

Banschick v Johnson
2019 NY Slip Op 35268(U)
September 19, 2019
Supreme Court, Nassau County
Docket Number: Index No. 608065/2018
Judge: Sharon M.J. Gianelli
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 20
Present: Hon. Sharon M.J. Gianelli, J.S.C.

RUTH BANSCHICK and STUART BANSCHICK,

Plaintiffs,

Index No. 608065/2018

-against-

Mot Seq. Nos. 001, 002, & 003

MICHAEL JOHNSON and JANICE JOHNSON,

Decision and Order

XXX

Defendants.

Papers submitted on this motion:

Mot. Seq. No. 001

Defendants' Notice of Motion _____X

Defendants' Memorandum of Law in Support _____X

Defendants' Reply Affidavit in Support and in Opposition

To Plaintiffs' Motion to Compel Further Discovery _____X

Defendants' Reply Memorandum of Law _____X

Mot. Seq. No. 002

Plaintiffs' Notice of Cross-Motion _____X

Defendants' Memorandum of Law in Opposition _____X

Plaintiffs' Affidavit in Reply _____X

Mot. Seq. No. 003

Plaintiffs' Notice of Cross-Motion _____X

Defendants' Affidavit in Opposition to Motion and in

Support of Cross-Motion _____X

Mot. Seq. No. 001 is Defendants' motion for an Order of the Court, pursuant to

CPLR § 3211 (a)(7) dismissing the complaint. Mot. Seq. No. 002 is Plaintiffs' motion for
an Order dismissing Defendants' counterclaims pursuant to CPLR § 3211(a)(7).

Mot. Seq. No. 003 is Plaintiffs' motion for an Order pursuant to CPLR § 3124

compelling discovery; and CPLR §§ 3041 and 3042 compelling Defendants to serve a
Supplemental Bill of Particulars

Background

The underlying action is one by Plaintiffs to recover damages for the Intentional Infliction of Emotional Distress, Intentional Interference with Plaintiffs' Persons and Property, Private Nuisance, and Defamation by Slander *per se* based upon Defendants' home re-build and landscaping, which Plaintiffs allege have the effect of obstructing Plaintiffs' view of the bay, enjoyment of property and value of their home.

Plaintiffs commenced this action by the filing of a Summons and Verified Complaint on June 15, 2018. There have been no allegations that Defendants' re-build and landscaping are in violation of any law or local ordinances.

Plaintiffs and Defendants are neighbors residing in Long Beach, New York. Defendants' home was damaged by Superstorm Sandy. In rebuilding, Defendants increased the size of their deck, made other changes to the rebuilt home and modified the landscaping by certain tree plantings, such that Plaintiffs' views are now obstructed. Despite attempted efforts to discuss the matter during and post-construction, the parties continue to disagree concerning Defendants' re-build, leading Plaintiffs to commence this action.

Defendants now seek dismissal of this Complaint pursuant to CPLR § 3211(a)(7), on the ground that Plaintiffs have failed to plead a cognizable claim. The Court Grants this application.

[*2]

Analysis/Law

In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), the Court must accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez*, 84 NY2d 83, 88; *Cervini v Zanoni*, 95 AD3d 919 [2d Dept. 2012]; *Sokol v Leader*, 74 AD3d 1180, 1181 [2d Dept. 2010]). The evidence should be construed in a light most favorable to the party moved against (*Corvino v Mount Pleasant Cent. Sch. Dist.*, 305 AD2d 364 [2d Dept. 2003]; *Weiss v Garfield*, 21 AD2d 156 [3d Dept. 1964]). It is a drastic remedy, the procedural equivalent of a trial, and will not be granted if there is any doubt as to the existence of a triable issue (*see Palacino v Equity Mgt. Group*, 272 AD2d 457 [2d Dept. 2000]; *Crowley's Milk Co. v Klein*, 24 AD2d 920 [3d Dept. 1965]; *Moskowitz v Garlock*, 23 AD2d 943 [3d Dept. 1965]). “Where evidentiary material is submitted on a CPLR 3211(a)(7) motion, it may be considered by the court, but unless the defendant demonstrates, without significant dispute, that a material fact alleged by the complaint is not a fact at all, the motion will not be granted” (*Quesada v Global Land, Inc.*, 35 AD3d 575 [2d Dept. 2006]). Here, the conduct that forms the basis for Plaintiffs’ first three causes of action, i.e. the rebuilding of a home such that Plaintiffs’ view is obstructed, is conduct that is lawful on the part of Defendants and not violative of any statutes or ordinances.

