Courtney v Board of Mgrs. of the Chadwin House Condominium
2021 NY Slip Op 31613(U)
May 12, 2021
Supreme Court, New York County
Docket Number: 151677/2017
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

TODD COURTNEY

INDEX NO. 151677/2017

MOT. DATE

- v -

MOT. SEQ. NO. 006

THE BOARD OF MANAGERS OF THE CHADWIN HOUSE CONDOMINIUM et al

The following papers were read on this motion to/for _____

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits ECFS DOC No(s).____

Notice of Cross-Motion/Answering Affidavits — Exhibits ECFS DOC No(s).____

Replying Affidavits ECFS DOC No(s).____

In this motion, defendants The Board of Managers of the Chadwin House Condominium, The Chadwin Driveway Association, Inc., Mark Greenberg Real Estate Co. Inc., Mark Greenberg Real Estate Co. LLC, James Goldstick and Infinity Corporation (the "Condo Defendants") move for an Order pursuant to CPLR § 3211[a][1], [5] and [7] as well as for summary judgment pursuant to CPLR § 3212 dismissing all claims against them. In a cross-motion, defendant Sam Koubti also so moves. Plaintiff opposes both the motion and cross-motion. Issue has been joined and note of issue has not yet been filed. Therefore, summary judgment relief is available. The court's decision follows.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]). Under CPLR § 3211(a)(1), "dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v. Martinez, supra* at 88).

Meanwhile, on a motion for summary judgment, the proponent bears the initial burden of setting forth evidentiary facts to prove a prima facie case that would entitle it to judgment in its favor, without the need for a trial (CPLR 3212; *Winegrad v. NYU Medical Center*, 64 NY2d 851 [1985]; *Zuckerman v. City of New York*, 49 NY2d 557, 562 [1980]). If the proponent fails to make out its prima facie case for summary judgment, however, then its motion must be denied, regardless of the sufficiency of the opposing papers (*Alvarez v. Prospect Hospital*, 68 NY2d 320 [1986]; *Ayotte v. Gervasio*, 81 NY2d 1062 [1993]).

Dated: 5/12/21

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☒**GRANTED** ☐ **DENIED** ☐ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

Granting a motion for summary judgment is the functional equivalent of a trial, therefore it is a drastic remedy that should not be granted where there is any doubt as to the existence of a triable issue (*Rotuba Extruders v. Ceppos*, 46 NY2d 223 [1977]). The court's function on these motions is limited to "issue finding," not "issue determination" (*Sillman v. Twentieth Century Fox Film*, 3 NY2d 395 [1957]).

In this action, the parties have a long and tortured history. In 2005, plaintiff purchased unit 5P (the "apartment") at The Chadwin House Condominium located at 140 Seventh Avenue, New York, New York. A judgment of foreclosure and sale was ultimately entered after plaintiff failed to make payments for common charges, etc., in connection with the apartment. This action arises from plaintiff's ownership and possession of a parking space in a garage owned/operated by The Chadwin Driveway Association, Inc. ("Chadwin Driveway Association") wherein plaintiff asserts various causes of action against entities and individuals allegedly connected to the garage after his parking privileges were suspended and his vehicle booted following his default in payments.

In the complaint, plaintiff admits that due to financial hardship "as a result of the 2007 global financial crisis", he fell behind on his payments of the common charges associated with his ownership and possession of the parking space in the amount of $12,000. Plaintiff complains that he made "multiple good faith attempts to reach a settlement" which were unsuccessful because the "defendants were unwilling to reasonably negotiate in good faith". Nonetheless, while plaintiff claims that he "remains ready and willing to make a good faith effort to become current on these obligations", he admits that "at this time, he is financially unable to pay all outstanding common charges and fees and interest assessed by the defendants."

Plaintiff alleges that in or about April 2012, "without any prior notice or warning, and in violation of Art. 9 of the Real Property Law ("the Condominium Act"), defendants arranged to have a boot illegally placed on [his] Range Rover which was legally parked within the parking space that he rightfully owns." Plaintiff maintains that "[i]t is an unreasonable and excessive form of punishment, and, indeed, improper vigilantism, for defendants to hold Mr. Courtney's $50,000.00 car hostage over a mere $12,000.00 in alleged unpaid common charges on a parking space that he owns outright." Plaintiff further complains that on or about January 16, 2016, the defendants notified him that they removed plaintiff's personal property from where he had "properly" stored it in his parking place, including a couch, a bench and a sub-zero wine cooler.

