Gonzalez v Marino
2021 NY Slip Op 31932(U)
February 22, 2021
Supreme Court, Queens County
Docket Number: 712540/20
Judge: Allan B. Weiss

Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE ALLAN B. WEISS IAS Part 2
Justice

GABRIEL GONZALEZ,

Plaintiff,

-against-

JOANNA MARINO, FRED CRUE and CHARLIE MARINO,

Defendants.

Index No: 712540/20

Motion Date: 9/23/20

Motion Seq. No. 1

The following papers numbered EF2 to EF23 read on this Order to Show Cause by plaintiff for a Preliminary Injunction pursuant to New York Civil Practice Law and Rules, Article 63, directing Defendants, and each of them, to cease their campaign of harassment and trespass against Plaintiff; and cross motion by Defendants to dismiss the complaint pursuant to CPLR 3211[a][7].

	Papers Numbered
Order to Show Cause - Affidavits - Exhibits.....	EF2 -EF7.
Notice of Cross Motion - Affidavits - Exhibits	EF8 -EF16
Answering Affidavits - Exhibits	EF17-EF22
Reply Affidavits	EF23

Upon the foregoing papers it is ordered that the motion and cross motion are determined herein as follows:

Plaintiff in this trespass and harassment action seeks a preliminary injunction directing Defendants, and each of them, to cease their alleged campaign of harassment and trespass against Plaintiff, Plaintiffs family, and Plaintiff's Real Property located at 97-09 Linden Blvd, Ozone Park Queens County, NY 11417. Plaintiff and Defendants are neighbors. Defendants purchased the neighboring home on or about October 30, 2014. When they purchased the home, the rear yard contained an above-ground pool together with a raised deck leading from the rear of the house to the pool. On the eastern side of Defendants' rear property there existed, and continues to exist, a white vinyl fence separating the properties of the parties. Defendants submit that since the day they purchased the home in 2014, Plaintiff has filed 16 complaints with the New York City Environmental Control Board and Department of Buildings concerning Defendants' use of the property. Each of the complaints has been dismissed, except for the most recently filed complaint, which are currently being challenged by Defendants. Defendants further submit that, prior to Defendants moving into the premises in 2014, Plaintiff had filed similar complaints against the prior property owners. Plaintiff submits that defendants constantly come onto plaintiff's property; that defendants installed cameras to surveil plaintiff's property and that defendants engaged in conduct of harassment against plaintiff and plaintiff's family.

Plaintiff moves, by Order to Show Cause, for a preliminary injunction against defendants to immediately direct defendants to cease a series of actions which plaintiff submits constitutes trespass and harassment. Defendants oppose the motion and cross move to dismiss the complaint for failure to state a cause of action pursuant to CPLR 3211[a][7]. Plaintiff opposes the cross motion.

Order to Show Cause

The Order to Show Cause ("OSC") for a preliminary injunction is denied. The decision to grant a preliminary injunction is a matter ordinarily committed to the sound discretion of the court hearing the motion" (*Nelson, L.P. v Jannace,* 248 AD2d 448, 448–449 [2d Dept 1998]; *see Doe v Axelrod,* 73 NY2d 748, 750 [1988]; *Automated Waste Disposal, Inc. v Mid–Hudson Waste, Inc.,* 50 AD3d 1072, 1073 [2d Dept 2008]). Moreover, " '[i]n the absence of unusual or compelling circumstances, [the] court[s][are] reluctant to disturb said determination' " (*Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 942 [2d Dept 2009], quoting *Borenstein v Rochel Props.,* 176 AD2d 171, 172 [1st Dept 1991]; *After Six v 201 E. 66th St. Assoc.,* 87

AD2d 153, 155 [1st Dept 1982]).

It is well settled that the ordinary function of a preliminary injunction is not to determine the ultimate rights of the parties, but to maintain the status quo until there can be a full hearing on the merits (*see Moltisanti v East Riv. Hous. Corp.*, 149 AD3d 530, 531 [1st Dept 2017]; *Residential Bd. of Mgrs. of Columbia Condominium v Alden,* 178 AD2d 121 [1st Dept 1991]). However, if relief is required because of " 'imperative, urgent, or grave necessity,' " then a court, acting with " 'great caution' " and " 'upon clearest evidence,' " i.e., " 'where the undisputed facts are such that without an injunction order a trial will be futile' " may grant a preliminary injunction (*Spectrum Stamford, LLC v 400 Atl. Tit., LLC*, 162 AD3d 615, 616 [1st Dept 2018], quoting *Xerox Corp. v Neises,* 31 AD2d 195, 197 [1st Dept 1968]; 28 N.Y. Jur, Injunctions, § 19; *see also Sithe Energies, Inc. v 335 Madison Ave., LLC,* 45 AD3d 469, 470 [1st Dept 2007]).

