

Atlantis Dev., Inc. v De Villa
2021 NY Slip Op 33063(U)
November 16, 2021
Supreme Court, Bronx County
Docket Number: Index No. 33409/2020E
Judge: Rubén Franco
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF BRONX - IAS PART 26

ATLANTIS DEVELOPMENT, INC. and 1984
ANTHONY, LLC,

Plaintiff,

-against-

CARMEN DE VILLA and YARIANNA R. VILLA,

Defendants.

Index No. 33409/2020E

**MEMORANDUM
DECISION/ORDER**

Rubén Franco, J.

Defendants move for an Order dismissing plaintiffs' 2nd (abuse of process), 3rd (tortious interference with contract), 4th (prima facie tort), 5th (private nuisance), and 6th (permanent injunction) causes of action "for failure to state a claim" and for a finding that "this matter was commenced or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law and scheduling a hearing to determine sanctions, costs, fees, and damages owed to defendants under Civil Rights Law 70-a (1)."

The parties are owners of neighboring properties on Anthony Avenue in Bronx County. In 2018, plaintiff commenced the process of constructing an 8-story building with 64 rental units on its property. Defendants have a family home on their property. From the inception, the parties have been at war. For example, plaintiffs required access to the unoccupied air space over defendants' property for the purpose of installing protection for defendants' property and performing work in the air space over defendants' property. After failed negotiations to gain access to defendants' property, plaintiff 1984 Anthony, LLC commenced a proceeding pursuant to Real Property Actions and Proceedings Law § 881 for a license to enter defendants' property to

perform the required work. In March 2021, another justice of this court granted plaintiff's application and the court awarded the amount of \$2500 per month for the 10-month license period.

Robert Lumaj (Lumaj), the owner, president and managing member of plaintiffs, avers that he negotiated with defendants and did extensive home repairs in exchange for access, but subsequent to the repairs, defendants denied access unless they were paid \$100,000; that defendant Carmen De Villa (Carmen) became hostile and began a campaign of harassment by filing false complaints with the New York City Police Department, the Fire Department, and the Department of Buildings (DOB), which appeared at the construction site on numerous occasions. Lumaj also alleges that Carmen physically attempted to interfere with the project on March 5, 2021, when she grabbed a metal cross bar from a worker and waived it at him to prevent him from working.

Defendants rely only on the affirmations of their attorney in support of the motion. The attorney states, in sum and substance, that the allegations set forth in support of causes of action two through six of the Complaint lack any factual or legal basis; that defendants have merely been complaining to city officials about bad construction practices which are intended to prompt an inspection, whereupon, city officials are called upon to exercise independent judgment regarding the validity of the complaints; that in fact, the complaints were valid inasmuch as many violations were issued to plaintiffs; and, that plaintiffs' lawsuit involves public petition and participation and thus, must be dismissed.

Civil Rights Law § 76-a provides protection to citizens facing litigation, known as "SLAPP" (strategic lawsuit against political participation) suits, arising from their public petition and participation (*see 600 w. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130 [1992]; *Hariri v Amper*, 51 AD3d 146, 149 [1st Dept 2008]; *Guerrero v Carva*, 10 AD3d 105, 116 [1st Dept 2004]).

CPLR 3211 (g) provides that a CPLR 3211 (a) (7) motion to dismiss "in which the moving party has demonstrated that the action [or] claim ... subject to the motion is an action involving

public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted unless the party responding to the motion demonstrates that the cause of action has a substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.”

The Civil Rights Law § 76-a (1) (a) defines an “action involving public petition and participation,” as a claim based upon:

- (1) any communication in a place open to the public or a public forum in connection with an issue of public interest; or
- (2) any other lawful conduct in furtherance of the exercise of the constitutional right of free speech in connection with an issue of public interest, or in furtherance of the exercise of the constitutional right of petition.

A plaintiff’s burden is stated in Civil Rights Law § 76-a (2), which provides:

2. In an action involving public petition and participation, damages may only be recovered if the plaintiff, in addition to all other necessary elements, shall have established by clear and convincing evidence that any communication which gives rise to the action was made with knowledge of its falsity or with reckless disregard of whether it was false, where the truth or falsity of such communication is material to the cause of action at issue.

Civil Rights Law § 70-a (1) permits a defendant in an action involving public petition and participation to “maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney’s fees, from any person who commenced or continued such action” on the condition that the action was commenced or continued “without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law”. The defendant may recover compensatory damages if the action was for “the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights” and may recover punitive damages “upon an additional demonstration that the action was for the sole purpose of harassing, intimidating,

punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights.” (*See Hariri v Amper*, 51 AD3d 146, 150 [1st Dept 2008].)

