

Jones v DNA Contr., LLC
2007 NY Slip Op 31541(U)
June 4, 2007
Supreme Court, New York County
Docket Number: 0404111/2005
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. JOAN A. MADDEN
J.S.C.

PRESENT: _____
Justice

PART 11

Index Number : 404111/2005

JONES, CHARLES

INDEX NO. _____

vs

MOTION DATE _____

DNA CONTRACTING

MOTION SEQ. NO. _____

Sequence Number : 011

MOTION CAL. NO. _____

REARGUMENT/RECONSIDERATION

FILED
JUN 08 2007
COUNTY CLERK'S OFFICE
NEW YORK

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits _____

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

is determined in accordance with the annexed decision and order.

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

Dated: June 4, 2007

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: PART 11

-----X
CHARLES JONES,

Plaintiff,

INDEX NO. 404111/05

-against-

DNA CONTRACTING, LLC; SUPERSTRUCTURES;
BOARD OF MANAGERS OF EXECUTIVE PLAZA
CONDOMINIUM ASSOCIATION; BOARD OF
MANAGERS OF 761-779 SEVENTH AVENUE
CONDOMINIUM; GOODSTEIN MANAGEMENT, INC.;
SANDY LEWIS, MARTIN GLASSER, TAMA STARR,
HERVE SENEQUIER and PAUL M. CORWIN, Individually
and as Managers of Executive Plaza Condominium; DONALD
KAHANER, Individually and as President of the Board of
Managers of Executive Plaza Condominium and Member of
the Board of Managers of 761-779 Seventh Avenue
Condominium,

Defendants.

-----X
EXECUTIVE PLAZA CONDOMINIUM ASSOCIATION,
761-779 SEVENTH AVENUE CONDOMINIUM ASSOCIATION,
761-779 SEVENTH AVENUE CONDOMINIUM, GOODSTEIN
MANAGEMENT, INC., and SANDY LEWIS,

Third-Party Plaintiffs,

-against-

ALEX WASINKI,

Third-Party Defendant.
-----X

JOAN A. MADDEN, J.:

Third-party defendant Alex Wasinski moves for leave to reargue the portion of the decision and order of this court dated February 26, 2007, which permitted him to withdraw his counterclaims and denied his motion to amend the counterclaims. Leave to reargue is granted,


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and upon reargument the court addresses the merits of the motion by defendants/third-party plaintiffs for summary judgment dismissing Wasinski's counterclaims, and the merits of Wasinski's motion to amend his counterclaims. Upon consideration of the merits of such motions, the court reaches the identical conclusion, in effect, dismissing the counterclaims/cross-claims and denying the amendment to the counterclaims.¹

Defendants/third-party plaintiffs move for summary judgment dismissing Wasinski's counterclaims. In his "Verified Answer /w/ Counterclaims & Cross-Claims," Wasinski asserts four counterclaims/cross-claims.² The first counterclaim/cross-claim seeks \$50,000 in damages for personal injuries based on a claim of negligence. Wasinski alleges he sustained personal injuries as a result of his exposure to "flurries of brick dust" in Jones's apartment, when he was present in the apartment "removing personal property consisting of crystal, glassware, silverware, dishes, art objects and other small objects from the apartment to be taken to a New Jersey household to be washed and otherwise cleaned." Wasinski alleges that the exposure to "toxic brick dust" caused him "to cough and sneeze profusely" and he "has risk of and may suffer from

¹The court's prior decision granted Wasinski's motion to dismiss the third-party complaint and explained that "Wasinski submits a sworn statement agreeing to withdraw his counterclaims upon dismissal of the third-party complaint." Based on that statement and the dismissal of the third-party complaint, Wasinski was permitted to withdraw his counterclaims, and his motion to amend the counterclaims was denied.

