Corley v Allstate Realty Assoc.

2010 NY Slip Op 32707(U)

September 21, 2010

Supreme Court, New York County

Docket Number: 400026/10

Judge: Joan A. Madden

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SCANNED ON 9/30/2010

[* 1]

SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MADDEN Justice

PART 4

INDEX NO. 400026/10

MOTION DATE

MOTION SEQ. NO. 001

MOTION CAL. NO.

LB CORLEY

- V -

ALLSTATE REMEDY ASSOCIATES

The following papers, numbered 1 to _____ were read on this motion to/for preliminary injunction & cross motion to dismiss

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☒ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with annexed Memorandum Decision & order.

FILED
SEP 30 2010
COUNTY CLERK'S OFFICE
NEW YORK

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: September 24, 2010

J.S.C.

Check one: ☒ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 11

----------X

W.B. CORLEY,

Plaintiff,

-against-

ALLSTATE REALTY ASSOCIATES and 100 STREET TRI VENTURE, LLC.,

Defendants.

----------X

Index No. 400026/10

DECISION AND ORDER

FILED
SEP 30 2010
COUNTY CLERK'S OFFICE
NEW YORK

JOAN A. MADDEN, J:

Plaintiff William Corley (s/h/a W.B. Corley), who appears *pro se*, is a resident of Apartment 540 First Avenue, New York, NY (the Building), which is owned and or managed by the defendants. Plaintiff moves, by order to show cause, pursuant to CPLR 6301, for a preliminary injunction enjoining defendants from renting apartment number 536 at the Building (motion seq. no. 001). Defendants cross-move, pursuant to CPLR 3211 (a) (7), to dismiss the complaint. Plaintiff separately moves, pursuant to CPLR 3215, for a default judgment asserting defendants' failure to timely serve answering papers (motion seq. no. 002).[1]

Plaintiff commenced this action by order to show cause which this court signed on January 7, 2010, and made returnable on February 2, 2010. At that time, the court issued an temporary restraining order ("TRO") enjoining defendants from renting apartment 536. By interim order dated February 9, 2010, the court vacated the TRO and directed defendants to serve answering papers so as to be received by plaintiff on January 21, 2010, and required that any reply be served so as to be received by February 1, 2010. Upon defendants' request the motion was adjourned to February 9, 2010 and defendants were given until February 5, 2010 to serve the

[1]Motion sequence numbers 001 and 002 are consolidated for disposition.

cross motion.

Plaintiff's motion for a default judgment is based on his position that defendants did not comply with the court's direction in the order to show cause that its answering papers be served by January 21, 2010, and made misrepresentations to the court attorney during a telephone conference in which defendants sought to extend their time to respond to the order to show cause to February 5, 2010. At oral argument, plaintiff admitted he received the cross motion responding to the order to show cause and, in fact, plaintiff submitted opposition to the cross motion (labeled a Verified Reply).

Plaintiff's allegations regarding misrepresentations to my court attorney are unsupported and, in any event, plaintiff admits he was served the cross motion. The court finds the cross motion was timely and proper. Accordingly the court denies plaintiff's motion for a default judgment, and the remainder of this decision will addressed the motion for a preliminary injunction and the cross motion to dismiss.

Plaintiff alleges that he has lived in the Building since December 1, 2004 and was the first occupant of Apartment No. 540. He currently pays a "market rate" monthly rental of $2,054.00. The building is known as The Aspen. Defendant 100 Street Tri Venture LLC (Tri Venture) is the owner and landlord of The Aspen. Defendant Allstate Realty Associates (Allstate) is an entity involved in the management of The Aspen.

The Aspen was a City-owned building which was deeded to Tri Venture, as sponsor, on November 4, 2002, for purposes of rehabilitation (Coppe Aff., Ex. A). Thereafter, on November 13, 2003, Tri Venture signed a Regulatory Agreement with the HDC (the Regulatory Agreement) providing for various restrictions on Tri Venture's use of the apartments, or units, in exchange

for over $46 million in financing from the New York City Housing Development Corporation (HDC). .