Generally, a property owner has wide latitude in the use of his property, so long as the use does not violate an ordinance or statute. (*Bove v Donner-Hanna Coke Corp.*, 236

AD 37 [4th Dept. 1932]). Further, absent an easement, New York does not recognize a right to a particular view from one's home, and an express agreement must exist entitling a Plaintiff to light, air and view easements. (*Golub v Simon*, 28 AD3d 359 [1st Dept. 2006]) Here, notwithstanding the ongoing dispute between the parties, Plaintiffs have failed to establish a cognizable basis upon which their first three causes of action can stand. Consequently, the causes of action pled by Plaintiffs, with the exception of defamation, cannot stand.

As to the defamation cause of action, slander *per se*, Plaintiffs allege that this cause of action is based in Defendants' having accused Plaintiff of "spying" on them and causing his drone to "hover" over their house. Further they allege that in July 2017, Defendant Michael Johnson told another individual in a loud voice: "Oh, there's Stuart Banschick! He spies on everyone with his drone! You better watch out or he'll spy on you with his drone!"

"Generally, only statements of fact can be defamatory because statement of pure opinion cannot be proven untrue" (see *Thomas H. v Paul B.*, *supra*). "Whether a particular statement constitutes and opinion or an objective fact is a question of law" (*Mann v Abel*, 10 NY3d 271 [2008] citing *Rinaldi v Holt, Rinehart & Winston*, 42 NY2d 369 [1977]); (see also *Stolatis v Hernandez*, 161 AD3d 1207 [2d Dept. 2018]). "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" (*Stolatis v Hernandez*, *supra*, citing *Mann v Abel*, *supra*).

To determine whether a statement is opinion or fact, courts must examine three factors: “(1) whether the allegedly defamatory words have a ‘precise meaning’ that is ‘readily understood’; (2) whether the statement can be proven as 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” (*id. quoting Brian v Richardson*, 87 NY 2d 46, 51 [1995]). Here, these statements are lacking in precision, not easily amenable to being proven true or false, and in the broader context is more akin to opinion than fact. Consequently, the statements that form the basis for Plaintiffs’ fourth cause of action are insufficient to support the charge of defamation by slander, therefore, the fourth cause of action also fails.

Accordingly, it is hereby

ORDERED, that Defendants’ motion for an Order of the Court pursuant to CPLR § 3211(a)(7) (Mot. Seq. No. 001) dismissing the complaint, is Granted; and it is

ORDERED, that Plaintiffs’ motion for an Order dismissing Defendants’ counterclaims pursuant to CPLR § 3211(a)(7) (Mot. Seq. No. 002), is Denied as moot; and it is

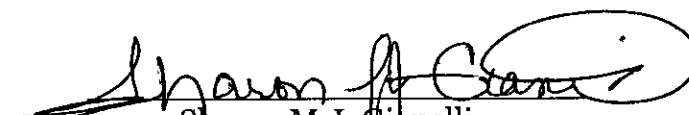
ORDERED, that Plaintiffs’ motion for an Order pursuant to CPLR § 3124 compelling discovery (Mot. Seq. No. 003), is Denied as moot.

[*5]

All other matters not specifically ruled on herein are hereby denied.

This constitutes the decision and order of this Court.

DATED: Mineola, New York
September 19, 2019



Sharon M.J. Gianelli
Justice of the Supreme Court

ENTERED
SEP 23 2019
NASSAU COUNTY
COUNTY CLERK'S OFFICE