

7001 East 71st St., LLC v Maimonides Med. Ctr.

2013 NY Slip Op 31793(U)

July 25, 2013

Sup Ct, New York County

Docket Number: 151387/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

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7001 EAST 71ST STREET, LLC,

Plaintiff,

Index No. 151387/13

-against-

DECISION/ORDER

MAIMONIDES MEDICAL CENTER, MILLENNIUM
HEALTH SERVICES, MILLENNIUM PEDIATRICS,
JORDAN MEYERS, M.D., DANIEL ABUELENIN,
M.D., PEDRAM BRAL, M.D., ORRIN LIPPOFF, M.D.
and JOHN DOES 1-10,

Defendants.

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HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for
: _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff 7001 East 71st Street, LLC ("7001") commenced the instant action against defendants Maimonides Medical Center ("Maimonides"), Millennium Health Services ("Health Services"), Millennium Pediatrics ("Pediatrics"), Jordan Meyers, M.D. ("Dr. Meyers"), Daniel Abuelenin, M.D. ("Dr. Abuelenin"), Pedram Bral, M.D. ("Dr. Bral"), Orrin Lippoff, M.D. ("Dr. Lippoff") and John Does 1-10 to recover damages to plaintiff's premises stemming from defendants' alleged conduct during Hurricane Sandy. Plaintiff now moves for an Order pursuant to CPLR § 3211 dismissing the counterclaims asserted by defendants Health Services, Pediatrics and Dr. Meyers. For the reasons set forth below, plaintiff's motion is granted in part and denied

in part.

The relevant facts are as follows. Plaintiff owns the premises located at 7001-7023 Avenue U, Brooklyn, New York (the "subject premises"). Defendant Maimonides leased a portion of the subject premises from plaintiff (the "Lease") and subleased all or some of that space to other businesses, including the remaining defendants. On or about October 29, 2012, Hurricane Sandy substantially damaged the subject premises. On or about November 14, 2012, plaintiff was informed by licensed professional engineers that the electrical system at the subject premises had been seriously damaged and that it was unsafe to use any of the electrical system components. On or about November 15, 2012, plaintiff advised Maimonides that Consolidated Edison had cut off electrical service to the subject premises, that Maimonides should not energize the electrical system because it could cause an explosion and that no one was authorized to enter the subject premises without plaintiff's prior written consent. On or about November 20, 2012, plaintiff wrote to Maimonides enclosing a statement received from a licensed electrician setting forth hazards at the subject premises and a report from an environmental consulting firm advising that the subject premises had become contaminated with fecal coliform, fecal bacteria and mold and that the building should be demolished. The letter further demanded that Maimonides immediately cease and desist all activities at the subject premises and vacate the subject premises.

On or about December 7, 2012, plaintiff terminated the Lease due to the damage from Hurricane Sandy and on December 28, 2012, Maimonides consented to the Lease's termination. Plaintiff alleges that defendants did not promptly vacate the subject premises but instead attempted to connect a portable generator into the existing lighting and power panel at the subject premises, which caused a substantial risk of harm and significant fire hazard. In or around February 2013, plaintiff commenced the instant action against defendants alleging causes of

action for breach of contract, negligence, prima facie tort, nuisance and conversion and requesting damages in the amount of \$1,000,000.00. Specifically, the Complaint alleges that defendants caused damage to the subject premises, distinct and separate from Hurricane Sandy, including, *inter alia*, leaving medical waste, including sharp disposal units and hazardous radiation equipment, illegally running a “jury-rigged” power cable, removing numerous fixtures, including electrical outlet covers and switch plates and completely destroying parts of interior plumbing and sanitation drains. In April 2013, defendants Health Services, Pediatrics and Dr. Meyers commenced a third-party action against Lori Falco-Greenberg (“Ms. Falco-Greenberg”), the alleged President and sole owner of the corporate stock of the plaintiff corporation. Plaintiff now moves for an Order pursuant to CPLR § 3211 dismissing the counterclaims asserted by defendants Health Services, Pediatrics and Dr. Meyers.

