

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

NORFOLK, ss

HOUSING COURT – METRO SOUTH
Docket No.: 24H82SP01628

MARINA BAY RESIDENCES, LLC,

Plaintiff,

v.

AHMED NAGUIB, DANY
ABOUELKHIER, AND SANDRA
FERNANDEZ DE VILLANICENCIO
FROMMER,

Defendants.

**MARINA BAY RESIDENCES LLC's OMNIBUS
MOTION TO DISMISS AND/OR MOTION TO STRIKE DEFENDANT FERNANDEZ'S ANSWER, AMENDED
ANSWER, COUNTERCLAIMS, AND JURY DEMAND;
OPPOSITION TO DEFENDANT ABOUELKHIER'S MOTION FOR LATE ANSWER, COUNTERCLAIMS, AND
JURY DEMAND;
MOTION TO STRIKE DISCOVERY REQUESTS PROPOUNDED UPON COUNSEL; AND
OPPOSITION TO MOTION FOR 14-WEEK POSTPONEMENT OF TRIAL DATE**

Now comes the Plaintiff and hereby submits its 1) Motion to Dismiss Defendant Fernandez's Answer/Amended Answer, or, in the alternative, to strike the Defendant Fernandez's Counterclaims and Jury Demand; 2) Opposition to Defendant Abouelkhier's Motion for Late Answer, Counterclaims, and Jury Demand; 3) Motion to Strike Requests for Discovery Propounded upon Counsel; and 4) Opposition to Defendants' Motion for 14-Week Postponement of the Trial Date. The Plaintiff respectfully requests that this Honorable Court: 1) strike the Defendant Fernandez's Answer with Counterclaims and Jury Trial Demand filed on July 19, 2024, and the Amended Answer filed on July 23, 2024, pursuant to Housing Court Standing

Order 6-23, or, in the alternative, 2) strike the Defendant Fernandez's Jury Trial Request, 3) strike the Defendant Fernandez's Counterclaims pursuant to M.G.L. c.239 §8A, 4) deny Defendant Abouelkhier's Motion for Late Answer, Counterclaims, and Jury trial, 5) strike the Defendant Fernandez's discovery requests upon Counsel; and 6) deny the Defendants' request for a 14-week postponement of the trial date. In support thereof, Plaintiff states as follows:

I. **RELEVANT FACTS AND PROCEDURAL HISTORY:**

The Plaintiff is the owner of the property known and numbered as 550 Victory Road, Quincy, MA (the "Property"). The Defendants, Ahmed Naguib, Dany Abouelkhier, and Sandra Fernandez de Villanicensio Frommer (collectively, the "Defendants"), are tenants at the Property pursuant to a written lease agreement (the "Lease"), residing at 550 Victory Road, Unit S339, Quincy, MA (the "Premises"). The Plaintiff commenced this summary process action on or about June 17, 2024, for cause, based on violations of the Lease ("Action"), after duly serving the Defendants with a Notice of Non-Renewal for fault.

On July 19, 2024, the Defendant Sandra Fernandez de Villanicensio Frommer ("Defendant Fernandez"), filed an Answer with Counterclaims and a Jury Trial Demand (the "Answer"). On July 23, 2024, Defendant Fernandez served Plaintiff's counsel with a copy of the Answer via email, and on the same date she filed a Motion to Amend Counterclaims. On July 26, 2024, Defendant Fernandez filed requests for interrogatories and admissions and a motion to file a late answer, and Defendant Dany Abouelkhier ("Defendant Abouelkhier") filed a [separate] motion to file late answer and counterclaims, with a jury trial demand on that same date¹. The Summary Process Trial is presently scheduled for a bench trial on August 6, 2024.

¹ Defendant Ahmed Naguib has not filed an Answer in this case.

