Khazanov v 2800 Coyle St. Owners Corp.
2015 NY Slip Op 31437(U)
July 16, 2015
Supreme Court, Kings County
Docket Number: 504597/14
Judge: Wavny Toussaint

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 16th day of July, 2015.

P R E S E N T:

HON. WAVNY TOUSSAINT,
Justice.

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MARK KHAZANOV,

Plaintiff,

- against -

Index No. 504597/14

2800 COYLE STREET OWNERS CORPORATION, SVETLANA MARMER, ALEC SAUCHIK AND STEVE POLYAKOV,

Defendants.

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The following papers numbered 1 to 6 read herein:

	Papers Numbered
Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	1, 2-3, 4-5
Opposing Affidavits (Affirmations)	
Reply Affidavits (Affirmations)	
Affidavit (Affirmation)	
Other Papers Complaint & Exhibits	6

Upon the foregoing papers, defendants 2800 Coyle Street Owners Corporation (2800 Coyle), Svetlana Marmer, Alec Sauchik and Steve Polyakov, move for an order: (1) pursuant to CPLR 3211 dismissing the complaint, and (2) imposing sanctions against plaintiff.

Plaintiff cross moves for an order: (1) denying defendants' motion and (2) granting judgment on the complaint.

Plaintiff Mark Khazanov alleges that he is entitled to monetary damages and injunctive relief against defendants based on prior harassment and improper retaliation for plaintiff's asserting his legal rights. Plaintiff is a shareholder of 2800 Coyle, the owner of a cooperative apartment building, and, pursuant to a proprietary lease, a lessee of an apartment unit in 2800 Coyle's building. Defendant Svetlana Marmer is the president of 2800 Coyle's board of directors and defendants Alec Sauchik and Steve Polyakov are attorneys who have represented 2800 Coyle in legal proceedings involving 2800 Coyle and plaintiff.

In the complaint, plaintiff alleges that, in August 2011, he requested the contract between DOM Management, Ltd. and 2800 Coyle. Receiving no answer based on this request, in October 2011, plaintiff commenced a small claims action (index no. 6304/11) against 2800 Coyle. Plaintiff also asserts that, in September 2011, 2800 Coyle improperly imposed late fees on his maintenance account. In order to challenge these fees, plaintiff, in October 2011, commenced a separate small claims action (index no. 6303/11) against 2800 Coyle. In April and May 2012, while the small claims actions were pending, 2800 Coyle separately charged $792 and $288 to plaintiff's maintenance account for the legal fees in the small claims actions. Plaintiff asserts that in June 2012, he and 2800 Coyle entered into stipulated settlements of the small claims actions, which settlements provided that he would

receive a $60 credit on his maintenance account and $15 in court fees relating to index no. 6303/11 and $30.30 credit and $15 court fee relating to index no. 6304/1.

Plaintiff further alleges that in February 2012, 2800 Coyle removed and broke a security camera plaintiff had placed on the front door of his apartment. As plaintiff considered this removal improper, in June 2012 he commenced another small claims action (808/12). 2800 Coyle charged $744 to plaintiff's account for legal fees relating to this small claims action despite plaintiff's assertion that 2800 Coyle was not the prevailing party in the small claims action.

In June 2012, plaintiff made a request for a reasonable accommodation relating to a disability. The request was denied by the board of 2800 Coyle. In light of this denial, plaintiff, in September 2012, filed a complaint (Case Number 10157208) with the New York State Division of Human Rights (NYSDHR) regarding the accommodation request. Prior to the June 2013 finding of probable cause by the NYSDHR, plaintiff alleges that, in November 2012, 2800 Coyle charged $1,000 in legal fees to his maintenance account relating to the NYSDHR proceeding. During the course of the NYSDHR proceeding, plaintiff asserts that 2800 Coyle, through its management company, refused or failed to properly credit the maintenance checks he had mailed.

