

<b>Slope Stor. &amp; Warehouse, Inc. v DeVito</b>
2021 NY Slip Op 32252(U)
October 15, 2021
Supreme Court, Kings County
Docket Number: Index No. 513279/20
Judge: Richard Velasquez
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mot. seq #1,2

At an IAS Term, Part 66 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 15<sup>th</sup> day of October, 2021.

PRESENT:

HON. RICHARD VELASQUEZ,

Justice.

-----X  
SLOPE STORAGE AND WAREHOUSE, INC., F/K/A  
SLOPE STORAGE WAREHOUSE CORP., D/B/A  
SLOPE STORAGE, AND JACOBO ASE,

Plaintiffs,

- against -

Index No. 513279/20

CHARLES DEVITO AND CHUCK REALTY CORP.,

Defendants.  
-----X

The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/ Petition/Cross Motion and Affidavits (Affirmations) Annexed _____	3, 5-16
Opposing Affidavits (Affirmations) _____	18-25
Reply Affidavits (Affirmations) _____	39-42

Upon the foregoing papers, defendants Charles Devito (Devito) and Chuck Realty Corp. (Chuck Realty) (collectively, defendants) move (in motion sequence [mot. seq.] one) for an order, pursuant to CPLR 3211 (a) (1) and (a) (7), dismissing the complaint and awarding them attorneys' fees, costs and disbursements.

Background

According to the complaint, plaintiff Jacobo Ase (Ase) is the sole shareholder and manager of plaintiff Slope Storage and Warehouse, Inc. (Slope Storage) (collectively, plaintiffs), a self-storage and U-Haul rental business located at 88 9<sup>th</sup> Street in Brooklyn

(Premises). The complaint alleges that Slope Storage has been operating at the Premises for over ten years. Defendant Chuck Realty owned the Premises during the relevant period of time. Defendant Devito is the owner of Chuck Realty.

The complaint alleges that, starting in or about 2020, Devito began falsely holding himself out as “the” owner of Slope Storage (or the business being conducted by Slope Storage) and falsely representing to the police and others that Ase was merely a “manager.” The complaint further alleges that Devito notified plaintiffs’ subtenants at the Premises to cease paying rent to plaintiffs and that said subtenants, in fact, stopped paying rent. The complaint alleges that, although the total monthly rent varies month to month, since 2020, the monthly income has been more than \$75,000.00. The complaint further alleges that on July 14, 2020, defendants wrongfully evicted plaintiffs from the Premises by physically threatening and assaulting Ase and vandalizing the business, including removing and/or destroying plaintiffs’ telecommunications equipment. The complaint also alleges that on July 23, 2020, Devito threw Ase to the ground and beat him.

The complaint asserts the following ten causes of action: (1) intentional interference with contract and business relations; (2) replevin for defendants removal of plaintiffs’ telecommunications equipment; (3) property damage based on defendants’ destruction of plaintiff’s telecommunications equipment; (4) unlawful eviction for the forceful removal of plaintiffs from the Premises; (5) intentional infliction of emotional distress; (6) assault; (7) battery; (8) trespass; (9) defamation for the false statements made

about plaintiffs to subtenants that have harmed their business; and (10) a declaratory judgment that plaintiffs are the owners of Slope Storage and tenants of the Premises.

Defendants now make the instant pre-answer motion to dismiss the complaint based on documentary evidence and/or failure to state a claim. In support of their motion, defendants submit an affidavit from Devito in which he disputes plaintiffs' ownership of the self-storage business operating at the Premises.

According to Devito, defendants have owned the Premises since 1980. Although Devito fails to state when defendants began using the Premises as a self-storage and U-Haul rental facility, he attests that on or around August 1, 2006, Devito entered into a commercial lease with nonparty Dev Murjani (Murjani). Murjani purportedly offered to manage the storage and U-Haul operations at the Premises for defendants. Attached to defendants' motion is the lease signed by Murjani and Devito reflecting a 10-year lease commencing August 1, 2006 with a monthly rent of \$20,000.00. According to Devito, at the time that Murjani signed the lease, he had yet to form a legal entity for his business, but asserts that Murjani formed Slope Storage, LLC in October 2007. Devito states that Murjani collected rents from customers and was paid a management fee, and that this relationship lasted until Murjani's death in September 2011.