II. ARGUMENT:

A. Defendant Fernandez's Answer was Not Filed or Served Timely Under Housing Court Standing Order 1-23.

Pursuant to Housing Court Standing Order 1-23, “answers in pending and new summary process cases shall be filed **and** served no later than three (3) business days **before** the date of the initial first-tier court event...An Answer that is not filed and served in accordance with this Order shall be left to judicial discretion and determination”. Emphasis added. In this case, the date of the first-tier event was July 23, 2024. However, Defendant Fernandez filed the Answer with Counterclaims and Jury Trial Demand on July 19, only two (2) business days before the date of the initial first-tier court event. Further, Defendant Fernandez did not serve Plaintiff’s counsel with her Answer until July 23 2024, the same date as the first-tier court event. Accordingly, this filing did not comply with the Housing Court’s Standing Order. Additionally, the Plaintiff did not assent to the Defendant Fernandez’s filing, nor did the Defendant Fernandez request leave of court for the same.

It is well established in this Commonwealth that pro se litigants are held to the same standard as those represented by counsel and are required to adhere to the procedural rules governing this action. Notwithstanding the dubiousness of Defendant Fernandez’s statements that she represents herself without assistance from an attorney, this does not excuse her noncompliance with procedural rules. See Maza v. Commonwealth, 423 Mass. 1006 (1996) (pro se litigant held to the same standards as litigants represented by counsel); and Mmoe v. Commonwealth, 393 Mass. 617, 620 (1985) (procedural rules bind pro se litigants as they bind other litigants). Massachusetts appellate courts hold that procedural rules should be applied so as to allow pro se litigants “a meaningful opportunity to develop and present [their] claims.”

Cambridge St. Realty, LLC v. Stewart, 481 Mass. 121, 132-133 (2018) (reversible error to deny continuance of action where pro se tenant had just obtained Lawyer for Day attorney representation); see also Morse v. Ortiz-Vazquez, Mass. App. Ct. No. 20- P-342 (April 13, 2021) (Blake, Desmond & Hand, JJ) (reversible error to deny leave to file late answer and affirmative defenses).

Based upon the aforementioned, the Defendant Fernandez's Answer, Counterclaims, and Jury Demand, including any amendments to the same, should be stricken in their entirety. In the alternative, if this Court is inclined to allow the Defendant Fernandez's filing of a late Answer, Plaintiff respectfully requests that the Court strike the Defendant Fernandez's Jury Demand.

B. To the Extent the Court is Inclined to Allow Defendant Fernandez's Filing of a Late Answer, Defendants Are Not Entitled to Counterclaims Where this Action Was Brought for Cause.

Massachusetts General Laws c. 239 §8A prohibits a tenant from raising by counterclaim any claim against the landlord relating to or arising out of the tenancy, unless such a claim is in response to either: (1) a notice to quit for non-payment of rent; or (2) a tenancy is terminated without fault of the tenant. M.G.L. c.239 §8A. Specifically, Chapter 239 §8A, states in relevant part:

“In any action under this chapter to recover possession of any premises rented or leased for dwelling purposes, brought pursuant to a notice to quit for non-payment of rent, or where the tenancy has been terminated without the fault of the tenant or occupant, the tenant or occupant shall be entitled to raise, by defense or counterclaim, any claim against the Plaintiff relating to or arising out of such property...for breach of warranty...or for a violation of any other law.”

This action is a so-called “fault” eviction, being based upon the Defendants’ violation of certain provisions of their lease. Specifically, this action is based on allegations that the Defendants have chronically paid their rent late/failed to pay at all, failed to come to a reasonable escrow agreement for purported withheld rent, failed to cooperate with efforts to address issues raised in the Premises, and failed to provide reasonable access to the Premises, in violation of the terms of the lease, as described in the Notice of Non-Renewal in this action dated April 24, 2024. As such, Plaintiff has alleged that the Defendants have materially breached the Lease. Where this action is based on the fault of the Defendants, the Defendants may not raise any counterclaims in this action.

This argument prevailed in the case of Spence v. O’Brien, where the Court accepted that c.239 §8A defenses may not be raised in an eviction case where the eviction is based upon wrongdoing or fault of the tenant. Spence v. O’Brien, 446 N.E.2d 1070 , rev. den. 448 N.E.2d 767 (1983); see also, Boston Hous. Auth. v. Martin, 87 N.E.3d 1202 (Mass. App. 2017).