According to plaintiff, in December 2012 based on the improper legal fees, improper failure to accept checks and improper late fees, 2800 Coyle, sent plaintiff a 10 day demand to pay the amounts allegedly due or surrender possession of his apartment. In January 2013,

2800 Coyle commenced an eviction/non-payment proceeding in New York City Civil Court, Kings County (Index no. 61122/13). 2800 Coyle discontinued the eviction/non-payment action in August 2013.

Finally, plaintiff asserts that Marmer, Sauchik and Polyakov lied, testified falsely and gave false affirmations and documentation during the course of the eviction/non-payment proceeding under Index no. 61122/13 and as part of motions to vacate judgments filed by plaintiff relating to the small claims actions under Index numbers 6303/11 and 6304/11.

Based on the alleged improper charging of legal fees to his maintenance account, plaintiff, in April 2014, commenced an action seeking recovery of those fees on the ground that 2800 Coyle, despite the fee provision contained in the proprietary lease,[1] was not the prevailing party in the prior actions, and was thus not entitled to charge plaintiff for its legal fees (Supreme Court, Kings County Index no. 5407/14).

In May 2014, plaintiff commenced this action based on the factual allegations outlined above, in which he seeks the entry of a judgment providing for: (1) the filing of criminal charges against Marmer, Sauchik, and Polyakov relating to the alleged perjury committed during the course of the eviction/non-payment proceeding under Index no. 61122/13 and as part of motions to vacate judgments filed by plaintiff as part of the small claims actions under

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[1] Paragraph 28 of the proprietary lease provides that, "[i]f the Lessee shall at any time be in default hereunder and the Lessor shall incur any expense (whether paid or not) in performing acts which the Lessee is required to perform, or in instituting any action or proceeding based on such default, or defending or asserting a counterclaim in, any action or proceeding brought by the Lessee, the expense thereof to the Lessor, including reasonable attorneys' fees and disbursements, shall be paid by the Lessee to the Lessor, on demand, as additional rent."

Index numbers 6303/11 and 6304/11; (2) awarding injunctive relief, civil fines and penalties, and punitive damages on the ground that defendants improperly retaliated against plaintiff in violation of Administrative Code § 27-2005 (d), Real Property Law § 223-b, and Executive Law Art. 15; and (3) awarding civil fines and penalties and punitive damages and certain compensatory damages based on defendants harassment of plaintiff pursuant to Administrative Code § 27-2115 (m) (2).

Defendants now move to dismiss pursuant to various grounds under CPLR 3211, including that plaintiff has failed to state a cause of action (CPLR 3211 [a] [7]), that the instant action is barred by the previous action commenced under Index no. 5407/14 (CPLR 3211 [a] [4]), and that plaintiff failed to properly serve the summons and complaint on defendants (CPLR 3211 [a] [8]). Defendants also seek the imposition of sanctions pursuant to 22 NYCRR 130-1.1 (a) on the ground that the instant action is frivolous. Plaintiff cross moves, in essence, for summary judgment in his favor on his causes of action.

DEFENDANTS' MOTION

Considering defendants' motion first, the court finds that the claims against Sauchik and Polyakov, who acted as 2800 Coyle's attorneys, must be dismissed as failing to state a cause of action. "It is well settled that attorneys are 'immunized from liability under the shield afforded attorneys in advising their clients, even when such advice is erroneous, in the absence of fraud, collusion, malice or bad faith'" (*Pecile v Titan Capital Group, LLC*, 96 AD3d 543, 544 [1st Dept 2012] [*quoting Beatie v DeLong*, 164 AD2d 104, 109 (1st Dept

1990)], *lv denied* 20 NY3d 853 [2013]; *see also Hadar v Pierce*, 111 AD3d 439, 439-440 [1st Dept 2013], *lv denied* 23 NY3d 904 [2014]). Nothing in the complaint or the attached exhibits suggests that Sauchik and Polyakov performed any actions other than in furtherance of the representation of 2800 Coyle (*see Pecile*, 96 AD3d at 544). To the extent that the complaint alleges fraud, collusion, malice or bad faith on the part of the Sauchik and Polyakov, the allegations are wholly conclusory and insufficient to state a claim (*see id.*; *see also Hadar*, 111 AD3d at 439-440).