After Murjani's passing in 2011, Devito attests that Ase, one of Murjani's employees, took over Murjani's role as "manager." In support of their contention that Ase's role was that of manager, defendants submit a settlement offer that Ase extended to a tenant whose car had been damaged on the Premises reflecting Ase's title as "manager"

(see NYSCEF Doc No. 11). Defendants also submits two sworn affidavits submitted by Ase in connection with an unrelated personal injury lawsuit against Slope Storage LLC, in which Ase attests that his position at Slope Storage LLC was "manager" (see NYSCEF Doc Nos. 12 and 13).

According to Devito, Chuck Realty and Ase never had a landlord/tenant relationship and Ase did not form Slope Storage, the corporate entity, until November 29, 2017, six years after Chuck Realty and Ase began doing business. Devito asserts that Ase was responsible for collecting monthly rent from customers and remitting it to Chuck Realty. However, in 2020, during the process of marketing the Premises for sale, Devito discovered that the storage and U-Haul business was generating more income than Ase represented. Devito attests that he confronted Ase about returning the money stolen from Chuck Realty, but Ase refused. Devito acknowledges that, thereafter, tempers flared and a physical confrontation ensued resulting in Ase pressing assault charges against him. However, Devito asserts that Ase is not blameless because during the course of being ejected from the Premises, Ase and his associates smashed every window in the office.

Plaintiffs, in opposition, dispute defendants' assertion that Ase was solely a manager and contend that defendants are unable to establish that by any credible documentary evidence such as an employment agreement, proof of Ase's salary or a W-2 or 1099 form. Plaintiffs contend that they paid rent for a decade after Murjani's departure, as evidenced by numerous rent checks made out to defendants (see NYSCEF Doc No. 20). Notably,

while some of the checks are made payable to Chuck Realty, other checks are made payable C.H. Devito, Chanaco LLC, A. Fabian, and various other entities and individuals.

To the extent that the court finds that any of plaintiffs' causes of action are insufficiently plead, plaintiffs request (without cross-moving) leave to amend their complaint to correct such deficiencies and add additional causes of action for tortious interference with contract and treble damages for wrongful eviction.

Defendants, in reply, submit an affidavit from Devito asserting that ten of the purported "rent" checks, specifically the ones made out to Devito, contain a forged endorsement and were cashed by Ase at the same check cashing business, Reliable Check Cashing in Brooklyn (Reliable). Devito further attests that he has never stepped foot in Reliable's place of business and has never seen these checks before plaintiffs submitted them as evidence in this case. Defendants also proffer a reply affidavit from Reliable's manager, Aaron Rottenstein, attesting to the fact that certain checks written on the account of Slope Storage Warehouse Corp. and made payable to CH. DeVito or C. Devito were all cashed by Ase. Defendants argue that these fraudulent checks prove that Ase has stolen a minimum of \$61,600.00.

#### Discussion

It is well established that a motion to dismiss a complaint pursuant to CPLR 3211 (a) (1) may be granted only if the documentary evidence submitted utterly refutes the factual allegations in the complaint and conclusively establishes a defense to the claims as a matter of law (*Integrated Constr. Servs., Inc. v Scottsdale Ins. Co.*, 82 AD3d 1160, 1162-

63. [2d Dept 2011]). Affidavits, deposition testimony, and letters are not considered documentary evidence within the meaning of CPLR 3211 (a) (1) (*id.*).

“When a party moves to dismiss a complaint pursuant to CPLR 3211 (a) (7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action” (*Sokol v Leader*, 74 AD3d 1180, 1180-81 [2d Dept 2010]).

“In considering such a motion, 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” (*id.* at 1181).

***Intentional Interference with Contract –  
First Cause of Action***

Intentional interference with contract requires proof of: “(1) the existence of a contract between plaintiff and a third party; (2) defendant’s knowledge of the contract; (3) defendant’s intentional inducement of the third party to breach or otherwise render performance impossible; and (4) damages to plaintiff” (*Kronos, Inc. v AVX Corp.*, 81 NY2d 90, 94 [1993] [citation omitted]).

