

Miele v Fisher
2018 NY Slip Op 32195(U)
September 6, 2018
Supreme Court, New York County
Docket Number: 652856/16
Judge: Lynn R. Kotler
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. LYNN R. KOTLER, J.S.C.

PART 8

RICH MIELE

INDEX NO. 652856/16

MOT. DATE

- v -

HOLLY FISHER and SUELLEN EPSTEIN

MOT. SEQ. NO. 002 and 003

The following papers were read on this motion to/for dismiss

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits

NYSCEF DOC No(s). _____

Notice of Cross-Motion/Answering Affidavits — Exhibits

NYSCEF DOC No(s). _____

Replying Affidavits

NYSCEF DOC No(s). _____

According to plaintiff's second amended complaint, "[t]his action arises out of a residential lease between the plaintiff Rich Miele ("Plaintiff"), and defendant Holly Fisher ("Fisher")... and, the intentional interference with that Lease, among other tortious conduct, by defendant SuEllen Epstein ("Epstein")..." Before the court are two motions to dismiss certain of plaintiff's claims. In motion sequence number 002, Epstein moves, pre-answer, to dismiss the claims asserted against her and for sanctions. In motion sequence number 003, Fisher moves to dismiss the cause of action for retaliatory eviction. Plaintiff opposes both motions. The motions are hereby consolidated for the court's consideration and disposition in this single decision/order. The court's decision follows.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

The facts are as follows. Fisher owns the condominium located at 9 Murray Street, #10NW, New York, NY (the "apartment"), which she leased to plaintiff pursuant to a residential lease dated November 17, 2014. Plaintiff and Epstein are neighbors in the same building whose windows directly face each other across an airshaft. This action was originally commenced against Fisher, only, based upon claims of breach of the warranties of habitability and quiet enjoyment and fraud. The second amended complaint asserts a new claim of retaliatory eviction against Fisher. As for Epstein, plaintiff asserts three claims against her: tortious interference with plaintiff's lease, tortious interference with plaintiff's prospective lease renewal and *prima facie* tort.

The court will first consider Epstein's motion. She argues that plaintiff's claims against her in this action should be dismissed: [1] because the claims duplicate those alleged in a private nuisance action pending before this court entitled *Miele v. Epstein*, 154048/16 (the "first action"); [2] because plaintiff has failed to state a cause of action; and [3] based upon documentary evidence.

Dated: 9/6/18


HON. LYNN R. KOTLER, J.S.C.

1. Check one:

☐ CASE DISPOSED ☒ NON-FINAL DISPOSITION

2. Check as appropriate: Motion is

☐ GRANTED ☐ DENIED ☒ GRANTED IN PART ☐ OTHER

3. Check if appropriate:

☐ SETTLE ORDER ☐ SUBMIT ORDER ☐ DO NOT POST

☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

Meanwhile, plaintiff argues that Epstein misapplies the standard on a motion to dismiss and the purported documentary evidence does not conclusively establish a defense.

At the outset, the court finds that plaintiff's claims against Epstein in this action are not duplicative of the asserted in the first action. Indeed, while the claims in both cases arise from the same operative set of facts and involve the same parties, they are based upon different legal theories and are factually distinguishable. Indeed, the court has consolidated these actions because they are related, but just because claims are related does not mean that they are duplicative. Plaintiff is not foreclosed from interposing new claims in subsequent action. Further, the parties stipulated to plaintiff's filing of the second amended complaint. Therefore, defendant's argument on this point is rejected.

Next, the court finds that Fisher has not established entitlement to relief based upon CPLR § 3211[a][1]. Indeed, her notice of motion was not brought based upon that provision, but only pursuant to CPLR 3211[a][4] and [7]. Even if properly noticed, such a request for relief must be denied because the motion is not actually based upon documentary evidence.

Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88). Documentary evidence is "unambiguous, authentic and undeniable", such as "[j]udicial records, documents reflecting out-of-court transactions such as mortgages, deeds, contracts" as compared to "affidavits, deposition testimony [and] letters [which] are [not] considered documentary evidence within the intendment of CPLR 3211 [a][1] (*Attias v. Costiera*, 120 AD3d 1281 [2d Dept 2014]). Here, the documentary evidence which Epstein's arguments is based upon is largely in the form of emails, which are certainly not incontrovertible. Accordingly, this argument is also rejected.

Next, the court considers Epstein's argument that the claims fail to state a cause of action. To state a claim for tortious interference with contract, plaintiff must allege [1] the existence of a valid contract between the plaintiff and a third party; [2] defendant's knowledge of that contract; [3] defendant's intentional procurement of the third-party's breach of the contract without justification; [4] actual breach of the contract; and damages resulting therefrom (*Lama Holding Co. v. Smith Barney Inc.*, 88 NY2d 413 [1996]).

Plaintiff alleges that Epstein "used her position as President of the Condo Board to interfere with Plaintiff's Lease" and that Epstein "intentionally interfer[ed] with Plaintiff's existing Lease agreement and renewal of same." These allegations are insufficient to demonstrate a *prima facie* cause of action, since they fail to set forth the breach of contract that Epstein allegedly caused. Indeed, not offering a renewal lease and/or rescinding the renewal lease offer before it was accepted is not a breach of contract.

Further, to the extent that plaintiff's breach of contract claim against Fisher is based upon Fisher's alleged "refusal and/or failure to undertake any actions, either with the condominium association or with the courts, to stop Epstein from continuing to harass Plaintiff and his family", a claim for tortious interference of contract against Epstein does not lie. Assuming *arguendo* that these facts demonstrate a breach of a contract, there are insufficient facts to support the element of procurement by Epstein so as to support the claim against her. Accordingly, the fifth cause of action is severed and dismissed.

To state a claim for tortious interference with prospective contractual relations, the plaintiff must allege that: [1] he had a business relationship with a third party; [2] the defendant knew of that relationship and intentionally interfered with it; [3] the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and [4] the defendant's interference caused injury to the relationship with the third party (*Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 AD3d 40 [1st Dept 2009]; see also *Carvel Corp. v. Noonan*, 3 NY3d 182 [2004]).

Epstein's motion to dismiss this claim is denied because at this stage of the litigation, plaintiff has alleged sufficient facts to support the cause of action. Specifically, plaintiff alleges that but for Epstein's

conduct, Fisher would have renewed his lease. Further, plaintiff alleges that Epstein engaged in wrongful conduct which led to the breakdown in his relationship with Fisher. While Epstein contends that plaintiff has not alleged that her conduct was illegal, such a rule is unsupported by case law. A defendant's wrongful conduct need not be illegal; rather, the unjustified campaign of harassment which plaintiff alleges through the use of her position as president of the Condominium Board is sufficient to support the cause of action for tortious interference with a prospective contract. Accordingly, Epstein's motion to dismiss the sixth cause of action is denied.

Finally, Epstein seeks dismissal of the *prima facie* tort claim. The elements of a *prima facie* tort claim are: [1] intentional infliction of harm; [2] causing special damages; [3] without excuse or justification; [4] by an act or series of acts that would otherwise be lawful (*Howard v. Block*, 90 AD2d 455 [1st Dept 1982]). Additionally, to demonstrate a *prima facie* tort, plaintiff must allege that defendant's conduct "was motivated solely by malice or disinterested malevolence" (*Diorio v. Ossining Union Free School Dist.*, 96 AD3d 710 [2d Dept 2012]).

Epstein argues that plaintiff's *prima facie* tort claim against her fails because plaintiff has not pleaded special damages and cannot demonstrate malice. The court disagrees. Plaintiff alleges special damages as follows: "(1) the loss of his home; (2) having to engage in lengthy and costly litigation in order to try and maintain his family's use of their home; and, (3) depending on the outcome of this and related litigations, Plaintiff and his family will be forced to move and incur significant expenses and withdraw their daughter from her current school." These allegations are sufficient to state special damages with particularity (see i.e. *Morrison v. National Broadcasting Co.*, 19 NY2d 453 [1967]).

