

New A&N Food Mkt. Inc. v Huang

2014 NY Slip Op 32675(U)

September 12, 2014

Supreme Court, Queens County

Docket Number: 704323/2013

Judge: Howard G. Lane

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FILED
SEP 17 2014
COUNTY CLERK
QUEENS COUNTY

ORIGINAL

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE HOWARD G. LANE IA Part 6
Justice

NEW A&N FOOD MARKET INC., et al.,

Index
Number 704323/13

Plaintiffs,

-against-

Motion
Date March 12, 2014

TERRY HUANG, et al.,
Defendants.

Motion
Cal. Number 85

Motion Seq. No. 1

The following numbered papers read on this motion by plaintiffs for partial summary judgment on the causes of action for conversion, trespass, and wrongful eviction and to dismiss the counterclaim asserted against them for defamation, libel, and slander for failure to state a cause of action pursuant to CPLR 3211(a)(7) and 3016; and cross motion by defendants to dismiss the complaint against defendants Andrew and Terry Huang (Huang defendants) pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction and for sanctions and costs against plaintiffs for the commencement of a frivolous lawsuit pursuant to 22 NYCRR 130-1.1 and 130-2.1.

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Upon the foregoing papers it is ordered that the motion and cross motion are determined as follows:

This is an action to recover damages arising from the eviction of plaintiff New A&N Food Market Inc. (New A&N Food Market), a supermarket, from the premises located at 41-79 Main Street in Flushing, New York. On January 2, 2008, defendant A&N Food Market, Inc. (A&N Food Market), the owner of the subject property, entered into a lease and security agreement with nonparty New K&S Supermarket for the purpose of operating a supermarket on the premises. On that same date, nonparty New K&S Supermarket subleased the premises to New A&N Food Market. On August 20, 2013, A&N Food Market sent a letter to nonparty New K&S Supermarket notifying it of its default on the lease and security agreement by allegedly failing to pay rent and loan payments. On the same day, A&N Food Market commenced an action against nonparty New K&S Supermarket and its shareholders (Index No. 15836/13) to foreclose on the security agreement and to reassign the lease back to the landlord. On August 27, 2013, A&N Food Market obtained a preliminary injunction and temporary restraining order enjoining nonparty New K&S Supermarket from continuing to operate a business on the premises and from altering, destroying, transferring, or disposing of any inventory on the premises. That same day, A&N Food Market repossessed the inventory and the premises. Thereafter, on October 9, 2013, plaintiffs commenced the within action against defendants, alleging causes of action for conversion, trespass, and wrongful eviction.

With respect to the causes of action for conversion, trespass, and wrongful eviction, the court finds that, based on a careful review of the evidence in the record,

there are numerous issues of fact precluding summary judgment in plaintiffs' favor on those claims. In support of their motion, plaintiffs claim, among other things, that defendants did not have the authority under the August 27, 2013 temporary restraining order, which was obtained by A&N Food Market in a related action, to evict plaintiffs from the premises and remove the store's inventory because New A&N Food Market is not a party to that lawsuit and, in any event, New A&N Food Market had a sublease with nonparty New K&S Supermarket. In opposition, however, defendants argue that, upon nonparty New K&S Supermarket's default on the lease and security agreement, defendants had the right to repossess the premises and the inventory pursuant to the terms of those documents. In addition, defendants argue that the purported sublease is invalid because section 43(a) of the lease required prior written consent of the landlord to sublease the property and the consent letter offered by plaintiffs on the motion is fraudulent as the signature of Andrew Huang, principal of A&N Food Market, was forged. Indeed, Andrew Huang stated in an affidavit that the signature on the consent letter was not his signature. In view of the foregoing, issues of fact exist, at least, as to whether nonparty New K&S Supermarket defaulted on the subject lease and security agreement, whether the sublease between New A&N Food Market and nonparty New K&S Supermarket is valid and enforceable, and whether defendants had the authority to repossess the premises and the inventory on the property pursuant to the August 27, 2013 temporary restraining order and/or the subject lease and security agreement. As such, those branches of plaintiffs' motion for partial summary judgment on the causes of action for conversion, trespass, and wrongful eviction are denied.

Plaintiffs also moved to dismiss the counterclaim sounding in defamation, slander, and libel asserted against them pursuant to CPLR 3211(a)(7) and 3016, primarily arguing that the counterclaim is based solely upon the allegations contained in the complaint insofar as asserted against defendants Howard S. Krebs and Stephen L. Brodsky, defendants' counsel. Specifically, defendants assert in the counterclaim that plaintiffs made allegations in the complaint, which plaintiffs allegedly knew to be false, in an attempt to intentionally cause Mr. Krebs and Mr. Brodsky financial harm and to ruin their professional reputations. On a motion to dismiss pursuant to CPLR 3211(a)(7), the court must accept the facts alleged by the plaintiff as true and liberally construe the complaint, according it the benefit of every possible favorable inference (*see Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]). The role of the court is to "determine only whether the facts as alleged fit within any cognizable legal theory" (*id.*). The elements of a cause of action for defamation are: (1) a false statement, (2) published without privilege or authorization to a third party, (3) constituting fault as judged by, at a minimum, a negligence standard, and (4) it must either cause special harm or constitute defamation per se (*see Martino v HV News, LLC*, 114 AD3d 913 [2014]; *Knutt v Metro Intl., S.A.*, 91 AD3d 915, 916 [2012]; *Epifani v Johnson*, 65 AD3d 224 [2009]).