Finally, plaintiff alleges that the individual defendant Koubti threatened him as well as "verbally and physically" assaulted him. Koubti allegedly told plaintiff's visitors that plaintiff did not reside at the condominium and "threatening plaintiff on [unspecified] multiple occasions". On April 16, 2012, Koubti allegedly screamed a number of explectives at plaintiff and complained that plaintiff does not pay his bills and threatened to "take plaintiff outside the building and kick his ass". Plaintiff claims that during this incident, Koubti pointed his mop handle at him. Plaintiff ultimately filed a police report in connection with the 4/16/12 incident. Plaintiff also complains that on December 3, 2015, Koubti called him "'the dumbest guy he knows'" and … a "loser." Plaintiff asserts that "[t]his incident left [him] shaken and in a state of distress. So much so that he felt it necessary to call a friend who was able to calm him down." Plaintiff specifies a third incident which occurred on September 16, 2016 when Koubti

> came very close and shook his fists at plaintiff and was restrained only by Chadwin House and MGRE employee Carlos Coste. During this incident, Mr. Koubti lied to plaintiff about the status/disappearance of his property by fraudulently informing him that his property had been removed by the Marshal who had placed a sticker on plaintiff's property. In fact, his property had not been removed by the Marshal but had, instead been removed by Mr. Koubti himself[.]

Plaintiff has asserted the following causes of action: [1] conversion of the vehicle and personal property; [2] breach of contract; [3] breach of duties of good faith and fair dealing; [4] negligence; [5] negligent supervision; [6] negligent retention; [7] intentional infliction of emotional distress; [8] negligent

infliction of emotional distress; and [9] assault against Koubti, only; [10] defamation against Koubti, only; and [11] *prima facie* tort.

The Chadwin Driveway Association By-Laws state that "all Parking Space Owners shall be members of the Association". The Chadwin Driveway Association By-Laws also state that "[d]uring any period in which a Member shall be in default in the payment of any assessment levied by the Association, the voting rights, if any, of such Member and the Member's right to the use of Driveway Unit may be suspended by the Board of Directors until such assessment has been paid". The Condo Defendants' motion is supported by the affidavit of James Goldstick, Vice President of the Chadwin Driveway Association.

The Condo Defendants argue that plaintiff's first cause of action fails to state a *prima facie* claim and is barred by the applicable statute of limitations. The elements of a cause of action in conversion are the plaintiff's right to possession, intent of the defendant, and defendant's interference with plaintiff's property rights to the exclusion of plaintiff's rights (*Komolov v. Segal*, 101 AD3d 639 [1st Dept 2012]). The cause of action is subject to a three-year statute of limitations (CPLR § 214[c][3]). Koubti joins many of the movants' arguments and further maintains that the assault and defamation claims against him, individually should be dismissed.

Meanwhile, plaintiff's counsel contends that at a minimum, the negligence claim should survive the motion. He contends that discovery remains outstanding and the case should proceed to trial so that he may request an adverse inference. Otherwise, plaintiff's counsel points to a host of inadmissible emails, plaintiff's partner's affidavit submitted in support of a prior motion, and a inadmissible letter from a psychiatrist that plaintiff saw in 2018.

At the outset, suspension of parking privileges and the booting of a vehicle is within a board's authority so long as these acts are "done in good faith, and in furtherance of the condominium's legitimate interests" (*Skouras v Victoria Hall Condominium*, 73 AD3d 902 [2d Dept 2010]). There is no dispute that plaintiff was delinquent in his payments. Therefore, defendants properly excluded plaintiff from use of his parking space, booted his car, and removed his personal property. In any event, since the vehicle was booted more than three years before this action was commenced (February 21, 2017), plaintiff's claims as to the vehicle are time-barred.