On a motion addressed to the sufficiency of the pleadings, the facts pleaded are assumed to be true and accorded every favorable inference. *See Morone v. Morone*, 50 N.Y.2d 481 (1980). Moreover, “a [claim] should not be dismissed on a pleading motion so long as, when [defendant’s] allegations are given the benefit of every possible inference, a cause of action exists.” *Rosen v. Raum*, 164 A.D.2d 809 (1st Dept 1990). “Where a pleading is attacked for alleged inadequacy in its statements, [the] inquiry should be limited to ‘whether it states in some recognizable form any cause of action known to our law.’” *Foley v. D’Agostino*, 21 A.D.2d 60, 64-65 (1st Dept 1977), citing *Dulberg v. Mock*, 1 N.Y.2d 54, 56 (1956). Further, in order to prevail on a defense founded on documentary evidence pursuant to CPLR § 3211 (a)(1), the documents relied upon must definitively dispose of plaintiff’s claim. *See Bronxville Knolls, Inc. v. Webster Town Partnership*, 221 A.D.2d 248 (1st Dept 1995). Additionally, the documentary evidence must be such that it resolves all factual issues as a matter of law. *Goshen v. Mutual Life*

Ins. Co. of New York, 98 N.Y.2d 314 (2002).

In the instant action, plaintiff's motion for an Order pursuant to CPLR § 3211 dismissing the counterclaims asserted by defendants Health Services, Pediatrics and Dr. Meyers is granted in part and denied in part. Plaintiff's motion to dismiss the first counterclaim which alleges hostile, or constructive, eviction is denied. To sufficiently plead a cause of action for constructive eviction, a tenant must plead "wrongful acts by the landlord that 'substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises.'" *Pacific Coast Silks, LLC v. 247 Realty, LLC*, 76 A.D.3d 167, 172 (1st Dept 2010). The first counterclaim sufficiently pleads a cause of action for constructive eviction as it alleges that "the Plaintiff [and third-party plaintiff]...failed to provide [electric service, heat and water] or to make a reasonable effort to provide them causing irreparable harm and damage..." and "failed, neglected and refused to give [the] authorization" necessary to restore such services after Hurricane Sandy. The first counterclaim further alleges such conduct "was a violation, repudiation and breach of the lease for peaceable possession, interfering in the practice, forcing [the] Defendants to curtail their practice and seek other premises, moving the practice at great costs and loss of business." Plaintiff's assertion that the first counterclaim should be dismissed because the loss of such services was not caused by any "wrongful acts" of plaintiff but rather Hurricane Sandy is without merit as such argument is more appropriately made on a motion for summary judgment pursuant to CPLR § 3212. Thus, plaintiff's motion to dismiss the first counterclaim for constructive eviction is denied.

However, plaintiff's motion to dismiss the second counterclaim for defamation, libel and loss of business is granted. To state a claim for defamation, a plaintiff must plead "a false statement, published without privilege or authorization to a third party, constituting fault as

judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se.” *Dillon v. City of New York*, 261 A.D.2d 34, 38 (1st Dept 1999). However, “good-faith communications by a party having an interest in a subject, or a moral or societal duty to speak, are protected by a qualified privilege if made to a party having a corresponding interest,” also known as the common interest privilege. *Herlihy v. Metropolitan Museum of Art*, 214 A.D.2d 250, 258 (1st Dept 1995). “A qualified privilege, however, is ‘conditioned on its proper exercise, and cannot shelter statements published with malice or with knowledge of their falsity or reckless disregard as to their truth or falsity.’” *Id.* At 259, citing *Loughry v. Lincoln First Bank*, 67 N.Y.2d 369 (1986). The second counterclaim alleges that plaintiff and third-party defendant “caused false and defamatory notices to be posted in November and December 2012 at the...premises stating [that the] premises were contaminated and dangerous with unsafe fecal matter and stating ‘Do Not Enter Premises’ causing great damage to the medical practice of the Defendants and loss of business and their reputation...[which] constituted libel per se.” It further alleges that “[t]he false and defamatory notices of contaminated premises posted by [third-party plaintiff] and the Plaintiff in a public place just outside Defendant’s pediatric medical offices that were seen by patients, patients families, visitors, employees and general public harmed Defendants’ reputation causing mental anguish, interruption of business and monetary loss” and that the premises “had absolutely no contamination, no water damage from the flood or leaks and any water or flood damage was limited to the basement which had a history of flooding.” However, such communications were protected under the common interest privilege as plaintiff was the landlord of the premises and had a duty to notify the defendant tenants and any patrons if it knew the premises were unsafe. Further, plaintiff has established through documentary