The Aspen is regulated under a "50-30-20" program regulated by HDC. In particular, under the terms of the Regulatory Agreement, The Aspen rents approximately half of its 232 apartments at market rate, 30% are designated middle income apartments also know as "New HOP Apartments," and the remaining 20% are designated as low income building. The agreement was made in connection with the New Housing Opportunities Program, known as the New HOP program, which is sponsored by HDC. The New HOP program combines a first mortgage, funded through proceeds from the sale of variable or fixed rate taxable bonds, with a second mortgage, provided through HDC corporate reserves, to finance multi-family rental housing affordable to moderate and middle income families. The HDC mandates that all units in a NEW HOP development must be affordable to middle-income households earning up to 130% of the New York City median income. It further mandates that tenants may pay up to 35% of their income toward net rents and sets maximum rent limits.

Under the terms of the Regulatory Agreement, for the first 15 years of occupancy, called the "Occupancy Restriction Period," Tri Venture must rent at least 46 units, or 20% of the total units in the project, to low income tenants (Coppe Aff., Ex. B ¶ 4.2). Specifically, the Regulatory Agreement provides, as follows:

> 4.2 (a) During the Occupancy Restriction Period, *not less than* forty-six (46) units, being twenty percent (20%) of all units in the Project (exclusive of the Superintendent Unit) shall be Low Income Units, and provided further that not less than eight (8) units, being at least fifteen percent (15%) or greater of such Low Income Units shall be rented or reserved for rental to tenants who prior to initial occupancy qualify as 40% Low Income Tenants

(*id.*) (italics added).

Low income tenants are defined as individuals or families with income below 50% of the area median income, as defined by the United States Department of Housing and Urban Development (HUD). For 2010, New York's area median income, as defined by HUD, is $62,300 per annum. Thus, at least 20% of the units must be rented to individuals or families with incomes not exceeding $31,150 per annum. "40% Low Income Tenants" are defined as tenants whose annual income does not exceed 40% of the area median gross income and thereafter during such tenant's tenancy does not exceed 170% of 40% of the area's median gross income.

The Regulatory Agreement further provides that "[d]uring the Occupancy Restriction Period *not less than* sixty-four (64) units (exclusive of the Superintendent Unit) shall be New HOP Units (*id.*). Under the Regulatory Agreement a "New HOP Tenant" "shall mean the individual(s) who execute(s) the lease for a unit and whose Annual Income . . . does not exceed the lesser of (I) two hundred fifty percent (250%) of the Area Median Gross Income, or seven times the annual rent of such unit . . ." (*id.*, § 1). Since the area median income for New York County is currently $62,300.00, the maximum income level for a New HOP Tenant is: $62,300.00 x 250%, or $155,750.00.

Under the Regulatory Agreement, a "New HOP Unit" is defined as "any unit that is occupied by a tenant who qualified under this Agreement as a New HOP Tenant prior to initial occupancy of such tenant's unit" (*id.*). Thus, a New HOP unit is *any unit* that is occupied by a tenant who qualified under the Regulatory Agreement as a New HOP Tenant when he or she

moved in. By contrast, under the Regulatory Agreement, a "Market-Rate Unit" is "any unit that is not Originally Designated [a] Low Income Unit, a New HOP Unit or a Superintendent Unit" (*id.*).

In addition to the terms of the Regulatory Agreement, the Aspen must comply with all HDC's rules and policies (Loftman Aff., ¶ 4). Moreover, HDC allows the Aspen to establish certain policies of its own in renting the subsidized apartments which must be applied with strict uniformity (Id.). At the Aspen these policies include setting a minimum of $55,000 annual income for New Hop tenants and in selecting subsidized tenants not to rent to those with outstanding civil judgments, prior criminal convictions, or multiple delinquent accounts. (Id., ¶ 5; Quinlivan Aff., ¶ 6).