On reargument, Wasinski asserts that his consent to withdraw his counterclaims was specifically conditioned on defendants/third-party plaintiffs withdrawing their third-party claims against him, and since they did not agree to such withdrawal, the condition was not met, and the motions should be determined on the merits. While there is some disagreement among the parties as to what Wasinski intended and whether he submitted a letter or an unsigned affidavit, and whether such letter or affidavit was submitted only to the court, it is not necessary to resolve these issues, as the merits of the motions will be considered on reargument.

²Since Wasinski's pleads combined counterclaims and cross-claims, ~~and~~ the instant decision deals with both. 

future health problems.” Such counterclaim/cross-claim fails as a matter of law as the record reveals that Wasinski is unable to establish any actual injuries caused by the alleged negligence of the third-party plaintiffs and defendants. At his deposition, Wasinski testified that as a result of being exposed to brick dust in Jones’s apartment, he has a “heart condition” and “a possible lung condition down the road.” Wasinski, however, provides no medical evidence or expert medical affidavit to establish causation. To the contrary, his medical records and own testimony show that he had pre-existing problems with his heart and lungs. Even if he is claiming that such conditions were aggravated by exposure to dust, he still submits no supporting medical evidence. In opposing the motion, Wasinski simply states that he is relying on “medical expert testimony that is yet to be determined.” However, a party opposing summary judgment is obligated to lay bare his proof and demonstrate the existence of a triable issue of fact. See Zuckerman v. City of New York, 49 NY2d 557 (1980); Feliz v. Beth Israel Medical Center, 38 AD3d 396 (1st Dept 2007). Thus, absent evidentiary proof sufficient to raise an issue as to causation to support a claim of negligence, Wasinski’s first counterclaim/cross-claim must be dismissed.

In the second counterclaim/cross-claim, Wasinski seeks the sums of \$3,500 and \$4,000 allegedly due and owing for “cleaning activity” and “cleaning work consisting of removing, cleaning and returning property” to Jones’s apartment in 2003 and 2004. As pleaded, this appears to be a claim for breach of contract, but the undisputed record shows that Wasinski had no contractual agreement, either oral or written, with any third-party plaintiff or defendant. Specifically, at his deposition, Wasinski testified that he was hired by Jones, who orally agreed to pay him and his daughter \$2,500 a month to clean his property, and that he received partial payment for such services in the amount of approximately \$9,000. In opposing the motion,

Wasinski asserts that his claim is for the “right to collect the debt owed to” Jones by the “counterclaim defendants” and that Jones assigned such right to him for one dollar. This bare and conclusory assertion is insufficient to defeat summary judgment, especially since the court takes judicial notice that Jones subsequently settled all of his claims arising from the instant underlying action and other related actions. Thus, absent a contractual relationship with a third-party plaintiff or defendant, Wasinski’s breach of contract claim fails as a matter of law. See Albstein v. Elany Contracting Corp., 30 AD3d 210 (1st Dept), lv app den 7 NY3d 712 (2006); Residential Board of Managers of Zeckendorf Towers v. Union Square-14th Street Assocs, 190 AD2d 636 (1st Dept 1993).

In the third counterclaim/cross-claim for prima facie tort, Wasinski alleges that third-party plaintiffs and defendants engaged in deliberate acts and negligent conduct “sufficiently outrageous in character, and so extreme in degree,” causing him to suffer “significant physical and mental distress and pain . . . from unnecessarily being exposed to the harmful effects of brick dust while” in Jones’s apartment which “exacerbated” his heart condition. A claim for prima facie tort consists of four elements: 1) intentional infliction of harm, 2) resulting in special damages, 3) without excuse or justification, and 4) by an act or series of acts that would otherwise be lawful. See DeMicco Bros., Inc. v. Consolidated Edison Co., 8 AD3d 99, 100 (1st Dept 2004).

Wasinski’s claim for prima facie tort fails as a matter of law, as he has not established special damages in the form of a “specific and measurable loss.” Friehofer v. Hearst Corp., 65 NY2d 135, 143 (1985). Moreover, as discussed below, where Justice Carol Edmead previously denied Wasinski’s motion to dismiss the third-party complaint based on Jones’s sworn testimony

that his property was damaged by Wasinski during the cleaning process, Wasinski he is unable to show that “disinterested malevolence” was the sole motivating factor for the third-party action.

