

Mackey v Ricatto

2021 NY Slip Op 30461(U)

February 9, 2021

Supreme Court, New York County

Docket Number: 158044/2017

Judge: Verna Saunders

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. VERNA L. SAUNDERS

PART

IAS MOTION 36

Justice

-----X

INDEX NO.

158044/2017

ANDREW MACKEY and BERNICE MACKEY,
Plaintiffs,

MOTION SEQ. NO.

002

- v -

MICHAEL RICATTO and 370 BERNARD AVE LLC,
Defendants.

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 002) 64, 65, 66, 67, 68, 69, 70, 71, 72, 74

were read on this motion to/for

DISMISS

Plaintiff Andrew Mackey and Bernice Mackey commenced this action seeking damages for injuries arising from an alleged unlawful eviction and conversion of property at 370 Bernard Avenue, Cedarhurst, New York 11516 (“the premises”). (NYSCEF Doc. No. 4, *verified complaint*). In their complaint, plaintiffs allege that, on July 15, 2017, defendants Michael Ricatto (“Ricatto”) and 370 Barnard Ave LLC s/h/a 370 Bernard Avenue LLC (“370 Barnard”), who acquired title of the premises in July 2017 by foreclosure, performed construction work at the premises that constructively evicted plaintiffs therefrom without legal right or authority. (NYSCEF Doc. No. 4). By decision and order dated June 11, 2020, this Court denied Bernice Mackey’s motion for summary judgment, finding that she failed to “conclusively establish occupancy for the specific time period in question” and that, based on the photographic proof submitted by defendants, “it [was] unclear whether any persons were occupying or even capable of occupying the premises at the subject time.” (NYSCEF Doc. No. 61, *June 2020 Decision & Order*).¹

Defendants now move, pursuant to CPLR 3211(a)(1), (2), (7), (8) and CPLR 3211(e), for an order dismissing the complaint against Ricatto, and/or, pursuant to CPLR 3212, for summary judgment in their favor. (NYSCEF Doc. Nos. 64-72, 74). Specifically, defendants argue that the action must be dismissed as against Ricatto based on lack of personal jurisdiction, insofar as he was never served with the pleadings within 120 days of the commencement of this action. (NYSCEF Doc. No. 66 ¶ 5-7). Moreover, they assert that this Court lacks subject matter jurisdiction given plaintiffs’ failure to articulate any basis for jurisdiction in New York County. (NYSCEF Doc. No. 66 ¶ 8-12). With respect to that branch of the motion seeking relief pursuant to CPLR 3211(a)(7), defendants argue that Ricatto was never in privity with plaintiffs and “was

¹ It should be noted that, although this action was commenced by both Andrew Mackey and Bernice Mackey, the RJI altered the caption to reflect only the latter. (NYSCEF Doc. No. 18). Although NYSCEF reflects that both plaintiffs are represented by same counsel, all papers submitted in support of the prior motion and the instant motion were submitted only on behalf of Bernice Mackey. However, since there is no notice of discontinuance filed on behalf of Andrew Mackey or any other document reflecting that the caption was amended, the caption here is styled in the manner reflected in the complaint.

not individually vested in the allegation asserted of a wrongful eviction as he was at all times a disclosed agent of the disclosed principal, [370 Barnard], and [d]efendants lacked the capacity to carry out such an action on the date alleged, as title to the premises remained vested in [p]laintiffs, and no landlord/tenant or occupancy status could have arisen, as between [p]laintiffs and [d]efendants, as alleged.” (NYSCEF Doc. No. 66 ¶ 13-15). Defendants rely, in pertinent part, on the deed reflecting that 370 Barnard received title to the premises on July 21, 2017, prior to the alleged eviction, as well as, on Ricatto’s affidavit, wherein he affirms, *inter alia*, that he is a member and disclosed principal of 370 Barnard. (NYSCEF Doc. No. 67, *Deed*; 65 ¶ 4, *Ricatto’s Aff.*).

With respect to their entitlement to summary judgment, defendants assert that plaintiffs have failed to establish that they were lawful tenants or occupants of the premises on July 21, 2017 such that 370 Barnard would have been required to give them notice of actions taken as a legal bona fide purchaser for value; that they fail to establish that they were constructively evicted, relocated or that defendants acted with any malice; and that they have failed to provide any foundation to support any tort committed against them. (NYSCEF Doc. No. 66 ¶ 26-34). Defendants also argue that this Court’s June 11, 2020 order supports their entitlement to summary judgment insofar as it notes the lack of documentation supporting plaintiffs’ claim that they were occupying the premises at the time in question, and that it purports to question whether the premises could be occupied at the subject time due to its condition. (NYSCEF Doc. No. 66 ¶ 36-38).

In opposition, Bernice Mackey argues, that, since defendants rely on the same proof proffered in her motion for summary judgment, this Court has already concluded, based on its review of said documents, that issues of fact remain. (NYSCEF Doc. No. 73 at 1-2). Additionally, defendants contend that personal jurisdiction with respect to Ricatto was waived and that, since no contractual relationship existed between plaintiffs and defendants, the issue of liability of an agent for a contract of the principal does not arise under the present facts. (NYSCEF Doc. No. 73 at 2-4). Annexed to her motion papers, Bernice Mackey submits, *inter alia*, affidavits of merit from herself, as well as, her son and daughter, Andrew Mackey, Jr. and Jazming Mackey, which were provided to the Court in the erstwhile motion. (NYSCEF Doc. No. 73, *Exhibit C*).