With respect to plaintiff's assertions that Sauchik, Polyakov and Marmer committed perjury, those allegations only appear to be relevant to plaintiff's claim requesting the filing of criminal charges against Sauchik, Polyakov and Marmer. The request that criminal charges be filed against Sauchik, Polyakov and Marmer, however, fails to state a cause of action, since "it is the district attorney who generally retains sole authority to prosecute such criminal activity" (*Kinberg v Kinberg*, 48 AD3d 387, 387 [1st Dept 2008], *lv denied* 11 NY3d 702 [2008]; *see also Pietra v State of New York*, 71 NY2d 792, 796-797 [1988]; *Schumer v Holtzman*, 60 NY2d 46, 50 [1983]).

Defendants also submit that, to the extent that plaintiff's retaliation and harassment claims are premised on Executive Law Art. 15, they are barred by the election of remedies provision of Executive Law § 297 (9) because they were raised in a complaint filed with NYSDHR under Case No. 10163451.[2] In the NYSDHR determination, the NYSDHR found

[2] There is no issue with respect to the authenticity of the NYSDHR determination submitted by defendants as plaintiff did not object to its consideration (*see Scudera v Mahbubur*,

that 2800 Coyle did not charge the legal fees to plaintiff and serve the 10 day demand on plaintiff in retaliation for his filing of the prior discrimination complaint with the NYSDHR under Case No. 10157208. Although the NYSDHR determination did not expressly address the commencement of the non-payment/eviction action in Civil Court, that action is based on the same failure to pay rent at issue in the 10 day demand addressed by the NYSDHR, and as such, is merely a culmination of the legal process that began with the service of the 10 day demand (*Benjamin v New York City Dept. of Health*, 57 AD3d 403, 404 [1st Dept 2008], *lv dismissed* 14 NY3d 880 [2010]). Accordingly, plaintiff's filing of the complaint under Case No. 10163451 with the NYSDHR bars plaintiff's current claims against all defendants to the extent that they are premised on Executive Law Art. 15 (Executive Law § 297 [9]; *Emil v Dewey*, 49 NY2d 968, 969 [1980]; *Benjamin*, 57 AD3d at 404; *Hirsch v Morgan Stanley & Co.*, 239 AD2d 466, 467-468 [2d Dept 1997]; *Brown v Wright*, 226 AD2d 570, 571 [2d Dept 1996]). The NYSDHR determination and order with respect to Case No. 10163451[3] provide unquestionable documentary evidence that Executive Law § 297 [9] bars these claims (CPLR

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299 AD2d 535, 535 [2d Dept 2002]; *Borchardt v New York Life Ins. Co.*, 102 AD2d 465, 467-468 [1st Dept 1984], *affd for the reasons stated below* 63 NY2d 1000 [1984]) and plaintiff submitted it himself as part of Exhibit G to his complaint (*see 805 Third Ave. Co. v M.W. Realty Assoc.*, 58 NY2d 447, 451-452 [1983]; *Matter of Singer v Prizer*, 96 AD3d 860, 861 [2d Dept 2012]).

[3] Of note, the non-payment/eviction proceeding was commenced based on a 10 day demand dated December 1, 2012 for the same amount of past due rent as demanded in the 10 day demand from November 2012 addressed by the NYSDHR. The court notes that the 10 day demand notices and the petition relating to the non-payment/eviction proceeding are attached as Exhibit A to plaintiff's complaint.

3211 [a] [1] and [a] [7]; *25-01 Newkirk Ave., LLC v Everest Natl. Ins. Co.*, 127 AD3d 850, 851 [2d Dept 2015]).