See Burns Jackson Miller Summit & Spitzer v. Lindner, 59 NY2d 314, 332-333 (1983).

The fourth counterclaim/cross-claim for punitive or exemplary damages cannot survive on its own, and, therefore, must be dismissed.

Turning to Wasinski’s motion to amend his counterclaims, he seeks to assert two additional counterclaims for malicious prosecution and abuse of process. Although motions for leave to amend pleadings are to be liberally granted in the absence of prejudice, where as here, the proposed amendments are totally devoid of merit and legally insufficient, leave to amend should be denied. See Heller v. Louis Provenzano, Inc., 303 AD2d 20, 25 (1st Dept 2003).

The elements of a cause of action for malicious civil prosecution are: 1) the initiation of a judicial proceeding; 2) a termination of that proceeding in favor of the party asserting the malicious prosecution claim; 3) lack of probable cause; 4) malice; and 5) special injury. See Engle v. CBS, Inc., 93 NY2d 195, 204 (1999). Here, Wasinski’s claim for malicious prosecution is legally insufficient, as he is unable to establish the necessary element of lack of probable cause.

In a November 22, 2005 order, Justice Carol Edmead directed defendant/third-party plaintiff Executive Plaza to commence a third-party action against Wasinski by December 31, 2005. In a March 10, 2006 order, Judge Edmead denied Wasinski’s motion to dismiss the third-party complaint, finding that third-party plaintiffs sufficiently articulated a “claim over” against Wasinski for any damages that may be assessed against them at trial, which may be attributable to the negligence of Wasinski. Judge Edmead based that conclusion on Jones’s sworn deposition

testimony acknowledging that his property was damaged by Wasinski while cleaning it, noting as follows: “That Jones now disavows these statements and attests that their meaning has been manipulated by third-party plaintiffs, merely raises an issue of fact and a question of credibility for the jury.” Under these circumstances, where a court previously held that a sufficient basis existed for the third-party action and pointed to specific evidence supporting such claims, Wasinski cannot show that probable cause was entirety lacking for the third-party action. See I. G. Second Generation Partners, L.P. v. Duane Reade, 17 AD3d 206 (1st Dept 2005). Absent probable cause, the malicious prosecution claim is legally insufficient.

For the identical reason, Wasinski’s claim for abuse of process is also legally insufficient, as he is unable to establish the essential elements of “an intent to do harm without excuse of justification” and the “use of process in a perverted manner to obtain a collateral objective.” Curiano v. Suozzi, 63 NY2d 113, 116 (1984). The institution of a civil action by summons and complaint is not sufficient to support a claim for abuse of process, even when an action is commenced with malicious intent. See I.G. Second Generation Partners, L.P. v. Duane Reade, supra; Walentas v. Johnes, 257 AD2d 352 (1st Dept), lv app disp 93 NY2d 958 (1999).

Based on the foregoing, defendants/third-party plaintiffs are entitled to summary judgment dismissing Wasinski’s counterclaims/cross-claims in their entirety, and Wasinski’s motion for leave to amend the counterclaims is denied.

Accordingly, it is hereby

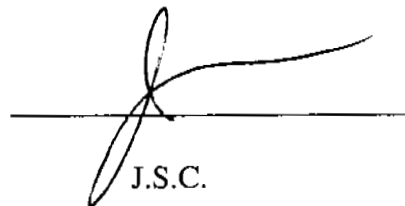
ORDERED that the motion by third-party defendant Wasinski for leave to reargue is granted, and upon reargument, the motion by defendants/third-party plaintiffs for summary judgment dismissing Wasinski’s counterclaims/cross-claims is granted, and Wasinski’s

counterclaims/cross-claims are dismissed in their entirety, and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that Wasinski's motion for leave to amend his counterclaims is denied.

DATED: June 4, 2007

ENTER:


J.S.C.

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