

Wright v Dennis

2008 NY Slip Op 30423(U)

February 11, 2008

Supreme Court, New York County

Docket Number: 0604318/2006

Judge: Marcy S. Friedman

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

PRESENT: **Hon. Marcy S. Friedman**
Justice

PART 57

Raymond Wright, ET AL.

INDEX NO. 604318/06

Melvin Dennis, ET AL.

MOTION DATE _____

MOTION SEQ. NO. 4

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this 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


**DECIDED IN ACCORDANCE WITH
ACCOMPANYING DECISION/ORDER.**

FILED

FEB 14 2008

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 2-11-08



J.S.C.

Hon. Marcy S. Friedman

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, a/k/a RJ ORSON
WRIGHT,

Index No.: 604318/06

Plaintiff,

DECISION/ORDER

- against -

MELVIN DENNIS, et al.,

Defendants.

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_____ x

In this action, plaintiff Raymond Wright, proceeding pro se, seeks damages against defendants for defamation and other alleged wrongs. Defendant David Rosenberg d/b/a Marcus Rosenberg & Diamond (“Rosenberg”), who at various times was the attorney for Waterside Tenants’ Association (“WTA”), moves, pursuant to CPLR 3212, to dismiss the complaint on the ground that the complaint fails to state a cause of action against him. By separate motion, defendants Melvin Dennis, Sylvia Franklin, Daniel Kassell, Ronnie Loeshelle and Karen Molloy, who are or were officers of the WTA (collectively “Tenants’ Association defendants”), move to dismiss plaintiff’s complaint against them, pursuant to CPLR 3211(a)(7). By prior decision and order of this court, dated August 20, 2007 (“prior decision”), this court dismissed plaintiff’s complaint as against defendant Arthur Zabarkes, the president of the management company for the premises.

Defendant Rosenberg demonstrates entitlement to judgment dismissing the complaint as a matter of law. For the reasons stated in the prior decision, the complaint fails to state a cause of

action against this defendant for defamation or intentional infliction of emotional distress.

To the extent that the complaint alleges that Mr. Rosenberg colluded with the other defendants to intimidate or harass plaintiff Wright, the complaint must be dismissed as New York law does not recognize a cause of action for conspiracy. (85 Fifth Ave. 4th Floor, LLC v I.A. Selig, LLC, 45 AD3d 349 [1st Dept 2007]; Steier v Schreiber, 25 AD3d 519 [1st Dept 2006], ly denied 6 NY3d 714.) There is also no common law cause of action for harassment. (See Edelstein v Farber, 27 AD3d 202 [1st Dept 2006]; Mago, LLC v Singh, ___ AD3d ___, 2008 WL 193247 [2d Dept 2008].) The complaint also does not contain allegations to support a claim of retaliatory eviction.

In his opposition to defendant’s motion, Mr. Wright asserts a number of new claims against Mr. Rosenberg, including that he violated the New York State Not-For-Profit Corporation Law by colluding with or counseling the officers to make unauthorized transfers of assets. (P.’s Aff. In Opp., ¶¶ 9-9.6); that he created false evidence (id., ¶ 10); and that he committed a fraud. (Id., ¶¶ 10.3-10.6.)

It has long been held that a plaintiff should be granted leave to replead where it appears from the plaintiff’s submissions in opposition to the defendant’s motion for summary judgment that the plaintiff may have an unpleaded cause of action. (See Alvord & Swift v Muller Constr. Co., 46 NY2d 276 [1978]; Lefft v Canada Life Assur. Co., 40 AD2d 641 [1st Dept 1972]; Babtkis Assocs. v Tarazi Realty Corp., 34 AD2d 754 [1st Dept 1970].) Here, however, plaintiff fails to submit any evidentiary support for its claims that defendant Rosenberg committed any wrongful act. Plaintiff’s wholly conclusory allegations, unsupported by evidentiary detail, are insufficient to defeat summary judgment or to warrant leave to replead. (See e.g. Welsh v West Haven

Manor Health Care Ctr., 15 AD3d 572 [2d Dept 2005]; Moskowitz v General Acc. Ins. Co., 179 AD2d 722 [2d Dept 1992].)

To the extent plaintiff claims that he needs discovery in order to oppose this summary judgment motion, he fails to meet his burden of showing “that facts essential to justify opposition may exist but cannot then be stated.” (See CPLR 3212[f].) “A mere chance or hope that something will be uncovered [through discovery] which will add to the case is insufficient.” (Harris v Alcan Aluminum Corp., 91 AD2d 830, 831 [4th Dept 1982], affd for reasons stated below 58 NY2d 1036 [1983].)

Deeming the complaint to allege whatever can be reasonably implied from its statements (see Stendig, Inc. v Thom Rock Realty Co., 163 AD2d 46, 48 [1st Dept 1990]), the court finds that the complaint fails to state any viable cause of action against defendant Rosenberg. His motion for summary judgment should therefore be granted.

