

Galland v Baron

2020 NY Slip Op 33379(U)

October 15, 2020

Supreme Court, New York County

Docket Number: 153736/2019

Judge: David Benjamin Cohen

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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DAVID BENJAMIN COHEN PART IAS MOTION 58EFM

Justice

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CLAUDE GALLAND, VIOLAINE GALLAND,
Plaintiff,

INDEX NO. 153736/2019

MOTION DATE 02/26/2020

MOTION SEQ. NO. 001

- v -

MATTHEW BARON, JONATHAN SIMON, SIMON BARON
DEVELOPMENT LLC, JMW 75 LLC, JOHN DOE, JANE DOE
Defendant.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 65

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

Defendants’ motion to dismiss is granted and plaintiffs’ cross-motion to strike defenses is denied. Plaintiffs Claude Debs Galland and Violaine Galland (“plaintiffs”) filed this action against defendants Matthew Baron (“Baron”), Jonathan Simon (“Simon”), Simon Baron Development LLC (“SBD”), JMW 75 LLC (“JMW), “John Doe” and “Jane Doe” from actions relating to plaintiffs tenancy of Single Room Occupancy (“SRO”) for multiple apartments in the subject building located at 166 West 75th Street, New York, NY 10023.

In 2007, non-party 166 West 75th Street LLC acquired title to the building. On July 1, 2008, despite having a Non-Interference Agreement, 166 West 75th served plaintiffs with a Notice of Termination of plaintiffs’ tenancy based on nonprimary residence and on November 3, 2008, 166 West 75th commenced a holdover proceeding. It is not disputed that the holdover action was frivolous.

On November 10, 2008, plaintiffs and 166 West 75th Street LLC executed a stipulation of settlement (the “Settlement Agreement”) resolving the dispute. Included in the terms of the Settlement Agreement was a written lease for two years, with twenty-nine additional two-year lease renewal options exclusive to the plaintiffs. The stipulation also contains a buyout clause, under which the landlord of record may terminate plaintiffs’ tenancy at any time and for any reason, in exchange for consideration of \$3,500,000, plus cost of living adjustments. The landlord of record may otherwise only terminate the plaintiffs’ lease, without payment, on the condition that plaintiffs failed to pay rent, committed a nuisance in the apartment or the building, or breached the terms of the new lease without remedying the breach within sixty days. If the landlord attempted to terminate plaintiffs’ lease for any reason beyond what was stipulated above, plaintiffs acquired the option to exercise the buyout agreement. In addition, the stipulation sets forth a liquidated damages clause that provided that should the landlord of record wrongfully attempt to terminate the lease, the landlord would pay plaintiffs \$250,000. The agreement stipulates that the liquidated damages clause is not a penalty.

JMW acquired title to the building in 2013. In 2016, JMW filed three separate holdover actions against plaintiffs, respectively alleging; (1) nonprimary residence, (2) overcrowding, and (3) additional nonprimary residence in a different unit. These actions were consolidated under Index Number NY-CV-107438/2005. Plaintiffs filed for summary judgment in the holdover proceedings and immediately sought relief pursuant to the Settlement Agreement. Shortly after receiving the summary judgment motion, JMW cross-motivated to discontinue the holdover proceedings and dismiss Plaintiff’s counterclaims for relief pursuant to the Settlement Agreement. Defendants claimed that they were not aware of the existence of the Settlement Agreement, nor were they made aware upon signing a Relocation Agreement with

plaintiffs in 2014. That agreement, signed by both of these parties, laid out that plaintiffs agreed to move apartments so that the defendants could install an elevator in the building. Defendants stated that the holdover actions were filed in good faith, and that plaintiffs were given adequate notice to remedy before the suits were filed. Plaintiffs argued that the lawsuits were frivolous, and that the defendant's sole motive was to remove plaintiffs from the units. Plaintiffs alleged that defendants attempted to negotiate a buyout at a significantly reduced price from the Settlement Agreement throughout the holdover proceedings. Plaintiffs further allege that defendants threatened they would pursue the litigation forever, and to pressure acceptance of buyout they received significantly reduced service in the building.

