

Rosenblatt v Elder

2012 NY Slip Op 30019(U)

January 3, 2012

Sup Ct, NY County

Docket Number: 105276/11

Judge: Joan M. Kenney

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JOAN M. KENNEY
J.S.C. Justice

PART 8

Index Number : 105276/2011
ROSENBLATT, ARTHUR NASH
vs.
ELDER, DAVID
SEQUENCE NUMBER : 002
SUMMARY JUDGMENT

INDEX NO. 105276/11
MOTION DATE 11/15/11
MOTION SEQ. NO. 002

The following papers, numbered 1 to 16, were read on this motion to/for Sj dismissing
Notice of Motion/Order to Show Cause — Affidavits — Exhibits + Memo of Law | No(s). 1-5
~~Answering Affidavits — Exhibits~~ | No(s). 6-10
Notice of Motion + Memo of Law | No(s). 12-16
~~Replying Affidavits~~

Upon the foregoing papers, it is ordered that this motion is

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 1/3/12

Joan M. Kenney, J.S.C.
JOAN M. KENNEY
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT 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 8

-----x

ARTHUR NASH ROSENBLATT,

Plaintiff,

DECISION & ORDER
Index No.: 105276/11

-against-

DAVID ELDER, CHELSEA 23RD STREET CORP.,
BD NY HOTELS, LLC, CHARLES FERRI, "ABC
CORP" d/b/a "HOTEL CHELSEA", "XYZ
CORP.," d/b/a "CHELSEA ROOM", f/n/a
"STAR LOUNGE" and JOHN DOES 1 through
10, whose names are presently unknown
to plaintiff,

Defendants.

-----x

JOAN M. KENNEY, J.:

FILED

JAN 09 2012

NEW YORK
COUNTY CLERK'S OFFICE

Defendant David Elder (Elder) moves, pursuant to CPLR 3212,
for summary judgment dismissing the complaint as asserted against
him. Defendant Chelsea 23rd Street Corp (Chelsea 23) cross-moves,
pursuant to CPLR 3212, for summary judgment dismissing the
complaint as asserted against it and awarding it all costs.
Plaintiff cross-moves, pursuant to CPLR 3025 (b) and 1024, for
leave to amend the complaint to substitute Chelsea Dynasty LLC for
defendant "ABC Corp." d/b/a "Hotel Chelsea," substitute Arnold
Tamasur as defendant John Doe #1, substitute Marlene Krauss as John
Doe #2, and rename defendant "XYZ Corp." d/b/a "Chelsea Room" f/k/a
"Star Lounge" to "XYZ Corp." d/b/a "Chelsea Room.

FACTUAL BACKGROUND

According to the complaint, on or about May 11 and 12, 2008,
while inside the premises known as the Hotel Chelsea, plaintiff
alleges that he was wilfully and intentionally assaulted and struck

by individuals acting on the direction of Elder. Plaintiff asserts five causes of action: (1) as against Elder, wilful and intentional assault and battery; (2) against Chelsea 23, BD NY Hotels, LLC, and "ABC Corp.," negligence resulting in plaintiff being assaulted; (3) as against "XYZ Corp." and Charles Ferri, wilful and intentional assault; (4) as against all defendants, false imprisonment; and (5) as against all defendants, wilful and intentional negligent hiring.

In his motion, Elder asserts that the first and fourth causes of action asserted as against him sound in intentional tort and, consequently, those causes of action must be dismissed as being time-barred. The actions complained of occurred on or about May 11 and 12, 2008, and the instant action was commenced on May 4, 2011, almost three years after the alleged occurrences. The statute of limitations for intentional torts is one year. CPLR 215 (3).

In opposition to Elder's motion, plaintiff asserts that discovery has yet to take place and there are material facts in question regarding Elder's negligence that preclude granting summary judgment in Elder's favor. It is noted that plaintiff fails to address with any specificity Elder's contention that the causes of action asserted as against him are time-barred.

With respect to plaintiff's cross motion to amend, neither the attorney's affirmation nor the affidavits in support directly relate to the relief requested in the notice of motion; rather, these averments contain various allegations of mistreatment of

plaintiff caused by defendants. Moreover, the amended complaint served with the notice of motion alleges different causes of action from those appearing in the initial complaint, but the notice of motion does not specify nor indicate that plaintiff is seeking to amend the complaint to change the causes of action. The causes of action appearing in the amended complaint are: (1) harassment, asserted as against all the defendants; (2) interference with contract (the apartment lease), asserted as against Elder, Tamasar, Krauss, Ferri Chelsea Dynasty LLC and "XYZ Corp." d/b/a "Chelsea Room" f/k/a Star Lounge; (3) negligence, asserted as against all the defendants; (4) vicarious liability, asserted as against Chelsea 23 and Chelsea Dynasty LLC; and (5) defamation, asserted as against Elder, based on his statements made to the New York State Division of Housing and Community Renewal.

Chelsea 23's cross motion asserts that the causes of action asserted as against it are time-barred, for the same reasons stated by Elder above. In addition, Chelsea 23 argues that plaintiff should not be allowed to amend the complaint because the causes of action that he seeks to add are mere subterfuges to get around the statute of limitations.

In reply and in opposition to plaintiff's cross motion, Elder reasserts his position regarding the statute of limitations, and contends that plaintiff cannot amend the complaint to couch his claims as sounding in negligence to avoid the statute of

limitations when the facts indicate intentional torts, which causes of action are time-barred.

DISCUSSION

"The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." *Santiago v Filstein*, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." *Mazurek v Metropolitan Museum of Art*, 27 AD3d 227, 228 (1st Dept 2006); see *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See *Rotuba Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 (1978).

CPLR 3025 (b) provides that

"[a] party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances."

