

Zackmaxie, LLC v Brooklyn Legal Servs. Corp.

2020 NY Slip Op 30540(U)

February 13, 2020

Supreme Court, Kings County

Docket Number: 510804/18

Judge: Wavny Toussaint

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 13th day of February 2020.

PRESENT:

HON. WAVNY TOUSSAINT,
Justice.

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ZACKMAXIE, LLC,
Plaintiff,

- against -

DECISION AND ORDER

Index No. 510804/18

BROOKLYN LEGAL SERVICES CORPORATION A,
ST. NICK'S ALLIANCE, BRUNO D. GARCIA,
NEW YORK CITY DEPARTMENT OF HOUSING
PRESERVATION AND DEVELOPMENT,
ERMELINDA CORCHADO, AMANDA WALLACE,
AARON BEAUMONT, EMIL BOVBJERG,
JEREMY LOUCAS, SOLONJE BURNETT-LOUCAS,
LUCY HUNTER, TIMOTHY BERGSTROM,
ALEC HOLST AND LEAH BLANTON,

Defendants.

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The following papers numbered 1 to 7 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed	<u>1-2, 3-5</u>
Opposing Affidavits (Affirmations) _____	<u>6</u>
Reply Affidavits (Affirmations) _____	<u>7</u>

Upon the foregoing papers, defendants Ermelinda Corchado, Amanda Wallace, Aaron Beaumont, Jeremy Loucas, Solonje Burnett-Loucas, Lucy Hunter, Timothy Bergstrom and Alec Holst (collectively, the moving tenant defendants)

move for order, pursuant to CPLR 3212, granting summary judgment dismissing the amended complaint of plaintiff Zackmaxie, LLC. Defendants Brooklyn Legal Services Corporation A and Bruno D. Garcia (collectively, the attorney defendants) also move, for an order, pursuant to CPLR 3211 (a) (7) and (8), to dismiss Zackmaxie's amended complaint for failure to state a cause of action and for lack of personal jurisdiction. Alternatively, the attorney defendants seek summary judgment, pursuant to CPLR 3212. All moving defendants further request an order dismissing all cross claims asserted against them by St. Nick's Alliance (St. Nick's) with prejudice. Plaintiff opposes the motion and cross-moves for permission to file an affidavit of service against the attorney defendants, nunc pro tunc, demonstrating that the attorney defendants were served on May 3, 2019.¹

Background

The moving tenant defendants and tenant defendants Emil Bovbjerg and Leah Blanton reside in 431 Bleeker Street, Brooklyn, New York (premises), a residential building owned by Zackmaxie since 2007. The defendants allege that the building is subject to rent stabilization laws and that Zackmaxie, among other things has denied this rental status to their apartments. On October 26, 2017, Zackmaxie obtained a permit to install eight new boilers and eight new hot water heaters and remove one boiler and two oil tanks from the premises. This was done in an effort

¹An August 15, 2018 short form order, issued by the Hon. Reginald A. Boddie, dismissed the New York City Department of Housing Preservation and Development from this action.

to “replace the inefficient oil boiler with new and efficient natural gas and water heaters.” According to plaintiff, this would enable each unit to regulate its own heat usage.

On March 28, 2018, Zackmaxie allegedly encountered complications that interrupted gas supply to the building. It claims to have immediately purchased 18 electric space heaters and 8 electric hot plates for its residential tenants and installed an electric water heater so that the tenant defendants would have heat, hot water and the ability to cook. Zackmaxie alleges that the tenant defendants failed to allow access to their apartments to make necessary repairs and purportedly lodged hundreds of fictitious complaints to various governmental bodies, including the New York City Department of Housing Preservation and Development (HPD).

