SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ANDREW BORROK** **PART** **IAS MOTION 53EFM**

Justice

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LSG 105 WEST 28TH LLC,

Plaintiff,

- v -

DAVID SINCLAIR, LISA CHAPMAN, NORTH WEST REAL ESTATE LLC, PATRICIA KIRSHNER, THE FLOWER HOUSE CONDOMINIUM, GOETZ FITZPATRICK LLP

Defendant.

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INDEX NO. 652440/2019

MOTION DATE 10/23/2019, 10/23/2019

MOTION SEQ. NO. 001 002

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 49, 51, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 128

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 42, 43, 44, 45, 46, 47, 48, 50, 52, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 129

were read on this motion to/for DISMISS.

Upon the foregoing documents, (i) David Sinclair, Lisa Chapman, and North West Real Estate LLC's (collectively, the **NWRE Defendants**) motion to dismiss (Mtn. Seq. No. 001) is granted solely to the extent that the claims for tortious interference (the third and fourth causes of action), prima facie tort (the fifth cause of action), abuse of process (the eighth cause of action), malicious prosecution (the ninth cause of action), and injunction (the tenth cause of action) are dismissed, and (ii) Patricia Kirshner and the Flower House Condominium's (collectively, the **Condo Defendants**) motion to dismiss (Mtn. Seq. No. 002) is granted solely to the extent that the claims for prima facie tort (the fifth cause of action), declaratory judgment (the sixth cause of

action), an injunction (the seventh cause of action), abuse of process (the eighth cause of action), and malicious prosecution (the ninth cause of action) are dismissed.

The Relevant Facts and Circumstances

This action arises from a dispute over certain development rights that LSG 105 West 28th LLC (the **Plaintiff**) acquired after it purchased three adjacent lots at 105, 107 and 109 West 28th Street in 2014 to construct the Moxy Chelsea Hotel (the **Hotel**) (NYSCEF Doc. No. 12, ¶ 8). Defendant Flower House Condominium (the **Flower House Condo**) is a condominium located at 111-113 West 28th Street (the **Building**), and adjacent directly to the Hotel (*id.*, ¶ 13). The Flower House Condo also owns the Building (*id.*). Defendants David Sinclair and Lisa Chapman are a married couple who reside at the Flower House Condo and they are co-managers and sole members of North West Real Estate LLC (**NWRE**), the managing agent of the Flower House Condo (*id.*, ¶¶ 9-11, 13). Mr. Sinclair is also the President of the Board of Managers of the Flower House Condo (*id.*). Defendant Patricia Kirshner is a resident of the Flower House Condo (*id.*, ¶ 12).

On December 16, 2014, the Plaintiff purchased certain excess development rights from NWRE for approximately $6,750,000 in order to build a 35-story hotel (*id.*, ¶¶ 17-24). Reference is made to a subsequent Construction Access and Easement Agreement (the **Access Agreement**; NYSCEF Doc. No. 13), dated March 17, 2015, by and between The Flower House Condo, LSG Fulton Street Holdings LLC, and the Plaintiff, pursuant to which the Flower House Condo granted certain access and temporary easements to the Plaintiff for the Building (*id.*, § 2).

Pursuant to Section 20 of the Access Agreement, the Plaintiff established an escrow fund of $195,000 (the **Escrow Fund**) to be held in the IOLA trust account of Goetz Fitzpatrick LLP (**Goetz**):

> 20. Escrow. At or by the time of the mutual execution of this Agreement the Developer shall establish an Escrow Fund of One Hundred, Ninety-Five Thousand and 00/100 ($195,000.00) by wire transfer into the IOLA trust account of Goetz Fitzpatrick LLP, attn." [sic] John B. Simoni Jr. ("Escrow"). The Escrow Agent for the Escrow shall be Goetz Fitzpatrick LLP attn. John B. Simoni Jr. ("Escrow Agent"). The Adjacent Owner may draw upon such Escrow to pay for the reasonable Professional Fees and the reasonable costs and expenses noted in this Agreement where Adjacent Owner may use the Escrow or upon a Default as referred to in Section 23, and up to amounts as specified herein. Upon the Developer's satisfactory completion and compliance with all terms under this Agreement, the unused portion of the Escrow shall be promptly returned to Developer …

(*id.* at 10).

Section 23 of the Access Agreement provided for a default escrow fund of $30,000 to be used in the event of a default thereunder:

> 23. Default. Any material breach of this Agreement by the Developer, provided Developer fails to cure such material breach within forty-five (45) days of receipt of written notice from the Adjacent Owner, shall be a default of this Agreement ("Default"). Developer shall deposit a one-time thirty thousand dollar ($30,000) deposit in an escrow account to be held with the Escrow Agent ("Default Escrow"), to be used only in the event of a Default for which (i) Developer does not believe it is in Default, or (ii) Developer is unable to cure such Default. A failure by Developer to perform its obligations under this Agreement due to an event of Force Majeure shall not be deemed a Default …

(*id.* at 12).

