SUPREME COURT OF THE STATE OF NEW YORK
Appellate Division, Fourth Judicial Department

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CA 22-00812

PRESENT: SMITH, J.P., CURRAN, BANNISTER, OGDEN, AND NOWAK, JJ.

EILEEN C. DRAKE, DANIEL R. DRAKE AND
EILEEN C. DRAKE, AS TEMPORARY ADMINISTRATOR
OF THE ESTATE OF LILLIAN COATS, DECEASED,
PLAINTIFFS-RESPONDENTS-APPELLANTS,

V MEMORANDUM AND ORDER

VILLAGE OF LIMA AND VILLAGE OF LIMA DEPARTMENT
OF PUBLIC WORKS, DEFENDANTS-APPELLANTS-RESPONDENTS.

WEBSTER SZANYI LLP, BUFFALO (SHANNON BRAE VANDERMEER OF COUNSEL), FOR DEFENDANTS-APPELLANTS-RESPONDENTS.

KNAUF SHAW LLP, ROCHESTER (MELISSA M. VALLE OF COUNSEL), FOR PLAINTIFFS-RESPONDENTS-APPELLANTS.

Appeal and cross-appeal from an order of the Supreme Court, Livingston County (Thomas E. Moran, J.), entered April 4, 2022. The order granted in part and denied in part the motion of defendants to, inter alia, dismiss certain causes of action.

It is hereby ORDERED that the order so appealed from is unanimously modified on the law by granting those parts of the motion seeking dismissal of the second and fourth causes of action, and as modified the order is affirmed without costs.

Memorandum: Plaintiffs commenced this action seeking damages arising from defendants' alleged failure to properly maintain and operate a sewer main, which allowed a blockage of grease and other objects to form in the sewer main, causing sewage to backflow into plaintiffs' home. Plaintiffs' amended complaint asserted causes of action for, inter alia, negligence, trespass, public nuisance, private nuisance, and inverse condemnation or de facto taking and sought injunctive and other relief. Defendants moved pursuant to CPLR 3211 to dismiss, inter alia, plaintiffs' causes of action for trespass, public nuisance, private nuisance, and inverse condemnation or de facto taking; the amended complaint insofar as it asserted a claim for damages arising from personal injury to Lillian Coats; all claims against defendant Village of Lima Department of Public Works (Department); and plaintiffs' claim for injunctive relief. Defendants now appeal and plaintiffs cross-appeal from an order that, inter alia, granted those parts of the motion with respect to the causes of action for public nuisance and inverse condemnation or de facto taking and plaintiffs' claim for injunctive relief.

Defendants contend on their appeal that Supreme Court erred in denying the motion with respect to the claims against the Department inasmuch as the Department lacks the capacity to be sued. We reject that contention. Although defendants are correct that administrative units of municipal entities may lack the capacity to be sued (*see Andrews, Pusateri, Brandt, Shoemaker & Roberson, P.C. v Niagara County Sewer Dist. No. 1*, 71 AD3d 1374, 1375 [4th Dept 2010], *lv dismissed in part & denied in part* 15 NY3d 741 [2010]), defendants failed to establish that the Department is such an entity.

Defendants contend that the court erred in denying that part of the motion seeking to dismiss plaintiffs' claim for damages arising from personal injury to plaintiffs' decedent, Lillian Coats, inasmuch as that theory of liability was not included in the notice of claim. We reject that contention. The notice of claim includes "information sufficient to enable the [municipality] to investigate the claim" (*O'Brien v City of Syracuse*, 54 NY2d 353, 358 [1981]) inasmuch as it identifies Coats as a claimant and asserts that the claimants suffered loss of quality of life and emotional distress (*cf. Clare-Hollo v Finger Lakes Ambulance EMS, Inc.*, 99 AD3d 1199, 1201 [4th Dept 2012]; *see generally Hart v City of Buffalo*, 218 AD3d 1140, 1149 [4th Dept 2023]).