Zackmaxie commenced the instant action on May 24, 2018, asserting three causes of action: (1) violation of a substantial obligation of the tenancy, (2) abuse of process and misuse of legal procedure and (3) breach of contract. On July 3, 2018, the attorney defendants filed an order to show cause and verified petition in Housing Court on behalf of the moving tenant defendants, to compel plaintiff to repair/remediate claimed violations and unlivable conditions in the subject apartments and for civil penalties for each building violation that Zackmaxie allegedly failed to correct within the statutorily required time period. In their petition, they asserted that plaintiff’s failure to repair was intended to cause the tenants to vacate their apartments. The Housing Court proceeding named

Zackmaxie's lender, Signature Bank, as a respondent.

On July 9, 2018, plaintiff filed the amended verified complaint, which named the attorney defendants and St. Nick's as additional defendants. Plaintiff asserts a total of nine causes of action in their amended complaint. The moving tenant defendants filed an answer on July 31, 2018, and responded to the seven causes of action asserted against them: harassment, abuse of process, tortious interference with a business interest, defamation per se, violation of a substantial obligation of the tenancy, abuse of process and misuse of legal procedure and breach of contract.

The Attorney Defendants' Dismissal Motion

The attorney defendants assert that they had not been served with the amended complaint, therefore the court lacks personal jurisdiction over them. Plaintiff opposes dismissal on two grounds: first, that the motion should be denied as moot because the amended complaint was served, by personal delivery on Brooklyn Legal Services, as counsel to the moving tenant defendants, on July 11, 2018. Zackmaxie argues that the attorney defendants were obviously aware that the amended complaint added them as defendants because they generated and served answers to that complaint on behalf of their clients.

Second, Zackmaxie claims that the attorney defendants' motion is moot because it served a separate copy of the amended complaint on each of the attorney defendants on May 3, 2019. Zackmaxie relies on two affidavits of service attached to their cross motion (*see* exhibit D) which demonstrate that the attorney defendants

were served on that date. Zackmaxie further argues that the attorney defendants suffered no prejudice by the delay.

Discussion

Pursuant to CPLR 3211(a) (8), a party may seek judgment dismissing one or more causes of action asserted against it where the court has no personal jurisdiction over the defendant. Pursuant to CPLR 306-b, service of a summons and complaint must be completed within 120 days after commencement of the action. Each defendant named in a complaint must be personally served with a copy of the summons and complaint (*see Matter of Nicklin-McKay v Town of Marlborough Planning Bd.*, 14 AD3d 858, 860 [3d Dept 2005]); *McCormack v Gomez*, 137 AD2d 504, 505 [2d Dept 1988]). “The burden of proving that personal jurisdiction was acquired over a defendant rests with the plaintiff” (*Deb v Hayut*, 171 AD3d 862, 863 [2d Dept 2019]). If the summons and complaint is not served within the 120-day window, then the court can “dismiss the action without prejudice as to that defendant, or upon good cause shown or in the interest of justice, extend the time for service” (CPLR 306-b). Plaintiff will be required to show either good cause for the failure to serve the defendant within 120 days after filing or that an extension of time should be granted in the interest of justice (*Umana v Sofola*, 149 AD3d 1138, 1139-1140 [2d Dept 2017]).

Here, the amended complaint was filed on July 9, 2018. Although a copy of the amended complaint may have been delivered to defendant Brooklyn Legal

Service as counsel for the tenant defendants, each defendant is entitled to one set of service of process. Therefore, Zackmaxie's service of the amended complaint on Brooklyn Legal Service, was not proper service to the attorney defendants as separate and individually named defendants in this action. The affidavits of service show that the attorney defendants were not served within the prescribed time frame and the attorney defendants were served only after filing of the instant motion. Further, Zackmaxie fails to provide a reasonable excuse for their failure to properly serve all the defendants as required. Therefore, the attorney defendants' motion to dismiss the amended complaint against them, pursuant to CPLR 3211 (a) (8), is granted.

