

**Louis v New York City Hous. Auth.**

2016 NY Slip Op 32448(U)

November 17, 2016

Supreme Court, Bronx County

Docket Number: 301338/15

Judge: Barry Salman

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF BRONX

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MESLINE LOUIS INDIVIDUALLY AND ON BEHALF OF  
INFANTS: G.A.H., G.A.L., AND N.V.S.,                    **DECISION AND ORDER**

Plaintiff(s), Index No: 301338/15

- against -

NEW YORK CITY HOUSING AUTHORITY,

Defendant(s).

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In this action for negligence, breach of contract and violation of NY Exec. Law § 296.18(2), defendant moves for an order dismissing the complaint in its entirety. Specifically, defendant seeks (1) dismissal of the cause of action for negligence pursuant to CPLR § 3211(a)(5) on grounds it is barred by the applicable statute of limitations; (2) dismissal of the cause of action for breach of contract pursuant to CPLR § 3211(a)(1) on grounds that the documentary evidence establishes the absence of any contract between the parties; and (3) dismissal of the cause of action for a violation of NY Exec. Law § 296.18(2) pursuant to CPLR § 3211(a)(7) on grounds that as per the express language of the statute, no such cause of action lies against defendant. Plaintiffs oppose the instant motion asserting that the complaint states viable causes of action against defendant and that defendant fails to establish entitlement to the relief sought

For the reasons that follow hereinafter, defendant's motion is

granted.

A review of the amended complaint<sup>1</sup>, dated July 2, 2015, establishes that this is an action for alleged negligence, breach of contract, and a violation of NY Exec. Law § 296.18(2) (the NYS Human Rights Law). Within the First cause of action, plaintiffs allege that defendant violated the NYS Human Rights Law inasmuch as beginning in February 2011, it discriminated against plaintiffs, participants in the Section 8 Housing Program, by solely providing vouchers to them and by failing provide assistance to them in procuring appropriate housing. Additionally, plaintiffs allege that the foregoing conduct constitutes a breach of the Voluntary Compliance Agreement (VCA) between defendant and HUD. Within the second cause of action, plaintiffs allege that between 2009 and 2011, plaintiffs notified defendant that their employee was harassing them, sought an emergency housing transfer to no avail and that as a result thereof, defendant was negligent.

Violation of the NYS Human Rights Law

Defendant's motion seeking dismissal of plaintiffs' cause of

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<sup>1</sup> Initially plaintiffs also pleaded a cause of action under the American with Disability Act which precipitated removal of the instant action to the United States District Court Southern District of New York. However, by Memorandum and Order dated January 14, 2016, the foregoing court granted dismissal of the federal causes of action, declined to exercise supplemental jurisdiction over the state law claims, and remanded those causes of action to this Court.

action sounding in a violation of the NYS Human Rights Law is granted pursuant to CPLR § 3211(a)(7) insofar as the complaint fails to state a cause of action. Specifically, a review of the relevant statutes establishes that defendant's status as a public housing authority, which administers the Section 8 Program in New York City does not confer upon it the requisite ownership and possessory interest in the dwellings under the foregoing program so as to make defendant subject to the NYS Human Rights Law.

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) all allegations in the complaint are deemed to be true (*Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Cron v Hargro Fabrics*, 91 NY2d 362, 366 [1998]). All reasonable inferences which can be drawn from the complaint and the allegations therein stated shall be resolved in favor of the plaintiff (*Cron* at 366. In opposition to such a motion a plaintiff may submit affidavits to remedy defects in the complaint (*id.*). The court's role when analyzing the complaint in the context of a motion to dismiss, is to determine whether the facts alleged fit within any cognizable legal theory (*Sokoloff v Harriman Estates Development Corp.*, 96 NY2d 409, 414 [2001]). In fact, the law mandates that the court's inquiry be not limited solely to deciding whether plaintiff has pleaded the cause of action intended, but instead, the court must determine whether the plaintiff has stated any cognizable cause of action (*Leon v Martinez*, 84 NY2d 83, 88 [1994] ["(T)he criterion is

whether the proponent of the pleading has a cause of action, not whether he has stated one." ]).

Here, a review of 42 USC § 1437f(a) establishes that the Section 8 Program aids "low-income families in obtaining a decent place to live and of promoting economically mixed housing." Under the program, it is clear that a housing authority such as defendant has no possessory or ownership interests in the dwelling under the program in that the statute merely allows an agency like defendant to "enter into contracts to make assistance payments to owners of existing dwelling units in accordance with this section" (*id.* at 1437f[b][1]). In fact, the statute defines an owner as a "private person or entity, including a cooperative, an agency of the Federal Government, or a public housing agency, having the legal right to lease or sublease dwelling units" (*id.* at 1437f[f][1]).