Turning to the Tenants’ Association defendants’ motion, the court finds that the claims for intentional infliction of emotional distress, collusion, harassment and retaliatory eviction are not viable for the reasons stated in connection with defendant Rosenberg’s motion.

As to the defamation cause of action, plaintiff’s opposition to the motion annexes e-mails in which various of the officers accused him of theft of the WTA computer. This evidentiary submission remedies plaintiff’s failure in the complaint to set forth the details of the defamatory statement. (See Rovello v Orofino Realty Co., 40 NY2d 633, 635 [1976]; Eastern Consol. Props., Inc. v Lucas, 285 AD2d 421, 422 [1st Dept 2001].) However, plaintiff acknowledges that the computer was WTA property and that he refused to return it the WTA after he was removed as an officer. He therefore fails to plead, and would be unable to prove, the falsity of the

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defamatory statement – an essential element of a defamation claim. (See Rinaldi v Holt, Rinehart & Winston, Inc., 42 NY2d 369, 379 [1977], cert denied 434 US 969; Dillon v City of New York, 261 AD2d 34, 38 [1st Dept 1999].)

In opposition to the motion, plaintiff asserts a number of new claims against the Tenants' Association defendants, including that they have misappropriated WTA funds. Plaintiffs' wholly conclusory allegations are, as stated in connection with defendant Rosenberg's motion, insufficient to defeat dismissal or to warrant leave to replead.

Contrary to plaintiff's further contention, this action is plainly not one involving public petition pursuant to Civil Rights Law § 76-a. Indeed, the assertion of that claim is characteristic of the complaint which indiscriminately alleges various statutory wrongs and various torts without any legal or factual basis whatsoever.

The legal jargon of the complaint aside, the complaint alleges only one potentially viable cause of action against the Tenants' Association defendants – namely, plaintiff's cause of action alleging that he was wrongfully removed as an officer of the WTA, and seeking reinstatement ("reinstatement cause of action"). The Tenants' Association defendants do not specifically address this cause of action. Melvin Dennis, the current President of the WTA, submits an affidavit in which he attests that the WTA Executive Council officers voted on October 12, 2006 to rescind all prior elections of officers, and held a new election at which plaintiff was not reelected to the position of Secretary. (Dennis Aff. In Support, ¶ 7.) In opposition, plaintiff attaches the by-laws which appear to raise an issue as to whether a general meeting was required to effect the removal. (See P.s' Aff. In Opp., ByLaws Art. IV[7].) As the motion to dismiss does not address the legality of the rescission or, if illegal, whether plaintiff states a cause of

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action for reinstatement, such cause of action should not be dismissed on this record.

The Tenants' Association defendants seek an order precluding plaintiff from commencing any further litigation without prior leave of court. Given that the causes of action in the instant complaint are overwhelmingly lacking in any legal basis and that, while the instant action was pending, plaintiff commenced a federal action asserting similar claims (Wright v Waterside Plaza LLC, Index No. 07 Civ 9303 [SD NY]), plaintiff will be enjoined from commencing any future related litigation in the courts of this State without prior court approval. (See Sibersky v Winters, 42 AD3d 402 [1st Dept 2007]; Melnitzky v Apple Bank for Sav., 19 AD3d 252 [1st Dept 2005], rearg denied 2006 NY App Div Lexis 1773.)

The Tenants' Association defendants also seek costs and expenses of defending the instant action. This branch of the motion will be denied in the discretion of the court. However, the court will reconsider granting such costs and expenses in the event plaintiff fails to comply with this court's order regarding the commencement of further litigation.

It is accordingly hereby ORDERED that the motion of defendant David Rosenberg d/b/a Marcus Rosenberg & Diamond for summary judgment is granted to the extent of dismissing the complaint as against said defendant with prejudice; and it is further

ORDERED that the motion of defendants Melvin Dennis, Sylvia Franklin, Daniel Kassell, Ronnie Loeshelle and Karen Molloy is granted to the following extent:

It is hereby ORDERED that all causes of action of the complaint are dismissed against said defendants with prejudice, except the cause of action for reinstatement of plaintiff as an officer of the WTA; and it is further

ORDERED that the denial of the motion as to the reinstatement cause of action is without

prejudice, if defendants are so advised, to a motion to dismiss specifically addressed to said cause of action, provided that the court will entertain such a motion only if it is served within 20 days of the date of entry of this order; and it is further

ORDERED that plaintiff is enjoined from commencing any future litigation in the courts of the State of New York arising out of or related to the issues and facts alleged in the instant action, without prior approval of the Administrative Judge of the Court in which he seeks to bring the future action; and the Clerk of such Court is directed not to accept any new summons or complaint from plaintiff without prior leave of the Administrative Judge of such Court; and it is further

ORDERED that the branch of said defendants' motion for costs and expenses in defending this action is denied without prejudice to a new motion for the same relief in the event plaintiff fails to comply with this court's above order concerning the commencement of any further action.

This constitutes the decision and order of the court.

Dated: New York, New York
February 11, 2008


MARCY FRIEDMAN, J.S.C.

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