The Moving Tenant Defendants Motion

A party seeking summary judgment bears the burden of establishing the cause of action or defense "sufficiently to warrant the court as a matter of law in directing judgment in his favor, and he must do so by tender of evidentiary proof in admissible form" (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980] [internal quotation marks and citation omitted]; see CPLR 3212 [b]). Once movant fulfills such burden, the nonmoving party must show "facts sufficient to require a trial of any issue of fact" (CPLR 3212 [b]).

Harassment

The moving tenant defendants argue that plaintiff's first cause of action alleging harassment should be dismissed pursuant to both § 3211 and §3212 , as no such civil claim exists under New York law. In opposition, plaintiff argues that this

dismissal motion is untimely, as the moving tenant defendant's have already interposed an answer.

New York does not recognize a common law cause of action alleging harassment (*see Scialdone v DeRosa*, 148 AD3d 741, 743 [2d Dept 2017]; *see also Mago, LLC v Singh*, 47 AD3d 772, 772 [2d Dept 2008]). As CPLR 3211 (d) provides that a dismissal motion based upon CPLR 3211 (a) (7) "may be made at *any* subsequent time" (emphasis added), this cause of action is dismissed.

Abuse of Process and Abuse of Process and Misuse of Legal Procedure

Plaintiff alleges that the Housing Court action and complaints to HPD were only made to strain their business relationships, and harass, embarrass and intimidate plaintiff. According to plaintiff, these allegations could have instead been addressed in the instant action.

Defendants assert that an abuse of process cause of action cannot be sustained as a result of their commencement of a meritorious housing court proceeding or by filing truthful complaints to HPD. Defendants further allege that since the Housing Court proceeding was dismissed pursuant to a consent order, wherein Zackmaxie agreed to correct the building violations or face civil penalties, malicious intent cannot be proven.

"Abuse of process has three essential elements: (1) regularly issued process,

(2) an intent to do harm without excuse or justification, and (3) use of process in a perverted manner to obtain a collateral objective” (*Lynn v McCormick*, 153 AD3d 688, 688 [2d Dept 2017] quoting *Greco v Christoffersen*, 70 AD3d 769, 770 [2d Dept 2010]). However, “[t]he mere commencement of a lawsuit cannot serve as the basis for a cause of action alleging abuse of process” (*id.*). Conclusory allegations that commencement of an action or proceeding was improper, unlawful or done in a perverted manner is insufficient to raise an issue of fact and avoid dismissing an abuse of process cause of action (*see 71 Pierrepoint Assocs. v 71 Pierrepoint Corp.*, 243 AD2d 625, 626 [2d Dept 1997]).

Plaintiff admits that there were ongoing issues with the basic building services that they were in the process of repairing when the Housing Court proceeding was commenced. Hence, the defendants have established that the commencement of the Housing Court proceeding did not constitute an abuse of process. Plaintiff has failed to establish that the commencement of said proceeding was motivated by anything other than a legitimate interest. Accordingly, this cause of action should be dismissed.

Tortious Interference with a Business Interest

Plaintiff alleges that the defendants initiated the Housing Court action with the intent to sever plaintiff’s relationship with its bank and cause the bank to bring an action for default on the terms of plaintiff’s mortgage. The defendants argue that

the bank was a proper party to the proceeding and that plaintiff failed to allege how their actions resulted in an actual breach of plaintiff's agreement with its bank.

“The elements of tortious interference with a contract are: (1) the existence of a contract between plaintiff and a third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff” (*Hersh v Cohen*, 131 AD3d 1117, 1119 [2d Dept 2015] quoting *Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993]).

Here, plaintiff has failed to specify any breach of contract or any hindered potential business interest that resulted from the defendants commencement of the Housing Court proceeding. “Conclusory allegations are insufficient to state a cause of action for to recover damages for tortious interference with prospective business relations” (*Nero v Fiore*, 165 AD3d 823, 825 [2d Dept 2018]). Accordingly, this cause of action should be dismissed.

