Astoria Blvd. Constr. & Dev. LLC v Midtown Concrete Corp.
2019 NY Slip Op 33797(U)
November 4, 2019
Supreme Court, Queens County
Docket Number: 714263/2018
Judge: Denis J. Butler
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENIS J. BUTLER IAS Part 12
Justice

ASTORIA BOULEVARD CONSTRUCTION AND DEVELOPMENT LLC,

Plaintiff(s),

-against-

MIDTOWN CONCRETE CORP., ANGELA O'BRIEN , DANIEL J. O'BRIEN, 8-49 CORP., LITO PROPERTIES LLC, ALLIED BUILDERS AND CONSTRUCTION CORP., LAMBRINOS STATHAKIS, and JOHN DOE 3 to 5, the last three parties being unknown to plaintiff, and intended to be any person or entity in possession of or claiming an interest in the property described in the verified compliant;

Defendant(s).

Index Number: 714263/2018

Motion Date: September 24, 2019

Motion Seq. No.: 002

The following papers were read on this motion by defendants Allied Builders and Construction Corp. and Lambrinos Stathakis for an order, pursuant to CPLR 3211 (a) (7), dismissing the third cause of action for public nuisance and the fourth cause of action for negligence.

	Papers Numbered
Notice of Motion, Affirmation, Affidavit, Exhibits.....	E36-42
Affirmation In Opposition	E42
Affirmtion In Reply.....	E44

Upon the foregoing papers, it is ordered that this motion is determined as follows:

This action concerns a private road known as Blackwell's Lane that is approximately 23 feet wide by 180 in length, running north from Astoria Boulevard to 28th Avenue.

Plaintiff alleges that, since 1858, all ownership, rights, and benefits to Blackwell's Lane have been transferred by deeds as an appurtenance, to the owners of Lots 15, 18, 42, 44, and 48. Without Blackwell's Lane, all or part of Block 509, Lots 15, 18, 42, 44, and 48 would be landlocked and of diminished value.

Plaintiff and defendants 8-49 Corp. and Lito Properties LLC are the owners of the properties fronting Blackwell's Lane, and which are entitled to the exclusive use of Blackwell's Lane as a private road to their adjoining properties.

Plaintiff alleges that defendants have intentionally entered upon plaintiff's property and Blackwell's Lane and are using and occupying such property to park and store commercial vehicles.

"It is well settled that on a motion to dismiss a complaint for failure to state a cause of action pursuant to CPLR 3211 (a) (7), the pleading is to be liberally construed, accepting all the facts alleged in the complaint to be true and according the plaintiff the benefit of every possible favorable inference" (*Jacobs v Macy's E., Inc.*, 262 AD2d 607, 608 [2d Dept 1999]; *see Leon v Martinez*, 84 NY2d 83 [1994]). The court does not determine whether the plaintiff may ultimately be successful on the merits on a CPLR 3211 (a) (7) motion to dismiss (*see Stukuls v State of New York*, 42 NY2d 272 [1977]; *Jacobs*, 262 AD2d 607), and the court will not examine affidavits submitted on a CPLR 3211 (a) (7) motion for the purpose of determining whether there is evidentiary support for the pleading (*see Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]).

Defendants Allied Builders and Ccnstruction Corp. and Lambrinos Stathakis (collectively, "defendants") move, pursuant to CPLR 3211 (a) (7), to dismiss plaintiff's causes of action for public nuisance and negligence.

Plaintiff's Third Cause of Action: Public Nuisance

A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority (*Copart Indus. v Consolidated Edison Co.*, 41 NY2d 564, 568 [1977]).

A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large (*see Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314 [1983]). This principle recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public.

In the instant matter, the submissions fail to demonstrate that the alleged conduct by defendants, that is, the parking and storing of commercial vehicles on plaintiff's property and Blackwell's Lane, is "so general and widespread as to affect a whole community, or a very wide area within it" (*532 Madison Ave. Gourmet Foods, Inc. v Finlandia Ctr., Inc.*, 96 NY2d 280, 293 [2001]). Nor do the submissions demonstrate that the use of plaintiff's property or Blackwell's Lane amounts to conduct which offends or impacts the public. In any event, even if the degree of harm to plaintiff may have been greater than to defendants 8-49 Corp. and Lito Properties LLC, who were named solely as parties in interest, in kind the harm was the same.

Accordingly, the branch of defendants' motion to dismiss the third cause of action for public nuisance is granted.

Plaintiff's Fourth Cause of Action: Negligence

It is a firmly established principle that negligence is merely one type of conduct which may give rise to a nuisance (*see Copart Indus., Inc.*, 41 NY2d 564). "A nuisance, either public or private, based on negligence and whether characterized as either negligence or nuisance, is but a single wrong, and 'whenever a nuisance has its origin in negligence,' negligence must be proven and a plaintiff 'may not avert the consequences of his [or her] own contributory negligence by affixing to the negligence of the wrongdoer the label of a nuisance'" (*id.* At 569, citing *Morello v Brookfield Constr. Co.*, 4 NY2d 83 [1958], and quoting *McFarlane v City of Niagara Falls*, 247 NY 340, 344-345 [1928]).

Besides liability for nuisance arising out of negligence, one may be liable for a private nuisance where the wrongful invasion of the use and enjoyment of another's land is intentional and unreasonable (*see Copart Indus., Inc.*, 41 NY2d 564).

"In the absence of negligence or intent, a cause of action to recover damages arising from a private nuisance cannot be maintained" (*State of New York v Fermenta ASC Corp.*, 238 AD2d 400, 403-404 [2d Dept 1997]).

Although there may be similarities and interplay between negligence and nuisance, these causes of action are distinct and should be treated separately (*see Nussbaum v Lacopo*, 27 NY2d 311 [1970]).

Contrary to defendants' argument, the complaint identifies a cognizable cause of action for negligence, pleads all material elements of it, and contains sufficient factual allegations supporting those elements (*see* CPLR 3013; *Mid-Hudson Valley Fed. Credit Union v Quartararo*, 31 NY3d 1090 [2018]). In pertinent part, the complaint alleges that, "[u]pon information and belief, [defendants] saw Blackwell's Lane and *wrongly assumed* that it was a public road which they could access and use for the storage and parking of commercial vehicles, trucks and equipment, including, but not limited to, bulldozers, backhoes, bobcats, dump trucks, trailers, and tractors (emphasis added)." The term "wrongly assumed," together with the concrete factual allegations asserted in the complaint, support or tend to support the elements of the cause of action for negligence (*see Sager v City of Buffalo*, 151 AD3d 1908 [4th Dept 2017]).

Accordingly, the branch of defendants' motion to dismiss the fourth cause of action for negligence is denied.

This constitutes the decision and order of the court.

Dated: November 4, 2019

Denis J. Butler, J.S.C.