Generally, the public interest is served by shielding certain communications rather than stifling them, for example in defamation actions (*see Stega v New York Downtown Hosp.*, 31 NY3d 661, 669 [2018]); and in malicious prosecution actions where a civilian who simply provides information to law enforcement authorities, who are then free to exercise their own independent judgment, as to whether to take action, will generally not be held liable (*see Williston v Jack Resnick & Sons, Inc.*, 177 AD3d 822, 823 [2nd Dept 2019]; *Moorhouse v Standard, N.Y.*, 124 AD3d 1, 7 [1st Dept 2014]).

Defendants posit that as interested parties, contacting the DOB or law enforcement regarding construction work abutting their property is entitled to a qualified privilege; and that their complaints, which resulted in independent inspections, without regard to the factual content of the communication or the outcome, illustrates that this is a SLAPP suit, requiring sufficiently pleaded factual allegations to support an inference of malice.

Plaintiffs argue that to the extent this litigation is viewed as a SLAPP suit, their claims have a substantial basis in fact and law. It is alleged that the statements made by Carmen were made with knowledge of their falsity or with reckless disregard of whether they were false. The substantial basis in law and fact includes that Carmen’s intentional harassing behavior is not the subject of a SLAPP lawsuit; and that she made false complaints and attempted to extort \$100,000 from plaintiffs for the requested license to protect defendants’ property.

The court finds that this is not a SLAPP action because it does not fit into the definition set forth in Civil Rights Law § 76-a (1) (a) in that it involves a private dispute and not an issue of public interest, nor are defendants acting in furtherance of the exercise of their constitutional right to petition.

On a motion brought pursuant to CPLR 3211 (a) (7), the Complaint must be liberally construed, the factual allegations set forth must be accepted as true, the plaintiff must be given the benefit of all favorable inferences therefrom, and the court must decide only whether the facts alleged fall under any recognized legal theory (*Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342 [2013]; *Lee v. Dow Jones & Co., Inc.*, 121 AD3d 548 [1st Dept 2014]). “Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss.” (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].) Affidavits may be considered freely “to preserve inartfully pleaded, but potentially meritorious, claims” in a Complaint (*Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Finkelstein Newman Ferrara LLP v Manning*, 67 AD3d 538, 540 [1st Dept 2009]). Vague and conclusory allegations are insufficient to maintain a cause of action (*see Fowler v American Lawyer Media*, 306 AD2d 113 [1st Dept 2003]; *see also Baker v City of New York*, 44 AD3d 977, 981 [2nd Dept 2007]). Relevant to this action, in *Kotowski v Hadley* (38 AD3d 499, 500 [2nd Dept 2007]), the Court stated that “the plaintiff had no obligation to show evidentiary facts to support ... allegations of malice on a motion to dismiss pursuant to CPLR 3211 (a) (7).”

CPLR 3013 provides that “[s]tatements in a pleading shall be sufficiently particular to give the court and parties notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action or defense.” To satisfy the requirements of CPLR 3013, a plaintiff must state facts that address the underlying transactions and occurrences and the material elements of the claim (*see Foley v D'Agostino*, 21 AD2d 60, 64 [1st Dept 1964]). While a court must assume the truth of a Complaint's allegations, the assumption does not apply where there are conclusory allegations lacking factual support. A cause of action cannot be predicated on conclusory statements unsupported by factual allegations

(see *Miller v Allstate Indem. Co.*, 132 AD3d 1306, 1307 [4th Dept 2015]; *Elsky v KM Ins. Brokers*, 139 AD2d 691 [2nd Dept 1988]).

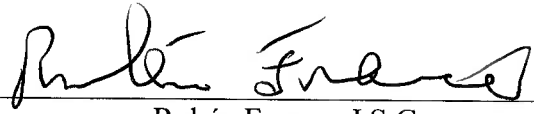
With respect to the claims sought to be dismissed, the Complaint does not allege sufficient facts to provide the court and defendants with notice of the transactions, occurrences, or series of transactions or occurrences, intended to be proved and the material elements of each cause of action. Rather, the Complaint consists of conclusory statements unsupported by factual allegations in that plaintiffs fail to specify the false complaints made and how they were false; what process defendants regularly issued and used in such a way so as to obtain the collateral objective of harming plaintiffs; what contracts defendants interfered with that were breached, how defendants' complaints were causally connected to the breach, and what contractors or work was delayed; what specifically defendants have done to interfere with plaintiffs' use of their property, and what activities should be curtailed.

Notwithstanding that the court has credited all favorable inferences to plaintiffs, and accepted the factual allegations as true, the court concludes that the allegations associated with the subject causes of action lack specificity and fail to allege sufficient facts to provide notice.

Accordingly, defendants' motion to dismiss plaintiffs' 2nd, 3rd, 4th, 5th, and 6th causes of action is granted.

This constitutes the Decision and Order of the court.

Dated: November 16, 2021


Rubén Franco, J.S.C.
HON. RUBÉN FRANCO