

Suissa v Baron
2017 NY Slip Op 31051(U)
April 12, 2017
Supreme Court, Suffolk County
Docket Number: 05895/2010
Judge: William G. Ford
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SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 38 - SUFFOLK COUNTY

COPY

PRESENT:

HON. WILLIAM G. FORD
JUSTICE SUPREME COURT

Motion Date: 01/12/17
Motion Seq #: 007 MG

RONALD SUISSA,

Plaintiff,

-against-

MARCY R. BARON & ADDISON
KLUTCHKO,

Defendants.

PLAINTIFF'S Pro Se:
Steven G. Legum, Esq.
170 Old Country Road
Mineola, NY 11501

DEFENDANT'S COUNSEL:
Marcy R. Baron, Esq.
C/O Addison Klutchko
P.O. Box 161
White Plains, NY 10602

The Court has considered the following on plaintiff's unopposed motion to dismiss defendant's counterclaim:

1. Notice of Motion, Affirmation of Steven G. Legum, Esq. dated August 3, 2016, Exhibits A – I; it is

ORDERED that plaintiff Ronald Suissa's motion to dismiss a counterclaim interposed by defendants *pro se* Marcy R. Baron and Addison Klutchko pursuant to CPLR 3211(a)(7) for failure to state a claim is granted as discussed herein.

The matter presently before the Court has a long history between the parties that will not be unnecessarily belabored here. At present and in its current phase, plaintiff has brought this action against his former paramour, Baron, who resided with him with her son Klutchko at his residence located at 602A Twin Hills Court, East Northport, New York. The action was commenced with plaintiff's filing of the summons and complaint on February 16, 2010. Issue was joined with defendants' service of their answer with counterclaims served on April 30, 2016. By her answer Barron asserts several affirmative defenses and counterclaims for monetary relief.

Essentially, the parties resided together at one point and upon the cessation of their relationship, plaintiff has alleged that Baron remained illegally on his property and retained use and occupancy of his residence. After protracted litigation in Supreme Court and District Court concerning a matrimonial action and a summary eviction, including appeals to the Appellate

Division, Second Department, Suissa has sued essentially seeking return of alleged special or unique personal property, including but not limited to art work, collectibles, antiques, furniture, a model train set, remaining in his home that he alleged defendants have converted. Plaintiff seeks compensatory and punitive damages.

In assessing the adequacy of a cause of action under CPLR 3211(a)(7), the court must afford the pleading a liberal construction (*see* CPLR 3026), accept the facts alleged to be true, accord the pleader the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*JPMorgan Chase Bank, N.A. v. Hunter Grp., Inc.*, 124 AD3d 727, 728, 2 NYS3d 536, 537 [2 Dept 2015]; *Granada Condominium III Assn. v. Palomino*, 78 AD3d 996, 996, 913 NYS2d 668; *see Leon v. Martinez*, 84 NY2d 83, 87, 614 NYS2d 972).

In their answer, defendants make several allegations in support of their counterclaims interposed against plaintiff. In sum and substance, Baron and Klutchko that Baron purchased the East Northport residence with plaintiff and resided there with Klutchko. Defendants state that Suffolk County Third District Court (Hackeling, J.) found after trial on or about August 15, 2009 that defendants had an equitable right of co-ownership or a possessory interest in constructive trust. Defendants' version of the facts states that District Court's ruling was appealed, but that the appeal was subsequently abandoned.

Baron further claims that although plaintiff commenced a holdover proceeding in Third District Court against her seeking eviction, that matter was terminated in her favor. Defendants assert that a further and additional eviction proceeding was brought against them in May 2009 to no avail. Defendants allege that plaintiff sought to compel a sale via an action brought in September 2009, but voluntarily withdrew that matter.

