

**World City Foundation, Inc. v Sacchetti**

2004 NY Slip Op 30202(U)

November 17, 2004

Supreme Court, New York County

Docket Number: 0114829/2003

Judge: Joan Madden

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

HON. JOAN A. MADDEN

PRESENT: 0114829/2003 J.S.C. Justice

PART 11

WORLD CITY FOUNDATION vs SACCHETTI, VITO

SEQ 6

SPECIAL PREFERENCE

INDEX NO. \_\_\_\_\_

MOTION DATE 7/22/04

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for reargument

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 is decided in accordance with the attached memorandum Decision + order

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

FILED

NOV 26 2004

CLERK'S OFFICE

Dated: Nov. 17, 2004

[Signature] J.S.C.

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

SUPREME COURT OF THE STATE OF NEW YORK  
 COUNTY OF NEW YORK: PART 11

-----X  
 WORLD CITY FOUNDATION, INC. and  
 JOHN S. RODGERS,

Plaintiffs,

INDEX NO. 114829/03

-against-

VITO SACCHETTI and T.M.S. MANAGEMENT CO.,

Defendants

-----X  
 JOAN A. MADDEN, J.:

In this action for damages arising out of a landlord-tenant dispute, plaintiffs move for an order (1) granting plaintiffs a trial preference, (2) granting renewal and reargument of this court's decision and order dated April 12, 2004 ("the original decision"), to the extent that it dismissed plaintiff's third and fifth causes of action, and (3) permitting plaintiffs to amend the Verified Complaint. Defendant opposes the motion, which is denied for the reasons below.

Background

In May 1987, a Master Lease was executed by defendants' predecessor-in-interest and plaintiffs for certain apartments at 330 East 43<sup>rd</sup> Street, New York, NY for a one year term ("the building"). Paragraph 12 of the "Supplemental Rider #2," to the Master Lease, the renewal option, provided for future renewals upon the expiration of the Master Lease term "at a renewal rate to be agreed upon but in no case shall the rent increase more than 5% per annum." Another provision of the lease provided for options for additional spaces in the building as they became available. At one time, plaintiffs held leases for at least seven apartments, and at the time this motion was made, had vacated one unit for the reasons indicated below. The lease was amended on October 20, 1987 to add a provision which permitted the landlord to terminate the lease on

one year's advance written notice upon payment of the costs of improvements to the premises. In or about July 1993, a partnership consisting of defendant Sacchetti and his wife purchased the building.

Following Sacchetti's purchase of the building various disputes arose between the parties. In this action, plaintiffs seek to recover damages in connection with defendants' alleged campaign of harassment aimed at depriving plaintiffs of their rights under the Master Lease. The complaint alleges that between 1996 and 2001, Sacchetti appeared at the building to request that plaintiffs pay additional rents in excess of the rental rates provided for in the lease and in the renewals. In November 2, 1999, it is alleged that plaintiff Rogers suffered a major stroke and underwent an extended hospitalization and rehabilitation, and that despite Rogers' illness, Sachetti continued to make demands for additional rent in 2000 and 2001 and for return of space. It is alleged that under pressure from Sachetti, plaintiffs agreed to vacate one unit, even though they invested over \$25,000 in improvements, and also agreed to a voluntary 5% monthly increase in rent amounting to \$740.57 per month. Nonetheless, it is alleged that Sacchetti continued to demand additional rent equivalent to a 49% increase for all units occupied by plaintiffs.

The complaint alleges that "[i]n retaliation for Plaintiffs' refusal to submit to his wrongful demand for rent increases, Sacchetti embarked on a brutal, oppressive and continuous campaign of harassment with the clear intention to inflict economic damage and injury on Plaintiffs without excuse or justification." These efforts purportedly included serving 245 Notices of Termination and Intention to Evict upon Plaintiffs, the wrongful refusal to renew the leases on six units in accordance with the Master Lease, and commencing 23 purportedly baseless legal proceedings.

### Motion to Reargue

At issue on this motion is the merit of the third cause of action which alleges the willful and malicious interference with plaintiffs' business, and the fifth cause of action for malicious prosecution.

A motion for reargument is addressed to the discretion of the court, and is intended to give a party an opportunity to demonstrate that the court overlooked or misapprehended the relevant facts, or misapplied a controlling principle of law. See, Foley v Roche, 68 AD2d 558, 567 (1st Dept 1979). However, "[r]eargument is not designed to afford the unsuccessful party successive opportunities to reargue issues previously decided." William P. Pahl Equipment Corp. v. Kassis, 182 AD2d 22, appeal denied in part dismissed in part 80 NY2d 1005 (1992) .