As an initial matter, Ricatto waived personal jurisdiction by failing to assert this defense in his answer or in a pre-answer motion to dismiss. (*see Chao Jiang v Ping An Ins.*, 179 AD3d 517, 517-518 [1st Dept 2020]; *McGowan v Hoffmeister*, 15 AD3d 297, 297 [1st Dept 2005]). Moreover, the argument regarding subject matter jurisdiction, based on allegations that no party resides in New York County, as well as, the fact that the premises is in Nassau County, is wholly rejected. While these facts may be relevant to the issue of venue, they have no bearing on this Court’s subject matter jurisdiction over this case. As such, the motion, to the extent it seeks relief pursuant to CPLR 3211(a)(2) and (8), is denied.

In assessing a motion to dismiss a complaint pursuant to CPLR 3211, the Court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory.” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). Dismissal of a claim

for failure to state a cause of action is permitted pursuant to CPLR 3211(a)(7), however, “[w]here evidentiary material is submitted and considered on a motion pursuant to [that section], and the motion is not converted into one for summary judgment, the question becomes whether the plaintiff has a cause of action, not whether the plaintiff has stated one, and unless it has been shown that a material fact claimed by the plaintiff to be one is not a fact at all, and unless it can be said that no significant dispute exists regarding it, dismissal should not eventuate.” (*Bonavita v Govt. Empls. Ins. Co.*, 185 AD3d 892, 894 [2d Dept 2020] [internal quotation marks and citations omitted]; see *Weksler v Weksler*, 81 AD3d 401, 402 [1st Dept 2011]). Furthermore, “[a] cause of action may be dismissed under CPLR 3211(a)(1) ‘only where the documentary evidence utterly refutes [the] plaintiff’s factual allegations, conclusively establishing a defense as a matter of law.’” (*Art & Fashion Group Corp. v Cyclops Prod., Inc.*, 120 AD3d 436, 438 [1st Dept 2014], quoting *Goshen v Mut. Life Ins. Co.*, 98 NY2d 314, 326 [2002]).

To prevail on a motion for summary judgment, the movant must make a *prima facie* showing of entitlement, tendering sufficient admissible evidence to demonstrate the absence of any material issues of fact. (see *Zuckerman v City of N.Y.*, 49 NY2d 557, 562 [1980]). However, “[t]his burden is a heavy one,” requiring that the “facts . . . be viewed in the light most favorable to the non-moving party.” (*Jacobsen v NY City Health & Hosps. Corp.*, 22 NY3d 824, 833 [2014] [internal quotation marks and citation omitted]). Thus, it “‘should only be granted where there is no doubt as to the existence of a triable issue of fact.’” (*Advanced Aerofoil Tech., AG v MissionPoint Capital Partners LLC*, 170 AD3d 460, 461 [1st Dept 2019], quoting *Ellenberg Morgan Corp. v Hard Rock Café Assoc.*, 116 AD2d 266, 269-270 [1st Dept 1986]).

Here, Ricatto avows that he is a disclosed agent and not personally liable for any of the alleged claims of wrongdoing on the part of 370 Barnard, “as there is not even an allegation that [he] acted in any way that would confer personal liability.” (NYSCEF Doc. No. 65 ¶ 9). However, Ricatto’s affidavit is belied by the affidavit of Jazming Mackey, plaintiff’s daughter, who affirmed, to wit: that “[she] spoke with [Ricatto] at the property in July of 2017” and that “[h]e exhibited a gun and told [her] he could do whatever he wanted, since he owned the property.” (NYSCEF Doc. No. 73, *Exhibit C*). Thus, even assuming, *arguendo*, that Ricatto was a disclosed agent, he could nevertheless be liable for “‘affirmative acts’ of negligence or wrongdoing.” (*Gordon v ROL Realty Co.*, 150 AD3d 466, 467 [1st Dept 2017], quoting *Newman v Upton, Cohen & Slamowitz*, 10 AD3d 491, 492 [1st Dept 2004]). Thus, considering the foregoing, that branch of the motion seeking dismissal of the summons and complaint, pursuant to CPLR 3211(a)(1) and (7) against Ricatto is denied.

That branch of the motion seeking summary judgment is also denied. Although Ricatto avers that he inspected the premises, both prior to and subsequent to the deed transfer, and that the premises were unoccupied and uninhabitable (NYSCEF Doc. No. 65 ¶ 7), the affidavits submitted in opposition to the motion challenge these assertions inasmuch as they state that defendants evicted plaintiffs from the premises on June 15, 2017. (NYSCEF Doc. No. 73, *Exhibit C*). In its June 11, 2020 Decision/Order, this Court reasoned that the apparent uninhabitability of the premises and the lack of proof demonstrating plaintiffs’ occupancy raised issues of fact sufficient to deny Bernice Mackey’s motion for summary judgment. However, no finding was made by this Court in said order so as to foreclose plaintiffs’ claim that they were indeed occupying the premises at the subject time. Furthermore, the fact that the deed was not

transferred until after the alleged eviction is not dispositive of plaintiffs' allegation that defendants, without legal right or authority, took adverse actions against plaintiffs on June 15, 2017. Thus, the motion is denied in all respects.

All remaining arguments are either without merit or need not be addressed given the findings above. Accordingly, it is hereby

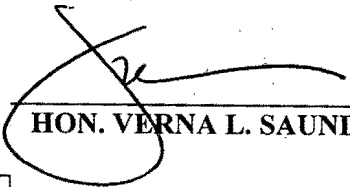
ORDERED that the motion is denied in all respects; and it is further

ORDERED that, within twenty (20) days after this decision and order is uploaded to NYSCEF, counsel for plaintiffs shall serve a copy of this order, with notice of entry, on defendants; and it is further

ORDERED that the parties are directed to appear remotely for a conference on March 24, 2021; and it is further

ORDERED that this constitutes the decision and order of this Court.

February 9, 2021



HON. VERNA L. SAUNDERS, JSC

CHECK ONE:

CASE DISPOSED
GRANTED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: