

Myers v Mobilization for Justice, Inc.

2021 NY Slip Op 30318(U)

February 1, 2021

Supreme Court, Kings County

Docket Number: 528314/2019

Judge: Lillian Wan

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 17

Index No.: 528314/2019
Motion Date: 1/27/21
Motion Seq.: 02 and 05

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GAYTHER MYERS and CAROLE MYERS, individually
And as Trustees of the MYERS LIVING TRUST DATED
6/9/15

Plaintiffs,

- against -

DECISION AND ORDER

MOBILIZATION FOR JUSTICE, INC. and
JAMES JUSINO,

Defendants.

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The following e-filed documents, listed by NYSCEF document number, (Motion 02) 31-50, 59, 60, 106, 107 and (Motion 05) 98-104, 110, and 112, were read on this motion by defendants for summary judgment.

This action is premised upon a pending Housing Court proceeding commenced by tenant defendant James Jusino (hereinafter Jusino) in New York City Civil Court in Kings County (Index No. LT-002566-19/KI), against the plaintiffs and the Department of Housing Preservation and Development on September 25, 2019, seeking, *inter alia*, to have the landlord of the premises in which he resides remedy outstanding housing violations in his apartment. Plaintiffs’ counsel represents the landlord in that action and defendant Mobilization for Justice, Inc. (hereinafter MFJ) represents defendant James Jusino.

Defendant MFJ seeks dismissal of the complaint (Motion 02) pursuant to CPLR § 3211(a)(2) arguing that the Court can and should decline to exercise subject matter jurisdiction over this matter because the underlying facts upon which this action is premised are being litigated in Housing Court, and this action was brought in order to chill legal activity in those proceedings. MFJ, argues that alternatively, pursuant to CPLR § 3211(a)(7), the plaintiffs’ cause of action based on “aiding and abetting” Jusino’s allegedly illegal conduct should be dismissed because causes of action predicated entirely on defendant MFJ’s relationship with its client, defendant Jusino, are not properly pleaded. The defendant further contends that dismissal is warranted pursuant to CPLR § 3211(a)(1) based on documentary evidence in the form of pleadings and filings in the Housing Court action, and email correspondence between the parties which refute the allegations contained in the complaint. The defendant asserts that an award of

sanctions, pursuant to 22 NYCRR 130-1.1, is warranted against the plaintiffs and their attorney in commencing and maintaining this action, which is retaliatory, frivolous and without merit.

Defendant Jusino is represented in this action by Community Development Project, d/b/a TAKEROOT JUSTICE, and cross moves for dismissal (Motion 05) of the plaintiffs' first and second causes of action alleging "Tortious Interference of executed repairs" and "Illegal Use of Subject Premises" by defendant Jusino. Jusino argues that the complaint amounts to a strategic lawsuit against public participation (SLAPP suit) and must be dismissed pursuant to NY Civ Rights Law §§ 70-a, 76-a and CPLR § 3211(g). He further asserts that the plaintiffs' cause of action for tortious interference with executed repairs fails to properly plead the elements for tortious interference or any other cause of action. Likewise, the allegations of plaintiffs' second cause of action for illegal use of premises fails to cite any lease clause, regulation or statute governing the lawful use of the premises. According to defendant Jusino, the allegations are devoid of information that support the plaintiffs' claim and whether it has caused damages to the plaintiffs. Defendant Jusino also adopts and joins in the arguments set forth in support of MFJ's motion to dismiss the complaint. For the reasons set forth below, both defendants' motions are granted.

The complaint contains three causes of action, although the complaint incorrectly labels what should be the third cause of action as the second cause of action. According to the complaint, the first cause of action is based on "Tortious Interference of executed repairs", and alleges that defendant James Jusino tortiously interfered with repairs made by the plaintiffs by destroying the repairs after they were made and refusing to provide access to the plaintiffs for repairs. The second cause of action is based on defendant Jusino's alleged illegal use of the premises for commercial purposes "by operating his business." The third cause of action (referred to in the complaint as the second cause of action) alleges that Mobilization for Justice, Inc., defendant Jusino's counsel in the Housing Court proceeding, is "aiding and abetting" defendant Jusino's conduct "by scheming to goad [d]efendant JAMES JUSINO, into causing further damage and then report same as violations at the subject premises."

In support of its motion, defendant MFJ submits the summons and verified complaint, various Housing Court filings as well as a case summary of the Housing Court proceedings, email correspondence, plaintiffs' orders to show cause, affidavits of service and related documents in the instant action, and a stipulation extending the time for the defendants to respond to the complaint. In support of his motion defendant Jusino adopts and joins in support of MFJ's motion to dismiss the complaint, and submits the summons and complaint as well as the case summary, Consent Order and Order to Show Cause for Civil Contempt in the landlord-tenant proceeding.

On October 28, 2019, the plaintiffs executed a Notice to Cure alleging that Mr. Jusino was running a barber shop out of his apartment and was “engaging in excessive noise-making at the subject premises and has people loitering in the street.” According to the complaint, on November 20, 2019 the plaintiffs executed a Notice of Termination. In the meantime, an appearance originally scheduled before Housing Court Judge Remy Smith for December 3, 2019 was adjourned to January 6, 2020. The instant Supreme Court action was commenced on December 31, 2019.

