Sikorsky v City of Newburgh
2018 NY Slip Op 33920(U)
July 2, 2018
Supreme Court, Orange County
Docket Number: EF007194-2017
Judge: Maria S. Vazquez-Doles

At a term of the IAS Part of the Supreme Court of the State of New York, held in and for the County of Orange, at the 1841 Court House located at 101 Main Street, Goshen, New York 10924 on the 2nd day of July, 2018

To commence the statutory time for appeals as of right (CPLR 5513 [a]), you are advised to serve a copy of this order, with notice of entry, on all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ORANGE

LIEUTENANT COLONEL KENNETH M. SIKORSKY

PLAINTIFF,

-AGAINST-

CITY OF NEWBURGH, NEW YORK and
JOHN AND JANE DOES 1-10

DEFENDANTS.

DECISION & ORDER
INDEX # EF007194-2017
Motion Date: 04/30/18
Motion Seq. #3

VAZQUEZ-DOLES, J.S.C.

The following papers numbered 1 - 6 were read on Defendant's motion to dismiss the amended complaint pursuant to CPLR §3211 and §3212:

Notice of Motion/Affirmation (Svensson)/Exhibits A - S..... 1 - 3
Affidavit in Opposition (Lynch)/Exhibit A/Supporting Affidavit..... 4 - 5
Reply Affirmation (Svensson)..... 6

This action is one for both declaratory and equitable relief, which was commenced by Plaintiff on September 11, 2017 and then filed a First Amended Complaint on November 3, 2017. Plaintiff alleges that Defendants acted unlawfully in the collection of real estate property taxes and as a result, Plaintiff lost his property located at 22 Bay View Terrace, Newburgh, NY, to a tax sale. Defendant, City of Newburgh, brings this pre-answer motion for dismissal, and argues that Plaintiff has failed to state any cause of action. Additionally, Defendant argues that Plaintiff was given an opportunity to re-purchase his home, by Agreement dated June 30, 2014, but failed to comply with the terms of that agreement.

In considering a motion to dismiss for failure to state a cause of action, the court must

accept the facts as alleged in the complaint as true, and accord plaintiff the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (*Sokol v Leader* 74 AD3d 1180 [2d Dept 2010]). The standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action (*see Guggenheimer v Ginzburg* 43 NY2d 268 [1977]).

In their **first cause of action** plaintiff is requesting the Court declare the interest rate set forth in the contract is above the lawful limit with those who are in the military service in violation of Military Law §314. In essence, plaintiff's claim is an "overcharge of interest" which is governed by the one year statute of limitations pursuant to CPLR §215(6). Plaintiff's first cause of action is barred by the statute of limitations.

Plaintiff alleges in his **second cause of action** that he did not have time, or notice, to close the Agreement because the City demanded payment; in his **third cause of action**, that the City should be forced to perform the Agreement (specific performance); in his **fourth cause of action** that the issuance of "time of the essence" demand violated his Fourteenth Amendment right to due process because it was based upon a municipal policy and in his **ninth cause of action** that the demand converted the Agreement into a contract of adhesion.

Where time is not made of the essence in the original contract for the sale of real property, a party may subsequently give notice to that effect (*see Guippone v. Gaias*, 13 A.D.3d 339 [2d Dept 2004]; *Mohen v. Mooney*, 162 A.D.2d 664[2d Dept 1990]). The notice setting a new date for the closing must (1) give clear, distinct, and unequivocal notice that time is of the essence, (2) give the other party a reasonable time in which to act, and (3) inform the other party that if he does not perform by the designated date, he will be considered in default *(see Moray v. DBAG, Inc.*, 305 A.D.2d 472 [2d Dept 2003]).

Here the "time of the essence" letter sent to the plaintiff dated January 6, 2017 did contain language informing him that he risked default by not appearing at the closing and did provide plaintiff with a reasonable time to perform (*see ADC Orange, Inc. v. Coyote Acres, Inc.*, 7

N.Y.3d 484 [2006]; *Woodwork Display Corp. v. Plagakis*, 137 A.D.2d 809 [2d Dept 1988]). Accordingly, the City demonstrated that they effectively made the February 10, 2017 closing a time of the essence closing date and plaintiff is considered in default in failing to appear at the closing.