Here, defendants argue that because plaintiffs do not have a lease for the Premises, there can be no sublease that was interfered with by defendants. Defendants’ assertion that a lease is required for plaintiffs to have a contract or financial arrangement with subtenants is without support. Moreover, defendants have neither established that Slope Storage is not a tenant or that Ase is merely defendants’ employee. The letter and affidavits submitted by defendants to establish that Ase held himself out as a “manager” of

Slope Storage do not constitute documentary evidence within the meaning of CPLR 3211 (a) (1). The allegedly fraudulent checks also do not dispose of the issues in this case since plaintiffs produced other purported rent checks made out to Chuck Realty, Chanaco LLC and other entities and individuals that defendants fail to explain. Presuming the truth of plaintiffs' allegations (i.e., that plaintiffs, not defendants, owned the storage and U-haul rental business), plaintiffs have stated a viable claim for intentional interference with contract, and defendants' motion to dismiss the first cause of action is denied.

***Replevin – Second Cause of Action***

“[A] cause of action sounding in replevin must establish that the defendant is in possession of certain property of which the plaintiff claims to have a superior right” (*Batsidis v Batsidis*, 9 AD3d 342, 343 [2d Dept 2004] [citation omitted]). Where the possession of certain property was originally lawful, a demand is necessary and the cause of action accrues from the time when the right to make the demand is complete (*Berman v Goldsmith*, 141 AD2d 487, 487 [2d Dept 1988]).

Here, defendants contend that an element of a replevin cause of action is a demand for a return of the property allegedly withheld, and that the complaint fails to allege that plaintiffs demanded the return of the telecommunications equipment allegedly removed by defendants. However, contrary to defendants' argument, their alleged taking of plaintiffs' telecommunications equipment was not originally lawful, and thus, no demand was necessary, as a matter of law. Consequently, defendants' motion to dismiss the second cause of action for replevin is denied.

***Damage to Property – Third Cause of Action***

Defendants assert that plaintiffs' third cause of action for "damage to property" is a "defective" claim for prima facie tort that fails to allege any details regarding the alleged damage to their property. However, the third cause of action in the complaint alleges that:

"On or about July 15, 202[0], Defendants intentionally and willfully destroyed certain telecommunications equipment and other property belonging to Plaintiffs. Said equipment consisted of various electronic equipment as well as hard drives and cameras. The destroyed items were purchased and owned solely by Plaintiffs. Plaintiffs are entitled to damages for the value thereof which is in excess of \$75,000.00" (complaint at ¶¶ 31-34).

Though not specifically labeled as such, the court finds that plaintiffs' third cause of action for "damage to property" adequately states a cause of action for trespass to chattel, the four essential elements of which are: (1) intent, (2) physical interference with (3) possession (4) resulting in harm (*see Amos Fin., LLC v H & B & T Corp.*, 48 Misc 3d 1205(A), 2015 NY Slip Op 50970(U) [Sup Ct, Kings County 2015]). Here, defendants' alleged destruction of plaintiffs' telecommunications equipment states a cognizable claim for trespass to chattels, and thus, defendants' motion to dismiss the third cause of action is denied.

***Unlawful Eviction – Fourth Cause of Action***

Defendants argue that plaintiffs cannot sustain a claim for "unlawful eviction" under either RPAPL 768 and/or NYC Admin. Code § 26-521 because plaintiffs' alleged tenancy at the Premises is commercial, not residential. In addition, defendants contend that they

were within their rights to call the police and have Ase removed from the Premises when they terminated him as manager. Plaintiffs, in opposition, contend that a landlord seeking to evict a commercial tenant must also follow the RPAPL and that RPAPL 853, which was enacted to discourage physical intimidation and violence in the ejection of tenants from real property by providing the remedy of treble damages, applies here.

Although defendants are correct that RPAPL 768 and NYC Admin. Code § 26-521 do not apply to commercial property unless plaintiffs are using it as a residence or sleeping place,<sup>1</sup> RPAPL 853 provides that “[i]f a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages . . .” Since RPAPL 853 concerns any “real property,” it applies to both commercial and residential evictions (*see Sam & Mary Housing Corp. v Jo/Sal Market Corp.*, 121 Misc. 2d 434, 441-42 [Sup Ct, Queens Cty 1983] [citations omitted]).