Plaintiff's second cause of action alleges that although he fulfilled his "obligations under the Chadwin House By-Laws and Chadwin Garage By-Laws, including but not limited to making payments, in good faith", the defendants "breached the terms of the contract when they, inter alia, refused [plaintiff] access to the facilities and services provided to residents of Chadwin House, illegally placed a boot on [the vehicle] and unlawfully removed Mr. Courtney's property from his garage space thereby causing Mr. Courtney significant losses…" The four elements required of a cause of action for breach of contract are: [1] formation of a contract between the parties; [2] performance by plaintiff; [3] defendant's failure to perform; and [4] resulting damage (*Furia v. Furia*, 116 AD2d 694 [2d Dept 1986]).

Not only is there no dispute that it was plaintiff who breached the Chadwin Driving Association bylaws, but plaintiff does not even state a *prima facie* cause of action for breach of contract because he admits in his complaint that he stopped paying the common charges associated with his parking space in the garage. To the extent that plaintiff complains that the Chadwin Condominium Association stopped provided him services associated with the apartment that was foreclosed on, these allegations fail to set forth any viable, operative contract from which an alleged breach thereof arose. Therefore, the second cause of action is also severed and dismissed.

Defendants argue that the third cause of action is duplicative of the second and must otherwise be dismissed because no breach occurred. Implied in every contract is a duty of good faith and fair dealing which requires that "'neither party shall do anything which will have the effect of destroying or injuring the right of the other party to receive the fruits of the contract'" (*Forman v. Guardian Life Ins. Co. of America*, 76 AD3d 886 [1st Dept 2010] [quotations omitted]). Plaintiff's allegations asserted in the third

cause of action are essentially identical to those asserted in the second. Not only is the third cause of action duplicative, but it fails to state a *prima facie* cause of action since plaintiff breached his agreement before the defendants' complained-of conduct occurred. Finally, to the extent that plaintiff alleges that the Condo defendants "permit[ed] and/or encourag[ed] Koubti to harass and abuse" him, New York does not recognize a civil cause of action for harassment (*Edelstein v. Farber,* 27 AD3d 202 [1st Dept 2006]). Accordingly, the third cause of action is severed and dismissed.

Plaintiff's fourth cause of action is for negligence and arises from the same allegations asserted in the second and third causes of action. Relatedly, the fifth and sixth causes of action are for negligent supervision and retention. Defendants maintain that the negligence claim should be dismissed because plaintiff has failed to allege a duty independent of a contract and the claim is duplicative. As for the fifth and sixth claims, the Condo Defendants assert that the claims are time-barred and plaintiff cannot otherwise prove notice.

All three causes of action are subject to a three-year statute of limitations. At the outset, the fourth cause of action fails because to the extent it is not duplicative of the fifth and sixth causes of action, plaintiff has failed to allege a legal duty owed by the defendants independent of the underlying agreements at issue.

Ordinarily, an employer is not liable for its employee's acts committed for personal motives unrelated to the furtherance of the employer's business (*Johansmeyer v. New York City Department of Education*, 165 AD3d 634 [2d Dept 2018]). However, an employer can be held liable for negligent hiring or retention if it has knowledge of the employee's propensity for the sort of behavior which caused the injured party's harm (*Detone v. Bullit Courier Service, Inc.*, 140 AD2d 278 [1st Dept 1988]). Further, an employer can be held liable for failing to prevent foreseeable injuries proximately related to the absence of adequate supervision (*Timothy Mc. V. Beacon City School Dist.*, 127 Ad3d 826 [2d Dept 2016]). In order to recover against an employer for negligent hiring, retention and supervision of an employee, a plaintiff must show that "the employer was on notice of a propensity to commit the alleged acts" (*G.G. v. Yonkers General Hosp.*, 50 AD3d 472 [1st Dept 2008] quoting *White v. Hampton Management Company LLC*, 35 AD3d 243 [1st Dept 2006]).

Plaintiff's counsel attempts to put in opposition to the motion copies of emails which are not in admissible form. Therefore, they cannot be considered by the court. In any event, many of the emails are irrelevant insofar as they concern unrelated complaints from other tenants about Koubti. The only allegations asserted in the complaint that occurred within the three-year period prior to commencement of this action are that on December 3, 2015, Koubti called plaintiff "'the dumbest guy he knows'" and … a "loser" and on September 16, 2016, Koubti "came very close and shook his fists at plaintiff and was restrained" by his coworkers and lied about who removed plaintiff's property. The court agrees with defendants that these claims do not give rise to an actionable tort and therefore, the fourth through sixth causes of action are severed and dismissed.