Reference is also made to a Zoning Lot Development Agreement (the **Zoning Agreement**; NYSCEF Doc. No. 14), dated September 19, 2015, by and between the Flower House Condo,

NWRE, and the Plaintiff, pursuant to which the Building and Hotel were merged into a single zoning lot to allow NWRE to, among other things, to convey its excess development rights to the Plaintiff, which NWRE did. The Zoning Agreement also provided that the parties agree to cooperate with respect to development of the Hotel as follows:

> 6. Utilization of Development Rights; Cooperation.
>
> (a) ***[Flower House Condo] and [NWRE] agree to cooperate***, at Developer's sole cost and expense, ***with Developer in connection with Developer's development of the Developer Parcel and the incorporation of the Developer Development Rights into the New Building or Rebuilding of the New Building, including, without limitation, the prosecution of all applications, approvals, permits, variances, special permits or modifications thereof or other discretionary land use approvals of any Agency reasonably requested by Developer relating to the development of the Developer Parcel*** and/or the incorporation in the New Building of the Developer Development Rights …
>
> …
>
> (c) ***Condominium and Owner agree not to appear in opposition to Developer in any action or hearing brought, sought or defended by Developer before any Agencies arising out of or in connection with*** any zoning applications relating to the New Building or the Combined Zoning Lot and/or the incorporation of any Additional Development Rights or ***any other reasonable application for or proceeding with respect to an Approval that affects or may affect the ability of Developer to construct the New Building*** or effect any Rebuilding thereof and/or to incorporate any Additional Development Rights into the New Building or other improvements on the Combined Zoning Lot***, provided Owner and Condominium may oppose any action which is inconsistent with the Declaration, this Agreement or the Zoning Documents.***

(the **Cooperation Clause**; *id.* at 10-11 [emphasis added]).

From 2015 onwards, the Plaintiff alleges that Mr. Sinclair, Ms. Chapman, and Ms. Kirshner implemented a scheme to sabotage the construction and/or opening of the Hotel by making false allegations, without justification, to the New York City Department of Buildings (the **DOB**), which ultimately delayed the opening of the hotel by 56 days and caused millions of dollars in lost profits, additional interest, construction costs, and other fees (the **Complaint**; NYSCEF Doc.

No. 12, ¶¶ 51-163). Specifically, the Plaintiff alleges that Mr. Sinclair and Ms. Chapman made numerous 311 calls with complaints from 2015 to the Hotel's opening in 2019, following which the DOB found minor violations that resulted in stop work orders but no violations (*id.*, ¶¶ 54, 112). The Plaintiff also alleges that it was denied necessary access by Ms. Chapman, as required under the Access Agreement, on several occasions between August 13, 2015 and January 19, 2016 (*id.*, ¶¶ 55-59).

The Hotel began accepting guests on February 15, 2019 and the Plaintiff alleges that Mr. Sinclair, Ms. Chapman, and Ms. Kirshner continued to make unfounded 311 calls and harass the Plaintiff's employees in their continued attempt to shut down the Hotel (*id.*, ¶¶ 123, 127-163).

Due to a dispute in February and March of 2019 between the Plaintiff and the Flower House Condo over alleged breaches of the Access Agreement and Zoning Agreement, the Flower House Condo advised that it would withdraw funds from the escrow fund and the default escrow fund for certain expenses (*id.*, ¶¶ 164-166). By letter, dated April 22, 2019, the Plaintiff's attorneys advised the escrow agent, Mr. Simoni, that the Plaintiff disputed Flower House Condo's request for money from the escrow funds pursuant to the Access Agreement (*id.*, ¶ 167). In response, Mr. Simoni emailed the Plaintiff's attorneys, indicating that he was rejecting the Plaintiff's position on the escrow funds and that he would release funds as he deemed fit (*id.*, ¶ 168).

By letter dated, April 1, 2019, counsel for the Flower House Condo wrote to the Borough Commissioner of the DOB with a request to revoke the Hotel's temporary certificate of

occupancy (the **April 2019 Letter**; NYSCEF Doc. No. 39), which letter outlined a number of technical violations of certain zoning provisions. As a result of the April 2019 Letter, the DOB began a special audit and issued notices to revoke the Hotel's temporary certificate of occupancy and two temporary use permits, which audit was lifted and the notices removed after the Plaintiff presented evidence of the Hotel's compliance with all the relevant codes (NYSCEF Doc. No. 12, ¶¶ 131-134; NYSCEF Doc. No. 88).

