

North Shore Towers Apts. v Kozminsky
2021 NY Slip Op 31945(U)
February 16, 2021
Supreme Court, Queens County
Docket Number: 710793/2019
Judge: Leslie J. Purificacion
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED

2/17/2021
12:57 PM

Present: HONORABLE Leslie J. Purificacion
Justice

IA Part 39

COUNTY CLERK
QUEENS COUNTY

North Shore Towers Apartments, Inc. x
Glen Kotowski, Steven Cairo

Index
Number 710793/ 2019

Plaintiff

v

Mot. Seq. No. 2

Kozminsky

Defendant

X

The following numbered papers were read on this motion by defendant seeking leave to reargue, pursuant to CPLR 2221 (d), the May 9, 2020 denial of his motion to dismiss the complaint, and on a cross motion by plaintiff seeking to dismiss defendant's affirmative defenses, pursuant to CPLR 3211 (b), and for sanctions, costs and attorney's fees, pursuant to 22 NYCRR 130.1.

	Papers <u>Numbered</u>
Notice of Motion - Affirmation - Exhibit	E42-E44
Notice of Cross Motion - Exhibits	E45-E46
Answering Affirmation to Cross Motion	E7
Reply Affirmation	E48

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

Plaintiff, North Shore Towers Apartments, Inc. (North Shore Towers) is a large cooperative apartment complex in Queens, New York. Plaintiff, Glen Kotowski is the General Manager of the Cooperative, and plaintiff, Steven Cairo, is the General Superintendent for North Shore Towers. Defendant lives at North Shore Towers as the son of a shareholder of record of the premises. In May 2019, defendant submitted a post on the website "www.NextDoor.com," a social networking website, which allegedly "concerned the plaintiffs and conditions at North Shore ... containing the defamatory language, which upon information and belief, is libelous per se," according to the complaint. Plaintiffs commenced

this action against defendant seeking compensatory and punitive damages for defamation, and defamation per se. Plaintiffs discontinued the action on behalf of North Shore Towers.

Defendant moved to dismiss plaintiffs' complaint, pursuant to CPLR 3211 (a) (1), (3), and (7). By decision and order, dated May 9, 2020 and entered on May 15, 2020, the court denied defendant's motion. Defendant now moves, pursuant to CPLR 2221 (d), for leave to reargue the court's denial of his motion, on the ground that the court misapplied the law relevant to the motion. Plaintiffs oppose, and cross-move to dismiss defendant's affirmative defenses, and for sanctions, costs, and attorney's fees, for defendant's "frivolous" conduct herein, pursuant to 22 NYCRR 130.1.

"A motion for leave to ... reargue is addressed to the sound discretion of the Supreme Court" (*Kugler v Kugler*, 174 AD3d 876, 877 [2d Dept 2019], quoting *Central Mtge. Co. v McClelland*, 119 AD3d 885, 886 [2d Dept 2014]; see *Cripps v Dibisceglie*, 172 AD3d 1305 [2d Dept 2019]). Defendants have failed to establish that the court overlooked any evidence, misapprehended the relevant facts, and/or misapplied any controlling principle of law, "or for some reason mistakenly arrived at its earlier decision," as required by CPLR 2221 (d) (*Schneider v. Solowey*, 141 AD2d 813, 813 [2d Dept 1988]; see *Deutsche Bank Natl. Trust Co. v Russo*, 170 AD3d 952 [2d Dept 2019]; *Bigun v Ahmed*, 150 AD3d 1186 [2d Dept 2017]; *Salcedo v Demon Trucking, Inc.*, 146 AD3d 839 [2d Dept 2017]; *Hackshaw v Mercy Medical Center*, 139 AD3d 798 [2d Dept 2016]). As such, defendant's motion seeking leave to reargue the prior decision is denied.

Plaintiff cross moves for an order dismissing defendants' affirmative defenses, pursuant to CPLR 3211 (b), on the grounds that they are "not stated and have no merit," and for sanctions, costs and attorney's fees, pursuant to 22 NYCRR 130.1, due to defendants' alleged frivolous conduct. Defendants oppose. Initially, defendants consent to withdraw their affirmative defenses numbered "First," asserting lack of jurisdiction; "Fourth," for failing to exercise reasonable care; and "Sixth," calling for reduced damages, pursuant to CPLR Art. 45.

