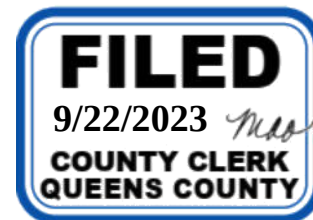


Goldberg v Horne
2023 NY Slip Op 35200(U)
September 20, 2023
Supreme Court, Queens County
Docket Number: Index No. 708657/2023
Judge: Mojgan C. Lancman
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. MOJGAN C. LANCMAN

IAS PART 20

FREDERICK GOLDBERG and TARYN GOLDBERG,

Index No.: 708657/2023

Plaintiff,

Motion Seq. No.: 1

-against-

Motion Date: 7/26/23

ROBERTA HORNE and WILLIAM RETTIG,

Defendants.

Motion Cal No.: 22

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The e-filed documents listed by NYSCEF document numbers 6-11 were read on this motion of the defendants for an order, *inter alia*, pursuant to CPLR 3211 dismissing the complaint with prejudice.

I. Factual Background and Procedural History

This action arises from defendant Roberta Horne's hiring of the plaintiffs in July 2016 to "legalize" past work done on defendant Horne's residence. On June 1, 2021, defendant Horne (without defendant William Rettig) commenced a separate action in the New York Supreme Court, Queens County for, *inter alia*, breach of contract in connection with that work. The action is still pending under index number 712512/2021 (the "Prior Action"). In the Prior Action, the plaintiffs here, who are the defendants in that action, have made *five* (5) separate motions to dismiss. Each motion was denied for being procedurally defective. Additionally, in the most recent Order dated November 28, 2022, Hon. Timothy J. Dufficy warned the plaintiffs here that the court would consider denying or restricting their access to the court "if any future motion papers are poorly drafted and procedurally defective as they are here." Justice Dufficy further warned the plaintiffs here that the court would consider imposing sanctions if there was a showing of frivolous conduct on any future motion. Instead of further motion practice, the plaintiffs filed this action on April 17, 2023, seeking damages for, *inter alia*, defamation and breach of contract. Defendants filed the instant motion to dismiss on June 12, 2023. This motion is unopposed.

II. Dismissal Pursuant to CPLR 3211(a)(4)

Pursuant to CPLR 3211(a)(4), "[a] party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that ... there is another action pending between the same parties for the same cause of action in a court of any state or the United States."

Under the subject statute, "a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same" (*HSBC Bank USA, N.A. v Pena*, 187 AD3d 724, 724 [2d Dept 2020]; *see Feldman v. Harari*, 183

AD3d 629 [2d Dept 2020]; *Mason ESC, LLC v Michael Anthony Contr. Corp.*, 172 AD3d 1195 [2d Dept 2020]).

The critical element in considering a motion to dismiss made under CPLR 3211(a)(4), is whether both actions arise out of the same subject matter or series of alleged wrongs (*see Board of Mgrs. of the 1835 E. 14th St. Condominium v Singer*, 186 AD3d 1477 [2d Dept 2020]; *DAIJ, Inc. v Roth*, 85 AD3d 959 [2d Dept 2011]). Thus, “it is not necessary that the precise legal theories presented in the first action also be presented in the second action as long as the relief . . . is the same or substantially the same” (*Board of Mgrs. of the 1835 E. 14th St. Condominium v Singer*, 186 AD3d 1477 [internal quotation marks and citations omitted]). Further, “while a complete identity of parties is not a necessity for dismissal under CPLR 3211(a)(4), there must be a substantial identity of parties, which is generally present when at least one plaintiff and one defendant is common in each action.” (*Mason ESC, LLC v Michael Anthony Contracting Corp.*, 172 AD3d 1195, 1196 [2d Dept 2019]).

This branch of the motion must be denied. While the parties are nearly identical and the cause of action arise out of the same transaction, the relief demanded in each of the two actions is “antagonistic and inconsistent.” (*see White Light Productions, Inc. v On the Scene Productions, Inc.*, 231 AD2d 90, 94 [1st Dept 1997]; *Arred Enterprises Corp. v Indemnity Ins. Co. of North America*, 108 AD2d 624, 627 [1st Dept 1985]). Here, the plaintiffs could only obtain the relief they seek by counterclaim in the original action or by bringing a separate action. (*see Arred Enterprises Corp.*, 108 AD2d at 627). “Since there is no compulsory counterclaim in this state, the complaint is not dismissable on the ground of ‘another action pending.’” (*id.*).