On July 19, 2019, the Plaintiff sued asserting the following ten causes of action: (i) breach of contract and/or breach of implied duty of good faith and fair dealing against NWRE and the Flower House Condo regarding the Zoning Agreement, (ii) breach of contract and/or breach of implied duty of good faith and fair dealing against Flower House Condo regarding the Access Agreement, (iii) tortious interference with the Zoning Agreement by Mr. Sinclair, Ms. Chapman, and Ms. Kirshner, (iv) tortious interference with the Access Agreement by Mr. Sinclair, Ms. Chapman, and Ms. Kirshner, (v) prima facie tort against Mr. Sinclair, Ms. Chapman, and Ms. Kirshner, (vi) declaratory judgment against Goetz and Flower House Condo, (vii) permanent injunction against Goetz and Flower House Condo, (viii) abuse of process against Mr. Sinclair, Ms. Chapman, Ms. Kirshner, and Flower House Condo, (ix) malicious prosecution against Mr. Sinclair, Ms. Chapman, Ms. Kirshner, and Flower House Condo, and (x) permanent injunction against Mr. Sinclair, Ms. Chapman, Ms. Kirshner, Goetz and Flower House Condo.

Discussion

I. The NWRE Defendants' Motion to Dismiss (Mtn. Seq. No. 001)

A. Civil Rights Law § 76-a Does Not Require Dismissal

The NWRE Defendants argue that the action against them should be dismissed because it falls within the statutory definition of a Strategic Lawsuit Against Public Participation otherwise known as a SLAPP Suit.

Civil Rights Law (**CRL**) § 76-a was designed to protect citizens who publicly challenge applications for land use permits and other approvals from SLAPP suits initiated by developers or other businesses, which may effectively intimidate opponents from speaking up and otherwise stifle public scrutiny (*see Harfenes v Sea Gate Assn.*, 167 Misc 2d 647, 650 [Sup Ct, NY County 1995]). CRL § 76-a (1)(a) provides that an "action involving public petition and participation" is an action brought by a "public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission." CRL § 76-a(1)(b) provides that a "public applicant or permittee" is defined as any person who has applied for or obtained a permit, zoning change, lease, license, or other permission from any government body. Once the defendant demonstrates that an action involves public petition and participation in accordance with CLR § 76-a, CPLR § 3211 (g) mandates dismissal unless the plaintiff establishes that the action "has a substantial basis in law."

The NWRE Defendants assert that, here, the Plaintiff brought this action as a permittee, in violation of CLR § 76, and that the substance of the action is "materially related" to the NWRE Defendants' efforts to report, comment, or challenge the Plaintiff's applications/permission for

construction of the Hotel. In opposition, the Plaintiff argues that the NWRE Defendants failed to identify any permit or application materially related to their purported public participation, the Plaintiff has a substantial basis in fact and law to maintain its claims based on the parties' agreements, and that the NWRE Defendants are not within the category of persons protected by anti-SLAPP legislation.

It is undisputed that the Plaintiff meets the definition of a public applicant or permittee because it obtained certain permits and certificates of occupancy in order to construct the Hotel. The critical issue is whether this action concerns the NWRE Defendants' conduct in challenging or opposing any application or permission of the Plaintiff.

With regard to the 311 calls, the record indicates that the associated complaints did not relate to any pending application or permission of the Plaintiff's before any public agency. In particular, Appendix A to the Complaint lists the purported reasons for 311 calls and the four pages of complaints listed therein reveal issues including, but not limited to, failure to receive demolition notice, unsafe crane operation, failure to safeguard, and noise, all of which are general complaints regarding the Hotel construction (NYSCEF Doc. No. 12 at 37-40). Under these circumstances, the NWRE Defendants have not identified in general or any terms the application or permit that is being challenged, or that the 311 calls were substantially related to such application or permit (*see Guerrero v Carva*, 10 AD3d 105, 117-118 [1st Dept 2004] [anti-SLAPP statute narrowly construed because it derogates from common law, such that SLAPP-suit defendant must identify close nexus between defendants' advocacy efforts and plaintiffs' application or permit). Simply put, the NWRE Defendants fail to identify the requisite nexus

between their "advocacy efforts" and the Hotel's permit application (*id.*). Further the ongoing nature of the 311 calls, for over four years, strongly suggests that complaints by the NWRE Defendants were not targeted towards any specific permit or application of the Plaintiff (*contra Duane Reade, Inc. v Clark*, 2 Misc 3d 1007[A], 1007A, 2004 NY Slip Op 50174[U], *2 [Sup Ct, NY County 2004] [defendant's allegedly defamatory ad posted seven days after public announcement about plaintiff's rooftop sign was a direct challenge the plaintiff's application for permission to erect the sign]).