CPLR 3018 (a) addresses "pleading denials" in responsive pleadings, which generally relate to allegations setting forth the essential elements that must be proven in order to sustain a particular cause of action (see *US Bank N.A. v Nelson*, 169 AD3d 110 [2d Dept 2019]). A motion to dismiss pursuant to CPLR 3211 (a) can address such denials. CPLR 3018 (b) addresses "affirmative defenses," which are necessarily pleaded on either, "any matter which if not pleaded would be likely to take the adverse party by surprise" or "any matter which raises fact issues not appearing on the face of a prior pleading."

Generally, on a motion to dismiss affirmative defenses, the moving party bears the burden of demonstrating that the defenses are without merit as a matter of law (*see Edwards v Walsh*, 169 AD3d 865 [2d Dept 2019]; *Mazzei v Kyriacou*, 98 AD3d 1088 [2d Dept 2012]), and the non-moving defendant is entitled to the benefit of every reasonable intendment of the pleading, which is to be liberally construed (*see Edwards v Walsh*, 169 AD3d 865; *Staropoli v Agrelopo, LLC*, 136 AD3d 791 [2d Dept 2016]). An affirmative defense should not be stricken where there exist questions of fact requiring a trial of the issue (*see 534 E. 11th St. Hous. Dev. Fund Corp. v Hendrick*, 90 AD3d 541 [1st Dept 2011]).

In the case at bar, the affirmative defenses numbered “Second,” calling for mitigation of damages; “Third,” claiming culpable conduct of plaintiff; “Ninth,” asserting that the statements made were “true”; “Tenth,” asserting that the statements made were “opinion”; and “Eleventh,” asserting that the statements made were “protected and privileged pursuant to Civil Rights Law, § 74, and others,” all raise questions of fact which movant fails to resolve as a matter of law, and, therefore, remain extant herein. Affirmative defenses “Fifth,” asserting failure to “adequately and particularly plead damages”; “Seventh,” asserting “failure to state a claim upon which relief can be granted” (which language comes directly from Rule 12 [b] [6] of the Federal Rules of Civil Procedure, but is analogous to CPLR 3211 [a] [7]); and “Eighth,” asserting failure to plead a claim for defamation “with sufficient particularity” per CPLR 3016; are all pleading denials, pursuant to CPLR 3018 (a), and were rejected by this Court in the aforementioned decision of May 9, 2020. However, contrary to plaintiff’s contention, “the doctrine of law of the case” does not apply to strike these defenses, as they were not “raised or determined in a prior appeal” (*Moran Enters., Inc. v Hurst*, 96 AD3d 914, 916 [2d Dept 2012]; *see Matter of Koegel*, 184 AD3d 764 [2d Dept 2020]; *Matter of Chung Li*, 165 AD3d 1105 [2d Dept 2018]). As such, they remain viable, at least until the appeal of the May 9, 2020 decision is determined.

The branch of plaintiff’s motion seeking sanctions, pursuant to 22 NYCRR 130-1.1 (a), for frivolous conduct, is denied. Such statute permits the court “in its discretion” to award costs and attorney’s fees “resulting from frivolous conduct,” which is defined, in (c), as including conduct “completely without merit in law ... undertaken primarily to delay or ... to harass or maliciously injure ... or (which) asserts material factual statements that are false.” In determining whether conduct is “frivolous,” the statute exhorts the court to consider the “circumstances under which the conduct took place ... and whether or not the conduct was continued when its lack of legal or factual basis ... was brought to the attention of counsel.” In the case at bar, although defendants’ filing may not, ultimately, be meritorious, plaintiff has failed to demonstrate that, at the time of the filing of the instant answer, defendants’ conduct rose to the level of “frivolous,” as interpreted by the statute (*see generally Cram v Keller*, 166 AD3d 846 [2d Dept 2018]; *U.S. Bank, N.A. v Rosario*, 164

AD3d 1290 [2d Dept 2018]; *Matter of Scottilare v Fahner*, 160 AD3d 967 [2d Dept 2018]; *United States Fire Ins. Co. v Raia*, 121 AD3d 970 [2d Dept 2014]). Consequently, this branch of plaintiff's cross motion is denied.

The parties' remaining arguments and contentions are either without merit, or need no be addressed, in light of the foregoing determinations.

Accordingly, defendants' motion, seeking leave to reargue the previous decision of May 9, 2020, is denied. The branch of plaintiff's cross motion seeking dismissal of defendant's affirmative defenses, is granted, solely, as to Affirmative Defense numbers "First," "Fourth," and "Sixth," without opposition and upon the consent of defendants, and is, otherwise, denied. The branch of plaintiff's cross motion seeking sanctions, pursuant to 22 NYCRR 130-1.1, is denied.

Dated: 2/16/21



Hon. Leslie J. Purificacion, J.S.C.

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