

LaBrew v Sheridan One Co., LLC

2015 NY Slip Op 30571(U)

March 17, 2015

Sup Ct, Bronx County

Docket Number: 301942-2014

Judge: Julia I. Rodriguez

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF THE BRONX

-----X **Index No. 301942-2014**

Lawrence LaBrew,
Plaintiff,

-against-

DECISION and ORDER

Sheridan One Company, LLC

Present:

Defendant.

Hon. Julia I. Rodriguez
Supreme Court Justice

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Recitation, as required by CPLR 2219(a), of the papers considered in review of defendant's motion to dismiss the complaint pursuant to CPLR §§3211(a)(1) and (a)(7) and plaintiff's motion to extend time to respond to defendant's motion to dismiss.

<u>Papers Submitted</u>	<u>Numbered</u>
Def's. Notice of Motion, Affirmation & Exhibits	1
Def's. Memorandum of Law	2
Pls. Notice of Motion, Affidavit & Exhibits	3
Pls. Memorandum of Law	4

Plaintiff commenced the instant action to recover damages for malicious prosecution and abuse of process. The complaint alleges that on November 1, 2012 Plaintiff mailed Defendant a check in the amount of \$2,247.80 which check posted to Plaintiff's bank account on November 29, 2012. The complaint further alleges that on December 4, 2012 Defendant, without probable cause, filed a Notice of Petition of non-payment in Bronx County Housing Court to recover \$2,247.80 and for a final judgment of eviction. Plaintiff filed an answer with counterclaims and alleged that payment in full was made prior to the filing of the papers in the Housing Court proceeding. On January 4, 2013, a default judgment was entered against Defendant in the amount of \$2,172.18 and, the complaint alleges, a warrant of eviction was scheduled to issue after January 9, 2013. On January 29, 2013 the default judgment was vacated and the case was restored to the court's calendar. On April 9, 2013, the Housing Court Petition was dismissed on the ground that payment had been made. The complaint alleges that Defendant commenced the

nonpayment proceeding with knowledge that the amount due was paid in full because Plaintiff “has complained about the Defendant’s breach of the warranty of habitability.” The complaint also alleges that “Plaintiff was wrongfully forced to face the prospect of eviction from Plaintiff’s residence, Plaintiff was forced to begin a search to find a place to live, Plaintiff had to take steps to move personal property to storage if Plaintiff was evicted, Plaintiff was compelled to employ an attorney, all to Plaintiff’s damage.”

On March 11, 2013, Plaintiff moved for summary judgment dismissing the Petition on the ground that he paid the amount due in full. Defendant cross-moved to amend the Petition to add rent arrears that had accrued since November 29, 2012. Plaintiff’s motion was granted, defendant’s cross-motion was denied, and the Petition was dismissed. Defendant commenced a second nonpayment proceeding against Plaintiff by filing a Petition dated April 24, 2013. Defendant prevailed in that proceeding and was awarded possession and \$7,389.78 from Plaintiff.

Defendant seeks the dismissal of the complaint on the grounds that it fails to state a claim upon which relief can be obtained [3211(a)(7)] and upon documentary evidence [3211(a)(1)].

Plaintiff moves for an extension of time to respond to Defendant’s motion to dismiss and submitted his opposition papers with the motion. In his affidavit, Plaintiff states that he has been dealing with a serious medical condition involving his brother which has caused his delay in responding to the motion. Under these circumstances and given the short delay and lack of opposition by Defendant, Plaintiff’s motion is **granted** and the court will consider his opposition papers.

In support of the motion, Defendant submitted, *inter alia*, a Resident Ledger indicating Plaintiff’s rent payments and charges for the period beginning 10/6/01 until 8/1/14, Notices of Petition of Non-Payment against Plaintiff dated 11/28/12 and 4/25/13, the affidavit of Lori Mark, a litigation manager for Defendant, and two Housing Court decisions. The Resident Ledger indicates that on November 29, 2012 Defendant received a check in the amount of \$2,247.80 from Plaintiff. The Notice of Petition indicates that the Petition was signed and verified on November 28, 2012. In her affidavit, Lori Mark states that she was unaware that the process

server had not filed the Petition until December 4, 2012. Mark claims that Plaintiff paid the rent demanded after the Petition was given to the process server. Mark also states that Defendant did not apply for a warrant of eviction after the default judgment was issued.