To the extent that the action involves claims concerning the April 2019 Letter, this portion of the action may fall within the protections of CRL § 76-a because the April 2019 Letter is materially related to the Flower House Condo's efforts to challenge and revoke the Plaintiff's temporary certificate of occupancy. Nevertheless, the Plaintiff has asserted a reasonable basis in law for its action concerning the April 2019 Letter because the Cooperation Clause in the Zoning Agreement bars the Flower House Condo and NWRE from appearing in opposition to the Plaintiff for any reasonable application that could affect the Plaintiff's ability to construct the Hotel (*Waterways at Bay Pointe Homeowners Assn., Inc. v Waterways Dev. Corp.*, 132 AD3d 975, 980 [2d Dept 2015]) [denying dismissal of defendant developer's counterclaim for breach of contract as SLAPP suit because defendant had substantial basis to assert claim where plaintiff agreed not to interfere with construction by developer]; *Matter of Related Props., Inc. v Town Bd. of Town/Village of Harrison*, 22 AD3d 587, 591 [2d Dept 2005]). Although the NWRE Defendants assert that the April 2019 Letter was justified because they could assert opposition to any action that was inconsistent with the Zoning Agreement, at bottom this is a disputed issue of

fact which cannot be resolved on the instant motion to dismiss. Accordingly, that branch of the NWRE Defendants' motion to dismiss the Complaint pursuant to CRL § 76-a is denied.

That branch of the NWRE Defendants' motion seeking costs, attorneys' fees, compensatory and/or punitive damages pursuant to CRL § 70-a(1) is also denied as the NWRE Defendants have not established that this action was commenced without a substantial basis in fact and/or law.

B. The Noerr-Pennington Doctrine Does Not Require Dismissal

The NWRE Defendants also argue that they cannot be liable for making the 311 calls because this conduct is protected speech under the First Amendment pursuant to the Noerr-Pennington Doctrine. In opposition, the Plaintiff argues that the 311 calls were not petitions to the government and, in any event, that such calls and the April 2019 Letter are actionable because this conduct falls within the sham exception to the Noerr-Pennington doctrine.

The Noerr-Pennington Doctrine provides that citizens who petition the government for governmental action favorable to them cannot be prosecuted under antitrust laws (*see Singh v Sukhram*, 56 AD3d 187, 191 [2d Dept 2008]), citing *E. R. Presidents Conference v Noerr Motor Frgt., Inc.*, 365 US 127, 135 [1961]). Courts have since expanded application of the Noerr-Pennington Doctrine to federal and state law claims (*see Villanova Estates, Inc. v Fieldston Prop. Owners Assn., Inc.*, 23 AD3d 160, 161 [1st Dept 2005] [applying Noerr-Pennington Doctrine to bar plaintiff's action concerning defendants' allegedly false statements about

plaintiff's right to access its property during Uniform Land Use Review Procedure application process]).

However, although the motives of individuals who petition the government for relief are generally irrelevant, pursuant to the "sham exception" to the Noerr-Pennington Doctrine the doctrine may not serve as a defense where the defendant's conduct is objectively baseless with no reasonable expectation of success and the defendant subjectively acts with intent to interfere with business relationships (*Singh*, 56 AD3d at 192 [citations omitted]).

Whether the complaints made by the NWRE Defendants fall under the protection of the Noerr-Pennington or whether this defense is barred under the sham exception presents an issue of fact that cannot be determined at this stage of the proceeding.

The complaints made through the 311 calls were brought to the attention of the DOB, which proceeded to perform inspections and issue violations where necessary, and this is sufficient to bring the calls within the purview of a petition to the government and thus fall within the ambit of the Noerr-Pennington doctrine (*see Venetian Casino Resort, LLC v NLRB*, 417 US App DC 85, 90 [2015] [property owner's request that police enforce state trespass law constitutes direct petition to government subject to protection under Noerr-Pennington doctrine]). Further, the Complaint alleges that the Plaintiff paid approximately $6,750,000 to the NWRE Defendants for excess development rights, the NWRE Defendants agreed by contract to provide such rights and not to interfere with the Hotel's development in exchange for this substantial sum of money, and that Mr. Sinclair and Ms. Chapman nevertheless made countless 311 calls while allegedly

knowing that their claims were baseless and unfounded, all in an attempt to ultimately shut down the Hotel (NYSCEF Doc. No. 12, ¶¶ 1-7). On this basis, the Complaint alleges sufficient facts to support an inference that the NWRE Defendants may have had no genuine interest in seeking governmental action so much as in having their cake and eating it, too (*contra Villanova*, 23 AD3d 160 at 161 [1st Dept 2005] [sham exception did not apply since complaint failed to allege that defendants had no genuine interest in seeking governmental action]).

