

Lazarich v Koumantaros

2020 NY Slip Op 35615(U)

August 17, 2020

Supreme Court, Queens County

Docket Number: Index No. 716435/2018

Judge: Robert J. McDonald

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD

Justice

- - - - - x

MARINA LAZARICH and JOSEPH LAZARICH, Index No.: 716435/2018

Plaintiffs, Motion Date: 8/13/20

- against - Motion No.: 14

CINDY KOUMANTAROS, JOHN ARGYROS, Motion Seq.: 5
NICK ARGYROS, DANA ARGYROS, IDEAL
BUILDERS AND CONSTRUCTION, SERVICES,
INC., and FAZAL HASSAN

Defendants.

- - - - - x

JOHN ARGYROS and DANA M. ARGYROS,

Third-Party Plaintiff,

- against -

CDW CARPENTRY INC., J.S.K.
CONSTRUCTION CORP., HEPHAISTOS
DEVELOPING, LLC, HEPHAISTOS BUILDING
SUPPLIES, INC.,

Third-Party Defendants.

- - - - - x

The following electronically filed documents read on this motion by defendants/third-party plaintiffs JOHN ARGYROS and DANA M. ARGYROS for an Order pursuant to CPLR 3211(a)(7) and 3212, dismissing plaintiffs' complaint against defendants/third-party plaintiffs:

| | |
|--|---------------------------|
| | Papers <u>Numbered</u> |
| Notice of Motion-Affirmation-Exhibits.....EF | 91 - 105 |
| Affirmation in Opposition-Exhibits.....EF | 109 - 113 |

This is an action for trespass, conversion of property, and private nuisance.

Plaintiffs commenced this action by filing a summons with notice on October 26, 2018. Defendants John Argyros and Dana Argyros (hereinafter the Argyros defendants) filed a Notice of Appearance with a Demand for a Complaint on January 10, 2019. Plaintiffs filed a complaint on February 12, 2019, seeking an injunction against defendants. Specifically, plaintiffs seek the removal of scaffolding from the front of their property and a licensing fee. The Argyros defendants filed an answer on March 4, 2019.

On December 6, 2019, plaintiffs filed an application, seeking an Order directing the immediate removal of a portion of the scaffolding and granting back payment of a licensing fee. After oral argument, this Court directed the Argyros defendants and defendant Cindy Koumantaros to pay a joint licensing fee in the amount of \$300 per month until removal of the subject sidewalk shed. All other requested relief was denied. The Argyros defendants now seek to dismiss this action.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83 [1994]; Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679 [2d Dept. 2011]).

A complaint must allege the material elements of the cause of action (see Lewis v Village of Deposit, 40 AD2d 730 [1972]; Kohler v Ford Motor Company, Inc., 93 AD2d 205 [3d Dept. 1983]). Generally, the test of the sufficiency of the complaint is whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (see Moore v Johnson, 147 AD2d 621 [1989]; JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802 [2d Dept. 2010]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) (see CPLR 3211[c]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]). Moreover, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (see Leon v Martinez, 84 NY2d 83 [1994]). When evidentiary

material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see Basile v Wiggs, 98 AD3d 640 [2d Dept. 2012]).

"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 failing to act" (Aristides v Foster, 73 AD3d 1105, 1106 [2d Dept. 2010]). "[E]xcept for the issue of whether the plaintiff has the requisite property interest, each of the other elements is a question for the jury, unless the evidence is undisputed" (Weinberg v Lombardi, 217 AD2d 579, 579 [2d Dept. 1995]).

Here, by directing defendants to pay a licensing fee, this Court already found that the alleged nuisance is not unreasonable in character since the sidewalk shed is necessary to protect the public (see 22 Irving Place Corp. v 30 Irving LLC, 60 NYS3d 640, 643 [Sup Ct., New York Cnty. 2017])["the fact that the sidewalk bridge is mandated by law and for public safety means that as a matter of law, the existence of the sidewalk bridge alone cannot be unreasonable and plaintiff cannot state a cause of action for private nuisance"].

As to the cause of action for conversion, conversion cannot be sustained when the property involved is real property (see Dickinson v Igoni, 76 AD3d 943 [2d Dept. 2010]). Thus, the cause of action sounding in conversion must be dismissed.

"The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission" (Volunteer Fire Assn. of Tappan, Inc. v County of Rockland, 101 AD3d 853, 855 [2d Dept. 2012]).

In support of the motion, defendant John Argyros submits an affidavit dated January 17, 2020, affirming that plaintiffs reside at 31-23 28th Road, which is adjacent to the Koumantaros' home. Neither he nor his wife, Dana Argyros, own a home next to plaintiffs' home. He and his wife own the home located at 31-27 28th Road. On July 20, 2017, a delivery was made on the roof of the Koumantaros' home, causing the roof to collapse. Damage was sustained to the Argyros' home and the Koumantaros' home. The Argyros defendants and defendant Koumantaros each hired a contractor to place a sidewalk shed in front of their respective properties. A separate permit was obtained for each home. The sidewalk shed placed in front of his home does not extend near,

onto or in front of plaintiffs' home. The sidewalk shed placed in front of his home extends for approximately twenty feet and stops at the property line between his home and the Koumantaros' home. The sidewalk shed is at least twenty feet from plaintiffs' home. Plaintiffs were present and observed the sidewalk shed being placed in front of their home. At no time did plaintiffs object to the placement of the sidewalk shed. Plaintiffs allowed the sidewalk shed to be placed there.

Based on Mr. Argyros' affidavit, even if the complaint does sufficiently allege a cause of action sounding in trespass, the Argyros defendants are entitled to summary judgment as their sidewalk shed is not on plaintiffs' property and as plaintiffs allowed the sidewalk shed to be placed there.

In opposition, counsel for plaintiffs contends that the Argyros defendants failed to eliminate all material issues of fact because they have not submitted any evidence regarding the issue that the Argyros defendants' representatives entered plaintiffs' property numerous times and installed foreign materials on plaintiffs' property without permission.

However, plaintiffs submit only an attorney's affirmation which is insufficient to defeat a summary judgment motion (see Zuckerman v City of New York, 49 NY2d 557 [1980]). Plaintiffs' counsel does not have personal knowledge of the facts, and thus, counsel's affirmation has no probative value (see Demacos v Demacos, 142 AD2d 546 [2d Dept. 1988]).

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that the motion by defendants JOHN ARGYROS and DANA M. ARGYROS is granted, and the complaint is dismissed as against defendants JOHN ARGYROS and DANA M. ARGYROS, only.

Dated: August 17, 2020
Long Island City, NY



ROBERT J. MCDONALD
J.S.C.

FILED

8/17/2020

2:28 PM

**COUNTY CLERK
QUEENS COUNTY**