Plaintiff's motion for summary judgment was granted in part, and JMW's motion was denied. The Court held that the Settlement Agreement was to be partially enforced, and judgment was granted in plaintiff's favor dismissing the action and for liquidated damages. The Court also held that the plaintiffs had not properly exercised their buyout option (which plaintiffs subsequently exercised). JMW subsequently appealed only the enforceability of the liquidated damages clause, not the disposition of the summary proceedings and order to pay attorney's fees. JMW's appeal was denied first in the Appellate Term, and then finally in the Appellate Division on September 20, 2018. Following the conclusion of JMW's appeal, plaintiffs commenced this action against the defendants alleging five causes of action; (1) prima facie tort, (2) negligent/intentional infliction of emotional distress, (3) malicious prosecution, (4) abuse of process, and (5) reasonable attorney's fees.

When deciding a motion to dismiss pursuant to CPLR § 3211, the court should give the pleading a "liberal construction, accept the facts alleged in the complaint to be true and afford the plaintiff the benefit of every possible favorable inference" (*Landon v Kroll Laboratory*

Specialists, Inc., 22 NY3d 1, 5-6 [2013]; *Faison v Lewis*, 25 NY3d 220 [2015]). However, if a complaint fails within its four corners to allege the necessary elements of a cause of action, the claim must be dismissed (*Andre Strishak & Associates, P.C. v Hewlett Packard & Co.*, 300 AD2d 608 [2d Dept 2002]). A motion to dismiss pursuant to CPLR § 3211(a)(1), should not be granted unless the documentary evidence submitted is such that it resolves all factual issues as a matter of law and conclusively disposes of the claims set forth in the pleading (*Art & Fashion Grp. Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014]). Under CPLR § 3211(a)(7), the court “accepts as true the facts as alleged in the complaint and affidavits in opposition to the motion, accords the plaintiff the benefit of every possible favorable inference, and determines only whether the facts as alleged manifest any cognizable legal theory” (*Elmaliach v Bank of China Ltd.*, 110 AD3d 192, 199 [1st Dept 2013] (quoting *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001])).

Prima Facie Tort

Plaintiffs’ first cause of action is for prima facie tort. Plaintiffs argue that the defendants’ commencement, procurement and continuation of the three holdover proceedings were intended solely to injure and harass the plaintiffs into vacating their SRO units. In order to establish a cause of action for prima facie tort, the plaintiffs must show: (1) the intentional infliction of harm, (2) which results in special damages, (3) without any excuse or justification, (4) by an act or series of acts that would otherwise be lawful (*Freihofer v Hearst Corp.*, 65 NY2d 135, 142-143 [1985]); *Curiano v Suozzi*, 63 NY2d 113, 117 [1984]; *Burns Jackson Miller Summit & Spitzer v Linder*, 59 NY2d 314, 332 [1983]). Accepting all alleged facts as true, plaintiffs have not presented a cognizable legal theory for prima facie tort. New York limits recovery for prima facie tort to “instances where the sole motivation for the damaging acts had been a malicious

intention to injure the plaintiff. Where there are other motives, e.g., profit, self-interest, business advantage, there is no recovery under prima facie tort” (*Squire Records Inc. v Vanguard Recording Soc., Inc.*, 25 AD2d 190, 191-192 [1st Dept 1966]). In *Meridian Capital Partners, Inc. v. Fifth Ave. 58/59 Acquisition Co., LP*, the Appellate Division, First Department held that, the allegation of “disinterested malevolence” is contrary to allegations of “landlord’s profit motive in coercing surrender of the lease”, and no cause of action for prima facie tort was present (*Meridian Capital Partners, Inc. v. Fifth Ave. 58/59 Acquisition Co., LP*, 60, AD3d 434, 434 [2009]). Plaintiffs acknowledge that they believed the defendants had ulterior motives for filing the lawsuits. Defendants’ objectives were, by plaintiffs’ account, to force the plaintiffs into a favorable buyout of their SRO units and deregulate the rent-controlled apartments to build a luxury hotel. “That prior actions were meritless or vexatious does not, without more, spell out prima facie tort” (*Howard v Block*, 90 AD2d 455 [1st Dept 1982]). In addition, prima facie tort should not become a “catch-all” alternative for every cause of action which cannot stand on its own legs” [*DeNaro v Rosalia*, 59 AD3d 584, 588 [2d Dept 2009], quoting *Belsky v Lowenthal* 62 AD2d 319, 323 [1st Dept 1978]). Here, as the allegations are not solely disinterested malevolence and are instead, are at minimum, mixed with profit motive, the cause of action for prima facie tort must be dismissed (*Burns*, 59 NY2d at 333).

Negligent/Intentional Infliction of Emotional Distress

Plaintiffs’ civil action seeks damages for intentional infliction of emotional distress. Plaintiffs argue that by commencing, pursuing, and continuing the three holdover proceedings, defendants intentionally engaged in extreme and outrageous behavior that caused severe emotional distress. Although plaintiffs simultaneously present a cause of action for both intentional and negligent infliction of emotional distress, plaintiffs’ complaint exclusively alleges

intentional actions by the defendants. A cause of action for intentional infliction of emotional distress must be supported by allegations of conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community” (*Dillon v City of New York*, 261 AD2d 34, 41 [1st Dept 1999]). In writing on this cause of action, the Court of Appeals once recognized that “of the intentional infliction of emotional distress claims considered by this Court, every one has failed because the alleged conduct was not sufficiently outrageous” (*Howell v. New York Post Co.*, 81 NY2d 115, 122 [1993]). The outrageousness element - the element most susceptible to a determination as a matter of law - is designed to filter out petty complaints and assure that the emotional distress is genuine (*Chanko v Am. Broadcasting Companies Inc.*, 27 NY3d 46 [2016]). Taking all facts as true, plaintiffs’ claim does not present a cognizable legal theory. “Commencement of litigation, even if alleged to be for the purpose of harassment and intimidation, is insufficient to support such a claim” (*Walentas v Johnes*, 257 AD2d 352, 353 [1st Dept 1999]). Plaintiff’s emotional distress claims are entirely based on the commencement of the holdover proceedings.

Even if plaintiffs could bring a cause of action, plaintiffs’ claims do not outline conduct that reaches the level of outrageousness. Plaintiffs’ allegations that defendants attempted to engender a buyout through intentional and extreme pursuit of the holdover proceedings is insufficiently outrageous to constitute a cause of action for intention infliction of emotional distress (*see Fischer v Maloney*, 43 NY2d 553 [1978]). Defendants’ motion to dismiss this cause of action granted.

Malicious Prosecution

Plaintiffs' civil action seeks compensatory, special and punitive damages for malicious prosecution. Plaintiffs argue that the commencement, procurement, and continuation of allegedly baseless holdover proceedings were out of malice towards the plaintiffs. To state a claim for malicious prosecution of a civil suit, a plaintiff must plead and prove: "(1) the commencement or continuation of a . . . proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the [plaintiff], (3) the absence of probable cause for the . . . proceeding and (4) actual malice" (*Facebook, Inc. v DLA Piper LLP [US]*, 134 AD3d 610, 613 [1st Dept 2015]; *Broughton v State*, 37 NY2d 451, 457 [1975], *cert denied sub nom. Schanbarger v Kellogg*, 423 US 929 [1975]). Plaintiffs must additionally prove special injury (*Engel v CBS, Inc.*, 93 NY2d 195, 201 [1999]). In order to prove special injury, plaintiffs are required to prove "some concrete harm that is considerably more cumbersome than the physical, psychological, or financial demands of defending a lawsuit (*id.* at 205). The special injury requirement serves as a buffer against using malicious prosecution claims as a retaliatory measure and unending prosecution, and thus special injury are satisfied by a "verifiable" burden (*id.* at 205).

Taking all facts as true, plaintiffs' claims fail to properly allege special injury. The "verifiable" burden outlined in *Engel* is extremely high. The Court in *Engel* held that the claim of a lost client and reputational loss was insufficiently severe to constitute special injury, even as the defendant's "actions in bringing a groundless claim for the purposes of creating conflict were reprehensible" (*id.* at 206-207). As the consequences sought by the defendant in *Engel* did not materialize, a claim for malicious prosecution did not lie (*id.* at 207). Here, plaintiffs' claims focus on the allegation that defendants' holdover proceedings were financially and psychologically debilitating, leading to issues such as anxiety, nervousness, and strained relationships with building employees. Under *Engel*, these allegations do not reach the level of

special injury (*id. at 205*). Regarding allegations of reduced building service and confrontations with building employees, even accepting these facts as true, neither alleges a damage that stem from a malicious prosecution charge. Rather, they were pressure tactics to force plaintiff to accept a buyout.