As noted herein, on July 19, 2024, the Defendant Fernandez filed an Answer and Counterclaim alleging numerous purported Counterclaims, including: violation of Ch. 93A, breach of covenant of good faith and fair dealing, fraudulent misrepresentation, negligent misrepresentation, failure to disclose material facts, breach of contract, retaliatory eviction, severe health issues of Kenzo Fernandez², breach of privacy, unspecified counterclaims against individual attorneys, criminal charges, neglect, violation of MGL on the protection of minors, violation of Federal privacy laws, coercion, intimidation, flagging and threatening residents, failure to provide health department reports, living conditions and impact on health, importance of mold legislation. Notwithstanding the fact that many of these Counterclaims are improperly

² Not a party to this Action.

brought in this action, and that the Defendant Fernandez lacks standing as to most of the same, the Defendants are barred from asserting said Counterclaims in this action.

C. Defendant Abouelkhier was Defaulted at the First-Tier Court Event, Such That Their Motion to File Late Answer and Counterclaims must be denied.

Where Defendant Abouelkhier did not appear at the First-Tier event, he was accordingly defaulted by this Court. Plaintiff duly filed the Rule 10/non-military affidavit for the same³. See Docket entry numbers 11 and 12. Where Judgment has already entered against Defendant Abouelkhier in favor of the Plaintiff, his Motion to File Late Answer, Counterclaims, and Demand for a Jury Trial must accordingly be denied.

D. To the Extent this Court is Inclined to Consider Defendant's Counterclaims, They Must be Dismissed Where They are Wholly Irrelevant to the Action, Substantively Deficient, and Where Defendants Lack Standing for Much of the Same.

1. **The Counterclaims are Irrelevant and Substantively Deficient.**

For a whole series of reasons, the “counterclaims” fail on their merits. These include:

Absolute litigation privilege. Massachusetts recognizes an absolute litigation privilege for all actions by counsel in the litigation itself. *See Bassichis v. Flores*, 490 Mass. 143, 149-50 (2022) (interpreting the privilege broadly to apply to all attorney actions in connection with litigation). *See also Bartle v. Berry*, 80 Mass. App. Ct. 372, 378 (2011) (“[T]he absolute litigation privilege ... shields an attorney from civil liability to nonclients for statements made in the course of litigation.”); *Doe v. Nutter, McClennen & Fish*, 41 Mass. App. Ct. 137, 140 (1996) (“The privilege is absolute. An absolute privilege provides a complete defense even if the offensive statements are uttered maliciously or in bad faith.”). Here, the “counterclaims” are

³ Awaiting formal entry of Judgment as of the date of this Motion.

based entirely on counsel to Barrett attaching the lease to the motion to dismiss in the class action suit. That alleged conduct is protected absolutely by the litigation privilege and a claim based thereon cannot stand.

The allegations do not state causes of action. There is no cause of action in Massachusetts for the disclosure of someone's name alone, even a minor's. Here statutory citations are not on point. The Massachusetts Privacy Act protects against the dissemination of "highly personal or intimate" information, such as social security numbers, where the disclosure of which would result in unreasonable, substantial, or serious interference with one's privacy. *Hayes v. Mirick*, 378 F.Supp.3d 109, 117 (D. Mass. 2019). The disclosure of a name alone does not qualify. Further, there can be no liability unless the party seeking the legal protection has used care to guard the private information. *Rodrigues v. EG Systems, Inc.*, 639 F. Supp.2d 131, 134 (D. Mass. 2009). That is not the case here where Abouelkhier raised issues under the lease in the class action complaint⁴, and Fernandez herself in her filings here has repeatedly used the name of her minor child.

The counterclaims also do not state a claim under the Protection of Minors statute, which governs the collection, maintenance, and dissemination of personal information by agencies of the Executive Branch of state government. It does not apply to private parties.

The federal Children's Online Privacy Protection Act gives parents control over what information websites can collect from their kids. COPPA applies to operators of commercial websites and online services directed to children under the age of 13 that collect personal information and to operators of sites and online services geared toward general audiences when

⁴ Documents referenced in but not attached to a complaint are considered a part thereof for purposes of a motion to dismiss. See *Harhem v. Brown*, 431 Mass. 838, 840 (2000).

they have “actual knowledge” they are collecting information from children under 13. It is not applicable here.