Here, the complaint alleges that defendants beat Ase and forcibly removed him from the Premises. These allegations are sufficient to state a claim for wrongful eviction and damages under RPAPL 853. And as previously stated, defendants have not established

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<sup>1</sup> RPAPL 768 provides: “It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling....” NYC Admin. Code § 26-521 (a) is similar to RPAPL 768 in sum and substance. Section 4 of the Multiple Dwelling Law defines a “dwelling” as any building or structure, or portion thereof, which is occupied in whole, or in part, as the home, residence or sleeping place of one or more human beings.

that Ase was merely an employee. Accordingly, defendants' motion to dismiss plaintiff's fourth cause of action for wrongful eviction is denied.

***Intentional Infliction of Emotional Distress –  
Fifth Cause of Action***

Defendants contend that plaintiffs' fifth cause of action for intentional infliction of emotional distress fails because plaintiffs have not alleged any specific "outrageous" conduct by them. Plaintiffs contend that the complaint sufficiently alleges that Ase was pummeled, brutalized and hospitalized.

The elements of a cause of action for intentional infliction of emotional distress are (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 the injury; and (iv) severe emotional distress (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]). The conduct complained of must be so outrageous that it "transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]). "Generally, a cause of action for infliction of emotional distress is not allowed if essentially duplicative of tort or contract causes of action" (*Wolkstein v Morgenstern*, 275 AD2d 635, 637 [1st Dept 2000] [citing *Murphy v American Home Prods. Corp.*, 58 NY2d 293, 303 [1983]]).

Here, construing the allegations in the complaint liberally, the alleged conduct is not sufficiently "outrageous" to support an intentional infliction of emotional distress cause of action. In addition, the fifth cause of action for intentional infliction of emotional distress

is duplicative of plaintiff's assault and battery claims (the sixth and seventh causes of action). Consequently, defendants' motion to dismiss plaintiff's fifth cause of action for intentional infliction of emotional distress is granted.

***Assault and Battery – Sixth and Seventh Causes of Action***

Although defendants' dismissal motion seeks to dismiss the entire complaint, it fails to address or even mention the sixth cause of action for assault. Regarding plaintiffs' seventh cause of action for battery, defendants argue that the complaint is devoid of any allegations that the alleged contact was "offensive" in nature.

An assault is the intentional placing of another in apprehension of imminent harmful or offensive contact (*Hayes v Schultz*, 150 AD2d 522, 523 [2d Dept 1989]). "To maintain a cause of action for battery, plaintiffs must prove bodily contact, with intent that was offensive in nature" (*Hassan v Marriott Corps.*, 243 AD2d 406, 407 [1st Dept 1997] [*citing Laurie Marie M. v Jeffrey T. M.*, 159 AD2d 52, 55, aff'd 77 NY2d 981 [2d Dept 1990]]).

Here, Ase's allegations that Devito beat him up is sufficient to state a cause of action for both assault and battery. Defendants fail to establish that the alleged contact was not "offensive in nature," and thus, defendants' motion to dismiss the sixth and seventh causes of action for assault and battery is denied.

***Trespass – Eighth Cause of Action***

"The essential elements of a cause of action sounding in trespass are the intentional entry onto the land of another without justification or permission" (*211-12 N. Blvd. Corp. v LIC Contr., Inc.*, 186 AD3d 69, 82 [2d Dept 2020] [*citing Reyes v Carroll*, 137 AD3d

886, 888 [2d Dept 2016]). Wrongful eviction constitutes a trespass (*Long Island Airports Limousine Service Corp. v Northwest Airlines*, 124 AD2d 711, 714 [2d Dept 1986]).

Here, the complaint sufficiently alleges that defendants wrongfully evicted plaintiffs from the Premises, which states a cognizable claim for trespass. Defendants' contention that they cannot be held liable for trespass for entering their own property is unavailing, since they did not prove that plaintiffs were not tenants entitled to possession of the Premises. Accordingly, that portion of defendants' motion to dismiss plaintiff's eighth cause of action for trespass is denied.

