

Chittle v Choi

2020 NY Slip Op 30739(U)

February 24, 2020

Supreme Court, Kings County

Docket Number: 508645/19

Judge: Carolyn E. Wade

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KINGS COUNTY CLERK
FILED

At an IAS Term, Part 84 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 24th day of February, 2020.

PRESENT: 2020 FEB 27 AM 8:15

HON. CAROLYN E. WADE,
Justice.

-----X
SHAWN CHITTLE,

Plaintiff,

DECISION and ORDER

- against -

Index No. 508645/19

STEPHEN CHOI, CHRISTINE TRIPI, SARA KIM, ST. VINCE GROUP LLC D/B/A EAST VILLAGE TAVERN, 158 AVENUE C REALTY LLC, 9300 REALTY MANAGEMENT INC., 9300 REALTY MANAGEMENT INC., 9300 REALTY INC., AND, CROMAN REAL ESTATE INC.,

Motion Sequence 2

Defendants.
-----X¹

The following e-filed papers read herein:

NYSCEF No.:

Notice of Motion/Cross Motion,	
Affirmation (Affidavit), and Exhibits Annexed _____	<u>26-27</u>
Affirmation (Affidavit) in Opposition and Exhibits Annexed _____	<u>35</u>
Reply Affirmation (Affidavit) and Exhibits Annexed _____	<u>47</u>

Defendant 158 Realty moves (in motion sequence [MS] two) for an order, pursuant to CPLR 3211 (a) (5), (7), and (8), dismissing the action for lack of personal jurisdiction, as barred by collateral estoppel and res judicata, and that it fails to state a cause of action.

¹ Plaintiff, Shawn Chittle (Mr. Chittle) commenced this action through the filing of an April 17, 2019 summons and complaint. Among other named defendants, the complaint identified defendant Tuan Tua (Tua). Subsequently, affidavits of services were filed attesting to service of process of the initial complaint on certain named defendants, but none attesting to service of process on either defendant Tua or defendant 158 Avenue C Realty LLC (158 Realty). Soon thereafter, defendant Tua and defendant 158 Realty made the instant motion to dismiss. On July 10, 2019, defendants St. Vince Group LLC, Stephen Choi, and Christine Tripi filed a joint answer. On September 24, 2019, plaintiff filed an amended complaint, adding several parties, amending certain factual allegations, and removing defendant Tua from the caption. On September 28, 2019, an affidavit of service was filed purporting service of process had been effectuated on defendant 158 Realty. The record contains no objection or responses to plaintiff's amended complaint, and this decision and order thus treats the instant motion as addressing the amended complaint (*see EDP Hosp. Computer Sys. v Bronx-Lebanon Hosp. Ctr.*, 212 AD2d 570, 571 [2d Dept 1995]). Hence, the motion, to the extent it seeks to dismiss the action against defendant Tua, is denied as moot as the action no longer includes Tua.

Background

This case concerns defendants' maintenance and operation of the East Village Tavern (EVT), a restaurant and bar located at 158 Avenue C in Manhattan (premises). 158 Realty is the premises landlord, and Mr. Chittle was a tenant residing in an apartment above EVT. This is the third action Mr. Chittle commenced against the defendants regarding EVT's operation. The first action, in New York County Supreme Court, was dismissed without prejudice as to Mr. Chittle's private nuisance cause of action against 158 Realty, with certain other causes of actions against certain other defendants dismissed with prejudice. The second action, commenced in this court, was discontinued by Mr. Chittle without prejudice. The instant action asserts claims of nuisance per se, private nuisance, and breach of warranty of habitability against 158 Realty.

Mr. Chittle alleges that he executed a lease with 158 Realty containing an explicit warranty of habitability that the apartment was fit for human living and presenting no condition dangerous to health, life or safety. After Mr. Chittle entered the lease, defendant St. Vince Group LLC doing business as EVT (St. Vince) acquired a license for on-premises liquor sales (liquor license) and began operating EVT. Mr. Chittle asserts that St. Vince agreed, as a condition of acquiring the liquor license, to nine stipulations limiting the operation hours, guaranteeing measures to reduce noise pollution, and restricting the events/promotions that EVT could host.

Mr. Chittle asserts EVT began violating these stipulations nearly immediately upon opening. Specifically, he alleges that EVT consistently remains open past its agreed upon closing time and failed to install noise-canceling safeguards. Hence, Mr. Chittle asserts that

his floors and walls shake and vibrate, and the noise and vibrations make it difficult for him to work, relax, or sleep. 158 Realty now seeks an order dismissing the action as asserted against it.

