

Minick v Picciano

2009 NY Slip Op 30364(U)

February 11, 2009

Supreme Court, New York County

Docket Number: 100783/08

Judge: Judith J. Gische

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

PRESENT: GISCHE
Justice

PART 10

MICHAEL MINICK

- v -

ALEX PICCIANO

INDEX NO. 100783/08
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

	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

FILED
FEB 20 2009

**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

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

Dated: 2/11/09

JUDITH J. GISCHE, 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 10

-----X
MICHAEL MINICK,

Plaintiffs,

-against-

ALEX PICCIANO and WILL DAVISON,

Defendants.
-----X

Decision/Order

Index No.: 100783/08

Seq. No. : 001

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

	Numbered
Pltf's OSC w/ MM affid, exhs	1
Def's n-xmot w/ MR affirm, AP, WD affids, exhs	2
MM reply and opp affid, AS, VD, UB, VB, AB affids, JB affirm	3
MJR reply affirm, exh	4
10/2/08 Transcript	5

-----X

FILED
FEB 20 2009
COUNTY OF NEW YORK

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff-landlord has commenced this action against the defendants, tenants in a building located at 440 West 22nd Street, New York, New York (the "Building"), as a result of defendants' alleged "harassment" of plaintiff. Plaintiff also resides in the Building.

In this action, plaintiff seeks a declaration that defendants are wilfully engaging in conduct for the sole purpose of harassing plaintiff; and for a permanent injunction enjoining defendants from engaging in such conduct. Plaintiff now moves for a preliminary injunction restraining and enjoining defendants from engaging in conduct for the sole purpose of harassing plaintiff and other residents at the Building. Defendants cross-move, pre-answer, to dismiss plaintiff's complaint for failure to state a cause of action. CPLR § 3211

(a) (7).

In this motion, plaintiff claims that defendants Alex Picciano and Will Davison have committed a “nuisance” by depriving plaintiff and other tenants of their right to quiet and peaceful enjoyment at the Building. Plaintiff claims that the defendants harass, threaten and intimidate him “on an almost daily basis.” The defendants’ alleged conduct includes:

- (a) Yelling, cursing, banging on plaintiff’s door and the heating pipes, at all hours of the day and night in the Building;
- (b) Threatening plaintiff with physical injury;
- (c) Using demeaning names and derisive comments to intimidate and provoke plaintiff;
- (d) Announcing their dislike for plaintiff throughout the hallways of the Building;
- (f) Refusing to notify plaintiff regarding repairs;
- (g) Calling the police to complain about the lack of heat in their apartment when defendants refuse to allow plaintiff to add additional radiators;
- (h) Disturbing and interfering with the rights of other residents in the Building;
- (i) Conducting themselves in such a manner in an attempt to harass and intimidate plaintiff.

In support of his material allegations, plaintiff has provided to the court affidavits from other persons who reside and/or work in the building, to wit, Ann Satterfield, plaintiff’s girlfriend, Virginia Desprez, a resident in the Building, Umer Bizati, a part-time superintendent at the Building, and Umer Bizati’s sons, Arben and Valben Bizati.

Plaintiff’s affidavit outlines two specific instances when Picciano (and not Davison) allegedly threatened plaintiff with physical harm, to wit: September 2006 and January 15, 2008. The September 2006 incident allegedly started because plaintiff asked Picciano for his email address. Picciano then allegedly “fl[ew] into a rage of screaming and cursing at [plaintiff] over the phone.” The substance of what was allegedly said is not provided in these papers. Plaintiff then claims that he called the police and that the police issued a warning. However, plaintiff has not provided any evidence of such action by the police.

Plaintiff also claims that he filed another complaint with the police as a result of an incident between him and Picciano which occurred on January 15, 2008. The only proof of this incident that plaintiff has provided to the court is the affidavits of Umer and Arben Bizati, who allegedly witnessed this event. Umer, Arben and Valben Bizati all claim that plaintiff is calm when dealing with the defendants and that the defendants have acted rudely towards them and plaintiff, as well as leaving their door open while operating a television at "an unnecessarily loud volume." Additionally, plaintiff impliedly claims that the defendants behavior has caused "virtually every tenant whose lease has come due [since September 2006] to leave the Building." Plaintiff has also provided copies of letters he sent to defendants requesting that the defendants stop their rude gestures and other behaviors alleged herein.

