

Aenyc Holding Co. LLC v Mardkha
2020 NY Slip Op 30217(U)
January 27, 2020
Supreme Court, New York County
Docket Number: 159071/2014
Judge: James E. d'Auguste
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES EDWARD D'AUGUSTE PART 55 IAS MOTION 55EFM

Justice

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INDEX NO. 159071/2014

AENYC HOLDING COMPANY LLC, ADVANCED
ENDODONTICS OF NYC P.C.,

MOTION SEQ. NO. 002

Plaintiffs,

- v -

DAVID MARDKHA, JD BAR CONDO LLC, AMIR MARDKHA,
AM BAR CONDO LLC, CAMERONTEC GROUP, DAVID
YAMINS, 168 MADISON AVENUE LLC, JOHN RAPP,
SHEILA CHESH, PHILIPS INTERNATIONAL HOLDING
CORP., THE BOARD OF MANAGERS OF THE BAR
BUILDING CONDOMINIUM,

**DECISION + ORDER
ON MOTION**

Defendants.

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HON. JAMES E. d'AUGUSTE:

Plaintiffs Aenyc Holding Company LLC and Advanced Endodontics of NYC P.C. move:

(a) pursuant to CPLR 3025 (b), for leave to amend the verified complaint to: (a) add two causes of action alleging violation of the New York State and New York City Human Rights Laws, respectively, Executive Law § 296 and Administrative Code of City of N.Y. § 8-107; (b) pursuant to CPLR 1003, to add Robert Huber, Benjamin Asher, Michael Pagnotta, Richard Tuske, Omid Hakimi, and Sudhir Jain as additional defendants; (c) to seek treble damages, pursuant to Real Property and Procedure Law (RPAPL) § 853, and (d) to delete the cause of action seeking a declaration, on the grounds that it is moot.

The proposed claims alleging discrimination are based upon an email that defendant Amir Mardkha sent to proposed defendant Benjamin Asher on December 13, 2013, explaining why he was refusing to permit plaintiffs to run a waste pipe above his condominium unit. The email reads in full:

“He is a low life Tehrani that was out to screw me. He asked me for access and I said if he pays for legal fees I will give it to him. At the end he said he was not paying fees because too high. I am out \$2500 now. It’s for his personal bathroom. I am going to run AC ducting in that area.”

NYSCEF DOC. No. 76. The “He” referred to in the 2013 email is nonparty Nima Dayani, the principal of both corporate plaintiffs.

Plaintiffs contend that the phrase “low life Tehrani” is an ethnic slur demonstrating discriminatory motive by a “Mashadi Jew” against a “Tehrani Jew.” Plaintiffs contend that these two groups are culturally and ethnically different from one another and that discrimination between two such groups is protected by the NYCHRL. Defendants argue that both Dayani and Mardkha, as well as one or more of the other members of the defendant Board of Managers of the Bar Building Condominium (Board), are all Jewish people from Iran and the phrase objected to is therefore implausible evidence of discrimination based upon religion or national origin and not protected.

The Court declines to decide on the issue as to whether discrimination between “Mashadi Jews” and “Tehrani Jews” would be covered under the NYCHRL as discrimination based on a protected category. However, the Court need not reach this conclusion to dispose of the motion.¹

Plaintiffs’ proposed amendments were first proposed more than four years after plaintiffs commenced this action, and more than two years after Mardkha’s email was produced to plaintiffs during discovery. Plaintiffs proffer no reason for this delay. Additionally, the limitations period for discrimination claims under the NYCHRL is three years. The alleged discriminatory act

¹ Even assuming arguendo that the single phrase in the single email “low life Tehrani” was a slur related to a protected category under the NYCHRL, the text, by itself, would be insufficient as a matter of law to demonstrate a violation of the State or City HRL. While leave to amend a pleading should be freely given (CPLR 3025 [b]), such leave should be denied where the amendment would be futile. *Sapienza v Becker & Poliakoff*, 173 AD3d 640, 640 (1st Dept 2019), citing *Heller v Louis Provenzano, Inc.* 303 AD2d 20, 25 (1st Dept 2003).

(refusal to allow plaintiff access to engage in the proposed construction work to run a bathroom waste line) occurred in or about December 2013, which is almost five years before the plaintiffs proposed the amendment to their complaint in November 2018. Accordingly, for these reasons, plaintiffs' motion to raise new claims under a completely new theory of liability must be denied. *See Oil Heat. Inst. of Long Is. Trust v RMTS Assoc.*, 4 AD3d 290, 293 (1st Dept 2003), citing *Heller v Louis Provenzano, Inc.*, 303 AD2d 20, 24 (1st Dept 2010).

Additionally, the individuals whom plaintiffs wish to add as defendants are members of the Board. A corporate officer who, by his individual acts, participates in the corporation's tort may be held liable for his or her acts (*Hersh v One Fifth Ave. Apt. Corp.*, 163 AD3d 500, 501 [1st Dept 2018]; *Fletcher v Dakota, Inc.*, 99 AD3d 43, 49 [1st Dept 2012]). However, plaintiffs' proposed amendments to their complaint allege no specific acts taken by any of the proposed new defendants. Accordingly, it would be futile to add those proposed defendants as parties.

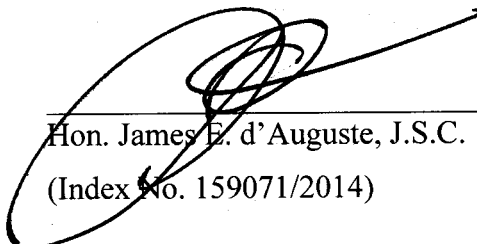
Finally, RPAPL § 853 provides for treble damages to a plaintiff who has been "disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence, or by unlawful means." Plainly, plaintiffs have neither been ejected from their unit, nor kept out of it. Plaintiffs rely on *Ripley LLC v Board of Mgrs. of the Avery Condominium* (2017 NY Slip Op 30240[U]) (Sup Court, NY County 2017), in which the court held the statute applicable to a refusal on the part of a board of managers to allow the plaintiff in that case to enter the building's electric meter room in order to activate electric service to the plaintiff's office. Refusing access to part of a building is a far cry from refusing to allow construction and the installation of a waste pipe in a building.

Accordingly, it is hereby

ORDERED that the motion of plaintiffs AENYC Holding Company LLC and Advanced Endodontics of NYC, P.C. to amend their complaint is granted to the extent of deleting the cause of action that seeks a declaration, and the motion is otherwise denied.

Dated: January 27, 2020

ENTER:



Hon. James E. d'Auguste, J.S.C.
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