On the merits, defendants claim that plaintiff sought their removal from the property by order to show cause seeking a temporary restraining order. Defendants believe this violated the CPLR because plaintiff purportedly did not seek a preliminary injunction. At either rate, as a result of plaintiff's application Supreme Court (Mayer, J) a warrant of eviction issued. Baron argues that this violated her rights pursuant to RPAPL § 749 which she interprets as prohibiting a court from issuing a warrant of eviction absent holding proceedings and specifically dispossessing the alleged offending parties. Defendants contend that due to the issuance of the warrant, they were locked out of the East Northport premises on or about November 11, 2010. Defendants thus believe this was in direct conflict with District Court's finding of equitable ownership or possessory interest under constructive trust.

Plaintiff seeks dismissal of defendant's counterclaims for several reasons. First and foremost, plaintiff argues that the counterclaim is barred as a matter of law as untimely. Suissa first alleges that defendants voluntarily quit the East Northport premises sometime in November 2011 in compliance with the warrant of eviction issued by Supreme Court. Plaintiff thus disputes defendants' interpretation of the underlying facts insofar as plaintiff was awarded a receiver of the East Northport property while defendants failed to pay any rents as required by the order or receivership. Additionally, plaintiff notes that defendants were found in civil contempt in an order issued by Supreme Court dated October 13, 2010, which gave them an opportunity to purge by surrendering their use and occupancy and return of personal property contained therein. Defendant failed to do so, prompting plaintiff seeking and Supreme Court

issuing a warrant of eviction. Suissa claims that defendants unsuccessfully appealed that matter to the Appellate Division.

Generally speaking under the CPLR a counterclaim is not barred if it was not barred at the time the claims asserted in the complaint were interposed” (CPLR 203[d]), except that if the counterclaim arose from “the transactions, occurrences, or series of transactions or occurrences, upon which a claim asserted in the complaint depends, it is not barred to the extent of the demand in the complaint notwithstanding that it was barred at the time the claims asserted in the complaint were interposed” (*Marshall v. Bonica*, 86 AD3d 595, 596, 928 NYS2d 48, 50 [2d Dept 2011]).

Thus, a motion to dismiss a counterclaim properly lies if that counterclaim is untimely and outside the applicable statute of limitations (*Rothschild v. Indus. Test Equip. Co.*, 203 AD2d 271, 271, 610 NYS2d 58, 59 [2d Dept 1994]; *Boccone v. Island Fed. Mortg. Corp.*, 261 AD2d 350, 350, 689 NYS2d 184, 185 [2d Dept 1999][counterclaim dismissed where it did not relate to the same transactions or occurrences referred to in the original complaint or the original answer and was otherwise is time-barred]).

A claim under the RPAPL for wrongful has a one year statute of limitations which begins to run when “it is reasonably certain that the tenant has been unequivocally removed with at least the implicit denial of any right to return”(*PK Rest, LLC v. Lifshutz*, 138 AD3d 434, 436–37, 30 NYS3d 13, 16–17 [1st Dept 2016]; *Gold v. Schuster*, 264 AD2d 547, 549, 694 NYS2d 646, 648–49 [2d Dept 1999][Wrongful eviction” claims are governed by the one-year Statute of Limitations applicable to intentional torts generally which begins to run at such time that it is reasonably certain that the tenant has been unequivocally removed with at least the implicit denial of any right to return]).

“To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises.” An actual eviction occurs only when the landlord wrongfully ousts the tenant from physical possession of the leased premises and there must be a physical expulsion or exclusion. On the other hand, constructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises (*Marchese v. Great Neck Terrace Associates, L.P.*, 138 AD3d 698, 699–700, 29 NYS3d 432, 434 [2d Dept 2016]), *leave to appeal dismissed*, 27 NY3d 1125 [2016]).

The Appellate Division has previously affirmed the motion court’s dismissal of a claim for wrongful eviction under RPAPL § 853 under similar circumstances. Specifically, where tenant was unable to allege with specificity that he/she was entitled to use and occupancy of the subject premises, a motion to dismiss was affirmed as entitlement to possession and occupancy is an considered an essential element of that claim. (*Dinger v. Cefola*, 133 AD3d 816, 817–18, 20 NYS3d 416, 418 [2d Dept 2015]).