Based, on the foregoing, where plaintiffs' cause of actions is premised on defendant's failure to help them find suitable housing, rather than as against defendant as an owner of a dwelling within which plaintiffs resided, it is clear that no violation of the NYS Human Rights Law lies. Significantly, the foregoing statute proscribes discriminatory practices by an "owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement" (Executive Law § 296 [McKinney]). Here, deeming all allegations in the complaint as

true, it is clear that defendant neither owned, operated, nor leased any of the dwellings sought by or within which plaintiffs resided.

Negligence

Plaintiffs' cause of action for negligence must be dismissed insofar as the cause of action for negligence pleaded within the complaint accrued more than one year and ninety days prior to the commencement of this action.

A defendant seeking dismissal of an action as barred by the applicable statute of limitations bears the burden of establishing that the applicable statute of limitations expired prior to the commencement of the action (*Swift v New York Medical College*, 25 AD3d 686, 687 [2d Dept 2006]; *Gravel v Cicola*, 297 AD2d 620, 620 [2d Dept 2002]; *Duran v Mendez*, 277 AD2d 348, 348 [2d Dep 2000]). Pursuant to CPLR § 304, [a]n action is commenced by filing a summons and complaint or summons with notice." If defendant meets his burden, in order to avoid dismissal, it is incumbent upon the plaintiff to present evidence establishing that the cause of action falls within an exception to the statute of limitations (*Gravel* at 621).

Here, where the defendant is an authority any action premised on negligence "shall be commenced within one year and ninety days

after the cause of action therefor shall have accrued" (Public Housing Law § 157 [McKinney]). Any action commenced thereafter is time-barred (*Hlanko v New York City Hous. Auth.*, 23 AD2d 840, 840 [1st Dept 1965], *affd*, 19 NY2d 937 [1967]). Here, within the their Second cause of action, plaintiffs plead personal injuries as a result of negligence, asserting that the tortious conduct defendant's failure to grant them emergency housing transfers between 2009 and 2011. Since the negligence accrued at the time of injury (*Fleishman v Eli Lilly and Co.*, 96 AD2d 825 [2d Dept 1983], *affd*, 62 NY2d 888 [1984]), no later than 2011, this action, commenced in 2015, more than four years thereafter, insofar as premised upon negligence, is time-barred.

Breach of Contract

Plaintiffs' cause of action for breach of contract must be dismissed insofar plaintiffs are not parties to the VCA, the agreement allegedly breached by defendant and the voucher issued by defendant to plaintiffs did not constitute an agreement to assist plaintiffs with the procurement of housing.

Pursuant to CPLR § 3211(a)(1) a pre-answer motion for dismissal based upon documentary evidence should only be granted when "the documentary evidence utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326

[2002]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *IMO Industries, Inc., v. Anderson Kill & Olick, P.C.*, 267 AD2d 10, 10 [1st Dept 1999]). Much like on a motion pursuant to CPLR § 3211(a)(7), on a motion to dismiss pursuant to CPLR § 3211(a)(1), the allegations in plaintiff's complaint are accepted as true, constructed liberally and given every favorable inference (*Arnav Industries, Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner, L.L.P.*, 96 NY2d 300, 303 [2001], *overruled on other grounds by Oakes v Patel*, 20 NY3d 633 [2013] ; *Hopkinson III v Redwing Construction Company*, 301 AD2d 837, 837-838 [3d Dept 2003]; *Fern v International Business Machines Corporation*, 204 AD2d 907, 908-909 [3d Dept 1994]).

Here, the instant cause of action fails, because as pleaded it patently fails to establish all the essential elements of a cause of action for breach of contract, namely "the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages" (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]). To be sure, plaintiffs plead the existence of a contract between defendant and HUD, but never one between themselves and defendant.

Moreover, a review of the voucher submitted by defendant demonstrates that it was not a contract between itself and plaintiffs such that defendant was capable of breaching it. Significantly, at best, the voucher charges defendant qualifying

persons for the Section 8 Program and making payments required thereunder. More significantly, the voucher expressly states that defendant "does not have any liability to any party by the issuance of [the] voucher." Thus, defendant's documentary evidence refutes plaintiffs' factual allegations of a contract imposing the duties and, thus, the breach alleged, thereby conclusively establishing defendant's defense as a matter of law. It is hereby

**ORDERED** that complaint be dismissed, with prejudice. It is further

**ORDERED** that defendant serve a copy of this Decision and Order with Notice of Entry upon all parties within thirty (30) days hereof

Dated November 17, 2016

Bronx, New York

A handwritten signature in black ink, appearing to be 'Barry Salman', written over a horizontal line.

Barry Salman, JSC