In addition, inasmuch as the Plaintiff alleges that (i) the NWRE Defendants' complaints were objectively baseless with no reasonable expectation of success because no violations were issued on the basis of the complaints made and (ii) that the NWRE Defendants acted with subjective intent to interfere with Hotel business during construction, and even after its opening (NYSCEF Doc. No. 12, ¶¶ 63-164), the Cooperation Clause nevertheless provided the NWRE Defendants a right to "***oppose any action which is inconsistent with the Declaration, this Agreement or the Zoning Documents****"* pursuant to the Zoning Agreement. Here, the Complaint also alleges that the Plaintiff made unfounded complaints about various safety issues such as flooding, crane operation, and concrete falling (*id.*, Appendix A), and to the extent that the Plaintiff may have had a basis to raise concerns regarding construction safety or otherwise, the Cooperation Clause ***does not*** prevent the NWRE Defendants from making any ***legitimate complaints***. Put another way, it is simply unclear at this stage of the proceedings whether the 311 calls fall within the sham exception to the Noerr-Pennington Doctrine because whether such calls were objectively and/or subjectively baseless require a further factual finding on this record.

C. Failure to State a Claim

a. Breach of Contract and/or Breach of the Implied Duty of Good Faith and Fair Dealing (First Cause of Action)

The elements of a claim for breach of contract are (1) the existence of a contract, (2) the plaintiff's performance, (3) the defendant's breach and (4) resulting damages (*Harris v Seward Park Housing Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). Here, the Plaintiff has sufficiently alleged the existence of the Zoning Agreement, its performance, and NWRE's breach of by making 311 calls and other baseless objections to the DOB regarding the Hotel in violation of the Cooperation Clause (NYSCEF Doc. No. 12, ¶¶ 170-175).

It is also well settled that implicit in every contract is a duty of good faith and fair dealing, which provides that neither party shall do anything that would destroy or injure the right of the other party to receive the fruits of the contract (*511 W. 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 153 [2002] [citations omitted]). To the extent that the NWRE Defendants' assert that NWRE cannot be liable for any objections set forth in the April 2019 Letter because said letter was sent on behalf of the Flower House Condo, the Complaint also alleges that NWRE is the sole managing agent of the Flower House Condo. As a party to the Zoning Agreement, NWRE is equally prohibited from acting in any way that would deprive the Plaintiff's benefit of the Zoning Agreement and giving the allegations every favorable inference, this is a sufficient basis for the Plaintiff to assert its claim for breach of the implied covenant of good faith and fair dealing against NWRE. Accordingly, the branch of the NWRE Defendant's motion to dismiss the first cause of action for breach of contract and/or breach of the implied covenant of good faith and fair dealing is denied.

b. Tortious Interference (the Third and Fourth Causes of Action)

The third and fourth causes of action involve claims of tortious interference with the Zoning Agreement and the Access Agreement by Mr. Sinclair and Ms. Chapman. The NWRE Defendants argue that the tortious interference claims should be dismissed because the purported tortfeasors are not strangers to the relevant contracts. The court agrees.

With respect to the Zoning Agreement, the Complaint alleges that Mr. Sinclair and Ms. Chapman are co-managers of NWRE, and the Plaintiff may not assert a tortious interference claim against the same individuals because they are not strangers to the Zoning Agreement, of which NWRE is a signatory (*XpressSpa Holdings, LLC v Cordial Endeavor Concessions of Atlanta, LLC*, 171 AD3d 511, 513 [1st Dept 2019] [dismissing tortious interference claim against two individual owners of defendant, which defendant was a party to the relevant agreement]). The tortious interference claim related to the Access Agreement also fails because inasmuch as the Complaint alleges that Mr. Sinclair and Ms. Chapman were "acting in their own interests and against those of the Flower House Condo" (NYSCEF Doc. No. 12, ¶ 191), Mr. Sinclair is the President of the Board of Managers of the Flower House Condo and Ms. Chapman is also member of the Board of Managers such that these individuals are, again, not strangers to the Access Agreement, of which the Flower House Condo is a signatory (NYSCEF Doc. No. 14, ¶ 13; NYSCEF Doc. No. 40, ¶ 3). Accordingly, the branches of the NWRE Defendants' motion to dismiss the third and fourth causes of action for tortious interference as against Mr. Sinclair and Ms. Chapman are granted.