CPLR 3211 (a) (8) - Personal Jurisdiction

The Parties' Positions

In support of its motion, 158 Realty presents the affirmation of its attorney, Dean Dreiblatt, who avers that his firm, Rose & Rose (R & R), received a copy of the summons and complaint to be served on 158 Realty. However, he asserts that R & R was not authorized to receive service for 158 Realty, which, in turn, argues that the action must be dismissed. 158 Realty claims personal jurisdiction over it is lacking because R & R is neither a member, manager, or authorized agent of 158 Realty.

Mr. Chittle, in opposition, argues for rejecting 158's argument that R & R was unauthorized to accept service since it admits to representing 158 Realty in the instant action. Robert Halpern, Mr. Chittle's attorney, avers that he served 158 Realty by delivering a copy of the summons and complaint to R & R. He further swears that he was familiar with that firm's relationship with 158 Realty due to previous litigation between Mr. Chittle and 158 Realty, and thus knew that R & R was suitable to receive service for 158 Realty.

In reply, 158 Realty maintains that the law fails to support Mr. Chittle's opposition. It notes that Mr. Halpern admitted to serving 158 Realty through R & R, not serving 158 Realty personally or by way of the New York State Secretary of State. 158 Realty argues that service here, through R & R, is facially improper service as R & R was not 158 Realty's attorneys at the time of service and had not had consented, stipulated, or agreed to accept

service on 158 Realty's behalf. Therefore, it contends that the action must be dismissed for lack of personal jurisdiction over it.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (8), a "plaintiff need only make a prima facie showing that the defendant is subject to the personal jurisdiction of the court" (*Shatara v Ephraim*, 137 AD3d 1244, 1246 [2d Dept 2016]). "A process server's affidavit of service constitutes prima facie evidence of proper service" (*Deutsche Bank Natl. Trust Co. v Quinones*, 114 AD3d 719, 719 [2d Dept 2014]). "While bare and unsubstantiated denials are insufficient to rebut the presumption of service, a sworn denial of service containing specific facts generally rebuts the presumption of proper service established by the process server's affidavit and necessitates an evidentiary hearing" (*Bayview Loan Servicing, LLC v Yusupova*, 172 AD3d 669, 670 [2d Dept 2019] [internal quotation marks and citations omitted]). Critically, the sworn denial of service must be that of the defendant (*see U.S. Bank N.A. v Aorta*, 176 AD3d 755, 756 [2d Dept 2019]; *Nationstar Mtge., LLC v Dekom*, 161 AD3d 995, 996 [2d Dept 2018]; *Mortgage Elec. Registration Sys., Inc. v Losco*, 125 AD3d 733, 733 [2d Dept 2015]; *Bank of N.Y. v Samuels*, 107 AD3d 653, 653 [2d Dept 2013]; *cf. Indymac Fed. Bank FSB v Quattrochi*, 99 AD3d 763, 764-765 [2d Dept 2012] [wherein the Appellate Division discusses the sufficiency of a sworn denial of a nonparty "agent" who received service of process on behalf of a defendant]; *but see Purzak v Long Is. Hous. Servs., Inc.*, 149 AD3d 989, 991-992 [2d Dept 2017]).

Here, 158 Realty's motion must be denied. Mr. Chittle demonstrated a presumption of service by way of the affidavit of service filed in the New York State Courts Electronic

Filing (NYSCEF) System purporting service of process was effectuated on 158 Realty by delivering a copy of, among other documents, a supplemental summons and first amended complaint at 640 Broadway, 2nd Floor, New York, New York 10003, to “‘Crystal,’ who indicated that she was authorized to accept process for [158 Realty]” (NYSCEF Doc No. 64). Such affidavit of service provides prima facie evidence of proper service and shifts the burden to the moving defendant to rebut the presumption of proper service (*Deutsche Bank*, 114 AD3d at 719).

158 Realty failed to rebut this presumption. It only presented the affirmation of its attorney, Mr. Dreibratt, whose assertions that R & R at the time of service did not have authority or any other form of capacity to accept service of process for 158 Realty are alone insufficient to defeat the presumption of service. A sworn denial from *the defendant* must rebut the presumption of proper service (*see U.S. Bank N.A.*, 176 AD3d at 756; *Nationstar Mtge., LLC*, 161 AD3d at 996; *Mortgage Elec. Registration Sys., Inc.*, 125 AD3d at 733; *Bank of N.Y.*, 107 AD3d at 653; *cf. Indymac Fed. Bank FSB*, 99 AD3d at 764-765; *but see Purzak*, 149 AD3d at 991-992). 158 Realty presents no sworn statement from any one of its principals or members. Accordingly, the motion to the extent it seeks dismissal of the action as against 158 Realty pursuant to CPLR 3211 (a) (8) is denied.