Plaintiff's claims fail to state a cause of action to the extent that plaintiff asserts that defendants harassed him in violation of Administrative Code § 27-2005 (d). Initially, plaintiff does not have a private right of action under section 27-2005 (d), at least to the extent that he seeks civil fines or penalties or monetary damages, as only the Commissioner of the New York City Department of Housing Preservation and Development (Department of Housing) is entitled to seek such relief for violations of the Housing Maintenance Code (*see Delgado v New York City Hous. Auth.*, 66 AD3d 607, 608 [1st Dept 2009]). While plaintiff could conceivably pursue his requested injunctive relief in Supreme Court despite the relegation of such claims to the Housing Part of the Civil Court in Administrative Code § 27-2120 (b) (*see Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41 [1st Dept 2011]; *cf. Brecker v 295 Cent. Park W., Inc.*, 71 AD3d 564, 565 [1st Dept 2010]), his claims, as pleaded, fail to establish a factual basis for harassment under section 27-2005 (d). In this regard, section 27-2005 (d) adopts the definition of harassment contained in Administrative Code § 27-2004 (a) (48). Under that definition, the single non-payment/eviction proceeding commenced by 2800 Coyle is insufficient to constitute harassment by way of the commencement of repeated baseless or frivolous court proceedings (Administrative Code § 27-2004 [a] [48] [d]; *Santo v Rose Assoc., Inc.*, 28 Misc3d 1225 [A], 2010 NY Slip Op 51488 * 3-4 [U] [Sup Ct, New York County 2010]). Similarly, the other alleged improper

conduct involving the imposition of improper charges and fees simply does not rise to the level of sufficient significance to warrant finding that it constitutes harassment under the definition contained in section 27-2004 [a] [48]).[4]

However, the facts alleged by plaintiff are sufficient to establish a retaliation claim under Real Property Law § 223-b. The non-payment/eviction proceeding is a "summary proceeding to recover possession of real property" for purposes of Real Property Law § 223-b (1) (*see* RPAPL 711 [2]; *601 W. 160 Realty Corp. v Henry*, 189 Misc 2d 352, 353 [App Term, 2nd Dept. 2001]). Given that this court, in determining the sufficiency of the complaint, must accept as true the facts alleged in the complaint and accord plaintiff the benefit of every possible inference (*see Hurrell-Harring v State of New York*, 15 NY3d 8, 20 [2010]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1995]), this court cannot reject outright plaintiff's factual assertion that the non-payment/eviction proceeding was commenced in retaliation for plaintiff's filing of the NYSDHR complaint (Real Property Law § 223-b [1]

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[4] For example, conduct warranting a finding of harassment includes use of force, repeated interruptions of essential services, removal of possessions, the removal of the unit's front door (Admin. Code § 27-2004 [a] [48] [a], [b], [e], and [f]) and "other repeated acts or omissions of such significance as to substantially interfere with or disturb the comfort, repose, peace or quiet of any person lawfully entitled to occupancy of such dwelling unit and that cause or are intended to cause any person lawfully entitled to occupancy of a dwelling unit to vacate such dwelling unit or to surrender or waive any rights in relation to such occupancy" (Admin. Code § 27-2004 [a] [48] [g]).

[a]),[5] or in retaliation for plaintiff's institution of the small claim proceedings to enforce his rights under the lease (Real Property Law § 223-b [1] [b]).[6]