Plaintiff alleges that he took occupancy of his apartment on December 1, 2004, at a monthly rental rate of $1,854.00. At the time he took occupancy, plaintiff was not aware that the Building participated in the New HOP program and was subject to regulation under HPD, and took a market rate apartment. On his first lease renewal, his rent was raised to $1,929.00. In December 2009, his rent was raised to $2,054.00.

In November 2005, Plaintiff wrote to the management of The Aspen informing them that, due to health issues, his income now consisted solely of government benefits in the amount of $34,164.00, and that he wished to be considered for a moderate or low-income rental rate (*id.*, Ex. E).

The Aspen did not respond to the November 2005 letter, and on September 22, 2009, Plaintiff wrote a second letter to Allstate Realty requesting that he be considered for a moderate or low-income rental rate (*id.*, Ex. F).

In response, by letter dated September 2009, Brian Loftmen, the Property Manager of The Aspen wrote to Plaintiff, in part, as follows:

> I am responding to your letter dated 09/22/2009 requesting that we reduce your monthly rent on the apartment that you are currently occupying. I am sorry to inform you that the programs we participated in here at The Aspen New York do not allow us to take a [sic] market rate units and then convert them to middle or low income units. When the building was built certain apartment [sic] were designated, and registered in the appropriate programs by DHPD.
>
> You do not qualify for any of the programs here at The Aspen New York. As per your disclosure you make well over the maximum amount allowed for the low income apartments and not enough for the middle income apartments

(Coppe Aff., Ex. G).

Several more correspondence ensued. At one point, The Aspen invited plaintiff to come into the management's on-site office, with documentation of his income and payment for a credit check, so that Plaintiff could properly apply to transfer to another "low income" unit. Plaintiff eventually did pay for a credit report and criminal background check. The credit report and criminal background check indicated several unsatisfied civil judgments and at least one criminal conviction for the offense of Criminal Possession of a Forged Instrument in the Second Degree. On December 1, 2009, The Aspen denied Plaintiff's application for a low-income unit.

Plaintiff commenced the within action in January 2010. In his complaint, Plaintiff alleges causes of action for fraud (first cause of action), unjust enrichment (second cause of action), discrimination (third cause of action), constructive fraud (fourth cause of action), rent gouging (fifth cause of action), violation of the Fair Credit Reporting Act and defamation (sixth cause of action), breach of fiduciary duty (seventh cause of action), intentional infliction of emotional

distress (eighth cause of action) and conspiracy (ninth cause of action).

It is well settled that on a motion to dismiss the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; *see also People v Coventry First LLC*, 13 NY3d 108, 115 [2009]; *JFK Holding Co., LLC v City of New York*, 68 AD3d 477, 477 [1st Dept 2009]).

As to Plaintiff's first cause of action for fraud, defendants correctly assert that, having failed to specifically set forth the material misrepresentation relied upon, Plaintiff has failed to comply with the pleading requirements of CPLR 3016 (b). Further, assuming that Plaintiff's complaint is, as alleged in his affidavit, that defendants misrepresented to him that the minimum income level for a moderate-rate apartment was $55,000., when, according to Plaintiff, it is the maximum income level, Plaintiff is mistaken. The HDC requires that tenants pay no more than a certain percentage of their income as rent, and the minimum level of income for a middle-income apartment at the Aspen is $55,000.

Plaintiff's second cause of action is for unjust enrichment, and while less than artfully written, this cause of action appears to be a claim to recover overpayments in Plaintiff's rent from the inception of his tenancy. Here, at the time plaintiff applied for an apartment in 2004, plaintiff did not seek a New HOP apartment as he did know the Building was participating in the New HOP program. When he applied for the apartment he represented that his annual income was approximately $95,000 (Coppe Aff. ¶ 8). Defendants annex to moving papers, a letter, dated November 2004, sent to defendants on Plaintiff's behalf, which apparently included Plaintiff's federal income tax returns for 2003 and 2004. These returns reflected an income of $95,121 in

2003 and $93,826 in 2004[2] (Coppe Aff., Ex D). However, even assuming *arguendo*, that plaintiff qualified based on his income for a New HOP apartment at the time he applied for an apartment, he is not entitled to recover for unjust enrichment.