CPLR 3211 (a) (5) - Res Judicata & Collateral Estoppel

The Parties' Positions

Alternatively, 158 Realty argues that the action must be dismissed on res judicata and collateral estoppel grounds and notes that this case now represents the third action Mr. Chittle has brought concerning the same relief and identical facts. 158 Realty maintains that

the first action was dismissed in its entirety after oral argument and contends that any subsequent action must be barred as having already been heard on its merits. Further, 158 Realty recounts that Mr. Chittle subsequently brought a second action, which he ultimately discontinued, and thus argues that Mr. Chittle is presently bringing the same action for the third time. Both prior actions were unsuccessful and permitting further litigation, he claims, would contravene the collateral estoppel and res judicata doctrines.

Mr. Chittle, in opposition, wholly rejects 158 Realty's position and stresses that the order dismissing the first action specifically provided that the nuisance cause of action as to 158 Realty be dismissed *without* prejudice. Mr. Chittle further submits that none of the merits of the action have been litigated thereby making the doctrines inapplicable.

158 Realty's reply papers do not specifically address Mr. Chittle's opposition to this branch of its motion.

Discussion

"Res judicata . . . bars successive litigation based upon the same transaction . . . if: (i) there is a judgment on the merits . . . and (ii) the party against whom the doctrine is invoked was a party to the previous action, or in privity with a party who was" (*Albanez v Charles*, 134 AD3d 657, 657 - 658 [2d Dept 2015] [internal quotation marks and citations omitted]). "Where a dismissal does not involve a determination on the merits, the doctrine of res judicata does not apply" (*Pereira v St. Joseph's Cemetery*, 78 AD3d 1141, 1142 [2d Dept 2010], quoting *Djoganopoulos v Polkes*, 67 AD3d 726, 727 [2d Dept 2009]). "A dismissal with prejudice generally signifies that the court intended to dismiss the action 'on the merits,' that is, to bring the action to a final conclusion against the plaintiff" (*Aard-Vark Agency, Ltd. v Prager*, 8 AD3d 508, 509 [2d Dept 2004], quoting *Yonkers Contr. Co. v Port*

Auth. Trans–Hudson Corp., 93 NY2d 375, 380 [1999] [internal quotation marks and citations omitted]; *see also Jespersen v Li Sheng Liang*, 68 AD3d 724, 725 [2d Dept 2009]). A dismissal *without* prejudice or a voluntary discontinuance *without* prejudice, in the first instance, does not have the same “preclusive effect” as an action resolved on the merits or dismissed *with* prejudice (*Highlands Ctr., LLC v Home Depot U.S.A., Inc.*, 149 AD3d 919, 921 [2d Dept 2017], citing *Landau, P.C. v LaRossa, Mitchell & Ross*, 11 NY3d 8, 14 [2008]; *see also Haber v Raso*, 130 AD3d 781, 782 [2d Dept 2015]; *Brandenberg v Primus Assoc.*, 304 AD2d 694, 695 [2d Dept 2003]).

Here, 158 Realty failed to present evidence that the previous actions bar Mr. Chittle from instituting the instant action. The order dismissing the first action was *without* prejudice as to Mr. Chittle’s private nuisance claim against 158 Realty (*see* NY St Cts Elec Filing [NYSCEF] Doc No. 30). Further, a review of the transcript clearly demonstrates that the private nuisance cause of action was without prejudice (*see* NYSCEF Doc No. 31 at 13, lines 3-5). The second action was voluntarily discontinued without prejudice by Mr. Chittle. Accordingly, neither prior action resulted in judgment on the merits and the decision in the first action limited the dismissal with prejudice to those causes of action as asserted against EVT and a nonparty. Hence, that branch of 158 Realty’s motion seeking an order dismissing the action pursuant to the *res judicata* and collateral estoppel doctrines is denied.