Further, defendant has established that they were ready, willing and able to close on the time of essence date and that plaintiff was in default therefore, plaintiff has no cause of action for specific performance (*see Iannucci v. 70 Wash. Partners*, LLC, 51 A.D.3d 869 [2d Dept 2008]; *Nissenbaum v. Ferazzoli*, 171 A.D.2d 654 [2d Dept 1991]).

"A contract of adhesion contains terms that are unfair and nonnegotiable and arises from a disparity of bargaining power or oppressive tactics" (*Love'M Sheltering, Inc. v. County of Suffolk*, 33 A.D.3d 923, 924 [2d Dept 2006]). However, a form agreement is not automatically one of adhesion because "[s]uch claims are judged by whether the party seeking to enforce the contract has used high pressure tactics or deceptive language in the contract and whether there is inequality of bargaining power between the parties" (*Sablosky v. Edward S. Gordon Co., Inc.*, 73 N.Y.2d 133, 139 [1989]). Here, the fact that a "time of essence" clause was not included in the Contract of Sale and was not the product of negotiation does not render it unenforceable (*see DiRuocco v. Flamingo Beach Hotel & Casino, Inc.*, 163 A.D.2d 270 [2dDept 1990]). The plaintiff failed to demonstrate that enforcement of the "time of essence" demand would be unreasonable or unjust, or would contravene public policy, or that it is invalid because of fraud or overreaching (*see Pratik Apparels, Ltd. v. Shintex Apparel Group, Inc.*, 96 A.D.3d 922, 923 [2d Dept 2012]).

"In the land use context, 42 USC § 1983 protects against municipal actions that violate a property owner's rights to due process, equal protection of the laws and just compensation for the taking of property under the Fifth and Fourteenth Amendments to the United States Constitution" (*Bower Assoc. v. Town of Pleasant Val.*, 2 N.Y.3d 617, 626 [2004]; *Town of Orangetown v. Magee*, 88 N.Y.2d 41, 49 [1996]). In order to establish a deprivation of a property right in

violation of substantive due process, the claimant must establish (1) a cognizable or vested property interest, not the mere hope of one, and (2) that the municipality acted " 'without legal justification and motivated entirely by political concerns' " (*Bower Assoc. v. Town of Pleasant Val.*, 2 N.Y.3d at 627, *quoting Town of Orangetown v. Magee*, 88 N.Y.2d at 53). "As for the second element of the test, 'only the most egregious official conduct can be said to be arbitrary in the constitutional sense' " (*Bower Assoc. v. Town of Pleasant Val.*, 2 N.Y.3d at 628).

Here, the City's conduct of demanding payment in a "time of essence letter" did not constitute egregious official conduct. Accordingly, plaintiff is unable to establish a First, Fifth or Fourteenth Amendment claim in violation of 42 USC §1983.

Further, plaintiff's bare allegation contained in his **fifth (and sixth) cause of action** that the City waived its claim that plaintiff no longer has any right of redemption has no basis in law where the plaintiff has defaulted.

Accordingly, plaintiff's second, third, fourth, fifth, ninth, eleventh and thirteenth[1] causes of action fail to state a cause of action. Plaintiff's Sixth cause of action is dismissed as a duplicate of his fifth cause of action.

Plaintiff's first cause of action alleges deprivation of his civil right of free speech. Generally, the elements of a cause of action alleging deprivation of the right of free speech in a case involving criticism of public officials by private persons are (1) plaintiff has an interest protected by the First Amendment, (2) defendants' actions were "motivated or substantially caused" by his exercise of that right, and (3) defendant's actions "effectively chilled" the exercise of his First Amendment right (*Curley v. Village of Suffern*, 268 F.3d 65, 73 [2d Cir 2001].

In the instant case, the plaintiff does not allege how the City's actions actually chilled his exercise of his First Amendment Rights (*id*). However, he does allege that the City retaliated against his exercise of his First Amendment Rights. He contends that the City's retaliation

[1] There are two (2) causes of action in plaintiff's amended verified complaint titled "AS AND FOR A TWELFTH CLAIM FOR RELIEF". For purposes of this decision the second of the two shall be considered the thirteenth cause of action.

resulted in the City declaring "time of the essence" and then terminating the Contract of Sale and forfeiture of plaintiff's monies paid pursuant to the Contract of Sale, constituting punishment for the exercise of the constitutional right to free speech, in violation of his right to equal protection of the laws. Accordingly, his eighth cause of action fails to state a cause of action.

