

NAR Apts. LLC v Ippolito
2011 NY Slip Op 33056(U)
November 21, 2011
Sup Ct, NY County
Docket Number: 107866/10
Judge: Eileen A. Rakower
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. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 107866/2010
NAR APARTMENTS LLC
vs.
PATRICIA IPPOLITO
SEQUENCE NUMBER : 003
AMEND

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

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

PAPERS NUMBERED
1, 2
3, 4
5
6

Cross-Motion: Yes No

FILED

Upon the foregoing papers, it is ordered that this motion

NOV 22 2011

NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: 11/21/11

HON. EILEEN A. RAKOWER *C.*

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE
 SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

THIS RULE BY EACH TENANT IS A MATERIAL REQUIREMENT OF EACH LEASE. TENANT'S FAILURE TO OBEY THIS RULE SHALL BE CONSIDERED A SERIOUS VIOLATION OF AN IMPORTANT OBLIGATION BY TENANT UNDER THIS LEASE. OWNER MAY ELECT TO END THIS LEASE BASED UPON THIS VIOLATION.

It is undisputed that, in January 2010, Defendant adopted a four year old Yorkie and brought it into her apartment without informing NAR or seeking its permission prior thereto.¹ NAR states that it became aware of a dog in the premises when its managing agent, who resides one floor above Defendant heard the dog barking. A letter dated February 22, 2010 from NAR to Defendant confirms a prior conversation that day wherein Defendant confirmed that she had a dog in her apartment, and further demanded that Defendant remove the dog from her apartment immediately or face actions to ensure compliance with the lease rules concerning pets. Defendant responded by letter, also dated February 22, 2010. In her letter, Defendant stated that the dog is a "rescue dog," and that she rarely barks, is not aggressive, is completely housebroken, and that neither she nor her roommate had received any complaints about the dog. The letter further advised that Defendant and her roommate would take the dog to a day care center for dogs during their work hours, and asked that NAR "[p]lease give Puddy a chance for a happy home, she's really come around in the time we've had her and I'm sure we can train her not to bark, she's proven herself to be a very intelligent dog." NAR notes that nowhere in this letter is there any mention that Defendant requires the presence of the dog for emotional support.

On February 23, 2010, NAR sent another letter to Defendant, wherein NAR advised Defendant that it would not accept rent from her until they have received written confirmation that the dog is no longer in her apartment. Defendant states that NAR commenced eviction proceedings immediately thereafter. By March 1, 2010, Defendant advised NAR that the dog has been removed from the apartment, and offered to let a representative from NAR inspect the apartment to confirm same. After inspection of the apartment, NAR provided Defendant with the Letter Agreement

¹NAR also states that Defendant has several cats in her apartment without NAR's prior knowledge or consent, but states that it decided to refrain from litigating that issue.

dated March 3, 2010. The Letter Agreement provided that

You hereby represent and warrant to us and hereby agree as follows: (i) you will not hereafter permit the dog to be present in your apartment under any circumstances, and (ii) neither you, nor any person whom you permit to reside with you in your apartment, will maintain or permit to maintain, or allow any dog to visit or to reside in your apartment at any time for any purpose whatsoever.

Defendant signed the Letter Agreement indicating that she understood the terms and provisions of the agreement, and agreed to be bound by the terms thereof. NAR thereafter told its process server not to serve Defendant with the papers from the holdover proceeding.

Defendant claims that she signed the Letter Agreement under duress; specifically, she claims that NAR placed her in the "terrifying position of facing homelessness or parting with [her] dog, leaving [her] with what [she] perceived as no option but to give away the dog..." Defendant states that she thereafter sought and obtained the advice of counsel in order to protect her rights. By letter dated June 8, 2010, Defendant's attorney claimed that the Letter Agreement, and NAR's coercion of Defendant into signing the letter constituted unlawful discrimination against a disabled person. The letter claimed that Defendant suffers from depression and is disabled as defined under relevant federal, state, and city anti-discrimination laws. Further, the letter claims that Defendant's dog is a medically necessary source of emotional support for Defendant. In support of this assertion, Defendant attached a letter from Psychiatrist Bradford M. Goff, M.D. In that letter, Dr. Goff states that Defendant has been under his care since 2007, and that she has had a long history of depression dating back to early adulthood. Further, Dr. Goff stated that, in his opinion, the availability of pets in the home has had a tremendously positive effect on Defendant, providing her with much-needed emotional support. Dr. Goff further stated that, after the dog was removed from the apartment, Defendant's condition worsened significantly, to the point of interfering with her work. Based on all of the foregoing, Defendant's counsel advised in his letter that, if NAR did not agree to Defendant's demand for a reasonable accommodation within ten days, Defendant intended to pursue a claim to vindicate her legal rights.

NAR commenced this action on June 15, 2010 by purchasing an index number and filing its summons and complaint. On August 6, 2010, Defendant filed a complaint with DHR.

In October of 2010, Defendant moved for summary judgment, or alternatively, for an order staying the action during the pendency of Defendant's State Division of Human Rights ("DHR") proceeding concerning her request for a reasonable accommodation; and for an order quashing subpoenas served on Dr. Goff seeking his deposition and pertinent medical records. NAR cross-moved for an order compelling the deposition of Dr. Goff; alternatively NAR sought summary judgment on the issue of the enforceability of the Letter Agreement.

