

**Amelio v Dipaola**

2021 NY Slip Op 30841(U)

March 17, 2021

Supreme Court, New York County

Docket Number: 162377/2019

Judge: Phillip Hom

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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. PHILLIP HOM** **PART** **IAS MOTION 2**

*Justice*

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**INDEX NO.** 162377/2019

CARMINE AMELIO, ALFONSO AMELIO, PAUL AMELIO,

**MOTION DATE** 2/26/2021

Plaintiff,

**MOTION SEQ. NO.** 001

- v -

JOHN DIPAOLO, DOES NO. 1 THROUGH,

**DECISION + ORDER ON  
MOTION**

Defendant.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20

were read on this motion to/for SUMMARY JUDGMENT (AFTER JOINDER).

Upon the foregoing documents, summary judgment is granted in favor of Defendant John DiPaola (“DiPaola”), and Plaintiffs’, Carmine Amelio (“Carmine”), Alfonso Amelio (“Alfonso”), and Paul Amelio (“Paul”) (collectively “Plaintiffs”), cross motion is denied.

*Background*

This case arises from an incident on August 1, 2015, in which Carmine allegedly suffered emotional distress when stuck in a stalled building elevator at 60 West 23rd Street, New York, New York, (the “Building”). Carmine is a former tenant of the Building owned by non-party Whitehall Properties II, LLC (“Landlord”). He commenced this action by filing a summons and complaint on December 20, 2019. Alfonso and Paul are Carmine’s brothers. DiPaola is employed as a superintendent by the Landlord. DiPaola moves for summary judgment on various causes of action stated below.

*Summary Judgment*

On a motion for summary judgment, the proponent must make prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case (*Fuller v KFG L & I, LLC*, 189 AD3d 666 [1st Dept 2020], citing *Zuckerman v New York*, 49 NY2d 557 [1980]). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial of the action (*Fuller v KFG L & I, LLC.*, *supra*; citing, *Zuckerman v New York*, 49 NY2d 557 [1980]; *Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). It is insufficient to merely set forth averments of factual

or legal conclusions (*Genger v Genger*, 123 AD3d 445, 447 [1st Dept 2014], citing *Schiraldi v US. Min. Prods.*, 194 AD2d 482, 483 [1st Dept 1993]).

Here, DiPaola has established his *prima facie* entitlement to summary judgment under CPLR §3212 by demonstrating that he did not create or exacerbate the dangerous condition which allegedly caused Carmine's injuries and that Plaintiffs' causes of action lack merit, as discussed below. In support of his motion, DiPaola submits his affidavit; Housing Court decisions dated September 17, 2019, November 8, 2019, December 11, 2019 and January 6, 2020; and August 1, 2015 elevator report. DiPaola states that Carmine was evicted from the apartment by Housing Court order dated January 2, 2020.

*a. Wrongful death*

This Court finds that the Plaintiffs lack standing to bring a wrongful death action on behalf of their mother Luisa Amelio's estate. The Second Department and Court of Appeals' decision in *Chong v NY City Tr. Auth.*, 83 AD2d 546 [2d Dept 1981] and *Gonzalez v NY City Hous. Auth.*, 77 NY2d 663 [1991] are dispositive here. The claim for damages for decedent's next of kin is inadequate here because Plaintiffs have failed to allege that they suffered pecuniary injuries by reason of the decedent's death and that any of the plaintiffs were appointed as a personal representative of the decedent.

*b. Obstruction of justice/solicitation of crime*

These causes of action are not viable. There is no private right of action for obstruction of justice or solicitation of crime. The district attorneys have the sole and exclusive authority to prosecute this alleged criminal activity. (*Kinberg v Kinberg*, 48 AD3d 387 [1st Dept 2008]).

*c. Negligence*

Plaintiffs' claim for negligence is time-barred and does not have the necessary elements. Under CPLR §214(5), a Plaintiff must start an action to recover damages for a personal injury within three years. Carmine's alleged emotional distress because of being stuck in a stalled Building elevator occurred on August 1, 2015. Plaintiffs did not file their lawsuit until December 20, 2019, more than four years later. Thus, Plaintiffs' negligence claim is time-barred by CPLR §214(5) (*Lewis v Worzman*, 22 AD3d 413 [1st Dept 2005]).

One of the elements of negligence is that defendant owed a duty of care to plaintiff. DiPaola did not owe a duty of care because he did not own, operate, control, or make a special use of the Building elevator (*Gibbs v Port Auth. of NY*, 17 AD3d 252 [1st Dept 2005]). Carmine also did not demonstrate either that DiPaola created the alleged hazardous condition or had actual or constructive notice of the defective condition and failed to correct it (*Mitchell v City of NY*, 29 AD3d 372 [1st Dept 2006]). DiPaola correctly argues that there is no nexus between Carmine's alleged injuries when stuck in a stalled elevator and DiPaola's alleged negligence.