CPLR 3211 (a) (7) - Failure To State a Claim

The Parties’ Positions

158 Realty argues that the complaint fails to allege sufficient facts constituting nuisance claims *per se*, private nuisance, and breach of the warranty of habitability. It asserts

that nuisance claims per se must contains allegations of unlawful conduct, which it views as absent here. Regarding private nuisance, 158 Realty maintains that Mr. Chittle fails to allege it engaged, as a landlord, in any intentional conduct to cause a nuisance, and it advocates that the breach of warranty of habitability claim must fail because Mr. Chittle presents no allegations that the noise emanating from EVT violated applicable noise ordinances. 158 Realty in other words argues that Mr. Chittle failed to allege sufficient facts constituting any causes of action.

Initially, Mr. Chittle notes that a motion to dismiss for failing to state a claim requires liberally construing the pleadings in a light most favorable to plaintiff and accepting all factual allegations as true. He asserts that he sufficiently pled factual allegations regarding the nuisance per se claim such as specifically pleading violations of New York State Liquor Authority and Alcoholic Beverage Control Law. Mr. Chittle also rejects 158 Realty's position as to his private nuisance claim. He submits that the law is clear that a landlord can be found liable for conduct constituting a private nuisance even where the landlord did not create the nuisance, if, among other factors, the landlord failed to take corrective measures. Finally, Mr. Chittle sees no basis for 158 Realty's contention that he must allege a violation of a noise ordinance to state a cognizable cause of action for breach of the warranty of habitability. Mr. Chittle asserts that he has sufficiently alleged facts constituting nuisance per se, private nuisance, and breach of the warranty of habitability and urges the motion's denial.

In reply, 158 Realty reasserts its various contentions.

Discussion

In considering a motion to dismiss for failure to state a claim pursuant to CPLR 3211 (a) (7), “the court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Gould v Decolator*, 121 AD3d 845, 847 [2d Dept 2014]). “Moreover, the court may consider affidavits submitted by the plaintiff to remedy any defects in the complaint, and upon considering such an affidavit, the facts alleged therein must also be assumed to be true” (*Nero v Fiore*, 165 AD3d 823, 824 [2d Dept 2018]). “[T]he 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 [1992] [internal quotation marks and citations omitted]).

Private Nuisance & Nuisance Per Se

“The elements of a private nuisance cause of action are an interference (1) substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act” (*Aristides v Foster*, 73 AD3d 1105, 1106 [2d Dept 2010] [internal citations omitted]).

“To constitute a nuisance the use of property must interfere with a person's interest in the use and enjoyment of land. . . . The term use and enjoyment encompasses the pleasure and comfort derived from the occupancy of land and the freedom from annoyance. . . . However, not every annoyance will constitute a nuisance. . . . Nuisance imports a continuous invasion of rights—a pattern of continuity or recurrence of objectionable conduct” (*Domen Holding Co. v Aranovich*, 1 NY3d 117, 123 [2d Dept 2003] [internal quotation marks and citations omitted]).

“[T]he duty to abate a private nuisance existing on real property arises from the power to possess the property and control the activities that occur on it” (*Taggart v Costabile*, 131 AD3d 243, 247 [2d Dept 2013] [internal citation omitted]). A landlord may not be held liable for a private nuisance where it has relinquished possession of the property and neither created the nuisance nor had notice of it at the time possession was transferred (*see id.*).

In contrast, a nuisance per se cause of action is “based on an act which is unlawful, even if performed with due care” (*State of New York v Fermenta ASC Corp.*, 238 AD2d 400, 403 [2d Dept 1997], *lv denied* 90 NY2d 810 [1997], citing *Delaney v Philhern Realty Holding Corp.*, 280 NY 461, 465 [1939]). To sufficiently plead a nuisance per se claim, a plaintiff must allege conduct undertaken by defendants constituting a nuisance, accompanied by allegations that there was a violation of law, which endangered or injured the property, health, safety, or comfort of a considerable number of persons (*see State of New York*, 238 AD2d at 403, citing *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 568 [1977]).

Here, Mr. Chittle failed to allege sufficient factual allegations constituting claims for private nuisance and nuisance per se against 158 Realty. The crux of Mr. Chittle’s allegations against 158 Realty focuses on its alleged failure to abate the nuisance created by EVT, namely, the noise and vibrations generated from music being played during and after its operating hours. There are no allegations that 158 Realty contributed or caused the conduct constituting the alleged nuisance in anyway, nor are there allegations that 158 Realty had any notice that a nuisance would be created before leasing the premises to EVT. Thus, there are insufficient allegations to constitute causes of action of private nuisance and nuisance per se against 158 Realty (*see Taggart*, 131 AD3d at 247-248).