Defamation Per Se

The amended complaint alleges that the moving tenant defendants made false statements, including: (1) plaintiff entered their units without consent, (2) plaintiff harassed and intimidated them, and (3) plaintiff offered the tenants money to vacate their apartments. Defendant's argue that the complaint does not sufficiently specify details of the statement, including, when the statements were made, to whom made,

or manner in which made.

Zackmaxie, in opposition, contends that the defendants have made various defamatory statements about it, at various press conferences and, previously, to its bank, by trying to paint it as a "racist slumlord who takes advantage of tenants." In reply, the defendants argue, inter alia that the statements allegedly made at the press conferences were made several months after the filing of the amended complaint.

"The elements of a cause of action for defamation are (a) a false statement that tends to expose a person to public contempt, hatred, ridicule, aversion, or disgrace, (b) published without privilege or authorization to a third party, (c) amounting to fault as judged by, at a minimum, a negligence standard, and (d) either causing special harm or constituting defamation per se" (*Kasavana v Vela*, 172 AD3d 1042, 1044 [2d Dept 2019] [internal citations and quotation marks omitted]).

Further, "[a] statement is defamatory per se if it (1) charges [among other things], the plaintiff with a serious crime; [or] (2) tends to injure the plaintiff in her or his trade, business or profession" (id.).

Affording plaintiff every favorable inference (see *Leon v Martinez*, 84 NY2d83, 87088 [1994]), it has sufficiently pled defamation per se. Allegations that plaintiff offered to buy out tenants, entered their units without consent and has harassed and intimidated them could be considered criminal activity, and could certainly injure plaintiff in its business and profession. Further, a reasonable listener could have concluded that these are allegations are about plaintiff and (2) these statements are capable of being proven true or false (see *Kamchi v Weissman*, 125 AD3d 142, 157-

158 [2d Dept 2014]).

Violation of a Substantial Obligation of the Tenancy and Breach of Contract

The amended complaint alleges that tenant defendants /violated a substantial obligation of tenancy under 28 RCNY 25-101 and breached their lease agreements, when they failed to permit access to their apartments for repairs. Defendants argue that these causes of action should be dismissed because plaintiff failed to provide proof of sufficient statutory and contractual notice (written seven-day notice) in advance of the requested repairs. In opposition, plaintiff claims it provided the tenants with adequate notice of all their repairs, but was not required to provide seven day advance notice where the repairs were considered to be an emergency.

Affording plaintiff every favorable inference, the complaints sufficiently pleads a cause of action for a substantial obligation of the tenancy and breach of contract. Factual issues warranting discovery remain regarding the adequacy of the notices provided to the tenant defendants and whether the necessary repairs could be classified as an emergency.

Dismissal of Defendant St. Nick's' Alliance Cross Claims

The moving defendants allege that they do not owe St. Nick's indemnification or contribution, as there is no proof they committed any of the acts alleged in the amended complaint. In light of the fact that plaintiff's complaint as asserted against

the attorney defendants is dismissed, the cross claims asserted against them are concomitantly dismissed (*see Hoenig v Park Royal Owners, Inc.*, 260 AD2d 250, 252 [1st Dept 1999]). However, as the complaint has not been dismissed as against the tenant defendants, triable factual issues exist which warrant the denial of said application as to the tenant defendants. Accordingly, it is

ORDERED that the attorney defendants' motion to dismiss plaintiff's amended complaint and to dismiss St. Nick's' cross claims as asserted against them is granted; and it is further

ORDERED that the moving tenant defendant's motion, for summary judgment is granted, to the extent of dismissing plaintiff's causes of action for harassment, abuse of process, abuse of process, misuse of legal procedure and tortious interference with a business interest and is otherwise denied; and it is further


ORDERED that plaintiff's cross motion, for permission to file an affidavit of service against the attorney defendants nunc pro tunc is denied; and it is further

ORDERED that the action shall be severed and shall continue against the

remaining defendants.

The foregoing constitutes the decision and order of this court.

E N T E R,


J. S. C.

HON. WAVNY TOUSSAINT

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