As for malice, the court rejects this argument for the reasons stated with respect to the wrongful conduct element of the tortious interference with prospective contractual relations claim. Accordingly, Epstein's motion to dismiss the seventh cause of action is also denied.

Finally, the court denies Epstein's request for sanctions/costs, as several of plaintiff's claims have survived, and the dismissed claim was not frivolous within the meaning of the court rules.

The court now turns to Fisher's motion, which is to dismiss the fourth cause of action for retaliatory eviction. Plaintiff alleges that at or about the time that he received a new proposed lease from Fisher, he advised Fisher that "he intended to pursue his own legal action against Epstein in response to her ongoing harassment, which had become unbearable." Plaintiff claims that Fisher retaliated against him in violation of RPL § 223-b by "unilaterally withdrawing the Lease extension and demanding that Plaintiff vacate the premises."

Fisher has provided a copy of the stipulation and amended stipulation of settlement of a related Housing Court action between her and plaintiff, whereby plaintiff agreed to vacate the apartment as of March 31, 2018. Fisher argues that plaintiff's claim for retaliatory eviction against her should be dismissed because plaintiff was holding over after the end of the lease. Meanwhile, plaintiff argues that the stipulation has been improperly advanced and further, that the stipulation was entered into without prejudice to plaintiff's retaliatory eviction claim.

Paragraph 6 of the Settlement Stipulation specifically states that "Parties reserve all rights to prosecute and defend pending Supreme Court case under Index 652856/16, except for possession of Premises, which Respondent shall vacate in accordance with this Stipulation. Except as stated herein Plaintiff or Defendant's rights in Supreme Court case shall not be prejudiced."

RPL § 223-b provides that a landlord shall be subject to civil action for damages for a violation thereof. Section 223-b specifically provides in pertinent part that:

1. No landlord of premises... shall serve a notice to quit upon any tenant or commence any action to recover real property or summary proceeding to recover possession of real property in retaliation for:

...

b. Actions taken in good faith, by or in behalf of the tenant, to secure or enforce any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter...

...

5. In an action or proceeding instituted against a tenant of premises or a unit to which this section is applicable, a rebuttable presumption that the landlord is acting in retaliation shall be created if the tenant establishes that the landlord served a notice to quit, or instituted an action or proceeding to recover possession, or attempted to substantially alter the terms of the tenancy, within six months after:

...

b. The tenant in good faith commenced an action or proceeding in a court or administrative body of competent jurisdiction to secure or enforce against the landlord or his agents any rights under the lease or rental agreement, under section two hundred thirty-five-b of this chapter...

Fisher's motion is denied because plaintiff has stated a claim under RPL § 223-b. Petitioner alleges that Fisher withdrew the lease renewal three weeks prior to its expiration and filed a holdover petition in retaliation for Plaintiff complaining to Defendant about the conditions present in his rental unit and for commencing the first action. These claims are legally sufficient.

Further, the court rejects Fisher's argument based upon the stipulation, since it expressly reserved the parties' rights to litigate the claims asserted in this action without prejudice. Accordingly, Fisher's motion is denied in its entirety.

CONCLUSION

Accordingly, it is hereby

ORDERED that motion sequence number 002 is granted only to the extent that the fifth cause of action is severed and dismissed; and it is further

ORDERED that motion sequence number 002 is otherwise denied; and it is further

ORDERED that Epstein is directed to serve and file an answer to plaintiff's second amended complaint within 20 days from the date of entry of this decision/order; and it is further

ORDERED that motion sequence number 003 is denied in its entirety.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order and Judgment of the court.

Dated:

9/16/18
New York, New York

So Ordered:

[Signature]
Hon. Lynn R. Kotler, J.S.C.