evidence, including reports from environmental consultants, that the premises were contaminated and unsafe. Defendants' conclusory allegation that plaintiff acted with malice is insufficient to outweigh the common interest privilege as there is no evidence to support such an assertion. Moreover, the second counterclaim fails to allege specific damages due to the alleged defamation. Thus, plaintiff's motion to dismiss the second counterclaim alleging defamation, libel and loss of business is granted.

Plaintiff's motion to dismiss the third counterclaim for slander is also granted on the same ground. The third counterclaim alleges that third-party defendant "did on or about November 13, 2012 enter the offices of...Dr. Meyers, holding what appeared to be a handkerchief over her nose and mouth and loudly proclaimed that [his] premises were 'condemned, contaminated and unsafe' in the presence of Defendant's employees, patients, patients families and visitors" and that such statement was "heard by all present and was slanderous and entirely untrue." The counterclaim further alleges that such conduct "did injure Dr. Meyer's reputation, business and credit and exposed him and his medical practice to ridicule and contempt." However, such communication is also protected under the common interest privilege as third-party defendant was the landlord of the premises and had a duty to notify the defendant tenants and any patrons if it knew the premises were unsafe. Plaintiff has provided reports from environmental consultants who found that the premises were contaminated, unsafe and that they should be vacated. Moreover, the third counterclaim fails to allege specific damages due to the alleged slander. Thus, plaintiff's motion to dismiss the third counterclaim for slander is granted.

Finally, plaintiff's motion to dismiss the fourth counterclaim for malicious abuse of process and frivolous action is granted. As an initial matter, the court will discuss a dismissal of

causes of action for both malicious prosecution and abuse of process as it is unclear from the fourth counterclaim which cause of action defendants allege. To state a claim for malicious prosecution, a party must plead the termination of a prior proceeding in favor of that party. See *Munoz v. City of New York*, 18 N.Y.2d 6 (1966). To state a claim for abuse of process, the complaint must plead the following elements: (1) a regularly issued process, either civil or criminal; (2) intent to do harm without excuse or justification; and (3) use of the process in a perverted manner to obtain a collateral objective. See *Curiano v. Suozzi*, 63 N.Y.2d 113 (1984). Further, pursuant to New York Court Rules § 130-1.1(c)(1), conduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law; (2) it is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false. The fourth counterclaim alleges that the complaint “constitutes malicious abuse of process in that it was brought in bad faith without merit for a malicious purpose and to attain an unjustifiable end.” Specifically, the fourth counterclaim alleges that as plaintiff and third-party defendant plan to demolish the building, they “cannot in good faith sue for such minor alleged damage” such as “unspecified debris left at the premises and missing electric outlet covers.” As an initial matter, the fourth counterclaim fails to allege any prior proceeding terminated in favor of defendants or the use of a process in a perverted manner to obtain a collateral objective. Moreover, it fails to allege any specific evidence of plaintiff’s intent to delay or prolong the resolution of this action, to harass defendants or that the action is completely without merit in law. The fourth counterclaim states that plaintiff’s conduct is “frivolous” and “abusive” but such assertions are merely conclusory. Thus, plaintiff’s motion to

