Getty v Goh
2019 NY Slip Op 34659(U)
January 11, 2019
Supreme Court, Westchester County
Docket Number: Index No. 60345/2018
Judge: Charles D. Wood
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To commence the statutory time period for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

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RICHARD GETTY,

Plaintiff,

DECISION & ORDER
INDEX NO. 60345/2018
SEQ NOS. 1&2

CHARLES GOH, ILIANA MALDONADO, EDWARD P. CONE, 35 SUMMIT AVENUE OWNERS LTD. and PATRIOT MANAGEMENT CORPORATION,

Defendants.

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WOOD, J.

New York State Courts Electronic Filing ("NYSCEF") Documents Numbers 16 through 76 were read for defendants' motion to dismiss (Seq 1), and plaintiff's motion to Amend Complaint (Seq 2) [1]

The owner of Unit 3J, a residence at 35 Summit Avenue ("the Unit") in Port Chester brings this action to seek to recover damages for purported personal injuries and property caused by mold in the Unit. Plaintiff claims that due entirely to defendants' retaliation, fraud and continuing gross negligence against plaintiff, he cannot sell his property, which is a health hazard not only to plaintiff, but to other residents at 35 Summit Avenue. Before this court, defendants bring this motion pursuant to CPLR 3211(a)(7), dismissing plaintiff's complaint for failure to

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[1]Despite defendants' objections, the Court has considered plaintiff's Affirmation or Affidavit in Reply, which as plaintiff explains was not a sur-reply, and in light of the fact that defendants had no objection to the extension of time for plaintiff to submit reply papers. Plaintiff's submission of his proposed Amended Complaint in his Reply papers is improper and will not be considered by the Court.

state a cause of action; pursuant to CPLR 3211(a)(5), dismissing the second cause of action as being time-barred; pursuant to 22NYCRR 130-1.1, and imposing costs and significant financial sanctions upon plaintiff. Plaintiff opposes the motion, and cross moves to add a fifth cause of action to the original complaint.

Based upon the foregoing, the motions are decided as follows:

Pursuant to CPLR (a)(7) "upon a motion to dismiss [for failure to state a cause of action], the sole criterion is whether the subject pleading states a cause of action, and if, from the four corners of the complaint, factual allegations are discerned which, taken together, manifest any cause of action cognizable at law, then the motion will fail. The court must afford the pleading a liberal construction, accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory"[2] (Esposito v Noto, 90 AD3d 825 [2d Dept 2011]; (Sokol v Leader, 74 AD3d 1180 [2d Dept 2010]); (Bua v Purcell & Ingrao, P.C., 99 AD3d 843, 845 [2d Dept 2012] lv to appeal denied, 20 NY3d 857 [2013]). However, this does not apply to legal conclusions or factual claims which were either inherently incredible or flatly contradicted by documentary evidence (West Branch Conservation Assn. v County of Rockland, 227 AD2d 547 [2d Dept 1996]), If the court considers evidence submitted by a defendant in support of a motion to dismiss under CPLR 3211 (a)(7), it may "freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint," and if the court does so, "the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one" (Leon v Martinez, 84 NY2d 83, 88 [1994]; Uzzle v Nunzie Ct. Homeowners Ass'n, Inc., 70 AD3d 928,

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[2]Internal citations omitted.

930 [2d Dept 2010]); Greene v Doral Conference Ctr. Assoc., 18 AD3d 429, 430 [2d Dept 2005]). Thus, affidavits and other evidentiary material may also be considered to "establish conclusively that plaintiff has no cause of action" (Simmons v Edelstein, 32 AD3d 464, 465 [2d Dept 2006]). The court may also consider further affidavits where a meritorious claim lies within inartful pleadings (Lucia v Goldman, 68 AD3d 1064, 1065 [2d Dept 2009]). More succinctly, under CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, but if the court considers evidentiary material, the criterion then becomes "whether the proponent of the pleading has a cause of action" (Sokol v Leader, 74 AD3d 1180, 1181-82 [2010]; Marist College v Chazen Envtl. Serv. 84 AD3d 11181 [2d Dept 2011]). Whether a plaintiff can ultimately establish [his or her] allegations is not part of the calculus (Dee v Rakower, 112 AD3d 204 [2d Dept 2013]).

