

Reid v City of New York
2009 NY Slip Op 31636(U)
July 10, 2009
Supreme Court, New York County
Docket Number: 105521/07
Judge: Karen Smith
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: KAREN S. SMITH
Justice

PART 62

APRIL REID,

Plaintiff,

- v -

CITY OF NEW YORK, et al.

Defendants.

INDEX NO. 105521/07

MOTION DATE 5/28/09

MOTION SEQ. NO. 002

MOTION CAL. NO. _____

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

Notice of Motion — Affidavits — Exhibits _____	PAGES NUMBERED _____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Cross-Motion: Yes No

Upon the foregoing papers, It is ORDERED that this motion by defendants City of New York and the Department of Housing Preservation and Development, for summary judgment dismissing plaintiff's complaint pursuant to CPLR § 3212, is granted on default.

Plaintiff commenced the instant action by filing a summons and complaint on or about April 24, 2007, seeking to recover for defendants' alleged violation of her constitutional rights, pursuant to 42 U.S.C. §§ 1983 and 1985(3). Plaintiff alleges, in essence, that defendants and other non-parties intentionally worked together to commence an unwarranted and illegal holdover proceeding in the New York City Civil Court, Housing Part, in retaliation for complaints she made about the condition of the building in which she lived, and that defendants altered certain records, removing a "Class C" violation on the building without conducting a proper inspection. Plaintiff does not name the other parties to the alleged conspiracy as defendants in this action.

Defendants City of New York and the Department of Housing Preservation and Development (hereinafter collectively "HPD" or "defendants") made the instant motion for summary judgment on or about October 14, 2008, contending that plaintiff's complaint should be dismissed on CPLR § 3211(a)(7) grounds, because her complaint fails to state a cause of action, or pursuant to CPLR § 3212 because they are entitled to judgment as a matter of law.

The instant motion was marked fully submitted without opposition by the Motion Support Office on October 30, 2008. After the motion was routed to this Part, pro se plaintiff Reid sought and was granted additional time to submit opposition papers to the instant motion. Those papers were due in Part 62 on December 11, 2008. Plaintiff claimed that she was unable to submit opposition and, thereafter, plaintiff sought and was granted additional adjournments to January 29, 2009, March 19, 2009, April 23, 2009 and May 28, 2009. At a conference on May 28, 2009, plaintiff Reid again represented that she needed additional time to submit papers in opposition. Reid represented to the Court that she is unable to obtain records from the Civil Court and that she believes those records have been tampered with, but has submitted no evidence to that effect. While the Court is sensitive to the needs of a plaintiff proceeding pro se, Reid was given approximately seven months to submit her opposition to the defendants' motion, which is ample time to secure any necessary evidence and affidavits. Any additional adjournments would constitute prejudice to the defendants who have been required to appear at numerous fruitless compliance conferences in the last seven months.

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

Plaintiff's complaint and notice of claim allege myriad actions by HPD and numerous non-parties which, taken as a whole, appear to be claiming that HPD and her landlord, Hope Community/New Haarlem Village Limited Partnership II (hereinafter "Hope"), neither of which are parties, conspired against her to dispose of complaints she made to HPD regarding conditions at her apartment building and to institute and prosecute a holdover proceeding against plaintiff in retaliation for those complaints, in violation of her constitutional rights and 42 U.S.C. §§ 1983 and 1985(3).

Plaintiff alleges that she began withholding her rent in July 2002 because of the conditions at her building, including allegedly illegal dumping. In her complaint, plaintiff claims that HPD inspectors visited the building 5 times between June 24, 2003 and July 14, 2003, but that because the complaints "had been tampered with to indicate the violations were within Plaintiff's apartment," the inspectors did not inspect the rest of the building. On July 24, 2003, plaintiff claims that an inspection was conducted "pursuant to court order", and a "Class C" violation was imposed on the building by HPD. Class C violations are those defects considered immediately hazardous by defendants and require corrections within one day unless given additional time by HPD, according to the moving papers. In support of her § 1983 cause of action, plaintiff alleges that defendants ordered the commencement of a holdover proceeding against her in retaliation for complaints she had filed with New York City's "311" service and in legal actions, in violation of her First Amendment rights. Additionally, plaintiff alleges that she attempted to make a complaint with a "Mr. Moore" in the office of Vincent Green, either at HPD or the Department of Inspections or the Inspector General's office, regarding the conditions of her building, but Mr. Moore refused to open a formal complaint or investigate, in violation of her constitutional rights pursuant to 42 U.S.C. § 1983. Plaintiff also asserts a cause of action for violation of her 14th Amendment Equal Protection and Due Process rights pursuant to 42 U.S.C. § 1985(3). In support of these claims, plaintiff again points to the holdover proceeding brought against her by her landlord and contends that HPD "directed" its instigation. Additionally, plaintiff contends that the Class C violation was improperly deleted in order to "aid in any defense that [New York Equity Fund, allegedly a limited partner in Hope Community/New Haarlem], might prepare in the eventuality that Plaintiff instituted civil action." Plaintiff alleges that this was done "in furtherance of its overall fraud in violating SEC rules and misleading investors."¹