In her affidavit, Ms. Satterfield, plaintiff's girlfriend, claims that the defendants are rude to plaintiff. She also states that he has witnessed at least six occasions where the defendants have insisted on keeping their door open which has caused offensive odors to emanate from their apartment into the hallways of the Building. Ms. Desprez, a resident in the building, states in her affidavit that she has "noticed resentful feelings exhibited by defendants regarding [plaintiff]." Ms. Desprez has also observed defendants keeping their door open causing "strong cooking odors" to emanate from their apartment. The defendants also allegedly asked Ms. Desprez several times if she was experiencing any problems with the temperature in her apartment which made her feel "uncomfortable."

Defendants have cross-moved to dismiss the action for failure to state a claim. Defendants also "request" that the court award them their legal fees and/or punitive damages because "it is difficult to pay for legal representation while living on a fixed

income.” In opposition to the motion, defendants have submitted a joint affidavit that refutes the material allegations contained in the complaint. Defendants have also submitted to the court letters and emails from various persons that were, at one time, residents of the Building. These persons generally claim that the defendants were good neighbors and that the plaintiff was a difficult and interfering landlord.

Discussion

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (see CPLR 3026; Leon v Martinez, 84 NY2d 83, 87 [1994]). The court accepts the facts as alleged by plaintiff as true, affording them the benefit of every possible favorable inference (EBC I, Inc v Goldman, Sachs & Co., 5 NY3d 11, 19 [2005]; Sokoloff v Harriman Estates Development Corp., 96 NY2d 409, 414 [2001]; P.T. Bank Central Asia v ABN AMRO Bank NV, 301 AD2d 373, 375-6 [1st Dept 2003]), unless clearly contradicted by evidence submitted in connection with the motion (see Zanett Lombardier, Ltd v Maslow, 29 AD3d 495 [1st Dept 2006]). In addition, in asserting a motion under CPLR § 3211 (a) (7), the Court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and “the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one” (id., quoting Guggenheimer v Ginsburg, 43 NY2d 268 [1977]).

However, it is not apparent to the court what cause of action plaintiff is seeking to assert. To the extent that plaintiff seeks to recover based on allegations of harassment, New York does not recognize a common-law cause of action for harassment (see Edelstein v Farber, 27 AD3d 202 [1st Dept 2006]). Nor does a landlord have a cause of action for harassment against a tenant (cf. RPL § 235-d). Specifically, plaintiff repeatedly uses the word “harassment” in the complaint and his affidavits, but at oral argument, plaintiff’s attorney

claimed that he was not seeking to assert a cause of action for harassment, but rather, one for private nuisance. However, the word "nuisance" is not even mentioned in the complaint. Based upon a parsing of the plaintiff's allegations in the complaint, as well as the affidavits submitted in opposition to the cross-motion to dismiss, it may be that plaintiff has a cause of action for private nuisance, the elements of which are as follows: (1) a substantial interference; (2) that is intentional; (3) and unreasonable in character; (4) with plaintiff's right to use and enjoy land; (5) caused by the defendants' conduct. Copart Inds. v. Consolidated Edison Co. of N.Y., 41 NY2d 564 [1977]. This even is not readily apparent from the papers submitted by plaintiff. Therefore, although the court is granting the cross-motion to dismiss due to the aforementioned pleading deficiencies, it is with leave to replead within 30 days from service of Notice of Entry of this decision and order. Elliman v. Elliman, 259 AD2d 341 [1st Dept 1999].

Since the complaint has been dismissed, plaintiff is not entitled to any injunctive relief. The court also notes that the injunctive relief sought, namely, to enjoin conduct engaged in for the sole purpose of harassing plaintiff, is generally not available in civil cases. The problem with this relief requested is that it is far too general to be enforceable. Orders of protection which prohibit criminal harassment are only available in a criminal proceeding. CPL §§ 240.25, 241.26, 530.12, 530.13. If plaintiff seeks injunctive relief, plaintiff will need to particularize what conduct he seeks to enjoin. Accordingly, the motion-in-chief is denied in its entirety.

Finally, the defendants "request" for an award for its attorneys fees is denied. First, the defendants failed to properly notice this request for relief in its cross-motion. Even if the court were to overlook this procedural error, the legal arguments and positions

advanced by plaintiff are not frivolous within the meaning of 22 NYCRR 130-1.1.

Conclusion

In accordance herewith, it is hereby:

ORDERED that plaintiffs' motion for a preliminary injunction is denied; and it is further

ORDERED that defendants' cross-motion to dismiss is granted and the complaint is hereby severed and dismissed; and it is further

ORDERED that plaintiff is granted leave to replead within 30 days from service of Notice of Entry of this decision and order.

This shall constitute the decision and order of the court.

Dated: New York, New York
February 11, 2009

So Ordered:



Hon. Judith J. Gische, JSC

FILED
FEB 20 2009
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