This is not the first action brought by plaintiff for his alleged injuries from mold in the Unit. On February 18, 2015, plaintiff as a pro se litigant, commenced the first of three lawsuits arising from the alleged water intrusion of his Unit under Index Number 52528/2015, against 35/37 Summit Avenue Owners Ltd. Board of Directors and Patriot Management. On December 14, 2015, the Supreme Court (DiBella, J.), dismissed plaintiff's breach of contract cause of action, but allowed plaintiff's negligence claim to survive. The court (Bellantoni,J.) also found no basis to the renewal and reargument motion of that decision. On May 31, 2018, this court granted Summit and Patriot's motion dismissing the complaint, finding that there is no contractual relationship between plaintiff and Patriot; and also dismissing plaintiff' negligence claim against Summit and Patriot.

Plaintiff was represented by counsel in the Second lawsuit on May 30, 2018, against

Summit and Patriot under Index Number 58601/2018, and by amended complaint that alleges that Goh is the president of Patriot and Maldonado is the CEO of Summit. The Amended Complaint alleges negligence and breach of contract and implied warranty of habitability. Patriot and Summit's motions to dismiss on the grounds of collateral estoppel and res judicata was denied by this court; and the branch of motion to dismiss all causes of action as against the individual corporate defendants, Charles Goh and Iliana Maldonado was granted.

The instant lawsuit was commenced by plaintiff pro se, even though he has counsel in the Second Lawsuit. In this Third Lawsuit in connection with the purported mold in plaintiff's Unit, plaintiff alleged causes of action based upon fraud, defamation, violation of the right to privacy, and violation of New York States Human Rights Law, the Complaint now seeks $8,225,000 in damages.

First, as a procedural matter, defendants raise that plaintiff's affidavit should be disregarded in its entirety, because he failed to submit his affidavit in proper admissible form. Plaintiff's 70 page Affidavit, which he submits in opposition to defendants' motion to dismiss and in support of his cross-motion to amend his complaint and to disqualify defendants counsel's law firm is defective, as it bears no notary stamp and signature, does not contain any oath or affirmation that it was submitted under penalties of perjury, and it does not contain plaintiff's own signature. Thus, this affirmation is not in admissible form, and may not be considered in opposition to the motion to dismiss (Laventure v McKay, 266 A.D.2d 516, 517, [2d Dept 1999]). While the court is mindful that plaintiff is proceeding pro se, his pro se status does not change the fact that his affidavit cannot be properly before the court in its present form. Accordingly, plaintiff's notice of cross-motion is denied, on this basis alone. Plaintiff also failed to attach a

proposed amended pleading in violation of CPLR 3025(b), which is also the basis for the denial of plaintiff's cross motion to amend the complaint.

Turning to defendants' motion to dismiss the First Cause of Action sounding in fraud, the Complaint alleges that defendants instructed or conspired with their legal representative and/or contractors to deceive a court of law in a civil case brought by plaintiff against Summit and Patriot in the First Lawsuit by submitting two invoices from 2012 as part of the prior summary judgment motion, which resulted in a dismissal of the First Lawsuit. This involves two invoices from a contractor K.P.G. Services, Inc dated March 1, 2012 and from Peak Restorations Inc with an invoice dated April 18, 2012, and they indicate several small repairs were performed in the Unit in 2012. Plaintiff asserts that the work as reflected in these invoices, was never performed in the Unit in 2012, and that they were forged. Plaintiff alleges that he recognized them as fraudulent when defendants' counsel presented them during a deposition and alerted this fact to Audrey D. Medd, Esq. of Lynch Schwab & Gasparini PLLC.