Plaintiffs vague allegation of \$18,000,000 in “special damages”, without further identification of a special injury, while they remain in possession of the apartments and no verifiable damages have been identified as a result of the litigation besides the aforementioned demands of continuing the lawsuit do not constitute special injury. Indeed, the parties have already agreed upon two damages specifically to compensate plaintiffs should a landlord wrongfully bring a frivolous action; the buyout and the liquidated damages. Accordingly, defendants’ motion to dismiss the malicious prosecution claim is granted.

Abuse of Process

Plaintiffs’ civil action seeks special and punitive damages for abuse of process. Plaintiffs argue that defendants’ commencement, procurement, and continuation of holdover proceedings constitutes an abuse of process. “In its broadest sense, abuse of process may be defined as misuse or perversion of regularly issued legal process for a purpose not justified by the nature of the process” (*Board of Educ. v Farmingdale Classroom Teachers Assn.*, 38 NY2d 397, 400 [1975]). A cause of action for abuse of process must have three elements: (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). Further, “the gist of the action for abuse of process lies in the improper use of process after it is issued” (*Id. at 117* (quoting *Williams v Williams*, 23 NY2d 592, 596 [1969])).

“Where process is manipulated to achieve some collateral advantage . . . the tort of abuse of process will be available to the injured party” (*Board of Educ.* at 404).

Plaintiff’s fail to adequately present a cause of action for abuse of process. Plaintiffs’ cause of action for abuse of process is rooted entirely in the commencement and continuation of the holdover proceedings themselves, not in any particular aspect of the process. Plaintiffs do not allege that the defendants manipulated the process in any way to their advantage. Plaintiffs did not allege any problems with the process during the holdover proceedings, but instead allege abuse due to the commencement and continuation of the holdover proceedings. The mere institution of a civil action by summons and complaint is not legally considered such process as is capable of being abused” (*Curiano* at 116; *Mago, LLC v Singh*, 47 AD3d 772, 773 [2d Dept 2008]; *Hoppenstein v Zemek*, 62 AD2d 979, 980 [2d Dept 158589]). It is not disputed that upon learning of the Settlement Agreement and shortly after the commencement of the holdover proceedings, defendants attempted to discontinue said proceedings and did not wish to continue the underlying nonprimary residence action.

Moreover, “it is not enough that the actor have an ulterior motive in using the process of the court. It must further appear that he did something in the use of the process outside of the purpose for which it was intended” (*Hauser v Bartow*, 273 NY 370, 374 [1937]). “Significantly, the falsity and of the allegations and defendant’s malicious motives in making them do not, of themselves, give rise to a cause of action for abuse of process” (*Butler v. Ratner*, 210 AD2d 691, 693 (3rd Dept 1994)). Plaintiffs do not allege such facts or motives and, in any event, regardless of the alleged motive of the defendants, the mere initiation of a civil action is insufficient to support a cause of action for abuse of process (*Ivancev v Garrido*, 184 AD3d 422 [1st Dept

2020]; *Casa de Meadows Inc. (Cayman Is.) v Zaman*, 76 AD3d 917 [1st Dept 2010]).

Defendants' motion to dismiss the abuse of process cause if action is granted.

As plaintiffs' other causes of action have been dismissed, plaintiffs have no grounds for attorney's fees. Accordingly, it is hereby

ORDERED that defendants' motion to dismiss is granted and plaintiffs' cross motion to strike defenses is denied.



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10/15/2020
DATE

DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
APPLICATION:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
CHECK IF APPROPRIATE:	<input type="checkbox"/>		<input type="checkbox"/>	REFERENCE
			<input type="checkbox"/>	OTHER
			<input type="checkbox"/>	DENIED