To obtain a preliminary injunction, a movant must establish (1) a likelihood of success on the merits, (2) irreparable injury absent a preliminary injunction, and (3) a balancing of the equities in the movant's favor (*see* CPLR 6312[c]; *Rowland v Dushin,* 82 AD3d 738 [2d Dept 2011]; *S.J.J.K. Tennis, Inc. v Confer Bethpage, LLC,* 81 AD3d 629 [2d Dept 2011]; *Volunteer Fire Assn. of Tappan, Inc. v County of Rockland,* 60 AD3d 666, 667 [2d Dept 2009]). A court evaluating a motion for a preliminary injunction must be mindful that "[t]he purpose of a preliminary injunction is to maintain the status quo, not to determine the ultimate rights of the parties" (*Masjid Usman, Inc. v Beech 140, LLC*, 68 AD3d 942, 942-43 [2d Dept 2009], *quoting Matter of Wheaton/TMW Fourth Ave., LP v New York City Dept. of Bldgs.*, 65 AD3d 1051, 1052 [2d Dept 2009]; *see Coinmach Corp. v Alley Pond Owners Corp.*, 25 AD3d 642, 643 [2d Dept 2006]).

The movant must show that the irreparable harm is "imminent, not remote or speculative" (*Golden v Steam Heat*, 216 AD2d 440, 442 [2d Dept 1995]). Moreover, "[e]conomic loss, which is compensable by money damages, does not constitute irreparable harm" (*EdCia Corp. v McCormack*, 44 AD3d at 994). The decision to grant or deny a preliminary injunction lies within the sound discretion of the Supreme Court (*see Glorious Temple Church of God in Christ v Dean Holding Corp.*, 35 AD3d 806, 807 [2d Dept 2006]).

To sustain the burden of demonstrating its likelihood of success on the merits, the movant must demonstrate a clear right to relief which is "plain from the undisputed facts" (*see, Family Affair Haircutters v Detling,* 110 AD2d 745 [2d Dept 1985]). Where, as here, the facts are in sharp dispute, a temporary injunction will not be granted (*see, Jurlique v Austral Biolab Pty.,* 187 AD2d 637 [2d Dept 1992]; *Sutton, DeLeeuw, Clark & Darcy v Beck,* 155 AD2d 962 [2d Dept 1989]; *Family Affair Haircutters v Detling, supra*). Guided by these principles, the court finds that the plaintiff has failed to establish its likelihood of success on the merits. The record discloses disputed issues of fact (*see Blueberries Gourmet, Inc. v Aris Realty Corp.*, 255 AD2d 348, 349-50 [2d Dept 1998])

Here, the plaintiff made only conclusory allegations and failed to point to any imminent and non-speculative harm that would befall him in the absence of a preliminary injunction (*see Family-Friendly Media, Inc. v Recorder Tel. Network,* 74 AD3d 738, 739-40 [2d Dept 2010]; *Golden v Steam Heat*, 216 AD2d at 442). Moreover, he failed to demonstrate that any harm he would suffer would not be compensable by money damages (*see EdCia Corp. v McCormack*, 44 AD3d at 994). Plaintiff did not demonstrate a likelihood of success on the merits of his trespass or harassment cause of action (*see Arcamone-Makinano v Britton Prop., Inc.*, 83 AD3d 623, 624-25 [2d Dept 2011]; *Long Is. Gynecological Servs. v Murphy,* 298 AD2d 504 [2d Dept 2002]; *see generally Stockley v Gorelik,* 24 AD3d 535, 536 [2d Dept 2005]), as well as the prospect of irreparable injury if the preliminary injunction is withheld (*see Omakaze Sushi Rest., Inc. v Ngan Kam Lee,* 57 AD3d 497 [2d Dept 2008]; *Sforza v Nesconset Fire Dist.,* 184 AD2d 631, 632 [2d Dept 1992]). Accordingly, the motion for a preliminary injunction, is denied.

Cross Motion

On a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must " 'accept as true the facts as alleged in the complaint and submissions in opposition to the motion, accord [the plaintiff] the benefit of every possible favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory' " (*Whitebox Concentrated Convertible Arbitrage Partners, L.P. v Superior Well Servs., Inc.,* 20 NY3d 59, 63 [2012], quoting *Sokoloff v Harriman Estates Dev. Corp.,* 96 NY2d 409, 414 [2001]). Here, the branch of the cross motion which is to dismiss the harassment cause of action is granted since "New York does not recognize a civil cause of action to recover damages for harassment" (*Trec v Cazares*, 185 AD3d 866, 868-69 [2d Dept 2020],

quoting *Pollack v Cooperman,* 109 AD3d 973, 975 [2d Dept 2013]; *see Mago, LLC v Singh,* 47 AD3d 772, 773 [2d Dept 2008]; *Ralin v City of New York,* 44 AD3d 838 [2d Dept 2007]; *Santoro v Town of Smithtown*, 40 AD3d 736, 738 [2d Dept 2007]).