As a procedural matter, defendants argue that plaintiff's fraud claim, regarding these invoices should be dismissed as being time barred since they are dated March 1, 2012 and April 18, 2012, and the Third Lawsuit was not filed until July 6, 2018, which is beyond the applicable six year statue of limitations period. Plaintiff also makes other general accusations of claims of fraud. The statute of limitations for fraud is six years from the commission of the fraud or two years from the time the plaintiff discovered, or could with reasonable diligence have discovered, the fraud, whichever is later (Loeuis v Grushin, 126 A.D.3d 761,763–764, [2d Dept 2015]) Pacella v RSA Consultants, Inc., 164 AD3d 806, 809 [2d Dept 2018]). Plaintiff claims that the fraud was committed when defendants filed the alleged forged financial documents in court on

March 13, 2017, which is when the Statute of Limitations should begin to accrue. Here, there is a question as to when plaintiff, at the very latest, possessed knowledge of the facts underlying his allegations of fraud (Clarke-St. John v City of New York, 164 AD3d 743, 744, [2d Dept 2018]). Defendants as the moving party, on a motion to dismiss a complaint pursuant to CPLR 3211(a)(5) on statute of limitations grounds, failed to establish prima facie, that the time in which to commence the action has expired (Doukas v Ballard, 135 AD3d 896, 897, [2d Dept 2016]).

As to the merits of defendants' motion to dismiss plaintiff's first cause of action sounding in fraud, the elements of a cause of action to recover damages for fraud are: (1) a false representation of fact, (2) knowledge of the falsity, (3) intent to induce reliance, (4) justifiable reliance, and (5) damages (Doukas v Ballard, 135 AD.3d 896, 898, [2d Dept 2016]). According to plaintiff, the alleged repairs inside plaintiff's Unit never took place in 2012. Rather, repairs only occurred in 2015 and only after defendants were forced to comply with orders by the Village Code Enforcement Department and Port Chester Justice Court. By defendants allegedly fabricating documents in and out of court, plaintiff claims that the clear intention of defendants was to induce plaintiff into relying on the documents, hide their negligence, extort funds from plaintiff and discredit plaintiff's legal claims. Defendants argue that plaintiff's contention that these invoices are fraud is baseless given that a witnesses's failure to recall a specific event over 6 years ago does not establish that defendants falsified any document or that this witness did not indeed prepare this document.

Since this is a motion to dismiss, the court must accept the facts alleged in the complaint as true, and according the plaintiff the benefit of every favorable inference, the complaint states a cause of action sounding in fraud.

As for plaintiff's second cause of action, Defamation, it can sound in libel or slander. Libel involves publication, something in writing or pictures, and slander involves statements, something spoken (Klein v McGauley, 29 AD2d 418, 421 [2d Dept 1968]). To allege a cause of action for defamation, plaintiff must show a 'false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se' (Epifani v Johnson, 65 AD3d 224, 233 [2d Dept 2009]). Specifically, plaintiff must allege a false statement by defendant made to third parties including statements charging the plaintiff with a serious crime, or statements that tend to injure the plaintiff in his or her trade, business, resulting in injury to reputation (Rinaldi v Holt, Rinehart & Winston, Inc., 42 NY2d 369 [1977] ; (Liberman v Gelstein, 80 NY2d 429, 435 [1992]). When allegedly false statements fall within one of these categories, the law presumes that damages will result, and they need not be alleged or proven (Liberman v. Gelstein, 80 N.Y.2d 429, 435; El Jamal v Weil, 116 AD3d 732, 734 [2d Dept 2014]); Matovcik v Times Beacon Record Newspapers, 46 AD3d 636, 367 [2d Dept 2007]). A defamation claim is subject to heightened pleading standards imposed by CPLR 3016 (a). and must include time, place and manner of the false statement and [specifying] to whom it was made and also requires that a complaint include the published words that plaintiff alleges as defamatory (Colantonio v Mercy Med. Ctr., 115 AD3d 902, 904 [2d Dept 2014]; Abakporo v Daily News, 102 AD3d 815, 816-817 [2013]). "In determining whether a complaint states a cause of action to recover damages for defamation, the dispositive inquiry is whether a reasonable listener or reader could have concluded that the statements were conveying facts about the plaintiff' (Kamchi v Weissman, 125 AD3d 142, 156 [2d Dept 2014]). In deciding a