We agree with defendants, however, that the court erred in denying the motion with respect to plaintiffs' second cause of action, for trespass, and we therefore modify the order accordingly. Among other elements, a claim for trespass requires "an intentional entry" (*Marone v Kally*, 109 AD3d 880, 882 [2d Dept 2013], *lv denied* 24 NY3d 911 [2014]; *see National Fuel Gas Distrib. Corp. v PUSH Buffalo [People United for Sustainable Hous.]*, 104 AD3d 1307, 1309 [4th Dept 2013]). Intent, in this context, "is defined as intending the act which produces the unlawful intrusion, where the intrusion is an immediate or inevitable consequence of that act" (*Marone*, 109 AD3d at 883 [internal quotation marks omitted]; *see Ivancic v Olmstead*, 66 NY2d 349, 352 [1985], *rearg denied* 66 NY2d 1036 [1985], 67 NY2d 754 [1986], *cert denied* 476 US 1117 [1986]). Here, accepting the allegations in the amended complaint as true (*see Sassi v Mobile Life Support Servs., Inc.*, 37 NY3d 236, 239 [2021]), we conclude that the amended complaint does not state a cause of action for trespass inasmuch as it failed to allege an intentional entry onto plaintiffs' property (*see generally Marone*, 109 AD3d at 882-883).

Defendants contend that the court also erred in denying the motion with respect to plaintiffs' fourth cause of action, for private nuisance. Plaintiffs' private nuisance cause of action is based on the same facts, alleges the same wrongs, and seeks the same damages as their negligence cause of action, and we thus agree with defendants that the private nuisance cause of action should have been dismissed as duplicative of the negligence cause of action (*see generally Olney v Town of Barrington*, 180 AD3d 1364, 1365-1366 [4th Dept 2020]; *517 Union St. Assoc. LLC v Town Homes of Union Sq. LLC*, 156 AD3d 1187, 1191 [3d Dept 2017]; *Trulio v Village of Ossining*, 153 AD3d 577, 579 [2d Dept 2017]). We therefore further modify the order accordingly.

Addressing the cross-appeal, we reject plaintiffs' contention that the court erred in granting that part of the motion seeking dismissal of their sixth cause of action, for inverse condemnation or de facto taking, insofar as it was based on the deprivation of personal property. Assuming, arguendo, that such a cause of action could be based on deprivation of personal property (*see generally O'Brien*, 54 NY2d at 357), we conclude that the court properly determined that the amended complaint does not state that cause of action inasmuch as the allegations therein refer to "Property," which the amended complaint defined solely as plaintiffs' real property.

Contrary to plaintiffs' further contention, the court did not err in determining that the amended complaint fails to state a cause of action for public nuisance. In contrast to private nuisance, which involves interference with a particular person's right to enjoy his or her property, public nuisance requires interference with a public right common to all (*see Andersen v University of Rochester*, 91 AD2d 851, 851 [4th Dept 1982], *appeal dismissed* 59 NY2d 968 [1983]; *see generally Williams v Beemiller, Inc.*, 103 AD3d 1191, 1192 [4th Dept 2013]). Although plaintiffs' third cause of action alleged that the blockage in the sewer "interfered with the rights common to all," the amended complaint's factual allegations discussed the harm to plaintiffs and their property only and presented no factual allegation supporting the claimed interference with a public right. "[C]onclusory allegations—claims consisting of bare legal conclusions with no factual specificity—are insufficient to survive a motion to dismiss" (*Godfrey v Spano*, 13 NY3d 358, 373 [2009]; *see Fika Midwifery PLLC v Independent Health Assn., Inc.*, 208 AD3d 1052, 1056 [4th Dept 2022]; *Medical Care of W. N.Y. v Allstate Ins. Co.*, 175 AD3d 878, 879 [4th Dept 2019]).

Finally, we reject plaintiffs' contention that the court erred in dismissing their claim for injunctive relief. Plaintiffs have failed to plead facts demonstrating that they would experience irreparable injury in the absence of injunctive relief and instead have claimed a loss that is calculable in monetary terms (*see Caruso v Bumgarner*, 120 AD3d 1174, 1175-1176 [2d Dept 2014]; *cf. Friscia v Village of Geneseo*, 197 AD3d 848, 850-851 [4th Dept 2021]).

Entered: November 17, 2023

Ann Dillon Flynn
Clerk of the Court