*d. Harassment and retaliation*

Carmine has raised the harassment and retaliation claims in prior proceedings. The Housing Court dismissed said claims by order dated September 17, 2019. Here, the harassment and retaliation claims arise out of the same transaction or series of transactions, therefore the Plaintiffs are barred by the doctrines of *res judicata* and *collateral estoppel* (*Jumax Assoc. v 350 Cabrini Owners Corp.*, 110 AD3d 622 [1st Dept 2013]) and *Buechel v Bain*, 97 NY2d 295 [2001]).

*e. Tortious interference*

A claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant's knowledge of that contract; (3) the defendant's intentional procuring of the breach, and (4) damages (*Foster v Churchill*, 87 NY2d 744, 749-750 [1996]). Tortious interference is a cause of action involving contracts. There is no allegation Plaintiffs and DiPaola had a contract. Plaintiffs allegation that DiPaola tortiously interfered with their ability to provide for their mother's care because of the Housing Court proceedings is meritless.

*f. Abuse of process*

The Court dismisses the abuse of process, abuse of power and fraud upon the Court claims. Abuse of process has three essential elements: (1) regularly issued process, (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 (*Fisk Bldg. Assoc. LLC v Shimazaki II, Inc.*, 76 AD3d 468, 469 [1st Dept 2010]). Plaintiffs have neither stated a cognizable legal theory nor any triable facts in support of the claims of abuse of power and fraud upon the Court.

*g. Conversion and spoliation*

In order to succeed on a cause of action to recover damages for conversion, a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's right (*Giardini v Settanni*, 159 AD3d 874, 875 [2d Dept 2018]; *Allen v Murray House Owners Corp.*, 174 AD2d 400 [1st Dept 1991]). Here, the Plaintiffs failed to establish that they had an immediate right of possession to the apartment and that DiPaola exercised unauthorized dominion over the apartment belonging to the Plaintiffs.

*h. Breach of contract*

The elements of such a claim include the existence of a contract, the plaintiff's performance thereunder, the defendant's breach thereof, and resulting damages (*Morris v 702 E. Fifth St. HDFC*, 46 AD3d 478 [1st Dept 2007]). As discussed, Plaintiffs have failed to show that there was any enforceable agreement between them and DiPaola. Therefore, Plaintiffs do not

have a cause of action for breach of contract against DiPaola (*Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010]).

*i. Defamation*

The elements of a defamation cause of action are: (1) a false statement that is (2) published to a third party (3) without privilege or authorization and (4) harm caused to the plaintiff, unless the statement is one of the types of publications actionable regardless of harm (*Dillon v City of NY*, 261 AD2d 34, 38 [1st Dept 1999]). In a defamation action, the particular words complained of must be set forth in the complaint. The complaint also must allege the time, place and manner of the false statement and specify to whom it was made (*Vardi v Mut. Life Ins. Co.*, 136 AD2d 453 [1st Dept 1988]). In evaluating whether a cause of action for defamation is successfully pleaded, the words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Silsdorf v Levine*, 59 NY2d 8 [1983]). Plaintiffs have failed to plead the particular words they allege constitute defamation, but instead allege loose, figurative or hyperbolic statements, which, even if deprecating to the Plaintiffs, are not actionable (*Gross v NY Times Co.*, 82 NY2d 146 [1993]).

*Plaintiffs cross motion and opposition*

Plaintiffs oppose DiPaola's motion and cross move to strike defendant's answer, for default judgment, or in the alternative, to grant Plaintiffs' leave to amend their complaint. Plaintiffs do not provide any reasons under the CPLR or caselaw why DiPaola's answer should be stricken. Plaintiffs do not explain why DiPaola is in default because he answered Plaintiffs' complaint on or about January 14, 2020. Under CPLR §3025(b) a party may amend his or her pleadings, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be given freely and any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplement pleading clearly showing the changes or additions to be made to the pleading.

The Courts may afford pro se litigants "some latitude," however, pro se litigants acquire no greater right than any other litigant and will be held to the same standards of proof as those who are represented by counsel. (*Limani Realty, LLC v. Zayfert*, 970 NYS2d 345 [2d Dept 2012]). The Court denies the motion to amend the complaint because Plaintiffs have failed to attach their proposed amended pleading showing the changes to be made to the pleading as required under CPLR §3025(b).