Breach of Warranty of Habitability

The warranty of habitability combines three covenants between the tenant and landlord: “(1) that the premises are ‘fit for human habitation’, (2) that the premises are fit for ‘the uses reasonably intended by the parties’, and (3) that the occupants will not be subjected to conditions that are ‘dangerous, hazardous or detrimental to their life, health or safety’” (*Solow v Wellner*, 86 NY2d 582, 587-588 [1995], quoting Real Property Law § 235-b). “A breach of warranty may be said to have occurred where the premises have not met the reasonable expectations of the parties” (*Goldhirsch v St. George Tower & Grill Owners Corp.*, 142 AD3d 1044, 1045 [2d Dept 2016] [internal quotation marks and citation omitted]). Stated more specifically:

“A residential lease is essentially a sale of shelter and necessarily encompasses those services which render the premises suitable for the purpose for which they are leased. To be sure, absent an express agreement to the contrary, a landlord is not required to ensure that the premises are in perfect or even aesthetically pleasing condition; he does warrant, however, that there are no conditions that materially affect the health and safety of tenants. For example, no one will dispute that health and safety are adversely affected by insect or rodent infestation, insufficient heat and plumbing facilities, significantly dangerous electrical outlets or wiring, inadequate sanitation facilities or similar services which constitute the essence of the modern dwelling unit. If, in the eyes of a reasonable person, defects in the dwelling deprive the tenant of those essential functions which a residence is expected to provide, a breach of the implied warranty of habitability has occurred” (*Park W. Mgt. Corp. v Mitchell*, 47 NY2d 316, 328 [1979], *cert denied* 444 US 992 [1979]; *see also Witherbee Ct. Assoc. v Greene*, 7 AD3d 699, 700-701 [2d Dept 2004; *Sazer v Marino*, 266 AD3d 448, 449 [2d Dept 1999]).

Where there are allegations that the breach of the warranty of habitability resulted from noise or vibrations, the allegations must constitute noise and vibrations “so excessive” that the

plaintiff was “deprived of the essential functions that a residence is suppose to provide” (*Kaniklidis v 235 Lincoln Place Hous. Corp.*, 305 AD2d 546, 547 [2d Dept 2003]; *Protano v 16 N. Chatsworth Ave. Corp.*, 272 AD2d 597, 597-598 [2d Dept 2000]; *Matter of Nostrand Gardens Co-Op v Howard*, 221 AD2d 637, 638 [2d Dept 1999] [Appellate Division found a breach of the warranty of habitability where “[t]he record reveal[ed] that there was excessive noise emanating from an apartment the neighbored the respondents’ apartment through the late night and early morning hours”]).

Here, Mr. Chittle’s allegations fail to assert a cognizable cause of action for breach of the warranty of habitability. While a complaint is liberally construed and given every favorable inference on a motion to dismiss, bare and conclusory allegations are not afforded such deference (*see Hester v Elderserve Health, Inc.*, 134 AD3d 673, 674 [2d Dept 2015], citing *Lakeville Pace Mech. v Elmar Realty Corp.*, 276 AD2d 673, 675 [2d Dept 2000]). Mr. Chittle’s allegations concerning the warranty of habitability are conclusive and fail to allege that he was deprived of the essential function of his residence (*see Kaniklidis*, 305 AD2d at 547; *see also* amended complaint at 10, ¶¶ 69-76). Here, the only allegations which could sound in breach of the warranty of habitability are that “[f]rom the beginning, EVT played music that created disturbing noise and vibrations in [Mr. Chittle’s] apartment” (amended complaint at 7, ¶ 39) and that “[t]he frequent and unpredictable noise and vibrations adversely affected [Mr. Chittle’s] mental and physical health” (amended complaint at 8, ¶ 49). Mr. Chittle failed to expound on these allegations - providing no allegations of lost sleep, headaches, hearing loss, etc.; rather, he only relies on his conclusory and vague allegations that the noise adversely affected his mental and physical health (*see generally Sloninski v City of New York*, 173 AD3d 801, 803 [2d Dept 2019] [discussing insufficiency


of conclusory allegations related to a nuisance cause of action]). Further, there are no allegations that Mr. Chittle was deprived of the essential function of his apartment.

Accordingly, it is

ORDERED that 158 Realty's motion, MS two, is granted, and the action as against 158 Realty is hereby dismissed with prejudice.

This constitutes the decision and order of the court.

ENTER,



J. S. C.

**Hon. Carolyn E. Wade
Acting Supreme Court Justice**

2020 FEB 27 AM 8:15
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