

**Shimon Props. LLC v Bialek**

2020 NY Slip Op 35691(U)

February 13, 2020

Supreme Court, Queens County

Docket Number: Index No. 702217/2018

Judge: Pam Jackman Brown

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**NEW YORK SUPREME COURT - COUNTY OF QUEENS**

**IAS PART 19**

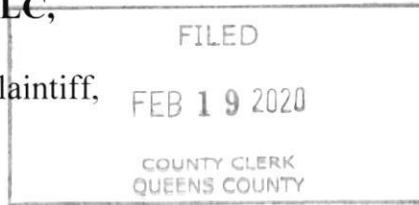
**Short Form Order**

**Present: Hon. Pam Jackman Brown, JSC**

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**SHIMON PROPERTIES LLC,**

Plaintiff,

-against-



**Index No.: 702217/2018**

**Motion Date: 4/15/19**

**Cal. No.: 30**

**Mot. Seq. No.: 2**

**TERESA BIALEK, LUKASZ BIALEK, AND  
MARIUSZ BIALEK,**

Defendants.  
-----X

Recitation, as required by CPLR § 2219(a), of the following papers e-file numbered 70 to 92 read on this motion by defendants pursuant to CPLR 3211 (a)(7) and (g)(2) seeking the dismissal of the amended complaint, seeking leave to file an amended answer pursuant to CPLR 3025, and granting defendants summary judgment on their counterclaim, pursuant to CPLR 3212(a) and (h).

	<u>PAPERS FILE NUMBERED</u>	
	Papers	Exhibits
Notice of Motion- Exhibits, Affidavit(s), and Affirmation(s) Annexed	70-71	72-79
Affirmation in Opposition- Exhibits and Affidavits Annexed	81; 90	82-89
Affirmation in Reply	92	

Upon the foregoing papers it is ordered that the motion is determined as follows:

This action arises from ongoing construction at property located at 61-47 56<sup>th</sup> Avenue, Queens County, New York, owned by plaintiff. During the course of the construction, defendants, who reside in the adjacent property, have made numerous complaints to the NYC Department of Buildings (DOB) regarding alleged dangerous, improper and illegal conditions at the construction site. Plaintiff has commenced this action alleging tortious and malicious interference with prospective economic advantage,

negligence and violation of New York Civil Rights Law § 52-A, by defendants.

Upon a motion to dismiss for failure to state a cause of action under CPLR §3211 (a)(7), the court must accept the allegations set forth in the complaint as true and determine whether they plead a cognizable action. (*See El Jamal v Weil*, 116 AD3d 732 [2d Dept 2014]; *Salvatore v Kumar*, 45 AD3d 560 [2d Dept 2007].) However, bare conclusory allegations and factual claims which are contradicted by documentary evidence, are not entitled to consideration. (*See Heller v Frota Oceanica E Amazonica, S.A.*, 81 AD3d 894 [2d Dept 2011]; *Garber v Board of Trustees of State Univ. of N.Y.*, 38 AD3d 833 [2d Dept 2007].)

With regard to plaintiff's first cause of action, New York Civil Rights Law § 52-a sets forth:

“Any owner or tenant of residential real property shall have a private right of action for damages against any person who installs or affixes a video imaging device on property adjoining such residential real property for the purpose of video taping or taking moving digital images of the recreational activities which occur in the backyard of the residential real property without the written consent thereto of such owner and/or tenant with intent to harass, annoy or alarm another person, or with intent to threaten the person or property of another person.”

The complaint alleges that defendants violated this statute by installing a videotaping device and recording plaintiff's activities without its consent. Defendants seek its dismissal on the basis that it did not videotape any recreational activities. It contends that it installed a security camera to monitor the construction site and for security from trespassers. In the absence of any relevant judicial interpretation on this issue, the court shall consider and attempt to effectuate the statute's legislative intent. (*See Jackson v Bank of Am., N.A.*, 149 AD3d 815 [2d Dept 2017].) According to its legislative history, “[t]he purpose of this legislation is to establish a private right of action for damages from the unauthorized invasion of privacy by video surveillance of an individual's recreational activities in their own backyard”. (2017 Legis. Bill Hist. NY S.B. 870) The history makes reference to situations where a family is under video surveillance while sunbathing or swimming in its own backyard, by an adjoining neighbor, who is a registered sex offender. Here, as the activities allegedly videotaped were construction related, they can not be considered “recreational”, entitled to protection pursuant to the statute. Thus, the complaint is insufficient to support a cause of action under New York Civil Rights Law § 52-a. Additionally, plaintiff's fourth cause of action,

seeking injunctive relief, relating to defendants' alleged violation of New York Civil Rights Law § 52-a is also dismissed.