Plaintiff's seventh and eighth causes of action are for intentional and negligent infliction of emotional distress. A cause of action for intentional infliction of emotional distress has four elements: "(i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Chanko v. American Broadcasting Companies Inc.*, 27 NY3d 46 [2016] quoting *Howell v. New York Post Co*., 81 NY2d 115 [1993]). This cause of action is subject to a one-year statute of limitations (CPLR § 215[3]; see *Bellissimo v. Mitchell*, 122 AD3d 560 [2d Dept 2014]).

A plaintiff bears a heavy burden of alleging a claim for intentional infliction of emotional distress (*Howell v. New York Post Co., Inc.*, 81 NY2d 115 [1993]). Plaintiff must assert conduct that is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency ... and [is] utterly intolerable in a civilized community" (*Kickertz v. New York University*, 110 AD3d 268, 277-278 [1st Dept 2013] citing *Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue*, 11 N.Y.3d 15 [2008]).

Generally, a cause of action for negligent infliction of emotional distress must be premised upon the breach of a duty owed to plaintiff which either unreasonably endangers plaintiff's physical safety or causes plaintiff to fear for his or her own safety (*Bernstein v. East 51st Street Development Co., LLC,* 78 AD3d 590 [1st Dept 2010] quoting *Sheila C. v. Povich*, *supra* at 130). A person "to whom a duty of care is owed ... may recover for harm sustained solely as a result of an initial, negligently-caused psychological trauma, but with ensuing psychic harm with residual physical manifestations" (*Ornstein v. New York City Health and Hospitals Corp.,* 10 NY3d 1881 N.E.2d 1 [2008]).

In the First Department, a cause of action for negligent infliction of emotional distress must arise from "extreme and outrageous conduct" (see *Melendez v. City of New York*, 171 AD3d 566 [1st Dept April 18, 2019]; compare *Taggart v. Costabile*, 131 AD3d 243 [2d Dept 2015]; see also *Lau v. S & M Enterprises*, 72 AD3d 49 [1st Dept 2010]). "Whether the alleged conduct is outrageous is, in the first instance, a matter for the court to decide" (*Wolkstein v. Morgenstern,* 275 AD2d 635 [1st Dept 2000] quoting *Rocco v. Town of Smithtown*, 229 AD2d 1034, appeal dismissed 88 NY2d 1065). Further, a cause of action for negligent infliction of emotional distress should generally not be allowed if it is duplicative of tort or contract causes of action (*Wofkstein*, *supra*).

The court agrees with the defendants that plaintiff has failed to allege a *prima facie* cause of action for either intentional or negligent infliction of emotional distress. Plaintiff's allegations of fear and needing to be consoled are conclusory and otherwise insufficient as a matter of law to state a claim. In any event, the conduct complained of falls short of that which is necessary to even survive a motion to dismiss (see *Wolkstein, supra*, quoting *Hernandez v. City of New York*, 255 AD2d 202 [1st Dept 1998] [a cause of action for negligent infliction of emotional distress must be based on allegations of conduct "so extreme in degree and outrageous in character as to go beyond all possible bounds of decency, so as to be regarded as atrocious and utterly intolerable in a civilized community"]). Accordingly, the seventh and eighth causes of action are also severed and dismissed.

Finally, the Condo defendants seek dismissal of plaintiff's eleventh cause of action for *prima facie* tort. The elements of the cause of action for *prima facie* tort is "an intentional infliction of harm, without excuse or justification, by an act or series of acts that would otherwise be lawful" (Lerwick v. Kelsey, 24 AD3d 931 [3d Dept 2005] citing Freihofer v. Hearst Corp., 65 NY2d 135 [1985]). A plaintiff must also demonstrate special damages and that the defendant acted with "disinterested malevolence" (Kickertz v. New York University, 110 AD3d 268 [1st Dept 2013]). Here, plaintiff's allegations fall woefully short in order to survive even a motion to dismiss. Accordingly, the eleventh cause of action is also severed and dismissed.