In deciding a motion to dismiss for failure to state a cause of action, even pursuant to CPLR § 3212 on CPLR §3211(a)(7) grounds, the complaint should be liberally construed and the facts alleged in the complaint and any submissions in opposition to the dismissal motion accepted as true, according plaintiffs the benefit of every possible favorable inference. (*511 West 232nd Owners Corp. v Jennifer Realty Co.*, 98 NY2d 144, 152 [2002] [internal citations omitted]). "The motion must be denied if from the pleadings' four corners 'factual allegations are discerned which taken together manifest any cause of action cognizable at law.'" (*Id.*). Where a party is seeking summary judgment pursuant to CPLR § 3212, it must make a *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence in an admissible form to demonstrate the absence of any material issues of fact. (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1987]). Once the movant has made such a showing, the burden then shifts to the opposing party to produce evidence in admissible form sufficient to establish the existence of any material issues of fact requiring a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). However, where the moving party fails to make a *prima facie* showing, the motion must be denied regardless of the sufficiency of the opposing party's papers. (See *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851 [1985]).

A government official who subjects an individual to deprivation of his or her rights, privileges or immunities secured by the Constitution is civilly liable to such individual under 42 U.S.C. § 1983. To state a claim for deprivation of her rights under 42 U.S.C. § 1983, plaintiff must show that "the conduct complained

¹ Although plaintiff makes numerous allegations of defendants' improper response to subpoenas and interactions with the court in the holdover proceeding against her, those issues are not properly before this Court and will not be considered. To challenge the propriety of a party's conduct during the pendency of an action, it must be raised before the presiding judge and then, if necessary, preserved for appeal, not raised in a different proceeding, in a different court, based on entirely different causes of action.

of was committed by a person acting under color of law"; that "defendants' conduct in fact deprived them of rights, privileges or immunities secured by the Constitution or laws of the United States"; that defendants' conduct "caused the deprivation of federal constitutional rights"; and that the conduct was "intentional, grossly negligent, or must have amounted to reckless or callous indifference to the constitutional rights of others." (*Neris v Vivoti*, 249 FSupp2d 146, 149 [D Puerto Rico 2003] [Internal citations omitted]).

To state a claim relating to deprivation of her First Amendment rights, plaintiff must further allege, 1) that she has an interest protected by the First Amendment; 2) that defendants' actions were motivated by or substantially caused by the plaintiff's exercise of that right; and 3) the defendants' action effectively chilled the exercise of the plaintiff's First Amendment rights. (*Connell v Signoracci*, 153 F3d 74, 78 [2d Cir 1997]). Here, although plaintiff has alleged that defendants "ordered" a holdover proceeding, it is undisputed that defendants did not themselves commence such a proceeding, nor could they, as a holdover proceeding may only be commenced by landlords/property owners to recover possession of property and defendants had no ownership interest in the building in which plaintiff lived. Defendants submit the affidavit of Marlo Ferrigno, Assistant Commissioner for Code Enforcement of HPD, who states that that, while HPD is authorized to commence litigation against property owners for violation of certain building codes, it neither commences nor orders holdover proceedings. As such, plaintiff has failed to allege any action by which defendants could have chilled the exercise of her speech in violation of 42 U.S.C. § 1983.

To successfully state a cause of action for violation of her Equal Protection Rights pursuant to 42 U.S.C. § 1983 where, such as here, plaintiff has made no allegation that the alleged deprivation was due to here belonging to a protected class, she must allege, 1) that she was treated differently than others similarly situated and 2) that the disparate treatment was "irrational and wholly arbitrary and 3) intentional." (*Barton v City of Bristol*, 294 FSupp2d 184, 195 [D Conn 2003]). Plaintiff claims that City officials in either the office of Housing Preservation and Development or the Inspector General failed to take or act on complaints she made regarding the apartment building, that employees of the City "tampered" with violations and the database in which they were kept, and/or that a Class C violation that had been placed on the subject building was removed without investigation or correction of the violation. Even giving plaintiff the benefit of each of her allegations, however, they do not state a cause of action for violation of her Equal Protection rights. Assuming that violations were improperly removed and that the computer database was unlawfully altered by City employees, none of these actions were taken against plaintiff. Further, plaintiff's allegation that two particular employees, "Mr. Moore" and Vincent Green, failed to take plaintiff's myriad complaints cannot support a § 1983 claim.

Plaintiff also claims violations of her Equal Protection and Due Process rights pursuant to 42 U.S.C. § 1985(3). That section states, *inter alia*,

If two or more persons in any State or Territory conspire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any state or Territory from giving or securing to all persons within which such State or Territory the equal protection of the laws; . . . If one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages, occasioned by such injury or deprivation, against any one or more of the conspirators.

"The language requiring intent to deprive of equal protection, or equal privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action." (*Griffin et al. v Breckenridge et al.*, 403 US 88, 102 [1971]).