III. Dismissal Pursuant to CPLR 3211(a)(5) and (7)

Pursuant to CPLR 3211(a)(7), “[a] party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that . . . the pleading fails to state a cause of action.”

“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. 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. Affidavits submitted by a defendant will almost never warrant dismissal under CPLR § 3211 unless they establish conclusively that the plaintiff has no . . . cause of action. A motion to dismiss pursuant to CPLR § 3211 (a)(7) in which the movant relies upon evidence beyond the four corners of the complaint must be denied unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it” (*808 Union Street, LLC v J. Lehman Park Slope, LLC*, 216 AD3d 883, 884 [2d Dept 2023] [internal quotation marks, brackets and citations omitted]).

Additionally, pursuant to CPLR 3211(a)(5), “[a] party may move for judgment dismissing one or more causes of action asserted against him [or her] on the ground that ... the cause of action may not be maintained because of [the] ... statute of limitations.”¹

The defamation causes of action must be dismissed. The complaint alleges claims for libel and slander per se. However, since 1897, the courts of this state have repeatedly held that “absolute immunity from liability for defamation exists for oral or written statements made by attorneys in connection with a proceeding before a court ‘when such words and writings are material and pertinent to the questions involved.’” (*Front, Inc. v Khalil*, 24 NY3d 713, 718 [2015] [citing *Youmans v Smith*, 153 NY 214 (1897)]). As all of the allegations relating to the defamation claims involve statements made in the complaint in the Prior Action, the statements are entitled to absolute immunity. Thus, the defamation causes of action cannot be sustained. Further, defamation claims must be commenced within one year of the accrual of the cause of action. (*see* CPLR 215[3]). As the complaint in the Prior Action was filed on June 1, 2021, this action is time barred and must be dismissed pursuant to CPLR 3211(a)(5).

The causes of action for unjust enrichment, negligence, and malpractice must also be dismissed. Each of these causes of action has a three-year statute of limitations. (*see* CPLR 214[3], [5], [6]; *Siegler v. Lippe*, 189 AD3d 903, 903 [2d Dept 2020] [“A three-year statute of limitations governs causes of action alleging unjust enrichment when the plaintiff is seeking monetary relief.”]). While the complaint does not allege specific dates of occurrences, it alleges that the events complained of happened in 2016-17. Even in the light most favorable to the plaintiffs, the action was commenced five to six years after the alleged acts, well beyond the three-year statute of limitations. Therefore, the causes of action for unjust enrichment, negligence, and malpractice must be dismissed pursuant to CPLR 3211(a)(5).

The cause of action for civil conspiracy must also be dismissed. Under New York law, “in order to properly plead a cause of action to recover damages for civil conspiracy, the plaintiff must allege a cognizable tort, couple with an agreement between the conspirators regarding the tort, and an overt action in furtherance of the agreement.” (*Faulkner v City of Yonkers*, 105 AD3d 899, 900 [2d Dept 2013]). However, “New York does not recognize civil conspiracy to commit a tort as an independent cause of action.” (*Palmieri v Perry, Van Etten, Rozanski & Primavera, LLP*, 200 AD3d 785, 788 [2d Dept 2021]). As all of the tort causes of actions are dismissed, the complaint does not identify a “cognizable tort to support the cause of action for conspiracy.” (*id.*).

The cause of action for breach of contract must also be dismissed. A cause of action for breach of contract requires: (1) a contract exists, (2) plaintiff performed in accordance with the contract, (3) defendant breached its contractual obligations, and (4) defendant’s breach resulted in damages. (*34-06 73, LLC v Seneca Insurance Company*, 39 NY3d 44, 52 [2022]). First, as to defendant Rettig, there is no allegation that he was ever a party to any contract at issue in this action. Therefore, the complaint must be dismissed as to him.

¹ While the defendants do not specifically move pursuant to CPLR 3211(a)(5), they assert in their motion papers that several of the claims are time-barred. The proper provision to do this under is CPLR 3211(a)(5). Therefore, in addition to a motion pursuant to CPLR 3211(a)(7), the Court will interpret the motion as one to dismiss pursuant to CPLR 3211(a)(5) in addition to the stated provisions.