The preliminary issue is whether this motion to reargue is timely. CPLR 2221(d)(3) provides, in relevant part, that a motion to reargue "shall be made within thirty days of service of a copy of the order determining the prior motion and written notice of its entry." In this case, plaintiffs served the original decision with notice of entry by mail on May 18, 2004. The thirtieth day after service was June 18, 2004. This motion was served by mail on June 25, 2004, or thirty-five days after service of the copy of the original decision with notice of entry. Plaintiffs argue that they are entitled to an additional five days, as the original decision with notice of entry was served by mail. See CPLR 2103(b)(providing an additional five days to time period when service is made by mail). Defendants counter that as the party serving the original decision with notice of entry, plaintiffs are not entitled to benefit from the additional five day period.

Under the 1999 amendment to CPLR 5513, regarding the time to take an appeal, when

the judgment or order with notice of entry is served by mail, five additional days are granted for taking an appeal regardless of which party serves the notice of entry. See CPLR 5513 (d).

Defendant's note, however, that the Appellate Division, First Department has refused to apply the additional five days provided under CPLR 5513(d) "to all situations involving the service of intermediate papers by mail." See Thompson v. Cuadado, 277 AD2d 151 (1<sup>st</sup> Dept 2000)(refusing to apply the additional five days to untimely motion to dismiss based on improper service). Nonetheless, as the time period for reargument is based on the time to take an appeal, it appears to this court that the five-day extension granted to a party taking an appeal should also apply to a motion to reargue. But see, Siegel Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, pocket part, C2221:8 (noting that the new CPLR 2221(d), which codified the practice of applying the same time period to taking an appeal for moving to reargue, did not include a counterpart provision including the additional five days) . Accordingly, the court will address the merits of the reargument motion.

In its original decision, the court found that the third cause of action, identified in the complaint as a claim for willful and malicious interference was insufficient to state a cause of action since there is no actionable tort for such conduct. See Harris v. Sobel, 31 AD2d 529 (1<sup>st</sup> Dept 1968). On this motion to reargue, plaintiffs assert that the third cause of action states a claim for prima facie tort. This argument is unavailing.

The third cause of action alleges that defendant Sacchetti retaliated against plaintiffs for refusing to pay illegal and excessive rent by bringing 23 meritless legal proceedings in the span of 16 months which required plaintiff Rogers to expend in excess of \$50,000 in defending the proceedings and devote 1,400 hours and the full time services of the defendant World

Foundation's Executive Vice President to respond to the proceedings. It is further alleged that defendants engaged in a campaign of harassment against the plaintiffs which included (1) removal of the World Foundation's two lobby signs in violation of the express terms of the Master Lease, (2) disconnecting Plaintiffs' security video system, (3) intercepting mail and packages, (4) interrogation and intimidation of plaintiffs' guests and business colleagues, (5) digging up a \$12,000 garden planted with the landlord's consent, (5) issuing improper subpoenas and (6) refusing to accept rent payments. It is further alleged that the defendants' conduct result in the disruption of plaintiff's business, and in particular that at the time that defendants began their course of conduct in November 2001, Rogers' business, which included the creation of an American flagship cruise industry (hereinafter "the American Flagship project"), was brought to a standstill, and the World Foundation's business activities were suspended, and that plaintiffs have been damaged by Sachetti's malicious interference with the business activities in the amount of \$10,000,000. It is further alleged that defendants' conduct caused Rogers to suffered extreme emotional distress, and devastating physical manifestations.

"The requisite elements for a cause of action sounding in prima facie tort include (1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, (4) by an act or series of acts which are otherwise legal." Del Vecchio v. Nelson, 300 AD2d 277 (2d Dept 2002). To recover for prima facie tort, a plaintiff must plead special damages in the form of a "specific and measurable loss." Freihofer v. Hearst Corp., 65 NY2d 135, 143 (1985). In addition, "[w]here relief may be afforded under traditional tort concepts, prima facie tort may not be invoked as a basis to sustain a pleading, which otherwise fails to state a cause of action in conventional tort." Id