c. Prima Facie Tort (Fifth Cause of Action)

The fifth cause of action for prima facie tort alleges that Mr. Sinclair and Ms. Chapman intentionally inflicted harm on the Plaintiff by making false 311 calls or other unfounded complaints to the DOB. The elements of a claim for prima facie tort are (1) the intentional infliction of harm, (2) without any excuse or justification, (3) resulting in special damages, (4) by an act or series of acts which are otherwise legal (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 403 [1st Dept 2014]). A claim for prima facie tort will be dismissed where the pleadings fail to allege that the ***sole motivation*** for the damaging act is "***disinterested malevolence***" – i.e. malicious intent to injure the plaintiff, without any other motive – and instead, sets forth more than one motive for the purported wrongdoing (*see Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 333 [1983] [no recovery for prima facie tort unless malevolence is the sole motive for defendant's actions]). By way of example, in *Iken v Bohemian Brethren Presbyterian Church*, the First Department affirmed the dismissal of the prima facie tort claim because the plaintiff in that case did not plead that "disinterested malevolence" was defendant's ***sole motive*** for alleged misconduct, but instead pleaded ***dual motives*** for the defendant's actions: (i) revenge ***and*** (ii) forcing the plaintiff out in order to re-let the premises at a higher rental rate (162 AD3d 594, 595 [1st Dept 2018], citing *Wigdor v SoulCycle, LLC*, 139 AD3d 613, 614 [1st Dept 2016]). This was insufficient to make out a claim for prima facie tort. In other words, a claim for prima facie tort cannot be sustained where the plaintiff is alleged to be motivated by profit ***as well as*** malicious intent (*see Squire Records, Inc. v Vanguard Rec. Socy., Inc.*, 25 AD2d 190, 191 [1st Dept 1966] [recovery for prima facie tort limited to instances where sole motivation for damaging act was malicious intention to injure

plaintiff, no recovery for under prima facie tort for other motives, such as profit, self-interest, or business advantage]).

Here, the Complaint fails to plead that disinterested malevolence was the ***sole motive*** for Mr. Sinclair and Ms. Chapman's alleged wrongful actions because the Complaint asserts ***dual motives*** for the NWRE Defendants' alleged wrongdoing: (i) malicious intent to prevent construction of the Hotel, ***and*** (ii) extortion of additional money from the Plaintiff's after the hotel became operational (*id.*; NYSCEF Doc. No. 12, ¶¶ 4, 5, 162). As the Plaintiff fails to plead that the NWRE Defendants' only motive for their alleged wrongdoing was malicious intent, the branch of the NWRE Defendants' motion to dismiss the fifth cause of action for prima facie tort is granted.

d. Abuse of Process (the Eighth Cause of Action)

The three elements of a claim for abuse of process are: (1) regularly issued process, compelling the performance or forbearance of some prescribed act, (2) the person activating the process intends to do harm without economic or social excuse or justification, and (3) the defendant seeks some collateral advantage or corresponding detriment to the plaintiff which is outside the legitimate ends of the process (*Board of Ed. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 403 [1975]).

To the extent that the claim for abuse of process is based on the 311 calls, complaints to the DOB about construction activities do not qualify as "regularly issued legal process" (*Mastrobattista v Borges*, 2012 NY Slip Op 32536[U], *28 [Sup Ct, NY County 2012]). In addition, the

subsequent stop work orders and audit by the DOB also do not constitute process, which must be issued by or filed in court to be actionable (*Kriss v BayRock Group LLC*, 2017 US Dist LEXIS 147525, at *9 [SD NY 2017], citing *Glaser v Kaplan*, 5 AD2d 829, 830 [2d Dept 1958]). Accordingly, the branch of the NWRE Defendants' motion to dismiss the eighth cause of action for abuse of process is granted.

e. Malicious Prosecution (the Ninth Cause of Action)

The Plaintiff's ninth cause of action for malicious prosecution is dismissed because the Complaint fails to allege that the *sine qua non* of this claim – i.e., the DOB audit – was a judicial proceeding or an administrative proceeding with sufficient attributes of a judicial proceeding, such as a hearing and/or trial of issues on evidence and testimony under oath, with the right of cross-examination (*see Broughton v State*, 37 NY2d 451, 457 [1975]; *Groat v Town Board of the Town of Glenville*, 73 AD2d 426 [3rd Dept 1980]). Accordingly, the branch of the NWRE Defendants' motion to dismiss the ninth cause of action for malicious prosecution is granted.

f. Injunction (the Tenth Cause of Action)

The Plaintiff's tenth cause of action for an injunction against Mr. Sinclair and Ms. Chapman to (i) enjoin them from entering the Hotel, (ii) enjoin them from making false 311 calls about the Hotel, and (iii) obtain an immediate retraction of the April 2019 Letter is dismissed because this remedy depends on the merits of the substantive claims against these individuals, which have also been dismissed (*see Weinreb v 37 Apts. Corp.*, 97 AD3d 54, 58-59 [1st Dept 2012] [injunctive relief not available when there is no substantive cause of action against the

defendant]). In any event, and for the avoidance of doubt, to the extent that the defendants have any legitimate complaints, the court cannot enjoin legitimate complaints from being made.