The state’s child protection statute applies to mandatory reporters of child abuse; but none of the parties here are mandatory reporters under the statute. Further, the statute does not provide a private cause of action against such mandatory reporters. *Doe v. D’Agostino*, 367 F. Supp. 2d 157 (D. Mass. 2005).

Regarding the claim for identity theft under G.L. c. 266 §37E, the elements include an “intent to defraud” and an “intent to pose as such person” whose information is obtained “without express authorization.” There are no such allegations in the “counterclaims.”

Finally, as for intentional infliction of emotional distress, the elements are an intentional act, amounting to “extreme and outrageous conduct,” causing severe emotional distress to another, by one not privileged to do so. *See, e.g., Tetrault v. Mahoney, Hawkes & Goldings*, 425 Mass. 456, 465 (1997). The “counterclaims” fail to allege any of these elements.

The motion to dismiss the attached the lease was only signed by two of the seven attorneys against whom Defendant Fernandez purports to bring the “counterclaims.”

Defendant Fernandez purports to bring her claims against Ted Papadopoulos, James Bragdon, Sangeetha Kannan (counsel to Bozzutto and Barrett in the class action suit), and Gregory Sapire, Raj Aujla, Daniel Dain, and Kate Carter (counsel to Marina Bay Residences, LLC in the class action suit). However, only Papadopolous and Bragdon signed the motion to dismiss Barrett in the class action suit. So, the “counterclaims” do not even articulate any conduct by Kannan, Sapire, Aujla, Dain, and Carter, and, and for this additional reason, should be dismissed as against them.

No damages/wrong mechanism. Defendant Fernandez’s purported “counterclaims” also fail because she alleges no present damages, only that she is afraid that someone in the future might use the identity of her minor child in some adverse way. As such, Defendant Fernandez has not stated causes of action for injury and her claims are not ripe. Also, if there was a concern about the son’s identity, the proper remedy should have been to seek an impoundment order from the Superior Court of the copy of the lease attached to the motion to dismiss.

2. The Counterclaims are Procedurally Defective.

The counterclaims fail also for a series of procedural defects, which should require their dismissal.

Failure of service. None of the named attorneys are existing parties to the action before this court. Defendant Fernandez cannot bring them into the case through a counterclaim. Rather, she needs to seek impleader under Massachusetts Rule of Civil Procedure 14, which requires service of a summons. Here, Defendant Fernandez did not serve a summons on any of the attorneys she named. As for sending them a copy of “counterclaims,” she used email and certified mail. This is ineffective service upon individuals within the Commonwealth under Rule 4(c) and (d)(1). For these reasons, Defendant Fernandez has not effectively brought any of the named attorneys into the case, which is why this motion to dismiss/motion to strike counterclaims is brought by party Marina Bay Residences.

Lack of jurisdiction. The purported “counterclaims” are unrelated to any right to possession of the premises. They also purport to assert claims (privacy, protection of minors, etc.) over which this Court lacks jurisdiction.

E. Defendants are Not Entitled to Discovery on Named Attorneys

Notwithstanding the Plaintiff’s contentions herein that Defendants’ requests to file Late Answer should be denied, Plaintiff further contends that Defendants’ Discovery Requests on

named attorneys must be denied, where the attorneys Defendant Fernandez has named in her purported “counterclaims” have not been properly served with a summons complying with Rule 4, because the alleged “counterclaims” fail to state causes of action and allege conduct protected by the absolute litigation privilege, and because they are procedurally defective, the discovery served on the attorneys should be struck. Further, as noted above, answering the questions directed to counsel to plaintiff Marina Bay Residences, as well as to counsel to Bozzuto and Barrett in the class action suit, would require the disclosure of information protected by the attorney-client privilege. If information is needed in this action, the requests can be directed at the party, the plaintiff, without serving counsel directly. Further, the discovery propounded does not go to the issue of possession and instead is related to the separate class action pending in Superior Court. That is the appropriate forum for this discovery. It should not be allowed in this case, and certainly not against the attorneys.

