Mulholland v Moret
2014 NY Slip Op 33504(U)
September 4, 2014
Supreme Court, Kings County
Docket Number: 503882/2014
Judge: Peter P. Sweeney

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS
----------x
EVELYN MULHOLLAND, MICHAEL MULHOLLAND, SHAWN MULHOLLAND & JACQUELENE MULHOLLAND,

Plaintiffs,

-against-

RAMON RIVERA MORET AND ELIZABETH DONSKY,

Defendants,

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Index No.:503882/2014
Motion Date: 6-10-14
Motion Cal. Nos.: 54 & 82

DECISION/ORDER

The following papers numbered 1 to 5 were read on this motion and cross motion:

Papers:	**Numbered**
Notice of Motion/Order to Show Cause Affidavits/Affirmations/Exhibits.....	1
Answering Affirmations/Affidavits/Exhibits.....	
Reply Affirmations/Affidavits/Exhibits.....	
Other.....	
Notice of Cross-Motion Affidavits/Affirmations/Exhibits.....	2
Answering Affirmations/Affidavits/Exhibits.....	3
Memorandum of Law in Further Opposition to Cross-Motion.....	4
Defendants' Supplemental Memorandum of Law.....	5
Reply Affirmations/Affidavits/Exhibits.....	
Other.....	

Upon the foregoing papers, the motion and cross-motion are decided as follows:

Plaintiffs Evelyn Mulholland, Michael Mulholland, Shawn Mulholland and Jacquelene Mulholland move by order to show cause for a preliminary injunction enjoining defendants

Ramon Rivera Moret and Elizabeth Dansky from harassing them and from interfering with their quiet enjoyment of their portion of the backyard and permitting them to erect a temporary fence dividing the backyard between apartment 1L and apartment 1R at the premises located at 247 Devoe Street, Brooklyn, New York pending a determination of this action. Plaintiffs also seek a preliminary injunction barring and prohibiting defendants from using plaintiffs names, pictures and images for any advertising or film making purposes.

Defendants, Ramon Rivera Moret and Elizabeth Donsky, cross-move for an order dismissing the complaint on the ground of lack of jurisdiction; granting defendants summary judgment dismissing the first, second, third and fourth cause of action asserted in plaintiffs' complaint, with prejudice, and granting them an injunction enjoining plaintiffs from entering or using or placing property in the backyard of 247 Devoe Street, Brooklyn, New York without defendants prior written permission and consent and authorization. Defendants also seek a temporary restraining order and preliminary injunction enjoining plaintiffs from entering or using the back yard of 247 Devoe Street, Brooklyn, New York pending the determination of this action.

Plaintiffs' motion for a preliminary injunction will be addressed first. To establish entitlement to a preliminary injunction, a party is required to demonstrate a likelihood of success on the merits, irreparable harm in the absence of an injunction and that the balance of the equities is in their favor (*see* CPLR 6301; *Nobu Next Door, LLC v. Fine Arts Hous., Inc.*, 4 N.Y.3d 839, 840, 800 N.Y.S.2d 48, 833 N.E.2d 191 [2005]; *Moore v. Ruback's Grove Campers' Assn., Inc.*, 85 A.D.3d 1220, 1221, 924 N.Y.S.2d 197 [2011]). Here, plaintiffs have not demonstrated that they are likely to succeed on the merits. Plaintiffs commenced this action claiming, *inter alia*, that they are entitled to use a portion of the backyard despite the fact that the lease agreement between the defendants and the prior building owner gave the defendants exclusive use of the backyard. Although plaintiffs contend that the prior building owner mistakenly inserted this provision for the first time in the most recent renewal lease, plaintiffs did not establish by admissible proof that they would likely succeed in having the lease reformed to the extent of deleting this provision. Plaintiffs' submissions, even when viewed in the light most favorable to them, failed to establish a mutual mistake which would support a claim to reform the lease (*Commerce Street Corp. v. Star Enterprise,* 14 A.D.3d 504, 505, 788 N.Y.S.2d 149, 150 [2nd Dep't 2005]). If the insertion of this provision was a mistake, as plaintiffs claim, it was a unilateral mistake of the prior building owner. Plaintiffs are not entitled to reform the lease based on a unilateral mistake in the absence of a showing of fraud (*see, Barash v. Pennsylvania Term. Real Estate Corp.,* 26 N.Y.2d 77, 308 N.Y.S.2d 649, 256 N.E.2d 707; *Mantek Services Inc., v. Rye Office Associates,* 149 A.D.2d 671, 540 N.Y.S.2d 311; *Pergament Scarsdale v. Greenville Shopping Center,* 55 A.D.2d 864, 382 N.Y.S.2d 556). Clearly, fraud has not been demonstrated.

The Court rejects plaintiffs' contention that 9 NYCRR 2522.5(g)(1) precluded the prior building owner from inserting the provision in the renewal lease which gave defendants exclusive use of the backyard. 9 NYCRR 2522.5(g), entitled " *Same terms and conditions",* in relevant part, provides: .

> (1) The lease provided to the tenant by the owner pursuant to subdivision (b) of this section shall be on the same terms and conditions as the expired lease, except where the owner can demonstrate that the change is necessary in order to comply with a specific requirement of law or regulation applicable to the building or to leases for housing accommodations subject to the RSL, or with the approval of the DHCR. **Nothing herein may limit the inclusion of authorized clauses otherwise permitted by this Code or by order of the DHCR not contained in the expiring lease . . . .**9 NYCRR 2522.5(g) (emphasis added).

