

Wright v Dennis

2007 NY Slip Op 32697(U)

August 20, 2007

Supreme Court, New York County

Docket Number: 0604318/2006

Judge: Marcy S. Friedman

Republished from New York State Unified Court System's E-Courts Service.
Search E-Courts (<http://www.nycourts.gov/ecourts>) for any additional information on this case.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: Hon. Marcy S. Friedman

PART 57

Justice

Wright, Raymond

INDEX NO. 604318106

- v -

MOTION DATE _____

M. Dennis

MOTION SEQ. NO. 01

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Rebarkes motion to dismiss

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...

Answering Affidavits - Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED
<u>1</u>
<u>2</u>
<u>3</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is granted as per
decurion order dated 8-20-07.

FILED
AUG 28 2007
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8-20-07

Hon. Marcy S. Friedman J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK – PART 57

PRESENT: Hon. Marcy S. Friedman, JSC

_____ x

RAYMOND WRIGHT, aka RJ ORSON WRIGHT,

Plaintiff,

- against -

MELVIN DENNIS, et al.,

Defendants.

Index No.: 604318/06

DECISION/ORDER

_____ x

In this action, plaintiff Raymond Wright, proceeding pro se, seeks damages against defendants for defamation and other alleged wrongs. According to the original complaint, plaintiff is a resident of 10 Waterside Plaza in Manhattan, and was elected an officer of the Waterside Tenants' Association ("WTA"). Defendants Dennis, Franklin, Kassell, Loeshelle and Molloy are "officials" of the WTA; defendant "David Rosenberg d/b/a Marcus Rosenberg & Diamond" ("Rosenberg") is the attorney for the WTA; and defendant "Arthur Zabarkes d/b/a Waterside Management LLC" ("Zabarkes") is the "superintendent" of the premises. (Complaint, ¶¶ 1-2.1.)

Defendant Zabarkes moves to dismiss the complaint against him and Waterside Management LLC. In support of the motion, Zabarkes submits an affidavit attesting that there is no such entity as Waterside Management LLC, and that he is the President of the Management Company at Waterside Plaza LLC. In response, by separate motion plaintiff seeks to amend the action to include Waterside Plaza LLC as a defendant and to substitute Arthur Zabarkes

individually for the defendant named in the original complaint as Arthur Zabarkes d/b/a Waterside Management LLC.

It is well settled that leave to amend “‘shall be freely given’ absent prejudice or surprise resulting directly from the delay.” (McCaskey, Davies & Assocs., Inc. v New York City Health & Hosps. Corp., 59 NY2d 755, 757 [1983]. See CPLR 3025[b].) The decision whether to permit amendment of pleadings is committed to the discretion of the court. (Edenwald Contr. Co. v City of New York, 60 NY2d 957 [1983].) However, “in order to conserve judicial resources, an examination of the underlying merits of the proposed causes of action is warranted” (Non-Linear Trading Co. v Braddis Assocs., Inc., 243 AD2d 107, 116 [1st Dept 1998] [internal quotation marks and citations omitted]), and leave to amend should be denied when the proposed pleading “is palpably insufficient as a matter of law.” (Davis & Davis, P.C. v Morson, 286 AD2d 584, 585 [1st Dept 2001]; Bankers Trust Co. v Cusumano, 177 AD2d 450 [1st Dept 1991], lv dismissed 81 NY2d 1067 [1993].) “Therefore, a motion for leave to amend a pleading must be supported by an affidavit of merits and evidentiary proof that could be considered upon a motion for summary judgment.” (Non-Linear Trading Co., 243 AD2d at 116 [internal quotation marks and citations omitted].)

Here, plaintiff fails to make a prima facie showing that the proposed amended complaint has merit. Neither the original nor the amended complaint contains factual allegations to support a cause of action against Zabarkes in his individual capacity. (See Metropolitan Transp. Auth. v Triumph Advertising Prods., Inc., 116 AD2d 526 [1st Dept 1986]; Itamari v Giordan Dev. Corp., 298 AD2d 559 [2d Dept 2002].)

Nor is any showing made as to the merits of any cause of action against Waterside Plaza

LLC. To the extent that the amended complaint seeks to plead a claim of defamation against this entity, it fails to set forth the words that constitute the defamation with particularity, as required by CPLR 3016(a). Moreover, while plaintiff appears to allege that Waterside Plaza LLC colluded with the WTA officers in a claim that plaintiff stole the WTA's computer, plaintiff fails to submit any evidence in support of this contention. To the extent that the amended complaint seeks to plead a cause of action against Waterside Plaza LLC for intentional infliction of emotional distress, the complaint is also plainly lacking in merit. In order to be held liable for this tort, a defendant must have engaged in "extreme and outrageous conduct." (See Howell v New York Post Co., 81 NY2d 115, 121 [1993].) The service of a rent demand, without more, does not constitute conduct that rises to the level of outrageousness sufficient to support this tort. The problems with repairs, as alleged in the amended complaint, and the placement of a Department of Buildings violation on the premises are also insufficient to support a claim of intentional infliction of emotional distress.

The amended complaint contains numerous other allegations of wrongdoing on the part of Zabarkes and Waterside Plaza. These allegations, to the extent they can be comprehended, also do not support a cognizable cause of action against Zabarkes individually or Waterside Plaza LLC. Plaintiff's motion to amend will accordingly be denied.

Plaintiff submitted a sur-reply on his motion to amend, requesting sanctions against defendants for dilatory filings. This sur-reply was unauthorized and will not be entertained by the court. However, the court notes that there is no basis whatsoever in this record for any finding of sanctions against defendants. Plaintiff is admonished that a frivolous request for sanctions may itself be sanctionable. (See 22 NYCRR § 130-1.1[c][3].)

The court further notes that defendant Zabarkes was the sole defendant to move to dismiss the complaint. While defendant Rosenberg opposed plaintiff's motion to amend, the motion to amend sought only to add claims against Zabarkes and Waterside Plaza LLC.

It is hereby ORDERED that the motion of defendant Arthur Zabarkes d/b/a Waterside Management LLC is granted to the extent of dismissing the complaint against Arthur Zabarkes and against Waterside Management LLC; and it is further

ORDERED that plaintiff's motion to amend the complaint to include Waterside Plaza LLC as a defendant and to substitute Arthur Zabarkes individually as a defendant is denied; and it is further

ORDERED that the remaining claims are severed and shall continue; and it is further

ORDERED that motions to dismiss, if any, by any other defendants in this action shall be brought on by order to show cause within 30 days of the date of entry of this order.

This constitutes the decision and order of the court.

Dated: New York, New York
August 20, 2007

FILED
AUG 28 2007
NEW YORK
COUNTY CLERK'S OFFICE
Marcy Friedman
MARCY FRIEDMAN, J.S.C.