Simultaneous with the commencement of this action on December 31, 2019, the plaintiffs filed an Order to Show Cause seeking a stay of the Housing Court proceedings. The plaintiffs argued, *inter alia*, that a stay was necessary because they were exposed to contempt proceedings in the Housing Court action. On January 2, 2020, Supreme Court Kings County Judge Lisa S. Ottley, declined to sign the Order to Show Cause, finding that there was no basis for a stay and that a hearing was scheduled for January 6, 2020 in Housing Court.

On January 6, 2020, a Consent Order was entered into between plaintiffs’ counsel and defendant Jusino in Housing Court, wherein the plaintiffs agreed to correct all violations, and HPD agreed to conduct an inspection of the premises on February 3, 2020. On September 10, 2020, Housing Court Judge Michael L. Weisberg signed defendant Jusino’s Order to Show Cause seeking an order, *inter alia*, assessing civil penalties against the plaintiffs for failure to correct outstanding violations of the Housing Maintenance Code as set forth in the January 6, 2020 Consent Order. On October 13, 2020, this Court declined to sign another Order to Show Cause filed by the plaintiffs seeking a stay of the Housing Court proceedings which was identical to the one previously filed in this matter on December 31, 2019. The plaintiffs again argued that a stay was necessary because they were facing contempt proceedings in the Housing Court action. This Court determined that there was no basis to stay the Housing Court matter.

The plaintiffs oppose the motion arguing that this Court can and should exercise jurisdiction over this matter because this action is based on defendant Jusino’s tortious interference in the related Housing Court action and because it adds defendant Jusino’s attorney, MFJ, as a party. The plaintiffs also contend that the complaint should not be dismissed based on CPLR § 3211(a)(1) because the documents submitted by the defendants, particularly in the form of emails, are insufficient to support a basis for dismissal. Lastly, the plaintiffs contend that sanctions are not appropriate here because this action is not frivolous, and they have a meritorious claim against the defendants.

In considering a motion to dismiss a complaint pursuant to CPLR § 3211(a)(7), a court “must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be 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.” *Lubonty v U.S. Bank N.A.*, 159 AD3d 962, 963 (2d Dept 2018) (internal quotation marks omitted); *see also Leon v Martinez*, 84 NY2d 83, 87-88 (1994). Allegations consisting of bare legal conclusions will not suffice. *See Connaughton v. Chipotle Mexican Grill, Inc.*, 29 NY3d 137 (2017); *Simkin v Blank*, 19 NY3d 46 (2012). “Dismissal of the complaint is warranted if the plaintiff fails to assert facts in support of an element of the claim, or if the factual allegations and inferences to be drawn from them do not allow for an enforceable right of recovery.” *Connaughton* at 142. Applying these principles to the case at bar, accepting the facts as alleged in the complaint as true and giving the plaintiffs the benefit of every possible inference, the plaintiffs’ first cause of action for “Tortious Interference of executed repairs” and third cause of action (labeled as second cause of action) alleging “Aiding and Abetting illegal conduct” must be dismissed. The plaintiffs have not set forth cognizable causes of action because they assert only bare legal conclusions with no specificity as to the underlying facts of the alleged claim.

Likewise, plaintiffs’ second cause of action against defendant Jusino for illegal use of the premises must also be dismissed. It lacks specificity and fails to allege any facts relating to the cause of action. Moreover, this claim should more properly be litigated in the landlord-tenant action pending in Housing Court. It appears that prior to commencing the instant action, the plaintiffs clearly intended to litigate this case in the Housing Part of the Civil Court. The plaintiffs served Mr. Jusino with predicate notices, including a 10-day Notice to Cure, and a Notice of Termination, which are ordinarily prerequisites to commencing a summary holdover proceeding in Civil Court. A summary proceeding in the Housing Part of the Civil Court is the proper forum for landlord-tenant disputes involving allegations of the unlawful use of an apartment. Although the Supreme Court has general jurisdiction to hear this claim, the “Civil Court has jurisdiction of landlord tenant disputes and when it can decide the dispute, [...] it is desirable that it do so.” *Post v 120 East End Ave. Corp.*, 62 NY2d 19, 28 (1984). As such, this cause of action should be brought in the Civil Court. *See 22 NYCRR 208.42.*

Lastly, the Court, in its discretion, does not find that the conduct of the plaintiffs rises to the level of costs or sanctions pursuant to 22 NYCRR § 130-1.1. *See Perna v Reality Roofing, Inc.*, 122 AD3d 821 (2d Dept 2014) (holding that the decision whether to award sanctions is entrusted to the court’s sound discretion.)

The remaining contentions are without merit.

Accordingly, it is hereby

ORDERED, that the motion of defendant, Mobilization for Justice, Inc. (Motion 02) is granted; and it is further

ORDERED, that the cross motion of defendant James Jusino (Motion 05) is granted.

This constitutes the decision and order of the Court.

Dated: February 1, 2021



HON. LILLIAN WAN, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020.