Koubti seeks dismissal and/or summary judgment dismissing the remaining claims for assault and defamation which are against him, only. Civil assault is the intentional placing of another person in fear of an imminent battery. *Charkhy v Altman*, 252 AD2d 413, 678 NYS2d 40 [1st Dept 1998]). "To sustain a claim for assault there must be proof of physical conduct placing plaintiff in imminent apprehension of harmful contact". *Holtz v Wildenstein & Co., Inc.,* 261 AD2d 336, 693 NYS2d 516 [1st Dept 1999].

Defamation is "the making of a false statement which tends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society" (*Stepanov v. Dow Jones & Co., Inc.*, 120 AD3d 28 [1st Dept 2014] citing *Foster v. Churchill*, 87 NY2d 744, [1996]). Whether the statements constitute fact or opinion is a question of law for the court to decide (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831).

The elements of a defamation claim are: [1] a false statement; [2] publication of the statement without privilege or authorization to a third party; [3] constituting fault as judged by, at a minimum, a negligence standard; and [4] the statement must either cause special harm or constitute defamation *per se* (*Dillon v. City of New York*, 261 AD2d 34 [1st Dept 1999] citing Restatement of Torts, Second § 558). A defamation claim must be pled with particularity, so that a plaintiff must allege the particular words

complained of as well as the time, place and manner of the statement and to whom the statement was made (CPLR 3016[a]; *Dillon*, *supra* at 38).

In evaluating the viability of a defamation claim, the words must be construed in the context of the entire statement before an ordinary audience, and if the statement is not reasonably susceptible to a defamatory meaning, the claim is not actionable (*Silsdorf v. Levine*, 59 NY2d 8 [1983] *cert denied* 464 US 831). “Courts will not strain to find defamation where none exists” (*Dillon, supra* at 38 [internal quotation omitted]).

Both defamation and assault are subject to a one-year statute of limitations. The court finds that plaintiff’s complaint fails to allege actionable conduct by Koubti within the relevant time-period to withstand the cross-motion. The conduct alleged by plaintiff "is not the type of menacing conduct that may give rise to a reasonable apprehension of imminent harmful conduct" necessary for an actionable assault claim (*Okoli v Paul Hastings, LLP*, 117 AD3d 539, 985 NYS2d 556 [1st Dept 2014]). Further, assuming *arguendo* that Koubti knowingly lied and stated that plaintiff’s property had been removed by a Marshal rather than Koubti himself, such a claim lacks sufficient allegations of publication, is generally lacking in particularity and plaintiff has otherwise failed to allege any facts to show damages.

On the issue of damages, the court rejects plaintiff’s counsel’s contention that it is sufficient to allege “significant losses, including, but not limited to, emotional trauma; mental anguish and suffering; fear of being in his own home”. Relatedly, annexed to his opposition is a letter from a psychiatrist generated in connection with a so-called psychiatric evaluation of the plaintiff in April 2018. Not only is the letter inadmissible, but Dr. Quentzel “opines” that plaintiff suffers from Major Depressive Disorder due to defendants’ treatment of plaintiff (seemingly based upon plaintiff’s hearsay statements to Quentzel), rather than a host of other factors outlined as follows:

> Living in a foreclosed apartment with little income and high tension with his fiancé. Long term unemployment, in part due to loss of access to a working vehicle since his SUV was booted by building management, and in part due to depression and stress symptoms causing global dysfunction and arising from how he has been treated at Chadwin House. Minimal alcohol. No drugs. Little family support.

Quentzel’s opinion lacks a sufficient basis to support the conclusion that it was defendants’ conduct, rather than plaintiff’s living situation and unemployment, which caused and/or contributed to plaintiff’s depression. Accordingly, Koubti’s motion to dismiss the claims asserted against him, individually, is also granted.

In accordance herewith, it is hereby

ORDERED that defendants’ motion and cross-motion are granted in their entirety; and it is further

ORDERED that plaintiff’s complaint is dismissed and the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly rejected and this constitutes the decision and order of the court.

Dated: 5/12/21
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.