To establish the elements of interference with prospective economic relations, as alleged in its second cause of action, plaintiff must plead (1) business relations with a third party; (2) defendant's knowledge of the business relations; (3) defendant's intentional interference with those business relations; (4) that defendant acted with the sole purpose of inflicting harm or used wrongful means to do so; and (5) injury to the business relationship, resulting in damages. (*See White Plains Coat & Apron Co., Inc. v Cintas Corp.*, 8 NY3d 422 [2007]; *NBT Bancorp v Fleet/Norstar Fin. Group*, 87 NY2d 614 [1996].)

The claim of tortious interference with prospective economic or business relations applies to situations where a third party would have entered into a contractual relationship with plaintiff, but for the intentional wrongdoing of defendant. (*See M.J & K. Co., Inc. v Matthew Bender and Company, Inc.*, 220 AD2d 488 [2d Dept 1995].) Where the cause of action is for alleged interference with a prospective business relationship, as opposed to a contractual interference, it must be shown that defendant intentionally acted with the sole purpose of injuring plaintiff's prospective economic relationship with a third party or used unlawful or improper means to cause harm. (*See Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183 [1980].) "[T]he plaintiff must show that defendant's conduct was not "lawful" but "more culpable". The implication is that, as a general rule, the defendant's conduct must amount to a crime or an independent tort. Conduct that is not criminal or tortious will generally be "lawful" and thus insufficiently "culpable" to create liability for interference with prospective contracts or other nonbinding economic relations." (*Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004]; *see also Guard-Life Corp.*, 50 NY2d 183; *M.J & K. Co., Inc.*, 220 AD2d 488.)

Here, the complaint is comprised of bare legal conclusions, insufficient to support a cause of action for tortious interference with prospective economic relations. (*See Heller*, 81 AD3d 894; *Garber*, 38 AD3d 833.) Contrary to plaintiff's allegations that defendants tortiously interfered with its prospective business relationship by filing false and malicious complaints with DOB, the documentary evidence demonstrates that at least two of the complaints filed were found to be meritorious. Upon investigation by DOB, they resulted in work stop orders which had to be addressed by the plaintiff before construction was allowed to continue. Furthermore, the claim is not pled with sufficient particularity to establish that the defendants acted with the sole purpose of harming the plaintiff's prospective economic relationship. To the contrary, the documentary evidence demonstrates that the defendants were motivated to file complaints with DOB by their concern with the impact of the construction upon their own property.

Moreover, conduct constituting tortious interference with a prospective business relationship is not directed at the plaintiff itself, but at the party with which the plaintiff seeks to have a relationship. (*See Carvel v Noonan*, 3 NY3d 182.) Here, defendants conduct is not alleged to be directed towards any third party with whom plaintiff had an existing or prospective relationship, nor is the existence of a third party identified.

Lastly, the court shall consider the third cause of action for negligence. To prevail on a cause of action for negligence, plaintiff must establish the existence of a duty, a breach of that duty, and that the breach of such duty was the proximate cause of its injuries. (*See Malone v County of Suffolk*, 128 AD3d 651 [2d Dept 2015]; *Pasquaretto v Long Is. Univ.*, 106 AD3d 794 [2d Dept 2014].) However, absent a duty of care, there can be no breach or liability. (*See Malone*, 128 AD3d 651; *Pasquaretto*, 106 AD3d 794.) Here, the third cause of action fails because it does not allege that defendants owed plaintiff a duty or a breach thereof. (*See Old Republic Natl. Tit. Ins. Co. v Cardinal Abstract Corp.*, 14 AD3d 678 [2d Dept 2005].)

In light of this determination, the court need not address the defendants' remaining contentions.

Accordingly, defendants' motion, seeking dismissal of the amended complaint is granted.

Dated: February 13, 2020  
Jamaica, NY

  
HON. PAM JACKMAN BROWN, JSC