Certainly relevant to the sufficiency of the retaliation claims are plaintiff's assertions that 2800 Coyle improperly charged his maintenance account for legal expenses related to defending plaintiff's small claims actions. Although paragraph 28 of the proprietary lease allows the imposition of such fees, case law suggests that a lessor may not recover under such a provision unless it is the prevailing party (*see Graham Court Owners Corp. v Taylor*, 24 NY3d 742, 746-747 [2015]; *Community Counseling & Mediation Servs. v Chera*, 115 AD3d 589, 590 [1st Dept 2014]; *Matter of Cohan v Board of Directors of 700 Shore Rd. Waters Edge, Inc.*, 108 AD3d 697, 700 [2d Dept 2013]; *Wood v 139 East 33rd St. Corp.*, 104 AD3d 620, 620 [1st Dept 2013]). Accepting plaintiff's allegations that 2800 Coyle was not the prevailing party and thus was not entitled to the legal fees charged to plaintiff and accepting plaintiff's allegations regarding the failure to properly credit payments made by him, plaintiff has sufficiently alleged grounds suggesting that he was not properly declared in default in paying his maintenance. Such allegations may allow the fact finder to infer that

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[5] Of note, the NYSDHR determination did not address whether plaintiff had a retaliation claim under Real Property Law § 223-b. In the determination, the NYSDHR stated that it was not a proper forum for determining retaliation for purposes of section 223-b. Moreover, defendant has made no argument that the NYSDHR's factual findings collaterally estop plaintiff's section 223-b claim.

[6] The court notes that the presumption of Real Property Law § 223-b (5) has no application since plaintiff is pleading the claim as an affirmative claim under section 223-b (3), and not as a defense (*see 601 W. 160 Realty Corp.*, 189 Misc 2d at 353).

retaliation was the motive behind the commencement of the non-payment/eviction proceeding (*see 601 W. 160 Realty Corp.*, 189 Misc 2d at 353-354).

Defendants' assertion that this action must be dismissed pursuant to CPLR 3211 (a) (4) upon the ground that there is another action pending is rejected. Although the pleadings in the prior action commenced under Supreme Court, Kings County Index no. 5407/14 share a common core of factual issues, plaintiff's current allegations of retaliation, which are primarily premised on the commencement of the non-payment/eviction proceeding, pleads an entirely separate cause of action based on a distinct actionable wrong (*see Kent Dev. Co. v Liccione*, 37 NY2d 899, 901-902 [1975]; *see Whitehall Tenants Corp. v 3333 Operating Corp.*, 190 AD2d 595, 595 [1st Dept 1993]; *Five Riverside Drive Towers Corp. v Chenango, Ltd.*, 111 AD2d 1025, 1026 [3d Dept 1985]; *cf. Feustel v Rosenblum*, 24 AD3d 549, 550 [2d Dept 2005]; *White Light Prods. v On the Scene Prods.*, 231 AD2d 90, 93-95 [2d Dept 1997]). Given that both actions share common questions of fact and law, however, it would appear that consolidation or joint trial of the actions would be appropriate in order to conserve judicial resources and to avoid inconsistent results (*see Shanley v Callanan Indus.*, 54 NY2d 52, 57 [1981]; *New York Annual Conference of Methodist Church v Nam Un Cho*, 156 AD2d 511, 514 [2d Dept 1989], *lv dismissed* 75 NY2d 947 [1990]). The court will thus consider the issue of consolidation in the event that the action continues following the traverse hearing (*see Kent Dev. Co.*, 37 NY2d at 902; David D. Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:19); Discussed below.

With respect to the portion of defendants' motion requesting dismissal pursuant to CPLR 3211 (a) (8), 2800 Coyle and Marmer assert that the court does not have personal jurisdiction over them because plaintiff did not properly serve them.[7] A process server's affidavit of service ordinarily constitutes prima facie evidence of proper service (*see Deutsche Bank Natl. Trust Co. v Pestano*, 71 AD3d 1074, 1074 [2d Dept 2010]; *Bankers Trust Co. of Cal. v Tsoukas*, 303 AD2d 343, 343-344 [2d Dept 2003]). 2800 Coyle and Marmer, however, have rebutted the prima facie showing with Marmer's affidavit in which she asserts that neither Roman Kalika, or his apparent employer, Dependable Property Management, Inc., (Dependable) were authorized to accept service on the behalf of 2800 Coyle or Marmer.