In the Housing Court decision dated April 9, 2013, Defendant's Petition to recover the \$2,247.80 from Plaintiff was dismissed based upon Plaintiff's payment of the full amount due. In the Housing Court decision dated January 14, 2014, Defendant was awarded \$7,398.78 and final possession based upon rental arrears for the period beginning in December of 2012 and ending December 31, 2013.

In opposition to Defendant's motion, Plaintiff reiterates the allegations in the complaint and adds that he contacted Defendant in December of 2012, after the Petition had been filed, and inquired as to why he was being sued since he had paid the outstanding arrears in full. According to Plaintiff, he was told to "go file an answer." Plaintiff does not state with whom he spoke. Plaintiff also alleges that "[t]here were complaints about a lack of heat and the tenants signed a Petition" regarding the lack of heat, which he attached to his affidavit. Plaintiff also alleges that Defendant has treated tenants in the Bronx "recklessly, negligently, and with deliberate indifference." Plaintiff further alleges that the Housing Court action was filed because "Plaintiff was complaining about a lack of heat." Plaintiff attached a newspaper article to his affidavit which details several tenant complaints made against Defendant, none of which concerned a lack of heat.

* * * * *

Abuse of process has three essential elements: (1) regularly issued process, (2) intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective. *Curriano v. Suozzi*, 63 N.Y.2d 113, 469 N.E.2d 1324 (1984); *Board of Education of Farmingdale v. Farmingdale Classroom Teachers Assoc., Inc.*, 38 N.Y.2d 397, 380 N.Y.S.2d 635 (1975). In order for an abuse of process action to lie "there must be an unlawful interference with one's person or property under color of process or order." See *Williams v. Williams*, 23 N.Y.2d 592, 596, 246 N.E.2d 333 (1969). To succeed on a malicious prosecution claim, the plaintiff must prove malice (a purpose other than the adjudication of a

claim), lack of probable cause to believe the action will succeed, a highly substantial and identifiable interference with person, property, or business, and that the civil prosecution ended in failure. *Engel v. CBS, Inc.*, 93 N.Y.2d 195, 711 N.E.2d 626 (1999).

At the outset, the Court notes that on a motion to dismiss pursuant to CPLR 3211(a)(1) or (a)(7), it is not appropriate to consider the substance of affidavits. However, documents introduced pursuant to an affidavit may be considered. As such, in determining Defendant's motion, the court will not consider the affidavits of Mark or Plaintiff

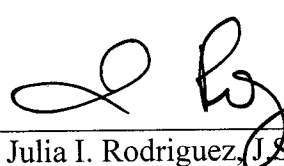
Upon careful consideration of the relevant submissions of the parties, and upon reviewing the complaint, the Court finds that the allegations in the complaint, which are assumed to be true, are sufficient to state a claim for both abuse of process and malicious prosecution. However, the documentary evidence proffered establishes that Defendant has a defense to those claims. The Resident Ledger demonstrates that Plaintiff's \$2,247.80 payment did not post to Defendant's records until November 29, 2012. As the Petition is dated November 28, 2012, it seems clear that, at the time the Petition was signed the Defendant believed the allegations therein to be true. That counsel did not effect the filing of the Petition until December 4, 2012 is insufficient to establish actual malice or lack of probable cause on the part of the Defendant as required for a malicious prosecution claim. *See Ford Motor Credit Company v. Hickey Ford Sales, Inc.*, 62 N.Y.2d 291, 336, 476 N.Y.S.2d 791, 797. It is also insufficient to establish an intent to do harm without excuse or justification or the use of the process in a perverted manner to obtain a collateral objective as required for an abuse of process cause of action. The clear purpose of the filing of the Petition of Nonpayment was to recover rental arrears reasonably believed to have been owed to Defendant by Plaintiff. That defendant signed a petition, along with 71 other tenants, complaining of a lack of heat is insufficient to rebut Defendant's showing of a legitimate purpose in filing the Petition Of Nonpayment. The court also notes that, while the Defendant's initial Petition was dismissed, in a subsequent proceeding in Housing Court, Plaintiff was found to have been in arrears on his rent for the period beginning in December of 2012 until at least December 31, 2013.

Based on the foregoing, Defendant's motion to dismiss pursuant to CPLR 3211(a)(7) is **denied**. However, Defendant's motion to dismiss pursuant to CPLR 3211(a)(1) is **granted**, and therefore it is

ORDERED that the complaint against Defendants is hereby dismissed.

The clerk is directed to enter judgment in accordance herewith.

Dated: Bronx, New York
March 17, 2015

 3/17/2015

Hon. Julia I. Rodriguez, J.S.C.