To prevail on a claim of unjust enrichment, the plaintiff must establish that (1) the other party was enriched, (2) at that party's expense, and (3) that it is against good conscience and equity to permit the other party to keep what is sought to be recovered (*Cruz v McAneney*, 31 AD3d 54, 59 [2d Dept 2006]). "'[T]he essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered'" (*Mandarin Trading Ltd. v. Wildenstein*, 65 AD3d 440, 453 [1st Dept 2009], quoting *Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421, *reargdenied* 31 NY2d 709 [1972], *cert denied* 414 US 829 [1973]).

As a preliminary matter, as plaintiff was a market rate tenant, he did not seek to be part of the HPD approval process. In addition, although plaintiff's income level may have qualified him for a New HOP apartment, his criminal record and credit history would have precluded him from obtaining such an apartment. Moreover, since the rents at fifty percent of the apartments are at market rate, and there is no requirement that all apartments occupied by an individual qualifying

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[2]According to HUD statistics, which, as noted, set the basis for determining income eligibility for New HOP tenants, in 2003, the median gross income for New York County was $51,900.00 and in 2004 the median gross income for New York County was $54,400.00. Accordingly, to qualify as a New HOP Tenant in 2003, an individual or family income could be no greater than $51,900.00 x 250%, or, $129,750.00. In 2004, a tenant's income could be no greater than $54,400.00 x 250%, or $136,000.00. Plaintiff's income at the time he moved in was below the maximum level for both 2003 and 2004. Moreover, pursuant to the Regulatory Agreement, a New HOP Tenant is an individual who executes the lease for a unit and whose annual income does not exceed the specified level. A "New HOP Unit" is merely one occupied by a New HOP Tenant.

for the income requirements be designated a New HOP Unit, it cannot be said that defendants have been unjust enriched, particularly as there is no dispute that plaintiff occupied a market rent apartment in exchange for his payments of rent. Under the circumstances, Plaintiff has not sufficiently stated a claim for unjust enrichment.

As to the third cause of action for discrimination, Plaintiff claims that, under the Regulatory Agreement, he is a member of a "protected class," consisting of seniors and the disabled, and that "[defendants] have an affirmative duty to actively insure affordable housing for these protected classes of persons" (Complaint, ¶ 32). The Regulatory Agreement does not require that The Aspen reduce rent for seniors or the disabled. It requires only that the management make 5% of the aggregate total of low-income units and New HOP units available for disabled persons. Plaintiff does not allege that the management of The Aspen has failed to do so. In addition, to state a claim under a housing discrimination statute, plaintiff must demonstrate he is "otherwise qualified" to rent or purchase the housing at issue (*see e.g.*, *Soules v. U.S. Dep't of Housing and Urban Development*, 967 F2d 817, 822 [2d Cir. 2009]). Here, as plaintiff does not qualify for a subsidized apartment based on his credit history, criminal record and income level, he cannot state a claim for discrimination.

As to those causes of action for constructive fraud and breach of fiduciary duty (the fourth and seventh causes of action, respectively), Plaintiff alleges that the defendants owe their tenants a fiduciary duty, and that "by deceptive material representations of past and existing facts or remaining silent when it was their positive duty to speak . . . defendants have injured plaintiff financially, his standing in the community, and otherwise" (Complaint, ¶ 34). In order to state a claim for breach of fiduciary duty, a plaintiff must allege: "(1) the existence of a fiduciary

relationship, (2) misconduct by the defendant and (3) damages" (*Rut v Young Adult Inst. Inc.*, 74 AD3d 776 [2d Dept 2010]). "A fiduciary relationship 'exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation'" (*People v Coventry First LLC*, 13 NY3d at 115, quoting *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005], quoting Restatement [Second] of Torts § 874, Comment a). Plaintiff has not set forth any facts which would indicate the existence of a fiduciary relationship. A claim for constructive fraud requires the existence of a fiduciary relationship (see *Mazza v Fleet Bank*, 16 AD3d 761 [3d Dept 2005]). Since there is no showing of a fiduciary relationship between the management of The Aspen and Plaintiff, both of these causes of action are dismissed.

