SUPREME COURT - STATE OF NEW YORK

PRESENT:

Honorable James P. McCormack

Justice

TRIAL/IAS, PART 23
NASSAU COUNTY

THERESA SUGAMELE and DOROTHY HOLLMAN,

Plaintiff(s),

-against-

JPMC SPECIALTY MORTGAGE LLC, and FAY SERVICING,

Defendant(s).

Index No.: 613238/17

Motion Seq. No.: 002
Motion Submitted: 2/15/18

The following papers read on this motion:

Notice of Motion/Supporting Exhibits.....X
Affirmation in Opposition.....X
Reply Affirmation.....X

Defendants, JPMC Specialty Mortgage, LLC (JPMC) and Fay Servicing (Fay), move this court for an order, pursuant to CPLR §§ 3211(a)(1) and (7), dismissing the complaint. Plaintiffs, Theresa Sugamele (Sugamele) and Dorothy Hollman (Hollman) oppose the motion.

Plaintiffs commenced this action by service of a Summons and Verified Complaint dated December 4, 2017. Defendants brought this motion to dismiss in lieu of an answer. This action involves real property that is also the subject of a foreclosure action pursuant to index number 641/13. The foreclosure action is near completion with the property having been sold at auction. Herein, the complaint contains six causes of action, to wit: 1) Trespass, 2) Conversion, 3) Private Nuisance, 4) Outrageous conduct causing emotional distress, 5) Breach of contract and 6) Negligence.

A party seeking relief pursuant to CPLR 3211(a)(1) " 'on the ground that its defense is founded upon documentary evidence has the burden of submitting documentary evidence that resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim' " (*Flushing Sav. Bank, FSB v. Siunykalimi*, 94 AD3d 807, 808 [2d Dept 2012], *quoting Mazur Bros. Realty, LLC v. State of New York*, 59 AD3d 401, 402 [2d Dept 2009]; *see Leon v. Martinez*, 84 NY2d 83, 88 [1994]). "[T]o be considered 'documentary,' evidence must be unambiguous and of undisputed authenticity" (*Fontanetta v. John Doe 1*, 73 AD3d 78, 86 [2d Dept 2010]).

A motion to dismiss a complaint pursuant to CPLR § 3211(a)(1) may be granted only if the documentary evidence submitted by the moving party "utterly refutes the factual allegations of the complaint and conclusively establishes a defense to the claims as a matter of law" (*Kopelowitz & Co., Inc. v. Mann*, 83 AD3d 793, 796 [2d Dept 2011]; *Fontanetta v. John Doe* 1, 73 AD3d 78, 83 [2d Dept. 2010]).

In order for evidence to qualify as "documentary," it must be unambiguous, authentic, and undeniable (*Fontanetta v John Doe 1*, 73 AD3d 78, 84-86 [2d Dept 2010]). Neither affidavits, deposition testimony, nor letters are considered "documentary evidence" under CPLR § 3211 (a) (1) (*see Suchmacher v Manana Grocery*, 73 AD3d 1017 [2d Dept 2010]; *Fontanetta v John Doe* 1, 73 AD3d at 85-87 [2d Dept 2010]). Affidavits submitted by a defendant "will almost never warrant dismissal under CPLR 3211" (*Lawrence v Miller*, 11 NY3d 588, 595 [2008]). In the context of CPLR § 3211(a)(1), the narrow exception to this general rule might be affidavits used solely to establish the *bona fides* of other, genuinely documentary evidence.

"To succeed on a motion to dismiss pursuant to CPLR § 3211 (a) (1), the documentary evidence that forms the basis of the defense must be such that it resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Tietler v Pollack & Sons*, 288 AD2d 302 [2d Dept 2001]; *see also, Held v Kaufman*, 91 NY2d 425, 430-431 [1998]; *Leon v Martinez*, 84 NY2d 83, 88 [1994]; *Museum Trading Co. v Bantry*, 281 AD2d 524 [2d Dept 2001]; *Jaslow v Pep Boys--Manny, Moe & Jack*, 279 AD2d 611 [2d Dept 2001]).

In reviewing a motion to dismiss for failure to state a cause of action pursuant to CPLR § 3211(a)(7), the court is to accept all facts alleged in the complaint as being true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the alleged facts fit within any cognizable legal theory (see *Delbene v. Estes*, 52

AD3d 647 [2nd Dept. 2008]; see also *511 W.232nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2D 144 [2002]. Pursuant to CPLR § 3026, the complaint is to be liberally construed. *Leon v. Martinez*, 84 NY2d 83 [1994]. It is not the court's function to determine whether plaintiff will ultimately be successful in proving the allegations. *Aberbach v. Biomedical Tissue Services*, 48 AD3d 716 [2nd Dept. 2008]; see also *EBCI, Inc. v. Goldman Sachs & Co.*, 5 NY3D 11 [2005].

The pleaded facts, and any submissions in opposition to the motion, are accepted as true and given every favorable inference *(see 511 W. 323nd Owners Corp. v. Jennifer Realty Co.*, 98 NY2d at 151-152; *Dana v. Malco Realty, Inc.*, 51 AD3d 621 [2d Dept 2008]; *Gershon v. Goldberg*, 30 AD3d 372, 373 [2d Dept 2006]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7) (*see* CPLR § 3211[c]; *Sokol v. Leader*, 74 AD3d at 1181). "When evidentiary material is considered" on a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether they have properly stated one, and unless it has been shown that a material fact as claimed is not a fact at all or that no significant dispute exists, the dismissal should not be granted (*Guggenheimer v. Ginzburg*, 43 NY2d at 275; *see Sokol v. Leader*, 74 AD3d at 1182).

The underlying behavior of which Plaintiffs complain is Defendants' alleged entering of the property. Plaintiffs allege that Defendants entered the property on

December 15, 2016, and changed the locks to the house situated thereon. It is undisputed that the property had been unoccupied, but Plaintiffs assert the property had not, and has not been abandoned. Annexed to their complaint, Plaintiffs include a letter written to Defendants expressing concern "that someone is coming in & [sic] out the house and removing the contents...Please refrain from entering the premises *and make sure said property is secure*". (Emphasis added).

Real Property and Proceedings Law (RPAPL) §1307(1) and (2) hold, in pertinent part:

> 1. A plaintiff in a mortgage foreclosure action who obtains a judgment of foreclosure and sale pursuant to section thirteen hundred fifty-one of this article, involving residential real property, as defined in section thirteen hundred five of this article, that is vacant, or becomes vacant after the issuance of such judgment, or is abandoned by the mortgagor but occupied by a tenant, as defined under section thirteen hundred five of this article, shall maintain such property until such time as ownership has been transferred through the closing of title in foreclosure, or other disposition, and the deed for such property has been duly recorded...
>
> 2. Such plaintiff shall have the right to peaceably enter upon such property, or to cause others to peaceably enter upon the property for the limited purpose of inspections, repairs and maintenance as required by this section, or as otherwise ordered by court...

Defendants make two main arguments in support of their motion. The first is that there is no evidence that they ever entered the premises. The second is that even if they

did enter the premises, they are under an obligation pursuant to RPAPL §1307 to maintain the premises, and have the right to enter the property pursuant the "Covenants" section of the mortgage, section (7)(b). That section states the lender, or one authorized by the lender, may enter the property for purposes of inspection. However, the lender is supposed to give the mortgagor notice that such an inspection will occur.

The argument that there is no proof that it was Defendants who entered the property is without merit for the purposes of the motion to dismiss. The court is to assume all allegations in the complaint are true. The complaint alleges Defendants entered the property, and Defendants offer no evidence to refute that allegation.

The RPAPL §1307 argument is more complex. Initially, the court must determine whether there is a difference "vacant", "abandoned" and "unoccupied". The former two terms are found in the statute while the latter term is used by Plaintiffs. "Abandoned" is clearly different from the other two terms in that it denotes a desire by the owner to not return. "Vacant" and "unoccupied" contain no such desire. Dictionary.com actually uses "unoccupied" to help define "vacant". However, Blacks Law Dictionary defines "vacant" as "a building that does not have any contents or inhabitants," and defines "Unoccupied" as a "Property classification where it is not occupied by people but can have goods and furniture in it." Herein, Plaintiffs repeatedly assert that the property still contains goods in it, and cars on the property.

Based upon the Blacks Law definitions, Plaintiffs admission that the property is

unoccupied would not invoke RPAPL §1307. However, complicating the matter is the fact that, in their letter to Defendants, made a part of the their complaint, Plaintiffs demand that Defendants "make sure" the property is secure. The court does not believe that Defendants can "make sure" the property is secure without entering it, and without inspecting it. While the letter is therefore contradictory, it is clear Plaintiffs wanted Defendants to ensure the property was secure.

A cause of action for trespass to real property requires a showing of an intentional entry onto the land of another absent permission. (*Julia Properties, LLC v. Levy*, 137 AD3d 1224 [2d Dept. 2016]). Plaintiffs' admitted direction to Defendants to ensure the property is secure defeats any argument that Defendants lacked permission to enter the property. Therefore, the cause of action for trespass cannot lie.

To prove conversion, a plaintiff must show that she has a possessory right or interest in the property and that a defendant's dominion over the property interfered with plaintiff's rights. (*Pappas v. Tzolis*, 20 NY3d 228 [2012]). Plaintiffs' complaint asserts conversion related to both the house, and the contents of the house. Plaintiffs clearly had a possessory interest in the house, and by placing a lock on it, Defendants exercised dominion over the property and interfered with Plaintiffs' rights. Even assuming RPAPL §1307 applies, Defendants do not explain how their right to enter the property to inspect and maintain it allows them to place a lock on the property that excludes Plaintiffs. While Plaintiffs did direct Defendants to secure the property, this did not occur until after the

locks were placed on the doors.

However, regarding the alleged conversion of "certain personal property", the complaint lacks the necessary particularity. CPLR §3013. Defendants cannot defend against converting "certain" property. Plaintiffs had the opportunity to supplement those allegations in opposition to the within motion but chose not to. Therefore, the cause of action for conversion related to the personal property will be dismissed for failing to state a case of action.

The elements of a private nuisance are a substantial interference with a person's right to use and enjoy land, such interference is intentional and unreasonable and is caused by another's actions. (*Sullivan v. Keyspan Corp.*, 155 AD3d 804 [2d Dept. 2017]). Herein, Defendants' conduct in placing a lock on the property met the elements of private nuisance, only up until the time Plaintiffs directed Defendants to secure the property. At that time, and thereafter, Defendants' action of placing a lock on the property was no longer "unreasonable" as they were directed to do so. As such, the motion to dismiss will be denied only for the period of time from December 15, 2016 until July 12, 2017.

A cause of action for intentional infliction of emotional distress requires a showing of "(1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress...". (*Klein v. Metropolitan Child Servs. Inc.*, 100 AD3d 708, 711 [2d

Dept. 2012]). Plaintiffs' complaint meets none of these elements. Whether or not they were justified to do so, it is clear Defendants placed a lock on the house because they believed they were duty bound to do so. There is nothing extreme or outrageous about doing so, particularly considering that Plaintiffs eventually ratified the action by directing Defendants to secure the property. There is no proof that Defendants intent when placing a lock on the property was to cause severe emotional distress, nor is there any indication that they ignored a substantial likelihood that doing so would cause such distress. Most importantly there is no evidence of the severe emotional distress. The conclusory statement in the complaint that "Plaintiffs suffered severe emotional distress", standing alone, is insufficient. *Id.*

Regarding breach of contract, a plaintiff must show the (1) formation of a contract between the parties, (2) performance by the plaintiff, (3) failure to perform by the defendant, and (4) resulting damages (*see, e.g., JP Morgan Chase v. J.H. Elec.*, 69 AD3d 802 [2d Dept.2010]; *Brualdi v. Iberia*, 79 AD3d 959 [2d Dept. 2010]). As with intentional infliction of emotional distress, the complaint meets none of the required elements. Plaintiffs complain that Defendants "failed to review multiple short sale offers". Such language does not indicate the formation of a contract, that Plaintiff performed under the contract and that Defendants failed to perform. Plaintiffs cite to no sections of the note or mortgage that requires Defendants to review their short sale offers. As such, the cause of action for breach of contract cannot lie.

Finally, Plaintiffs assert a cause of action for negligence. To establish negligence, a plaintiff must prove a duty owed the plaintiff by the defendant, a breach of that duty and injury proximately caused therefrom. (*Pasternack v. Laboratory Corp. Of Am. Holdings*, 27 NY3d 817 [2016]). It is unclear, from reading the complaint, what duty Plaintiffs are alleging was owed, and how it was breached. The complaint states Defendants failed to "exercise ordinary care" when they entered the property, but do not state in what way, or what damage was caused by the failure to exercise ordinary care. The negligence cause of action is couched in terms of improper entry onto the property, which appears duplicative of the conversion and nuisance causes of action. The court therefore finds the negligence cause of action fails to state a cause of action.

Accordingly, it is hereby

ORDERED, that the Defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is GRANTED to the extent that First, Fourth, Fifth and Sixth Causes of Action are dismissed; and it is further

ORDERED, that the Defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is partially GRANTED in connection with the Second Cause of Action to the extent that the court finds no cause of action for conversion related to "certain personal property"; and it is further

ORDERED, that Defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(7) is GRANTED in part, and DENIED in part, related to the Third Cause of

Action to the extent that the cause of action is viable only for the time period of December 15, 2016 through July 12, 2017; and it is further

ORDERED, that Defendants' motion to dismiss the complaint pursuant to CPLR §3211(a)(1) is DENIED.

The foregoing constitutes the Decision and Order of the Court.

Dated: April 11, 2018
Mineola, N.Y.

Hon. James P. McCormack, J. S. C.

ENTERED
APR 13 2018
NASSAU COUNTY
COUNTY CLERK'S OFFICE