Neglia v Florentin
2013 NY Slip Op 33301(U)
April 5, 2013
Sup Ct, Queens County
Docket Number: 12750/12
Judge: Augustus C. Agate
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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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CHARLES and KAREN NEGLIA,

Plaintiffs,

-against-

GUIDO FLORENTIN and MILAGROS FLORENTIN,

Defendants.

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Index No: 12750/12

Motion
Dated: December 21, 2012

M# 1

The following papers numbered 1 to 7 read on this motion by the defendants for an order dismissing the complaint pursuant to CPLR 3211.

	PAPERS NUMBERED
Notice of Motion - Affidavits - Exhibits.......	1 - 4
Affirmation in Opposition - Exhibits	5 - 7
Defendants' Memorandum of Law	

Upon the foregoing papers it is ordered that this motion by the defendants for an order dismissing the complaint pursuant to CPLR 3211 is decided as follows:

At the outset, the court notes that plaintiffs, in their opposing affirmation, concede that the fifth cause of action of the complaint for a Declaratory Judgment should be withdrawn.

This action arises out of a dispute between neighboring homeowners. Plaintiffs were the owners of premises located at 3 Doxsey Place in Jamaica, New York. Defendants owned the adjoining premises, located at 5 Doxsey Place. Plaintiffs allege that defendants interfered with plaintiffs' efforts to sell their property in 2012. Plaintiffs assert that defendants would state to real estate agents and possible buyers that plaintiffs' house was in "disrepair" and that "the people who lived in the house were dirty." Plaintiffs also contend that during construction work on defendants' property, the vinyl siding on the side of plaintiffs' house was damaged. The complaint seeks to recover damages for (i) tortious interference with a contract;

(ii) defamation; (iii)intentional infliction of emotional distress; (iv) negligence and (v) punitive damages.

When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action. (*Sokol v Leader*, 74 AD3d 1180, 1180-1181 [2d Dept 2010]; *see Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977].) "In considering such a motion, the court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Sokol v Leader*, 74 AD3d at 1181; *see Bokhour v GTI Retail Holdings, Inc.*, 94 AD3d 682, 682 [2d Dept 2012]; *Nonnon v City of New York*, 9 NY3d 825, 827 [2007]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994.) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus." (*Sokol v Leader*, 74 AD3d at 1181, quoting *EBC I, Inc. v Goldman Sachs & Co.*, 5 NY3d 11, 19 [2005].)

The branch of the motion to dismiss the first cause of action for tortious interference with a contract is granted. "Tortious interference with a contract requires the existence of a valid contract between the plaintiff and a third party, defendant's knowledge of that contract, defendant's intentional procurement of the third-party's breach of the contract without justification, actual breach of the contract, and damages resulting therefrom." (*Lama Holding Co. v Smith Barney*, 88 NY2d 413, 424 [1996]; *Foster v Churchill*, 87 NY2d 744, 749 [1996]; *Miller v Theodore-Tassy*, 92 AD3d 650, 651 [2d Dept 2012]; *Monex Fin. Servs., Ltd., v Dynamic Currency Conversion, Inc.*, 76 AD3d 515, 515 [2d Dept 2010].) Here, the first cause of action alleges that defendants' intentional actions were designed to interfere with the broker listing agreement between the plaintiffs and Bridges Realty Holdings Corp. and the plaintiffs' ability to sell their property. However, the complaint does not allege that the agreement was actually breached. Thus, plaintiffs have not set forth a viable cause of action for tortious interference with a contract, and the first cause of action is dismissed.

The second cause of action to recover damages for defamation is dismissed. A plaintiff cannot recover damages for defamation for statements that are expressions of pure opinion. (*Steinhilber v Alphonse*, 68 NY2d 283, 289 [1996]; *Kamalian v Reader's Digest Assn., Inc.*, 29 AD3d 527, 528 [2d Dept 2006].)

Whether a statement is pure opinion is a question of law for the court. (*Mann v Abel*, 10 NY3d 271, 276 [2008], *cert denied* 555 US 1170 [2009]; *Abakporo v Daily News*, 102 AD3d 815, 816 [2d Dept 2013].) The factors to be considered in determining whether a statement constitutes a pure opinion are: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal . . . readers or listeners that what is being read or heard is likely to be opinion, not fact." (*Brian v Richardson*, 87 NY2d 46, 51 [1995].)

In the matter at hand, the second cause of action asserts that defendants broadcast to prospective purchasers of plaintiffs' home that the family that lives in plaintiffs' house is "dirty" and the place "is falling apart, needs a lot of work, and is old." These statements constitute pure opinion and are not actionable. Indeed, these statements are a "subjective characterization" of the property and incapable of objective verification. (*Mogil v Mark B. Zaia Enters., Inc.*, 230 AD2d 778, 779 [2d Dept 1996].)

The third cause of action, which seeks to recover for intentional infliction of emotional distress, is dismissed. It is well settled that liability for damages as a result of intentional infliction of emotional distress arises only where the conduct alleged is "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" (*Howell v New York Post Co.*, 81 NY2d 115, 122 [1993][quoting *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]; *Tartaro v Allstate Indem. Co.*, 56 AD3d 758, 759 [2d Dept 2008].) Accepting the allegations of the complaint as true, the conduct alleged therein does not rise to the level of behavior so extreme and outrageous that warrants a finding of intentional infliction of emotional distress. (*see Murray v 600 East 21st St., LLC*, 55 AD3d 805, 806 [2d Dept 2008]; *Simon v 160 West End Ave. Corp.*, 7 AD3d 318, 320 [1st Dept 2004].)

The branch of the motion to dismiss the fourth cause of action for negligence is denied. The fourth cause of action alleges that as a result of construction work performed on defendants' property, the vinyl siding on the side of the

plaintiffs' house was damaged. This cause of action also asserts that the construction caused dozens of black tar marks on the plaintiffs' siding. Accepting these allegations as true, the claims state a viable cause of action for negligence.

To the extent that defendants seek to dismiss the fourth cause of action pursuant to CPLR 3211(a)(1), the branch of the motion is also denied. A motion to dismiss on the ground that there is a defense founded upon documentary evidence pursuant to CPLR 3211(a)(1) will be granted only if the documentary evidence resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim. (*Cives Corp. v George A. Fuller Co., Inc.*, 97 AD3d 713, 714 [2d Dept 2012]; *Suchmacher v Manana Grocery*, 73 AD3d 1017, 1017 [2d Dept 2010]; *Fontanetta v John Doe 1*, 73 AD3d 78, 83 [2d Dept 2010].) Here, the movants have not submitted any documentary evidence which conclusively disposes of the plaintiffs' fourth cause of action for negligence.

The sixth cause of action which seeks to recover punitive damages is dismissed. It is well settled that New York law does not recognize a separate cause of action for punitive damages. (*Ehrlich v Incorporated Vil. Of Sea Cliff*, 95 AD3d 1068, 1070 [2d Dept 2012]; *Muniz v Mount Sinai Hosp. of Queens*, 91 AD3d 612, 618 [2d Dept 2012]; *Aronis v TLC Vision Ctrs., Inc.*, 49 AD3d 576, 577 [2d Dept 2008]; *Rose Lee Mfg., Inc. v Chemical Bank*, 186 AD2d 548, 550 [2d Dept 1992].)

Accordingly, this motion by the defendants to dismiss the complaint pursuant to CPLR 3211 is granted to the extent that the first, second, third, fifth and sixth causes of action are dismissed.

The fourth cause of action of the complaint shall continue.

Dated: April 5, 2013

AUGUSTUS C. AGATE, J.S.C.