motion to dismiss a defamation claim, a court must determine whether the identified statements are reasonably susceptible of a defamatory meaning (Golub v Equirer/Star Group, 89 NY2d 1074, 1076 [1997]). The court must look at the content of the entire communication, its tone and apparent purpose, to determine whether a reasonable person would consider it as conveying facts about the defendants. Gjonlekaj v Sot, 308 AD2d 471, 473 [2d Dept 2003]). Whether a particular statement constitutes an opinion or an objective fact is a question of law (Mann v Abel, 10 NY3d 271, 276 [2008]). Expressions of opinion, as opposed to assertions of fact, are deemed privileged and, no matter how offensive, cannot be the subject of an action for defamation (Kamchi v Weissman, 125 AD3d 142, 157 [2d Dept 2014]).

The Court of Appeals has identified several guidelines to be considered to aid in such determination: "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal ... readers or listeners that what is being read or heard is likely to be opinion, not fact" (Mann v Abel, 10 NY3d at 276, [internal quotation marks omitted]; (Kamchi v Weissman, 125 AD3d 142, 157 [2d Dept 2014]). False statements constitutes defamation per se when it charges another with a serious crime or tends to injure another in his business, trade, or profession (Epifani v Johnson, 65 AD3d 224, 233-234 [2d Dept 2009]).

Given the one year statute of limitations applicable to all defamation, libel and slander claims, with the instant action not commenced until July 6, 2018, all of these claims are time barred.

In the Complaint, plaintiff references two notices issued on Patriot's letterhead, dated February 22, 2016 and March 7, 2016, which were distributed by Patriot to the entire 35/37 Summit building complex to all shareholders and residents. Plaintiff claims that defendants committed libel, insofar as these notices contained false statements that were damaging to plaintiff's reputation and character. Notably, as for the February 22, 2018 Notice, it referred to three unnamed shareholders. Additionally, defendants purportedly committed slander which was damaging to plaintiff's credibility, to his character.

According to plaintiff, the purported slander committed in court was intended to damage the legitimacy of Village officials' lawsuit against defendants on behalf of plaintiff, who was absent and unable to defend himself in Port Chester village court. Plaintiff contends that Prosecutor Frank A. Cerninka of the Village of Port Chester informed him on or about May 5, 2016, that defendants and/or their attorney, Audrey D. Medd, Esq. stated to Judge Peter F. Sisca that repairs were not performed in plaintiff's Unit because plaintiff did not allow access, which is not true. In fact, plaintiff maintains that he has always allowed access to his residence but plaintiff was not a party to the case and unable to defend himself.

In light of these facts, plaintiff's complaint fails to articulate the necessary elements for a defamation, libel and slander by demonstrating the falsity of any statement or publication or any damages sustained. Plaintiff's claim that defendants' law firm purportedly made statements that plaintiff did not allow access to his unit is not actionable given that "for purposes of defending against a libel cause of action, "[s]tatements made by parties, attorneys, and witnesses in the course of a judicial or quasi-judicial proceeding are absolutely privileged, notwithstanding the motive with which they are made, so long as they are material and pertinent to the issue to be

resolved in the proceeding" (Rufeh v Schwartz, 50 AD3d 1002, 1004 [2d Dept 2008]).

Plaintiff's Third Cause of Action for Invasion of Privacy is dismissed as New York State does not recognize the common-law tort of invasion of privacy except to the extent it comes within Civil Rights Law §§ 50 and 51 (Farrow v Allstate Ins. Co., 53 AD3d 563, 563–64 [2d Dept 2008) the factual allegations in the complaint are not embraced by Civil Rights Law §§ 50 and 51. Thus, the complaint does not state a cognizable cause of action to recover damages for invasion of privacy.

