

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

2013 NY Slip Op 32279(U)

September 20, 2013

Sup Ct, NY County

Docket Number: 151387/13

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____ **CYNTHIA S. KERN**
J.S.C.
Justice

PART _____

Index Number : 151387/2013
7001 EAST 71ST STREET LLC.
vs
MAIMONIDES MEDICAL CENTER
Sequence Number : 006
DISMISS

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

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

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

is decided in accordance with the annexed decision.

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

Dated: 9/20/13

CK

CYNTHIA S. KERN, J.S.C.
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

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

-----X
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.

-----X
MILLENNIUM HEALTH SERVICE, MILLENNIUM
PEDIATRICS and JORDAN MEYERS, M.D.,

Third-Party Plaintiffs,

-against-

LORI FALCO-GREENBERG,

Third-Party Defendant.

-----X
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 allegedly stemming from defendants’ conduct during Hurricane Sandy. Plaintiff now moves for an Order pursuant to CPLR § 3211 dismissing the counterclaim asserted by defendant Dr. Abuelenin. For the reasons set forth below, plaintiff’s motion is granted.

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 plaintiff alleges that on December 28, 2012, Maimonides consented to the Lease's termination. Plaintiff further 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 President and sole owner of the corporate stock of the plaintiff corporation. Plaintiff now moves for an Order pursuant to CPLR § 3211 dismissing the counterclaim asserted by defendant Dr. Abuelenin.

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 counterclaim asserted by defendant Dr. Abuelenin is granted. As an initial matter, it is unclear to the court what cause of action Dr. Abuelenin's counterclaim attempts to set forth. The counterclaim states "Plaintiff was aware I was not a subtenant but an employee of Dr. Meyers and Millennium Health Services and wrongfully named in this lawsuit without legal basis. As a result I suffered damages to my reputation and incurred legal fees" and requests damages in the amount of \$1 million. Under a liberal interpretation of the counterclaim, Dr. Abuelenin appears to set forth possible causes of action for defamation, malicious prosecution, abuse of process and/or frivolous action.

As an initial matter, Dr. Abuelenin's counterclaim fails to state a claim for defamation. To state a claim for defamation, a party 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). Dr. Abuelenin's counterclaim fails to allege any false statement made by plaintiff. To the extent Dr. Abuelenin is alleging that the false statement was the instigation of this litigation against him, the counterclaim fails to state a claim for defamation. It is well-settled that an attorney, party to a case or witness in a judicial proceeding

enjoys immunity from a defamation action for his or her spoken or written statement, if that statement is pertinent to the litigation. *See Finkelstein v. Bodek*, 131 A.D.2d 337 (1st Dept 1987). Thus, the mere fact that plaintiff initiated a lawsuit against Dr. Abuelenin is not sufficient to state a claim for defamation. Additionally, the counterclaim fails to allege that Dr. Abuelenin has suffered any special damages. *See Liberman v. Gelstein*, 80 N.Y.2d 429 (1992).

Dr. Abuelenin's counterclaim also fails to state a claim for malicious prosecution. 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). However, Dr. Abuelenin's counterclaim fails to allege any prior proceeding terminated in his favor. Additionally, Dr. Abuelenin's counterclaim fails to state a claim for abuse of process. To state a claim for abuse of process, a party 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). However, the counterclaim fails to allege the use of a process in a perverted manner to obtain a collateral objective or any intent to do harm without justification.

Finally, Dr. Abuelenin's counterclaim fails to state a claim for frivolous action. 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. However, Dr. Abuelenin's counterclaim fails to allege any specific evidence of plaintiff's intent to delay or prolong the resolution of this action, to harass him or that the action is

completely without merit in law. Additionally, the counterclaim fails to state a claim for frivolous action as this court, in a prior decision, partially denied Dr. Abuelenin's motion to dismiss the complaint on the ground that plaintiff has sufficiently pled certain causes of action against him. Thus, plaintiff's motion to dismiss Dr. Abuelenin's counterclaim is granted.

Accordingly, plaintiff's motion for an Order pursuant to CPLR § 3211 dismissing the counterclaim asserted by Dr. Abuelenin is granted. This constitutes the decision and order of the court.

Dated: 9/20/13

Enter: PK

J.S.C.

CYNTHIA S. KERN
J.S.C.