Here, plaintiffs' cause of action for prima facie tort consists primarily of a restatement of plaintiffs' claim for malicious prosecution since the gravamen of the claim is the commencement of 23 lawsuits which plaintiffs alleged were without merit . New York courts have consistently rejected claims for prima facie tort, which like the claim of plaintiffs herein, are based on defendant's alleged malicious prosecution of judicial proceedings. See Curiano v. Suozzi 63 NY2d 113, 118-119 (1984); Lemberg v. John Blair Communications, Inc., 251 AD2d 205 (1<sup>st</sup> Dept 1998); Belsky v. Lowenthal, 62 AD2d 319 (1<sup>st</sup> Dept 1978). As the Court of Appeals explained in Curiano v. Suozzi, prima facie tort cannot be used "to avoid the stringent requirements we have set forth traditional torts, such as malicious prosecution, requirements which are necessary to effectuate strong public policy of open access to the courts for all parties without fear of reprisal in the form of retaliatory lawsuits." Curiano 63 NY2d at 118-119 .

In addition, to the extent that the third cause of action contains allegations other than the commencement of legal proceedings, these allegations are insufficient to support a finding of special damages, and/or, consist of acts which are not otherwise legal, as required to state a claim for prima facie tort.

Accordingly, upon reargument, the court finds that the third cause of act is insufficient to state a claim for prima facie tort.

The fifth cause of action is for malicious prosecution. It alleges that Sacchetti prosecuted 23 separate and meritless legal proceedings against plaintiffs without any economic rationale, and that the sole purpose of such proceedings was to harass and injure plaintiffs. It is further alleged that as a result of these legal proceedings, in which "Sacchetti has not prevailed in a single proceeding to date," the World Foundation "has suffered almost the total loss of services

of its Chairman and CEO, Rogers and of the other executive of the Foundation,” and that such proceedings have created a potential long term loss of \$50 million dollars to the American Flagship project.

As noted in the original decision, to state a cause of action for malicious civil prosecution, the plaintiff must prove the initiation of a judicial proceeding, a termination in its favor, lack of probable cause, malice and special injury. See Engel v. CBS, Inc., 93 NY2d 195, 204 (1999). The special injury requirement includes arrest of a person, attachment of property, or any other “verifiable burden substantially equivalent to the provisional remedy.” Id at 205. In other words, “some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit.” Id at 205.

In the original decision, the court found plaintiffs had not satisfied the special injury requirement. The court also found that as plaintiffs had not shown that the legal proceedings had been resolved in their favor, the malicious prosecution claim must be dismissed.

On this motion, plaintiffs assert that the special injury requirement has been satisfied as the complaint alleges that the World Foundation business and the American Flagship project has suffered financial harm as a result of the proceedings brought by defendants.<sup>1</sup> At the outset, it is noted that plaintiffs allege large business losses resulting from defending the lawsuits and not from the lawsuit themselves. These general allegations of business losses fail to establish a concrete identifiable harm necessary to establish special damages, and plaintiffs have not

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<sup>1</sup>Plaintiffs also argue that defendants waived their right to object to the malicious prosecution claim based on documentary evidence (CPLR 3211(a)(1)) by failing to raise it in the answer or in a pre-answer motion. See CPLR 3211(e). However, as the court treated the objection as one for failure to state a cause of action under 3211(a)(7), this argument is without merit.

sufficiently alleged or tendered any proof that the profits of its business has declined as a result of the lawsuits. See Engel v. CBS, Inc., 93 NY2d at 205; Compare Dudick v. Gulyas, 277 AD2d 686 (3d Dept 2000)(special injury requirement satisfied when licensed chiropractor demonstrated loss of business directly arising out of complaint filed with Office of Profession Discipline, which subsequently was dismissed and found to be without probable cause); Groat v. Town Board of Town of Glenville, 73 AD2d 426 (3d Dept 1980)(plaintiff's suspension without pay and dismissal from the police force as a result of disciplinary proceedings against him constitutes sufficient interference with property and person to support malicious prosecution claim).

That being said, however, to the extent special damages may be shown following the termination of the actions in plaintiffs' favor, this court makes no determination as to whether plaintiffs under such circumstances would have a viable cause of action for malicious prosecution. While Engel v. CBS, Inc. holds that defending a lawsuit is insufficient grounds for malicious prosecution, the instant action is potentially distinguishable based on the number of lawsuits. However, since plaintiffs occupy six or seven apartments and the majority of the actions involve proceedings in Civil Court related to these apartments, it cannot be said at this time that the number of lawsuits alone indicates a malicious intent by defendants.