By order dated November 16, 2010, the court denied the parties' motions for summary judgment, and granted NAR's cross-motion to the extent that it sought to depose Dr. Goff and obtain pertinent medical records. In its decision, the court rejected Defendant's argument that she signed the Letter Agreement under duress - i.e., that NAR knowingly forced her to relinquish her right to a reasonable accommodation as a disabled person under threat of being evicted and facing homelessness. In so holding, the court noted that the undisputed facts in the record indicated that, at the time Defendant signed the Letter Agreement, she had never claimed - nor was NAR otherwise on notice of any claim - that Defendant was disabled and required the dog as a support animal. Nevertheless, the court denied NAR's motion for a judgment declaring the Letter Agreement enforceable, as issues of fact remained as to whether Defendant was in fact disabled, and whether she required the presence of her dog in the apartment as a reasonable accommodation for her claimed disability.

Defendant now moves to amend her answer to assert an additional cross-claim. The additional cross-claim seeks compensatory and punitive damages, as well as costs and attorney's fees based upon NAR's failure to grant her a reasonable accommodation by allowing her to harbor her dog. Defendant's second counter-claim alleges and seeks damages for NAR's commencement and prosecution of this action in retaliation for Defendant's assertion of her right to a reasonable accommodation under the Fair Housing Act, and other state and local claims.

NAR opposes Defendant's motion to amend her answer, and cross-moves for dismissal of Defendant's counter-claims and the imposition of sanctions.

[* 6]

Pursuant to CPLR §3025(b), “A party may amend his pleading... at any time by leave of court... Leave shall be freely given upon such terms as may be just...” “CPLR §3025 allows liberal amendment of pleadings absent demonstrable prejudice” (*Atlantic Mut. Ins. Co. v. Greater New York Mut. Ins. Co.*, 271 A.D.2d 278, 280 [1st Dept. 2000]). In the absence of prejudice, leave to amend a pleading should be denied only when the proposed amendment is plainly lacking in merit (*see Bd. of Managers of Gramercy Park Habitat Condo. v. Zucker*, 190 A.D.2d 636 [1st Dept. 1993]) (*see also Pier 59 Studios, L.P. v. Chelsea Piers, L.P.*, 2007 NY Slip Op 4179, *2 [1st Dept. 2007]) (“[I]n considering the proposed amendment, ‘the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face. Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment’”).

Here, the court finds that Defendant is entitled to amend her answer to the extent that she may add a counter-claim based upon her claim of entitlement to a reasonable accommodation. Factual issues remain as to the existence and/or extent of Defendant’s purported disability, as well as the necessity of harboring a dog as an emotional support animal, assuming that Defendant is in fact disabled.

However, the court finds that NAR is entitled to dismissal of Defendant’s counter-claim for retaliation². The commencement of litigation is a protected activity under the *Noerr-Pennington* doctrine, which bars the imposition of liability of a party based upon its petitioning the government (*I.G. Second Generation Partners, L.P. v. Duane Reade*, 17 A.D.3d 206 [1st Dept. 2005]). Although originally derived from antitrust law, the doctrine is rooted in First Amendment principles and has been applied to bar liability for alleged violations of civil rights laws, including the Fair Housing Act (*see Mosdos Chofetz Chaim, Inc. v. Vill. of Wesley Hills*, 701 F. Supp.2d 568 [E.D.N.Y. 2008]) (*citing, inter alia, Sanghvi v. City of Claremont*, 328 F.3d 532, 543 [9th Cir. 2003], which affirmed the dismissal of plaintiffs’ claim that municipal defendant’s commencement of legal action against them constituted unlawful retaliation for asserting their rights under 42 U.S.C. §1983 and the Fair Housing Act.). An exception to the doctrine is made when a party demonstrates that the

² The court notes that, although the court denied NAR’s prior motion for summary judgment, NAR’s motion was based upon the enforceability of the Letter Agreement, and the court did not specifically address the merits of Defendant’s retaliation claim.

[* 7] .
challenged action was “a sham” and was “objectively baseless” (*I.G. Second Generation Partners* at 208).

Here, the court cannot find that NAR’s commencement of this lawsuit was objectively baseless. As previously noted, it is undisputed that NAR and Defendant entered into the Letter Agreement, whereby she agreed not to harbor a dog in her apartment. It was further established that she did so free of duress or coercion on the part of NAR, and that up to that point, Defendant made no mention of suffering from a disability and requiring a dog for emotional support. Irrespective of the ultimate determination of Defendant’s reasonable accommodation claim, and whether the Letter Agreement must yield to Defendant’s rights under the Fair Housing Act or other applicable laws, Defendant cannot show that NAR’s declaratory judgment action is a sham brought merely for the purpose of harming Defendant.

Wherefore it is hereby

ORDERED that Defendant’s leave to amend her answer is granted, and the amended answer in the proposed form annexed to the moving papers shall be deemed served on defendants upon service of a copy of this Order with notice of entry thereof; and it is further;

ORDERED that NAR’s cross-motion is granted to the extent that Defendant’s counter-claim for retaliation is dismissed.

This constitutes the Decision and Order of the Court. All other relief requested is denied.

DATED: November 21, 2011



EILEEN A. RAKOWER, J.S.C.

FILED

NOV 22 2011

NEW YORK
COUNTY CLERK'S OFFICE