While 9 NYCRR 2522.5(g) generally precludes an owner from offering a renewal lease to a tenant on terms and conditions that are less favorable than the expired lease, this provision should not be construed as precluding an owner from offering a renewal lease to a tenant on terms and conditions that are more favorable (*Missionary Sisters of Sacred Heart, Ill. v. New York State Div. of Housing and Community Renewal*, 283 A.D.2d 284, 287, 724 N.Y.S.2d 742, 745 [1 Dep't 2001] (recognizing that owners may offer tenants a preferential rent). In *Missionary Sisters of Sacred Heart, Ill.* , the Court stated as that "[t]he Rent Stabilization Law, enacted in 1969, was designed to encourage future housing construction by allowing owners to charge reasonable rent increases, as well as to prevent the exaction of "unjust, unreasonable and oppressive rents" and to "forestall profiteering, speculation and other disruptive practices" in the housing market . . . (id.) (citations omitted). The Court went on to state that "[s]urely, requiring a tenant to pay less than the full legal rent, no matter for how short a term, cannot possibly violate any public policy prohibiting the exaction of "unjust, unreasonable and oppressive rents," especially where the tenant is aware of the concession and the limitation on its duration" (283 A.D.2d at 287, 724 N.Y.S.2d at 744 - 745). Allowing a tenant exclusive use of a backyard, just like requiring a tenant to pay less rent, cannot be viewed as violating any public policy prohibiting the exaction of unjust, unreasonable and oppressive rents.

For the above reasons, plaintiff's motion for a preliminary injunction enjoining defendants from harassing plaintiffs and from interfering with their quiet enjoyment of their portion of the backyard and permitting plaintiffs to erect a temporary fence dividing the backyard pending a determination of this action is **DENIED**.

Plaintiffs' motion for a preliminary injunction barring and prohibiting defendants from using plaintiffs names, pictures and images for any advertising or film making purposes is likewise **DENIED**. Plaintiffs have failed to cite to any authority which would entitle them to this relief under the circumstances presented.

Turning to defendant's cross motion, since defendants have asserted counterclaims in their answer which are unrelated to the claims alleged by plaintiffs in their complaint, they have consented to the jurisdiction of the Court (*Textile Technology Exchange, Inc. v. Davis,* 81 N.Y.2d 56, 59, 611 N.E.2d 768, 769, 595 N.Y.S.2d 729, 730 [1993]). Accordingly, their cross-motion,

to the extent it seeks an order dismissing the action on the grounds that the court lacks personal jurisdiction over them due to improper service of process is **DENIED**.

Defendants' cross-motion for summary judgment dismissing plaintiffs' first, second and third cause of action is **GRANTED**. The first, second and third causes of action are premised on plaintiffs' contention that the lease agreement between the parties should be reformed to delete the provision giving defendants exclusive use of the backyard. Plaintiffs contend that the insertion of this provision in the lease by the prior owner was a mistake and the result of fraud and coercion.

In support of their motion for summary judgment dismissing these causes of action, defendants submitted sufficient proof establishing that these causes of action are without merit. In opposition, plaintiffs failed to raise a triable issue of fact. While plaintiff submitted an affidavit from the prior owner who stated that he mistakenly wrote in the lease that the plaintiffs had exclusive use of the back yard, nothing contained in his affidavit raises a triable issue of fact as to whether the mistake was mutual or a product of fraud or coercion. Therefore, plaintiffs failed to demonstrate the existence of triable issues as to whether the lease failed to conform to an actual agreement between the prior owner and the defendants due to due to mutual mistake or unilateral mistake coupled with fraud (*see Southwell v. Middleton,* 67 A.D.3d 666, 670, 890 N.Y.S.2d 57, 61 [2nd Dep't 2009]; *Janowitz Bros. Venture v. 25–30 120th St. Queens Corp.,* 75 A.D.2d 203, 214, 429 N.Y.S.2d 215 [2nd Dep't 1980]). Accordingly, defendants' motion, insofar as it seeks an order granting them summary judgment dismissing the first three causes of action alleged in plaintiffs complaint, is **GRANTED** and it is hereby declared that the defendants have exclusive use of the back yard pursuant to their lease agreement with the prior owner. Plaintiffs are hereby enjoined from interfering with defendants' use and enjoyment of the backyard.

Defendants' motion for a temporary restraining order and preliminary injunction enjoining plaintiffs from entering or using the back yard of 247 Devoe Street, Brooklyn, New York pending the determination of this action is **DENIED** as moot.

While defendants also seek summary judgment dismissing the fourth cause of action alleged in plaintiffs complaint, defendants do not provide a factual or legal basis for dismissing this cause of action. Indeed, defendants failed to address the fourth cause of action in any meaningful way and their cross-motion. Accordingly, defendants' motion, insofar as it seeks an order granting them summary judgment dismissing the fourth cause of action, is **DENIED**.

This constitutes the decision and order of the Court.

Dated: September 4, 2014

PETER P. SWEENEY, A.J.S.C.

HON. PETER P. SWEENEY, J.S.C.