As to Plaintiff's fifth cause of action for "rent gouging" based upon defendants' purported overcharge of rent. Under the Penal Law, rent gouging is defined as a landlord's charging a tenant more than the "lawful rent and other lawful charges" (Penal Law §§ 180.55, 180.56, 180.57). Lawful rent is defined as "registered, reported or contracted for rent" (Penal Law § 180.54).

As plaintiff was charged the contracted for rent for a market rate apartment, the complaint fails to state a claim for rent gouging. In addition, "[a] necessary element to establish rent gouging is that the landlord accept or demand the unlawful charges while telling the tenant that by paying the additional money, the possibility increases that tenant may obtain a lease, or use the property, or that failure to pay the additional amount will decrease the possibility that the tenant will obtain a lease or use of the property" (*562 West 149th Street HDFC v. Rodriguez*, 5 Misc3d 1020(A) [Civ. Ct. NY Co. 2004], *citing* Penal Law §§ 180.55, 180.56, 180.7). Here,

there are no allegations of this kind of conduct by defendants. According, this cause of action must be dismissed.

Plaintiff's sixth cause of action, for violation of the Fair Credit Reporting Act and defamation, alleges that the defendants improperly and intentionally used impermissible and erroneous data from Plaintiff's credit report and then published that data to HDC in order to deprive Plaintiff of his right to a moderate-rate apartment. The Fair Credit Reporting Act, 15 USC § 1681 (the Act), proscribes a "consumer reporting agency" from including in its reports civil judgments that, from the date of entry, antedate the report by more than seven years or until the governing statute of limitations has expired, whichever is longer (15 USC § 1681c [a] [2]). The Act places no time limitations as to criminal convictions (15 USC § 1681c [a] [5]). The Act defines a consumer reporting agency as, in essence, any person in the regular business of assembling and evaluating consumer information for the purpose of furnishing consumer reports to third parties (15 USC § 1691a [f]). The defendants are not a consumer reporting agency. Plaintiff has, therefore, failed to state a cause of action for violation of the Fair Credit Reporting Act as to these defendants. As to that portion of the cause of action for defamation, the elements of a cause of action for defamation are "a 'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se'" (*Salvatore v Kumar*, 45 AD3d 560, 563 [2d Dept 2007] [citation omitted], *lv denied* 10 NY3d 703 [2008]). Here, to whatever extent defendants "published" the credit report to HDC, such publication was protected by the common-interest privilege, since defendants and HDC share the common interest of the proper administration of The Aspen (*see Shapiro v Health Ins. Plan of Greater N.*

Y., 7 NY2d 56 [1959]).

Plaintiff's eighth cause of action is for intentional infliction of emotional distress. In order to state a claim for infliction of emotional distress, a plaintiff must demonstrate conduct by the defendant that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency" (*Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 759 [2d Dept 2008][internal quotation marks and citation omitted]). The facts, as alleged by Plaintiff, do not sufficiently state conduct so extreme as to support a claim for intentional infliction of emotional distress.

As to Plaintiff's ninth cause of action for conspiracy, there is no cause of action for civil conspiracy in New York (*Jebran v LaSalle Bus. Credit, LLC*, 33 AD3d 424 [1st Dept 2006]). This cause of action must therefore be dismissed as well.

Finally, Plaintiff moves for a preliminary injunction preventing the defendants from renting apartment number 536, which is now vacant, and which Plaintiff alleges is a moderate-rate apartment. Given that the complaint fails to state a claim, there is no need for a preliminary injunction.

Accordingly, based upon the foregoing, it is

ORDERED that, as to motion sequence 001, plaintiff's motion for a preliminary injunction is denied; and it is further

ORDERED that, as to motion sequence 002, defendants' motion to dismiss is granted and the Clerk is directed to enter judgment dismissing the complaint in its entirety.

Dated: September 21, 2010

J.S.C.

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