As stated in *Seidman v Industrial Recycling Properties, Inc.* (83 AD3d 1040, 1040-1041 [2d Dept 2011]):

"Leave to amend a pleading pursuant to CPLR 3025 (b) should be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit, or unless prejudice or surprise to the opposing party results directly from the delay in seeking leave to amend."

Elder's motion and Chelsea 23's cross motion for summary judgment dismissing the complaint is granted, and plaintiff's cross motion seeking leave to amend the complaint is denied, for the reasons stated below.

Since plaintiff has failed to present any opposition to the motion and cross motion to dismiss the original complaint, and the causes of action that plaintiff wishes to substitute are different, Elder's motion and Chelsea 23's motion are granted.

However, even had there been opposition, the motion and cross motion to dismiss the original complaint would have been granted. The first, second and third causes of action all sound in intentional tort, which has a one year statute of limitations, and are time-barred (*Cagliostro v Madison Square Garden, Inc.*, 73 AD3d 534 [1st Dept 2010]; *Smiley v North General Hospital*, 59 AD3d 179 [1st Dept 2009]; *Panzella v Burns*, 169 AD2d 824 [2d Dept 1991]); the fourth cause of action alleging false imprisonment is also an intentional tort subject to a one-year statute of limitations (*Wood v Strong Memorial Hospital of the University of Rochester*, 262 AD2d 1054 [4th Dept 1999]), and the fifth cause of action for negligent hiring and supervision is similarly subject to the one-year statutory period because plaintiff alleged that defendants' actions were intentional and, in addition, the complaint fails to allege any negligence in the hiring of the individuals or any notice of their alleged violent propensities (*Alharezi v Sharma*, 304 AD2d 414

[1st Dept 2003]).

Based on the foregoing, plaintiff's initial complaint is dismissed.

Plaintiff's cross motion seeking leave to amend the complaint is denied.

"CPLR 2214 (a) provides that a notice of motion shall specify the time and place of the hearing on the motion, the supporting papers upon which it is based, the relief demanded, and the grounds therefor. A court typically lacks jurisdiction to grant relief that is not in the moving papers. . . . However, the notice of motion also contained a general prayer, for 'such other and further relief as [the] [c]ourt may deem just and proper. . . . The presence of a general relief clause enables the court to grant relief that is not too dramatically unlike that which is actually sought, as long as the relief is supported by proof in the papers and the court is satisfied that no party is prejudiced [internal citations omitted]."

Tirado v Miller, 75 AD3d 153, 158 (2d Dept 2010).

In the instant matter, the relief sought in the amended complaint is dramatically different from the relief stated in the notice of motion: the amended complaint seeks to substitute five new causes of action and delete the original claims, whereas the notice of motion indicates that plaintiff seeks only to substitute parties. *Id.*; see generally *HCE Associates v 3000 Watermill Lane Realty Corp.*, 173 AD2d 774 (2d Dept 1991). Moreover, plaintiff's cross motion is not supported by an affidavit of merit explaining why the new causes of action were not made at the time of filing the original complaint. *Clark v Foley*, 240 AD2d 458 (2d Dept 1997). Therefore, for procedural reasons, plaintiff's cross motion

must be denied.

Moreover, even if the court were to overlook plaintiff's significant procedural defects, the cross motion would have to be denied because plaintiff has failed to allege facts sufficient to support his newly-asserted causes of action.

The first cause of action appearing in the amended complaint, harassment, would have to be dismissed because New York does not recognize a civil cause of action for harassment. *Jacobs v 200 East 36th Owners Corp.*, 281 AD2d 281 (1st Dept 2001).

The second cause of action appearing in the amended complaint, interference with contract, is time-barred. *Buller v Giorno*, 28 AD3d 258 (1st Dept 2006).

The third cause of action appearing in the amended complaint, negligence, is based on allegations of intentional conduct and is hence time-barred since, "[i]n determining which limitations period is applicable to a given claim, the court must look to the substance of the allegations rather than to the characterization of the allegations by the parties." *Tong v Target, Inc.*, 83 AD3d 1046, 1046 (2d Dept 2011).

The fourth cause of action appearing in the amended complaint, vicarious liability, cannot stand because the underlying claim upon which such liability is based is no longer viable, assuming that it ever was, because the actions complained of were intentional and are now time-barred. *Karaduman v Newsday, Inc.*, 51 NY2d 531, 546

(1980); *Mars v Diocese of Rochester*, 6 AD3d 1120 (4th Dept 2004).

Lastly, the fifth cause of action appearing in the amended complaint, defamation asserted as against Elder, is based on statements that Elder allegedly made in July of 2008, and is now time-barred. *Casa de Meadows, Inc. (Cayman Islands) v Zaman*, 76 AD3d 917 (1st Dept 2010).

Since plaintiff failed to allege any cause of action for which relief could be granted, even if his motion were not to be denied on procedural grounds, it would be futile to rename and/or substitute parties.

As a consequence of the foregoing, Elder's motion and Chelsea 23's motion to dismiss the complaint is granted, and plaintiff's cross motion seeking leave to amend the complaint is denied. Accordingly, it is

ORDERED that defendant David Elder's motion and defendant Chelsea 23rd St. Corp.'s cross motion to dismiss the complaint is granted and the complaint is dismissed in its entirety as against said defendants, with costs and disbursements to said defendants as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendants; and it is further

ORDERED that plaintiff's cross motion seeking leave to amend the complaint is denied; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who are directed to mark the court's records to reflect the change in the caption herein; and it is further

ORDERED that the remaining parties appear for a compliance conference on February 9, 2012, as previously scheduled.

Dated: January 3, 2012

ENTER:



Joan M. Kenney, J.S .C.

FILED

JAN 09 2012

**NEW YORK
COUNTY CLERK'S OFFICE**