Defamation traditionally consists of two related causes of action - libel and slander. Slander is the uttering of defamatory words which tend to injure another in his or her reputation, office, or trade, whereas libel is written (*see Floyd Harbor Animal Hosp. v Doran*, 2009 NY Slip Op 32868[U] [Sup Ct, Suffolk County 2009]). In an action for libel or slander, the particular words complained of must be set forth in the complaint, but their application to the plaintiff may be stated generally (CPLR 3016 [a]). Here, plaintiffs demonstrated that the counterclaim for defamation, libel, and slander was based upon privileged statements made in the complaint. Allegations contained in a pleading are protected by the absolute privilege of immunity from liability when those statements are made in the course of a legal proceeding and are pertinent to the litigation (*see Sexter & Warmflash, P.C. v Margrabe*, 38 AD3d 163, 171-175 [2007]). “The pertinence of a statement made in the course of judicial proceedings is a question of law for the court” (*id.* at 173). Significantly, defendants failed to oppose the branch of plaintiffs’ motion to dismiss the counterclaim for defamation, libel, and slander. Therefore, that branch of plaintiffs’ motion to dismiss the counterclaim sounding in defamation, slander, and libel asserted against them is granted.

In response to the motion, defendants Kuo Chen Yen, Kam Sen Food LLC, Kam Sam Supermarket of MD Inc, and the Huang defendants cross-moved to dismiss the action against the Huang defendants pursuant to CPLR 3211(a)(8) for lack of personal jurisdiction on the ground that the Huang defendants were never served with process. Although the Huang defendants interposed an answer to plaintiffs’ complaint on November 1, 2013, in which they pleaded the affirmative defense of lack of personal jurisdiction, said defendants failed to timely make a motion to dismiss on that ground within sixty (60) days after service of their answer, as required under CPLR 3211(e). The cross movants also failed to make a showing of undue hardship warranting an extension of time to move for dismissal of the action based on lack of personal jurisdiction (CPLR 3211[e]). Therefore, that branch of the cross motion by defendants Kuo Chen Yen, Kam Sen Food LLC, Kam Sam Supermarket of MD Inc, and the Huang defendants to dismiss the complaint against the Huang defendants for lack of personal jurisdiction is denied.


Likewise, that branch of the cross motion by defendants Kuo Chen Yen, Kam Sen Food LLC, Kam Sam Supermarket of MD Inc, and the Huang defendants seeking sanctions and costs against plaintiffs for the commencement of a frivolous lawsuit pursuant to 22 NYCRR 130-1.1 and 130-2.1 is denied. The court, in its discretion, may award reasonable costs or financial sanctions against an attorney or party resulting from frivolous conduct (22 NYCRR 130-1.1[a]). Frivolous conduct is defined as conduct that is (1) completely without merit in law and cannot be supported by a reasonable argument for an extension, modification or reversal of existing law, (2) undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another,

or (3) asserts material factual statements that are false (*id.*). To determine whether conduct is frivolous, the court must consider, among other issues, the circumstances under which the conduct took place, including the time available for investigating the legal or factual basis of the conduct, and whether the conduct was continued when its lack of legal or factual basis was apparent, or should have been apparent, or was brought to the attention of counsel or the party (*id.*). Here, the evidence does not demonstrate that the within action was commenced in bad faith or primarily to harass or maliciously injure defendants, that the parties' arguments are completely without legal merit, or that the parties' conduct was frivolous within the meaning of 22 NYCRR 130-1.1(c) (*see e.g. Providence Wash. Ins. Co. v Munoz*, 85 AD3d 1142 [2011]; *Mimoun v Zicherman*, 293 AD2d 585 [2002]). Furthermore, 22 NYCRR 130-2.1(a) provides that a court may award costs in the form of reimbursement for actual expenses reasonably incurred and reasonable attorney's fees, upon any attorney who, without good cause, fails to appear at a time and place scheduled for an action or proceeding to be heard before a designated court. However, defendants did not make any allegations against plaintiffs or plaintiffs' counsel justifying the imposition of costs under 22 NYCRR 130-2.1. Therefore, under the circumstances of this case, the court finds that the imposition of sanctions and costs for frivolous conduct pursuant to 22 NYCRR 130-1.1 and 130-2.1 is unwarranted.

Accordingly, those branches of plaintiffs' motion for partial summary judgment on the causes of action for conversion, trespass, and wrongful eviction are denied. That branch of plaintiffs' motion to dismiss the counterclaim for defamation, libel, and slander pursuant to CPLR 3211(a)(7) is granted. Defendants' cross motion to dismiss the complaint against the Huang defendants for lack of personal jurisdiction and for sanctions against plaintiffs is denied.

This constitutes the decision and order of the court.

Dated: September 12, 2014



Howard G. Lane, J.S.C.