“In the absence of any allegations of fact showing damage, mere allegations of breach of contract are not sufficient to sustain a complaint.” (*Lexington 360 Associations v. First Union Nat. Bank of North Carolina*, 134 AD2d 187, 189-90 [1st Dept 1996]). Boilerplate allegations that the contract was breached and that, as a consequence, the plaintiffs were damaged are not sufficient to sustain a breach of contract action. (*see Gordon v. Dino De Laurenntiis Corp.*, 141 AD2d 435, 436 [1st Dept 1988]). Here, the only allegation of damages is the boilerplate language “[b]y reason of Defendant Horne’s Breach of contract, plaintiffs have incurred damage in the amount of ONE MILLION (\$1,000,000.00) DOLLARS.” This boilerplate language is insufficient to support a breach of contract action. (*id.*). Therefore, the cause of action for breach of contract must be dismissed as to defendant Horne.

The motion to dismiss is also granted on the separate and independent ground that plaintiffs have acquiesced to the relief sought by failing to oppose the motion (*see Flake v Van Wagenen*, 54 NY 25 [1873]; *Mixon v TBV, Inc.*, 76 AD3d 144 [2d Dept 2010]).

IV. Enjoining the Plaintiffs from Initiating Further Legal Proceedings

The defendants further move this Court to enjoin the plaintiffs and their attorney from initiating further legal proceedings against the defendants absent court approval due to the “plaintiffs’ history of asserting frivolous and unactionable claims and for failing and refusing to withdraw the instant frivolous action against Defendants.”

Public policy mandates free access to the courts. (*Sassower v Signorelli*, 99 AD2d 358, 359 [2d Dept 1984]). However, “a litigious plaintiff pressing a frivolous claim can be extremely costly to the defendant[s] and can waste an inordinate amount of court time, time that [the courts] can ill afford to lose.” (*id.*). “[W]hen ... a litigant is abusing the judicial process by hagridding individuals solely out of ill will or spite, equity may enjoin such vexatious litigation.” (*id.*)

The plaintiffs were warned in the most recent order of Justice Dufficy (*see* NYSCEF Doc. No. 106 under Index No. 712512/2021) that the court would consider enjoining them from initiating further legal proceedings if any future motion papers are poorly drafted and procedurally defective. However, instead of making another motion, the plaintiffs decided to commence this action with a complaint that is just as poorly drafted as the motions in the Prior Action. The complaint addresses defendant Horne’s claims in the Prior Action, discusses the actions and regulations of the Department of Buildings (which is not a party to this action), and discusses discovery issues in the Prior Action. Even when the complaint does make allegations relating to the causes of action asserted here, they are vague and barely touch on the alleged agreement between the parties. Further, out of the five causes of action alleged in the complaint, four of them were clearly time barred. Taking the entire history of these actions into account, the Court can infer that the plaintiffs commenced this action in an attempt to avoid the punishments warned of in Justice Dufficy’s order. The totality of circumstances justifies enjoining the plaintiffs from initiating further legal proceedings against the defendants without prior court approval.

V. Sanctions

Pursuant to 22 NYCRR 130-1.1, “[t]he court, as appropriate, *may* make such award of costs or impose such financial sanctions against either an attorney or a party to the litigation or against both.” (emphasis added). The Court, however, in its discretion, declines to impose sanctions in this case at this time.

Accordingly, it is hereby:

ORDERED, that the motion is granted in part and denied in part; and it is further

ORDERED, that the defendants’ motion to dismiss the complaint is granted and the complaint is hereby dismissed in its entirety with prejudice; and it is further

ORDERED, that the plaintiffs, Frederick Goldberg and Taryn Goldberg are hereby enjoined from initiating any further litigation against any of the defendants named in this action based on any of the causes of action dismissed herein in any courts of New York State, without attaching a copy of this decision to their proposed complaint and addressing same in the first paragraph of their complaint or pleading, and receiving prior approval of the Administrative Judge in the Judicial District in which they seek to bring a further motion or future action, or the designee of such judge, with the sole exception of appealing the within decision and order; and it is further

ORDERED, that the motion is in all other respects denied; and it is further

ORDERED, that the Clerk of the Court shall mark this case disposed and close all future appearances; and its further

ORDERED, that the defendants shall serve a copy of this Order with Notice of Entry upon the plaintiffs by November 15, 2023.

This constitutes the Decision and Order of the Court.

Dated: Jamaica, New York
September 20, 2023



MOJGAN C. LANCMAN, J.S.C.