II. The Condo Defendants' Motion to Dismiss (Mtn. Seq. No. 002)

In Motion Sequence 002, the Condo Defendants move to dismiss the Complaint. As an initial matter, the branches of the Condo Defendants' motion to dismiss pursuant to CRL § 76-a and the Noerr-Pennington Doctrine are denied for the same reasons as set forth above.

A. Dismissal for Lack of Damages

The branch of the Condo Defendants' motion to dismiss for failure to plead damages is denied because the Plaintiff has sufficiently alleged that the 311 calls were baseless and caused the DOB to issue partial or full stop work orders that delayed the opening of the Hotel by 56 days until the concerns could be vetted, which concerns were investigated and found to be without merit, allegedly resulting in millions of dollars of damages to the Plaintiff (NYSCEF Doc. No. 12, ¶¶ 112-115).

The Condo Defendants also argue that the Plaintiff takes an inconsistent position on the cause of its damages by adducing the affidavit of William Hunsberger, senior project manager of the Plaintiff's affiliate, who attested in a separate action (NYSCEF Doc. No. 45) against another neighboring building that the Plaintiff required no less than one month of continuous access to that property as of October 25, 2018 to obtain its temporary certificate of occupancy (the **Other Neighbor Action**) NYSCEF Doc. No. 46). However, the Condo Defendants' argument is unavailing. In his affidavit, Mr. Hunsberger merely explained that in the Other Neighbor Action,

the conduct of the defendants therein interfered with the Plaintiff's scheduled opening of the Hotel on January 1, 2019, but Mr. Hunsberger did not state that this individual was the ***sole cause*** of delays to the Hotel construction and opening. Further, and significantly, Mr. Hunsberger's affidavit, which is dated October 25, 2018, cannot account for additional 311 calls complained of in this action that were allegedly made through November and December of 2018, that may support an inference that these calls may have contributed to further pushing back the opening date of the Hotel (NYSCEF Doc. No. 12, ¶¶ 101-105).

B. Breach of Contract/Breach of Implied Duty of Good Faith and Fair Dealing (the First Cause of Action)

In sum and substance, the Plaintiff alleges that the Flower House Condo breached the Cooperation Clause in the Zoning Agreement by making baseless objections to the DOB about the Hotel, by e.g., sending the April 2019 Letter (*id.*, ¶¶ 127-137, 170-175). Although the Zoning Agreement permits the Flower House Condo to oppose any action that is inconsistent with the Zoning Agreement, the Plaintiff has sufficiently pled that the April 2019 Letter was a breach of the Cooperation Clause such that any dispute over the ultimate application of the Cooperation Clause is a factual issue that cannot be resolved on this motion to dismiss. Accordingly, that branch of the Plaintiff's motion to dismiss the first cause of action for breach of the Zoning Agreement against the Flower House Condo is denied.

C. Breach of Contract/Breach of Implied Duty of Good Faith and Fair Dealing (the Second Cause of Action)

The Plaintiff alleges that the Flower House Condo breached the Access Agreement by failing to provide the Plaintiff with requisite access and by wrongfully asserting a claim to the escrow

funds (*id.*, ¶¶ 55-56, 58-60, 176-182). According the Plaintiff every favorable inference as this court must on a motion to dismiss, the Plaintiff states a claim for breach of the Access Agreement and damages, which were partially caused by denial of access and various fees incurred as a result (*id.*, ¶¶ 112-122). Accordingly, that branch of the Condo Defendants' motion to dismiss the second cause of action for breach of contract is denied.

D. Tortious Interference (the Third and Fourth Causes of Action)

The Plaintiff also alleges that Ms. Kirshner tortiously interfered with the Zoning Agreement by making baseless objections to the DOB about the Hotel. The Plaintiff further alleges that Ms. Kirshner tortiously interfered with the Access Agreement by causing the Flower House Condo to restrict the Plaintiff its requisite access.