In order for a party to bring a claim for abuse of process, three elements must be met: (1) there must be “regularly issued process, either civil or criminal;” (2) there must be “an intent to do harm without excuse or justification;” and (3) there is a “use of the process in a perverted

manner to obtain a collateral objective” (*Curiano v. Suozzi*, 63 NY2d 113). All three elements must be established in order to have a cause of action for abuse of process (*Mago v. Singh*, 47 AD3d 772, 851 NYS2d 593 [a counterclaim failed because it failed to allege “any actual misuse of the process to obtain an end outside its proper scope”]). “A claim to recover damages for abuse of process cannot be based on the mere commencement of an action by summons and complaint, without unlawful interference with person or property” (*Island Fed. Credit Union v. Smith*, 60 AD3d 730, 875 NYS2d 198).

Plaintiff argues that defendant’s counterclaim for wrongful eviction or abuse of process must fail and his motion must be granted as it, on its face, fails to state a legally cognizable claim. Here, plaintiff argues that all of the steps that culminated in defendants being evicted from plaintiff’s residence were pursuant to litigation between the parties, argument and procedural devices or mechanism therein undertaken in good faith by plaintiff. Plaintiff further argues that at every turn its actions were reviewed and affirmed by the Second Department, thus further buttressing the good faith and legal correctness of its position relative to defendant’s assertion of wrongful eviction or abuse of process as far as plaintiff’s assertion of ownership of his property is concerned.

This Court notes despite the vehemence of defendants arguments and positions in this litigation, that it has not received any papers filed in opposition to plaintiff’s motion, originally returnable before the Court on September 1, 2016 and subsequently adjourned to January 12, 2017.

Therefore, given the parties respective positions, applying the relevant Second Department’s guidance and precedent to the facts at bar, this Court finds that plaintiff’s motion has meritorious and persuasive. The Court is cognizant of the long and bitter litigious history between the parties. Defendants may well engender strong subjective feelings stemming from a long protracted, but mostly unsuccessful history of litigating their dispute against plaintiff in the court system at various levels and venues. However, these subjective feelings do not ripen into legally valid or cognizable claims, as defendants have attempted to assert here as counterclaims as against plaintiff, absent colorable or meritorious claims or competent and admissible proof. Plaintiff’s actions in seeking partition, receivership, ejectment of defendants from his property, and vigorously defending his victories in Supreme Court to the Second Department bear the hallmarks of hotly contested litigation. That the parties are locked in such litigation and may bear bitter feelings towards one another does not by itself constitute bad faith or unwarranted or frivolous conduct as defendants seem to suggest. Rather and to the contrary, the present record lacks any objective evidence that plaintiff has taken these actions, affirmed by the Appellate Division, without sound legal footing. As a result, this Court finds that defendants’ assertions of wrongful eviction and abuse of process are lacking and fail on both accounts.

Accordingly, plaintiff’s motion to dismiss defendant’s counterclaim sounding in the nature of wrongful eviction or abuse of process is hereby **GRANTED**.

Therefore, it is

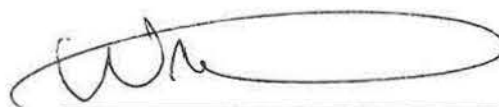
ORDERED that portion of defendant's answer containing or pleading a counterclaim against plaintiff Ronald Suissa asserting claims for wrongful eviction or abuse of process is hereby dismissed from this action; and it is further

ORDERED that plaintiff serve a copy of this decision and order with notice of entry on defendants via personal service to occur on or before May 15, 2017; and it is further

ORDERED that the parties **are directed to appear before this Court on June 13, 2017 at 10:00 a.m., for a discovery status conference** at which the parties shall be prepared to discuss whatever pretrial disclosure is left outstanding preventing certification of this matter.

The foregoing constitutes the decision and order of this Court.

Dated: April 12, 2017
Riverhead, New York



WILLIAM G. FORD, J.S.C.

 FINAL DISPOSITION

 X NON-FINAL DISPOSITION