The fact that 2800 Coyle used Dependable as a managing agent to manage its property does not, in and of itself, mandate a finding that it was authorized to accept service of process and does not make it a "managing agent" for purposes of CPLR 311 (a) (1) (*see Lawrence v Ruskin*, 186 AD2d 485, 485 [1st Dept 1992]; *cf. Societe Generale v Charles & Co., Acquisition*, 157 Misc 2d 643, 645 [Sup Ct, New York County 1993] [defendant's declaration of condominium appointed managing agent as agent to accept service on its behalf]). Accordingly, Marmer and 2800 Coyle have demonstrated the existence of a factual issue with respect to the propriety of service warranting a hearing (*see Teitlebaum v North*

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[7] Although Sauchik and Polyakov also contend that they were not properly served, the court has not addressed their assertions regarding the propriety of service in light of its dismissal of the action as against them for failing to state a cause of action.

Shore-Long Is. Jewish Health Sys., Inc., 123 AD3d 1006, 1007 [2d Dept 2014]; *Deutsche Bank Natl. Trust Co.*, 71 AD3d at 1074-1075; *Bankers Trust Co. of Cal.*, 303 AD2d at 344).

Finally, with respect to defendants' request that plaintiff be sanctioned pursuant to 22 NYCRR 130-1.1, the court finds that, while several of plaintiff's causes of action must be dismissed, they are not so devoid of merit to warrant sanctioning plaintiff for frivolous conduct (*see Global Events LLC v Manhattan Ctr. Studios, Inc.*, 123 AD3d 449, 450 [1st Dept 2014]; *Stone Mtn. Holdings, LLC v Spitzer*, 119 AD3d 548, 550-551 [2d Dept 2014]). In addition, while defendants' papers may show plaintiff to be litigious, they do not show that plaintiff has commenced frivolous actions and proceedings with the intention of harassing or punishing defendants (*cf. Jackson v Deer Park Ventures*, 9 Misc 3d 1123 [A], 2005 NY Slip Op 51762 *7-8 [Sup Ct, Kings County 2005]).

PLAINTIFF'S CROSS MOTION

Turning to plaintiff's cross-motion, although not so labeled, the requested relief of judgment on the complaint is the equivalent of a request for summary judgment. It would be premature to grant summary judgment, however, as issue has not yet been joined and the parties have not charted a summary judgment course warranting consideration of the motion prior to joinder of issue (*see City of Rochester v Chiarella*, 65 NY2d 92, 101-102 [1985]; *Harrison v Samaritan Med. Ctr.*, 128 AD3d 1469 [4th Dept 2015]; *Gaskin v Harris*, 98 AD3d

941, 942 [2d Dept 2012]). Plaintiff's requested relief of judgment on the complaint is therefore denied.

Accordingly, the portion of defendants' motion requesting dismissal pursuant to CPLR 3211 (a) (1) and (a) (7) is granted to the extent that the complaint is dismissed in its entirety as against defendants Alec Sauchik and Steve Polyakov. Further, defendant's motion is granted as to that portion of the complaint requesting the filing of criminal charges against defendant Svetlana Marmer (plaintiff's complaint did not address criminal charges against defendant 2800 Coyle). In addition, the portions of the complaint premised on violations of Executive Law Article 15 and Administrative Code of the City of New York §§ 27-2005 [d] and 27-2115 [m] [2]) are dismissed as against defendant Svetlana Marmer and defendant 2800 Coyle. The portion of defendants' motion requesting dismissal pursuant to CPLR 3211 (a) (8) is granted to the extent that a traverse hearing will be held before a Judicial Hearing Officer (JHO) to determine the propriety of the service on defendants Marmer and 2800 Coyle. The court will refer the hearing to the JHO, and the JHO once assigned, will contact the parties to set up a date and time for the hearing.

Plaintiff's cross motion is denied.

This constitutes the decision and order of the court.

E N T E R,

J. S. C.