To establish a claim of tortious interference with contract, the plaintiff must demonstrate (1) the existence of its valid contract with a third party, (2) defendant's knowledge of that contract, (3) defendant's intentional and improper procuring of a breach, and (4) damages (*AREP Fifty-Seventh, LLC v PMGP Assoc., L.P.*, 115 AD3d 402, 402 [1st Dept 2014]).

Here, the Plaintiff has adequately pled that it is a party to the Zoning Agreement and Access Agreement, that Ms. Kirshner knew about these agreements, and intentionally interfered with the same agreements, that this resulted in damages to the Plaintiff (NYSCEF Doc. No. 12, ¶¶ 61, 103-122, 138-163, 183-192). Further, as the Complaint only alleges that Ms. Kirshner resides at the Flower House Condo, without more, and therefore the claims of tortious interference are sustained because she appears to be a stranger to the relevant contracts. Accordingly, the

branches of the Condo Defendants' motion to dismiss the third and fourth causes of action for tortious interference are denied.

E. Declaratory Judgment (the Sixth Cause of Action)

The Plaintiff seeks a declaratory judgment that it is entitled to the remaining escrow funds and default escrow funds. As the second cause of action for breach of the Access Agreement is sustained against the Flower House Condo in relation to its claim over the escrow funds, the declaratory judgment is duplicative of the relief sought by the breach of contract claim (*see Apple Records, Inc. v Capitol Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988] [declaratory judgment unnecessary where plaintiff seeks declaration of same rights that are determined by breach of contract claim]). Accordingly, that branch of the Condo Defendants' motion to dismiss the sixth cause of action for a declaratory judgment is granted.

F. Prima Facie Tort (the Fifth Cause of Action), Abuse of Process (the Eighth Cause of Action), Malicious Prosecution (the Ninth Cause of Action)

The branches of the Condo Defendant's motion to dismiss the claims for prima facie tort (the fifth cause of action), abuse of process (the eighth cause of action), and malicious prosecution (the ninth cause of action) are granted as the Complaint fails to state a claim with respect to these causes of action for all the reasons set forth above (see Mtn. Seq. No. 001).

G. Injunction (the Seventh and Tenth Causes of Action)

The Plaintiff's seventh cause of action seeks an injunction to enjoin Goetz, as escrow agent, from releasing any remaining escrow funds except to the Plaintiff (NYSCEF Doc. No. 12, ¶ 215). Although the Flower House Condo is a party to the Access Agreement that governs the release of

the escrow funds, the Flower House Condo is not the escrow agent and the Plaintiff fails to state a claim for an injunction as it relates to the Flower House Condo. Accordingly, that branch of the Condo Defendants' motion to dismiss the seventh cause of action for an injunction is granted.

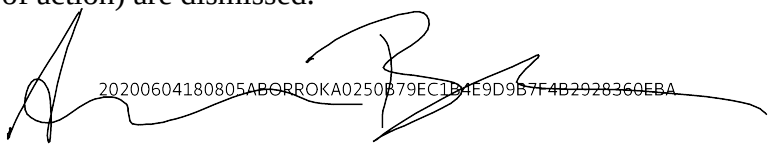
The Plaintiff's tenth cause of action seeks to enjoin the Condo Defendants from entering the Hotel, making false 311 calls about the Hotel, and to obtain an immediate retraction of the April 2019 Letter. As the first through fourth causes of action are sustained as against the Flower House Condo and Ms. Kirshner, there is a substantive basis to ground the action for an injunction. Further, the Plaintiff has alleged that the defendants' purported wrongdoing, if continued, could result in irreparable harm such as loss of good will (NYSCEF Doc. No. 92, ¶ 78; *see Second on Second Café v Hing Sing Trading*, 66 AD3d 255, 272-273 [1st Dept 2009] [loss of goodwill constitutes irreparable harm]). Accordingly, that branch of the Condo Defendants' motion to dismiss the tenth cause of action for an injunction is denied.

Accordingly, it is

ORDERED that the NWRE Defendants' motion to dismiss (Mtn. Seq. No. 001) is granted solely to the extent that the claims for tortious interference (third and fourth causes of action), prima facie tort (fifth cause of action), abuse of process (eighth cause of action), malicious prosecution (ninth cause of action), and injunction (tenth cause of action) are dismissed; and it is further

ORDERED that the Condo Defendants' motion to dismiss (Mtn. Seq. No. 002) is granted solely to the extent that the claims for prima facie tort (fifth cause of action), declaratory judgment

(sixth cause of action), an injunction (seventh cause of action), abuse of process (eighth cause of action), and malicious prosecution (ninth cause of action) are dismissed.



6/4/2020
DATE

ANDREW BORROK, J.S.C.

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**