Furthermore, at this juncture, the malicious prosecution claim is premature. Notably, while the complaint alleges that Sacchetti has not prevailed in any of the proceedings filed, to make out a prima facie cause of action for malicious prosecution, a plaintiff is required to show that the proceedings terminated in its favor. Park v. State, 226 AD2d 153 (1<sup>st</sup> Dept 1996 ). Furthermore, aside from the one Supreme Court action that was resolved in plaintiffs' favor, it appears from the record that numerous proceedings in Civil Court, which are the focus on the

malicious prosecution claim, have not yet been resolved. And, in the case of certain of the Civil Court proceedings that have been resolved, the parties discontinued them by stipulation so that it cannot be said that plaintiffs were the prevailing party (See Sacchetti v. Rogers, 2003 WL 22220143 (App Term, First Dept 2003), and in one case the dispute was rendered moot (Sacchetti v. Rogers, 2003 WL 2222095 (App Term, First Dept 2003)). Under these circumstances, the record does not support a finding that the proceedings terminated in plaintiffs' favor so as to support a malicious prosecution claim. See Salamanca Trust Co. v. McHugh, 156 AD2d 1007, 1008 (4<sup>th</sup> Dept 1989).

#### Renewal

Plaintiffs alternatively seek to renew based on a lawsuit recently commenced by Sachetti against Rogers which they argue supports their malicious prosecution claim. A motion to renew is "based upon new facts not offered on the prior motion that would change the prior determination." CPLR 2221(e). Here, renewal must be denied as the new action does not provide a basis for changing the prior determination, particularly as the new action, which was only recently commenced, does not support a malicious prosecution claim which requires a termination in plaintiffs' favor.

#### Trial Preference

Plaintiffs move for a trial preference pursuant to CPLR 3403(a), based on Mr. Rogers' age and ill health. Defendants oppose the request, arguing that a motion for a trial preference may not be made until after the note of issue is filed, and that plaintiffs have not complied with the requirements of Uniform Trial Rule 202.25(b). While the requirements of Uniform Trial Rule 202.25(b) are not applicable here to the extent that plaintiffs are not seeking a preference in

the interests of justice under CPLR 3403(3), defendants are correct that a trial preference cannot be sought until after note of issue is filed. Specifically, CPLR 3403(b) provides that: “[u]nless the court otherwise orders, notice of motion for a preference shall be served with note of issue by the party serving the note of issue or ten days after such service on any party; or thereafter during the pendency of the action upon the application of a party who reaches seventy years, or who is terminally ill.” (emphasis supplied).

Thus, although a person who turns seventy can obtain a preference after his birthday even if note of issue is filed, and a person who is terminally ill may obtain a trial preference any time after the filing of the note of issue, there is no provision for obtaining a preference before filing of the note of issue. See Siegel, New York Civil Practice, §373, at 594 (3d Ed 1999). Accordingly, plaintiffs’ motion for a trial preference is denied without prejudice to renewal once note of issue is filed. Such renewal shall contain documentary evidence regarding plaintiff’s age and/or health.

#### Application to Amend

Plaintiffs seek to amend their complaint to add certain factual allegations in support of the third and fifth cause of action. Defendants oppose the motion, noting plaintiffs’ failure to annexed a proposed amended pleading.

In the absence of either prejudice or unfair surprise resulting from delay, Murray v City of New York, 43 NY2d 400, 404-405, reargument dismissed, 45 NY2d 966 (1977), requests for leave to amend should be freely granted (CPLR 3026[b]), unless the proposed amendment is plainly lacking in merit. Thomas Crimmins Contracting Co., Inc. v City of New York, 74 NY2d 166 (1989).

Here, defendants have not demonstrated prejudice or unfair surprise which would prevent the amendment. The proposed additional allegations include that Sachetti disrupted a business meeting at the subject property, and that defendants have brought a new action in the Supreme Court. However, such conduct is insufficient to support a cause of action for prima facie tort and malicious prosecution. In addition, as plaintiffs have not provided a proposed amended pleading, the court cannot sufficiently review the merits of the proposed amendment. See Loehner v. Simons, 224 AD2d 591 (2d Dept 1996).

### Conclusion

In view of the above, it is

ORDERED that plaintiffs' motion for reargument is granted and upon reargument, the court adheres to its original decision dismissing the third and fifth causes of action; and it is further

ORDERED that plaintiffs' motion for renewal is denied; and it is further

ORDERED that plaintiffs' motion to amend is denied; and it is further

ORDERED that plaintiffs' request for a trial preference is denied without prejudice to renewal upon filing the note of issue.

DATED: November 17 2004