#### ***Defamation – Ninth Cause of Action***

“The elements of a cause of action for defamation are a false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se” (*Kamchi v Weissman*, 125 AD3d 142, 156 [2d Dept 2014]). “Special damages contemplate ‘the loss of something having economic or pecuniary value’” (*Lieberman v Gelstein*, 80 NY2d 429, 434-35 [1992] [citation omitted])

Here, the complaint sufficiently alleges that defendants falsely represented to plaintiffs' subtenants that Ase was not the owner of the Slope Storage business, that he was merely a manager and, for that reason, to stop paying rent to plaintiffs. The foregoing allegations state a cognizable claim for defamation. The special harm alleged is the lost rental income due to defendants' false statements, which defendants fail to establish are true. Contrary to defendants' contention, the fact that the complaint does not allege the

precise time that such false statements were made is not fatal since an approximate time can be deduced from the allegations. Accordingly, defendants' motion to dismiss the ninth cause of action for defamation is denied.

***Declaratory Judgment – Tenth Cause of Action***

The tenth cause of action in the complaint seeks a declaratory judgment determining that: (i) Ase is the sole owner of Slope Storage; (ii) plaintiffs have a valid tenancy at the Premises and their possession should be restored; (iii) defendants wrongfully evicted plaintiffs from the Premises; and (iv) defendants had no right to notify the subtenants to stop paying rent to plaintiffs and are liable for lost rent (*see* complaint at ¶ 61).

Defendants argue that plaintiffs' ownership of Slope Storage is not in dispute since defendants have never asserted an ownership interest in Slope Storage. Defendants further argue that plaintiffs' attempt to obtain a declaration that their tenancy is valid "goes beyond the pale" because plaintiffs never had a lease. Defendants also assert that the claim for a declaratory judgment is duplicative of plaintiffs' other causes of action.

"A motion to dismiss the complaint in an action for a declaratory judgment presents for consideration only the issue of whether a cause of action for declaratory relief is set forth, not the question of whether the plaintiff is entitled to a favorable declaration" (*DiGiorgio v 1109-1113 Manhattan Ave. Partners, LLC*, 102 AD3d 725, 728 [2d Dept 2013] [citations and internal quotation marks omitted]). Thus, "where a cause of action is sufficient to invoke the court's power to render a declaratory judgment . . . as to the rights and other legal relations of the parties to a justiciable controversy, a motion to dismiss that

cause of action should be denied” (*Matter of Tilcon N.Y., Inc. v Town of Poughkeepsie*, 87 AD3d 1148, 1150 [2d Dept 2011] [citations and internal quotation marks omitted]). A cause of action for a declaratory judgment is “unnecessary and inappropriate” when the plaintiff has an adequate, alternative remedy in another form that addresses the same rights and obligations (*Tiffany Tower Condominium, LLC v Insurance Co. of the Greater N.Y.*, 164 AD3d 860, 863 [2d Dept 2018]).

Here, plaintiffs present a proper case for a declaratory judgment regarding the ownership of the storage and U-Haul business operating at the Premises. Although the complaint may be unartfully drafted, it is clear that the main issue in this case is who owns the business operating at the Premises, not who owns the various corporate entities formed by either Murjani, Ase or Devito as a way to operate the business or to receive the income generated by the business. However, since a determination on plaintiffs’ causes of action for wrongful eviction, trespass and defamation will establish whether plaintiffs are tenants of the Premises rather than an employee of defendants, it is unnecessary for plaintiffs to seek a declaratory judgment regarding plaintiffs’ tenancy, wrongful eviction or wrongful interference with their alleged subtenants. As such, dismissal of this cause of action is granted except as to a declaration regarding whether plaintiffs are the sole owners of the storage and U-Haul business. Accordingly, it is hereby

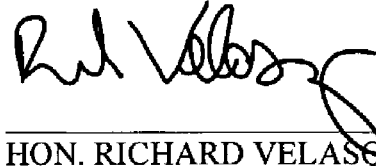
**ORDERED** that defendants’ motion to dismiss the complaint is only granted to the extent that the fifth cause of action for intentional infliction of emotional distress and the tenth cause of action for a declaratory judgment (except for subsection [i] seeking a

declaration that Ase is the sole owner of Slope Storage) are dismissed; and the motion is otherwise denied.

This constitutes the decision and order of the court.

Dated: October 15, 2021  
Brooklyn, New York

ENTER FORTHWITH:



HON. RICHARD VELASQUEZ

HON. RICHARD VELASQUEZ, J.S.C.

KINGS COUNTY CLERK  
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