The branch of the cross motion which is to dismiss the trespass cause of action is also granted. In considering a motion to dismiss pursuant to CPLR 3211(a)(7), the facts pleaded are presumed to be true, and the court must afford those allegations every favorable inference and determine only whether the facts as alleged fit within any cognizable legal theory (*see Leon v Martinez,* 84 NY2d 83, 87–88 [1994]; *Dickinson v Igoni,* 76 AD3d 943, 945 [2d Dept 2010]). However, "the allegations in the [pleading] cannot be vague and conclusory" (*Phillips v Trommel Const.*, 101 AD3d 1097, 1098 [2d Dept 2012], quoting *Stoianoff v Gahona,* 248 AD2d 525, 526 [2d Dept 1998], *cert. denied sub nom. Stoianoff v New York Times,* 525 U.S. 953, 119 S.Ct. 384, 142 L.Ed.2d 317; *see Parola, Gross & Marino, P.C. v Susskind,* 43 AD3d 1020, 1021 [2d Dept 2007]). The test of the sufficiency of a pleading is 'whether it gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments' " (*V. Groppa Pools, Inc. v Massello,* 106 AD3d 722, 723 [2d Dept 2013], quoting *Pace v Perk,* 81 AD2d 444, 449 [2d Dept 1981] [internal quotation marks omitted]). On a motion to dismiss for failure to state a cause of action, any deficiency on the part of the complaint because of detailed pleadings of the facts and circumstances relied upon may be cured by details supplied in the affidavits submitted by plaintiff, resort to which is proper for the limited purpose of sustaining a pleading against a motion under *CPLR* 3211(a)(7) (*Ackerman v Vertical Club Corp.,* 94 AD2d 665 [1st Dept 1983]). The court may consider the pleading, together with the affidavits submitted in opposition to the motion to dismiss, to determine whether sufficient facts are asserted to state a cognizable cause of action (*see Chapman, Spira & Carson, LLC v Helix BioPharma Corp.*, 115 AD3d 526 [1st Dept 2014]).

"Trespass is an intentional entry onto the land of another without justification or permission" (*Woodhull v Town of Riverhead,* 46 AD3d 802, 804 [2d Dept 2007]). Plaintiff's allegation that during the past year, Defendants have followed Plaintiff around on Plaintiffs own property is insufficient to support a cause of action for trespass (*see Trec v Cazares*, 185 AD3d 866, 867-68 [2d Dept 2020]; *see generally Sunset Café, Inc. v Mett's Surf & Sports Corp.*, 103 AD3d 707, 709 [2d Dept 2013];

Carlson v Zimmerman, 63 AD3d 772, 773 [2d Dept 2009]; *Woodhull v Town of Riverhead,* 46 AD3d 802, 804 [2d Dept 2007]). While the court "may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint" (*Leon v Martinez*, 84 NY2d at 88), the plaintiff's affidavit here, submitted in opposition to the motion, did not remedy the defects in the complaint. Thus, the plaintiff failed to allege sufficient facts demonstrating that defendants trespassed onto his property.

Notably, a dismissal for failure to state a cause of action based on the insufficiency of the allegations in the pleading is not a dismissal on the merits, and does not bar the adequate re-pleading of the claim in a subsequent action (*Canzona v Atanasio*, 118 AD3d 837, 840-41 [2d Dept 2014]; *see 175 E. 74th Corp. v Hartford Acc. & Indem. Co.,* 51 NY2d 585, 590 n. 1 [1980]; *Hae Sheng Wang v Pao–Mei Wang,* 96 AD3d 1005, 1008 [2d Dept 2012]; *Pereira v St. Joseph's Cemetery,* 78 AD3d 1141, 1142 [2d Dept 2010]; *Sullivan v Nimmagadda,* 63 AD3d 908, 909 [2d Dept 2009]; *Janssen v Incorporated Vil. of Rockville Ctr.,* 59 AD3d 15, 24, 27–28 [2d Dept 2008]). Accordingly, the trespass cause of action is dismissed, without prejudice.

Conclusion

The Order to Show Cause for a preliminary injunction is denied.

The cross motion to dismiss the complaint pursuant to CPLR 3211[a][7], is granted.

Dated: February 22, 2021

J.S.C.

FILED

2/22/2021
12:30 PM

COUNTY CLERK
QUEENS COUNTY