As an additional matter, Defendant Fernandez alleges in her “counterclaims” that counsel to Barrett filed a motion to dismiss in the separate class action suit (Civil Action No. 2382CV00389) brought only by Defendant Abouelkhier (Defendant Fernandez is not a party in that suit), and that counsel included a copy of the tenants’ lease as part of the motion to dismiss package. Defendant Fernandez claims in her counterclaims that the lease mentions her minor child who lives in the unit and that, consequently, the disclosure of the son’s name in a publicly filed document constituted a violation of the Massachusetts Privacy Act, G.L. c. 214, § 1B; a violation of the statute for the Protection of Minors, G.L. c. 66A; a violation of federal privacy laws, including the Children’s Online Privacy Protection Act; a violation of child protection laws under G.L. c. 119, § 51A; plus “neglect and intentional infliction of emotional distress;” and “potential criminal charges, including identity theft under G.L. c. 266, §37E”. In support of her

purported “counterclaims” against counsel, Defendant Fernandez has served extensive document requests, interrogatories, and requests for admission. As served on counsel, these requests go to the heart of the attorney-client relationship, with requests such as, “Describe in detail the decision-making process that led to the initiation of eviction proceedings against the Defendant, including the names and roles of individuals involved, dates of key decisions, and reasons for pursuing eviction.” To permit time for discovery, Defendant Fernandez has asked the court to postpone trial by *14 weeks*, during which time, presumably, the tenants would continue to holdover in the unit rent free.

Defendant Fernandez purported to serve the counterclaims, discovery, and extension request by email and certified mail. At no time was a summons served by a process server on any of counsel.

Plaintiff Meriel Marina Bay, on behalf of its counsel, and counsel to Bozzuto and Barrett, ask that the court dismiss/strike the counterclaims, do not permit discovery of its lawyers, and keep the current trial date. The reasons are both substantive and procedural.

F. Defendants’ Motion for a Continuance of 14-Weeks Should be Denied as Overtly Prejudicial to Plaintiff

Defendant Fernandez filed a motion asking the Court for a 14-week continuance of this case “on the grounds that additional time is necessary to complete discovery and adequately prepare for the recently requested jury trial.” This request should not be permitted for all of the reasons stated above, where Defendant Fernandez has not stated any valid grounds to vary the statutorily imposed schedule under the summary process rules, and where granting such an extension would be extremely prejudicial to the Plaintiff.

Defendants are continuing to hold over in the Premises, and notably without making payments to Plaintiff. The request for a 14-week delay is wholly unjustifiable and unnecessary.

WHEREFORE, the Plaintiff moves this Court to:

1. Strike the Defendant Fernandez's Answer/Amended Answer, Counterclaims, and Jury Demand; or, in the alternative,
2. Strike the Defendant Fernandez's Jury Demand; and
3. Strike the Defendant Fernandez's Counterclaims pursuant to M.G.L. c.239 §8A;
4. Deny the Defendant Abouelkhier's Motion for Late Answer, Counterclaims, and Jury Demand;
5. Deny Defendants' request for 14-week extension;
6. Strike the Defendant Fernandez's demands for discovery responses from named Attorneys; and
7. Issue any other Order that the Court deems just and proper.

MARINA BAY RESIDENCES, LLC

By its attorneys,

/s/ Kayla Chatell

Ted Papadopoulos, BBO# 671506

Mustafa Sidki, BBO# 698220

Kayla Chatell, BBO # 707024

AMPS Law, P.C.

304 Cambridge Road, Suite 440

Woburn, MA 01801

ted@ampslaw.com

P: (781) 756-6600

F: (888) 756-6680

Date: July 31, 2024

CERTIFICATE OF SERVICE

I, Kayla Chatell, hereby certify that on August 1, 2024 a copy of the foregoing document was served via email and first-class mail to:

Dany Abouelkhier
550 Victory Road Apt #S339
Quincy, MA 02171
danytaw@yahoo.com

Sandra Fernandez De Villanicensio Frommer
550 Victory Road Apt #S339
Quincy, MA 02171
Sandreva14@yahoo.com

And via first-class mail to:

Ahmed Naguib
550 Victory Road Apt #S339
Quincy, MA 02171

/s/ Kayla Chatell

Kayla Chatell