Plaintiff's Fourth Cause of Action invokes Human Rights Law. Defendants contend that the basis of this cause of action seems to stem from a purported question asked by an attorney from defendants' counsel's office concerning plaintiff's sexual orientation at his deposition of October 17, 2016. However, the transcript itself makes no reference to any purported quesiton about plaitniff's sexual orientation. Given that plaintiff's complaint only alleges discriminatory conduct by an attorney from defendants' counsel's firm as well as Dr. Baer, a psychologist who examined plaintiff by court-ordered independent psychological examination, with no reference to any discriminatory conduct being made by defendants, the fourth cause of action alleging improper discriminatory conduct is dismissed.

Further, based upon this court's review of the pleadings, plaintiff has not alleged a cause of action for as against the individual defendants Mr. Goh, as president of Patriot, Maldonado, as CEO of 35 Summit Avenue, and Edward Cline as treasurer of 35 Summit Avenue. Plaintiff claims that Mr. Goh is the absolute monarch of 35 Summit Avenue and has openly bragged about having total control over the Board, even though he is not a shareholder or resident.

A recognized and legitimate purpose of incorporating is to limit or eliminate the personal

liability of corporate principals (Bonacasa Realty Co., LLC v Salvatore, 109 AD3d 946, 947 [2d Dept 2013]). It is well-settled that a party seeking to pierce the corporate veil must establish that "(1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) that such domination was used to commit a fraud or wrong against the plaintiff which resulted in the plaintiff's injury" (Goldman v Chapman, 44 AD3d 938, 939 [2d Dept 2007]).

Taking into consideration the parties' contentions, plaintiff's complaint against Maldonado and Cline, as members of the Board of Directors of Summit, are dismissed given the absence in the complaint of any non-conclusory allegation that these individuals committed any tortuous conduct in their individual capacity. Likewise, plaintiff's complaint against Goh is dismissed given his position as the President of Patriot (a New York Corporation). Plaintiff failed to demonstrate that the individual corporate defendant used such dominion and control to commit a fraud or wrong against plaintiff which resulted in injury, or that failed to observe corporate formalities, or that he was alter egos (Goldman v Chapman, 44 AD3d at 940). For these reasons, the causes of action alleged against the individuals cannot survive the motion to dismiss under CPLR 3211(a)(7).

Punitive damages are available for the purpose of vindicating a public right only where the actions of the alleged tort-feasor constitute gross recklessness or intentional, wanton or malicious conduct aimed at the public generally or are activated by evil or reprehensible motives" (Gravitt v Newman, 114 AD2d 1000, 1002 [2d Dept 1985]). Plaintiff's allegations do not rise to the level of moral culpability necessary to support a claim for punitive damages. Plaintiff also claims that defendants were harassing him by interfering with his parking privileges

as well as commencing an eviction proceeding. This claim is undermined by the fact that plaintiff refused to make monthly maintenance payments, and that the Port Chester Village Justice resolved Summit's eviction petition whereby plaintiff agreed that the sum of $8,163.83 was due and owing, and that he would repay this sum.

Furthermore, the court has reviewed the record and finds that no costs or sanctions against plaintiff pro se for bringing this action are appropriate under these circumstances.

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss (Seq 1) is **granted** to the extent that the Second, Third and Fourth Causes of Action in the complaint are **dismissed**, as well as in the ad damnum cause for punitive damages is **dismissed**, and the motion is **denied** otherwise; and it is further

ORDERED, that the parties are directed to appear in the Preliminary Conference Part at 930AM - Feb. 11th, 2019 in Room 811 of the Westchester County Courthouse, 111 Dr. Martin Luther King Jr. Blvd., White Plains, New York 10601.

The Clerk shall mark his records accordingly.

All matters not herein decided are denied. This constitutes the Decision and Order of the court.

Dated: January 11, 2019
White Plains, New York

HON. CHARLES D. WOOD
Justice of the Supreme Court

To: All Parties by NYSCEF