2004(a) (48)). The crux of the argument is that the allegations in the petition, which mainly refer to the actions of another tenant, do not support a claim of harassment against it as an "owner" defined in the Housing Maintenance Code. As defined in NYC Admin. Code § 27-2004(a) (45), an "owner" is "the owner or owners of the freehold of the premises or lesser estate therein, a mortgagee or vendee in possession, assignee of rents, receiver, executor, trustee, lessee, agent, or any other person, firm, or corporation, directly or indirectly in control of a dwelling." [\*See Leung v. Zi Chang Realty Corp.\*, 74 Misc 3d 126\[A\]](#), 2022 NY Slip Op 50034[U] [App Term, 1st Dept 2021] [Person involved in the day-to-day operations of the building and acknowledged to be a manager of the building by an officer of corporate respondent was an "owner" within the meaning of the Housing Maintenance Code]. Petitioners have not named the fellow tenant referenced in the petition as a respondent. Therefore, the court must assess whether the allegations in the petition, as augmented by the evidentiary materials submitted in opposition to the motion, are sufficient to constitute a cause of action for harassment against respondent-owner.

The petition's factual allegations are set out in an attachment dated November 5, 2021. Petitioners state that they are rent-stabilized tenants who have lived in the subject building for 22 years. The next portion of the attachment requests the court's assistance in addressing an ongoing issue with noise from the apartment above petitioners' apartment. Petitioners claim that the noise is intentional and is, in effect, imputed to respondent-owner since the upstairs tenant is alleged to be the superintendent and complaints to the "landlord" have been ignored. On the form petition, petitioners checked only the box stating that respondent-owner has "repeatedly [\*3] caused or permitted acts or omissions that substantially interfered with or disturbed the comfort, peace or quiet of the tenant/petitioner." This box corresponds with NYC Admin. Code § 27-2004(a)(48)(g). Petitioners' opposition papers provide additional allegations via an affidavit and photographs, primarily focused on explaining the connection between respondent-owner and the upstairs tenant, Z.L. Petitioner Isein Alibasic states in his affidavit that he was the superintendent of the building for approximately 20 years but was terminated from that position in 2020. He states that Mr. L. is now acting as superintendent, and in support attaches a photograph purporting to show a notice posted in the building listing Mr. L. as the person to contact for the key to the heating system area.

In support of its motion, respondent-owner submits affidavits from its managing member, Leonardo Berisaj, V.L. (spouse of Z.L.), and another tenant, R.V. The affidavits dispute the allegations of noise emanating from the L.'s apartment and further dispute that the

L.'s are agents or employees of respondent-tenant. The affidavits of Mr. Berisaj and Ms. L. acknowledge only that Mr. L. takes out trash for sanitation pickup, and specifically deny that he is a superintendent.

Respondent-owner cites to [\*Robinson v. Taube\*, 63 Misc 3d 1224](#)[A], 2019 NY Slip Op 50666[U] [Civ Ct, NY County 2019], for the principle that an owner cannot be held responsible under the harassment provisions of the Housing Maintenance Code for the actions of fellow tenants. In *Robinson*, Judge Jack Stoller rejected the petitioner-tenant's assertion that an owner can be held responsible for failing to take affirmative actions against fellow tenants (including initiating an eviction proceeding) under NYC Admin. Code § 27-2004(a)(48) and held that "[t]he statutory language defining harassment demonstrates that harassment entails some level of purpose on a landlord's behalf." *Robinson*, 2019 NY Slip Op 50666[U], \*3. In *Robinson*, however, there was no indication that the fellow tenant in question was an employee or agent of the landlord (or indeed acting on its behalf in any meaningful way). Here, petitioner alleges that Mr. L. is employed by respondent-owner and that they are acting in concert.

It is important to note that it is not necessary to determine whether Mr. L. is an "owner" as defined by the Housing Maintenance Code for the purposes of the instant motion. Mr. L. is not named as a party, so his potential status as an "owner" is immaterial. Rather, the issue is whether Mr. L.'s actions, as pled, can be attributed to respondent-owner, via agency, to make out a claim for harassment under the relevant law. Generally, "one of the indicia of agency is whether that person [potential agent] is directly or indirectly in control of the premises." *Dept. of Hous. Preserv. & Dev. v. Livingston*, 169 Misc 2d 660, 661 [App Term, 2d Dept, 2d & 11th Jud Dists 1996]; *see also Waldman v. Abt*, [\*73 Misc 3d 1232\*](#)[A], 2021 NY Slip Op 51220[U] [Civ Ct, Kings County 2021]. Moreover, an "agent is a party who acts on behalf of the principal with the latter's express, implied, or apparent authority." *Maurillo v. Park Slope U-Haul*, 194 AD3d 142, 146 [2d Dept 1993].

Petitioners' allegations, even given the benefit of every favorable inference, as required under the governing standard (*Watts*, 186 AD3d at 1578), do not make out a claim of harassment against respondent-owner under NYC Admin. Code §§ 27-2005(d) and 27-2004(a)(48). The facts stated in the petition primarily involve the noises emanating from the upstairs neighbors' apartment. Even assuming that the statements in the petition and the affidavits annexed to the opposition papers (with supporting photographs) are taken as true and Mr. L. is employed in some capacity by respondent-owner, there is no cogent allegation that the agency between respondent-owner and Mr. L. extends to any actions undertaken by

Mr. L. and his wife in their own apartment, nor that respondent-owner's failure to abate the noise is an omission [\*4] covered by the harassment statute. *See Robinson*, 2019 NY Slip Op 50666[U]. The assertions that the L.'s and respondent-owner were acting in concert are conclusory and based on surmise. To the extent that the petition and affidavits raise other allegations involving certain statements made by a representative of respondent-owner and other actions taken by the L.'s, they are, in the case of the former, lacking in relevant details (dates, places, specific language), and similarly deficient in demonstrating agency, in the case of the latter.

For each of these reasons, respondent-owner's motion to dismiss pursuant to CPLR § 3211(a)(7) is granted. The petition is dismissed without prejudice. This Decision/Order will be filed to NYSCEF. A copy will be mailed to DHPD since it has not appeared via NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: March 10, 2022

Queens, New York

HON. CLINTON J. GUTHRIE

J.H.C.

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