A cause of action asserted pursuant to 42 USC § 1983 does not require service of a notice of claim (*see Rapoli v. Village of Red Hook*, 41 A.D.3d 456[2nd dept. 2007]). However, the plaintiff's **seventh cause of action** sounding in the common-law tort of wrongful interference with contractual rights required the service of a notice of claim as a condition precedent for maintaining it (*see Montano v. City of Watervliet*, 47 A.D.3d 1106 [3d Dept 2008]; *Clemens v. MTA N.Y. City Tr. Auth.*, 19 A.D.3d 636 [2d Dept 2005]). Since the plaintiff has failed to allege service of a notice of claim, the seventh cause of action is dismissed for failure to state a cause of action.

Plaintiff is also alleging that the City violated the Americans with Disabilities Act (ADA) which provided that no disabled individual shall "be excluded from participation in or be denied benefits of the services, programs, or activities or a public entity or be subjected to discrimination." (42 USC §12132). Plaintiff alleges that he was injured while on active duty in the military and suffers from impairments that substantially limit major life activities (ADA Title II §35.108[a][1]). He alleges that such disability prevented him from properly challenging real property taxes due to the City's policies, practices and procedures related to the such program.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." (*Bell Atlantic Corporation v Twombly*, 127 S.Ct. 1955 [2007]. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged (*Id.*, at 556). The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's

liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.' " (*Id.*, at 557 [brackets omitted]). Commonplace recitals of the elements of a cause of action, supported by mere conclusory statements do not suffice. The Court is not bound to accept as true a legal conclusion couched as a factual allegation. While legal conclusions can provide the framework of a complaint, they must be supported by factual allegations (*Ashcroft v Iqbal*, 129 S.Ct 1937 [2009]). Although a plaintiff may not be required to plead a claim with detailed factual allegations, it must be more than a bare-naked accusation that "the defendant unlawfully harmed me".

Title II of the ADA defines discrimination as a "failure to make reasonable modifications and policies, practices, procedures, when such modifications are necessary to afford such goods, services, facilities, privileges, advantages, or accommodations to individuals with disabilities," an outright intentional exclusion, the discriminatory effects of overprotective rules and policies, failure to make modifications to existing facilities and practice and regulation to lesser services and opportunities, denying a disabled individual "the opportunity to participate in or benefit from the goods and services offered by a public accommodation."

To establish disability discrimination the plaintiff must show: (1) that he is a person with a disability under the meaning of the ADA; (2) the City had notice of his disability; (3) with reasonable accommodation, plaintiff could be afforded the privileges and advantages of a tax grievance; and (4) that the entity failed to make such accommodations. Here, plaintiff does not state what his disability is nor does he allege that the City had notice of such disability except that they knew he was in active military service. There is nothing in the complaint to explain how the City's policy and procedures prohibited him from filing a tax grievance aside from the fact that he was away on active military duty on numerous occasions. Contrary to his argument, plaintiff actually admits that he sought to have his taxes reduced because of his military status applying for a veteran's exemption in 2008. Further, the City submits an Affidavit of Joanne Majewski, Assessor for the City of Newburgh, who avers that plaintiff received a veteran's

exemption from both the City and Orange County during the period 2008 to 2012 in the amount of $21,000.00 and $12,000.00 respectively which was the maximum allowable War Veteran's tax reduction during those times.

The City fails to address plaintiff's **twelfth cause of action** in which plaintiff asks the Court to declare the liquidated damages in the contract as inequitable and unenforceable.

In light of the above it is hereby

ORDERED that defendant's motion to dismiss is granted dismissing all causes of action except for plaintiff's twelfth cause of action in the First Amended Complaint; and it is further

ORDERED that defendants are to serve and file an answer to the remaining cause of action within 20 days from the date of this Order; and it is further

ORDERED that all parties are directed to appear for preliminary conference on August 23, 2018 at 9:15am at Court Room 5 in the renovated court house at located at 285 Main St., Goshen, New York.

The foregoing constitutes the Decision and Order of this Court.

Dated: July 2, 2018
Goshen, New York

ENTER:

HON. MARIA S. VAZQUEZ-DOLES, J.S.C.

To: Counsel of record via NYCEF