Plaintiff alleges, in support of her 42 U.S.C. § 1985(3) claims,² that un-named employees of defendants conspired with Hope to delete the Class C violation from HPD's database, which would "aid any defense that NYEF might prepare in the eventuality that Plaintiff instituted civil action. NYEF would then be able to wrongly assert that its' [sic] fraudulent actions against Plaintiff were not in furtherance of its overall fraud in violating SEC rules and misleading investors." (Complaint, ¶ 48). As a result, plaintiff's due process rights were allegedly violated. Further, according to plaintiff, the failure on the part of "Mr. Moore" and Vincent Green to take down plaintiff's complaint regarding the "tampering" with HPD's computer records, and a failure to investigate such "tampering", violated plaintiff's equal protection rights.

It must first be noted that 42 U.S.C. § 1985(3) does not provide for a cause of action based on an alleged violation of plaintiff's due process rights; the statute contemplates only those actions involving equal protection of the laws. Considering all of plaintiff's allegations, however, she still cannot state a cause of action. Plaintiff has alleged no "racial, or . . . otherwise class-based, invidiously discriminatory animus" directed toward her, which may have motivated the defendants to conspire with Hope. In fact, plaintiff's allegation is that Hope's conspiratory actions were intended to protect them from a civil lawsuit by plaintiff or their investors, or investigation by the SEC. Neither has plaintiff alleged any injury she suffered as a result of the alleged conspiracy to remove the Class C violation. Plaintiff does not articulate why the violation was placed on the subject building in the first place, nor does plaintiff state whether the violation was ever corrected. Since plaintiff has failed to submit opposition papers, the Court cannot look to such papers or evidence to supplement plaintiff's complaint.

Even if plaintiff's complaint stated a cause of action under 42 U.S.C. §§ 1983 or 1985(3), defendants have submitted sufficient evidence in admissible form to demonstrate their entitlement to judgment as a matter of law pursuant to CPLR § 3212. Defendants submit the affidavit of Mario Ferrigno, Assistant Commissioner for Code Enforcement of HPD. Ferrigno states that he personally reviewed the relevant records and spoke to other HPD employees regarding the allegations made herein. According to Ferrigno, HPD is authorized to enforce the Housing Maintenance Code ("HMC"), the New York State Multiple Dwelling Law, and other laws directed to proper housing maintenance standards. HPD, he states, may place violations on buildings and issue notices of violation to owners of buildings, may commence litigation against building owners to obtain compliance, and may sometimes perform emergency repairs where conditions endanger life, health or safety of individuals. Generally, HPD's enforcement actions are in response to tenant or citizen complaints, usually made through the "311" Citizen Services Hotline. If an inspection is conducted, an inspection report is created to describe the conditions of the premises. HMC violations are categorized as 1) non-hazardous (Class A); 2) hazardous (Class B); or 3) immediately hazardous (Class C), according to Ferrigno's affidavit.

According to HPD's records, inspectors were at the premises on only one occasion between June 24, 2003 and July 14, 2003, not five occasions as plaintiff alleges. The one visit was on July 10, 2003, and did not result in the issuance of a violation. On July 15, 2003, HPD inspectors visited the premises again and this time issued two violations: one Class B violation (NOV# 4641487) to "Repair the broken or defective plastered surfaces and paint in a uniform color walls at public hall and stairs all stys", and one Class C (NOV# 4641461), in which the owner was directed to "cleanse and disinfect to the satisfaction of this department after removing sewage at basement." The Class C violation was corrected on August 4, 2003, and certified as corrected by the building owner on August 9, 2003. HPD's Emergency Repair Program inspected the premises again on August 19, 2003 and determined that the violation had, in fact, been corrected. However, the computer database failed to correctly reflect the results of HPD's August 19, 2003 inspection, until January 23, 2006. At that time, according to Ferrigno, it is believed that the computer database was corrected in conjunction with a system-wide correction of open violations which should have already been marked closed/dismissed. Ferrigno's statements regarding the subject premises are all supported by the documents submitted, including Violation Summary Reports, printouts of HPD's computer system, and Violation Inspection Detail reports.

² As noted previously, the Court explicitly rejects plaintiff's causes of action based on alleged improprieties in previous proceedings, including her Third Cause of Action.

Accordingly, it is

ORDERED that plaintiff's complaint is dismissed in its entirety; it is further

ORDERED that defendants serve a copy of this decision and order, with notice of entry, upon all parties and upon the Clerk of the Court (60 Centre Street) within 20 days of entry hereof; it is further

ORDERED that upon service of a copy of this decision and order with notice of entry, the Clerk of the Court is directed to enter judgment in favor of defendants City of New York and Department of Housing Preservation and Development, and Jane and John Does 1-10, dismissing plaintiff's complaint.

The foregoing constitutes the decision and order of the Court. A copy of this decision and order is being mailed to all parties, and the parties are on notice that this is a final disposition of this action and the appearance scheduled for July 16, 2009 is hereby canceled.

FILED
JUL 23 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 10, 2009


Hon. Karen S. Smith, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST