

Liarikos v Litourgis
2024 NY Slip Op 35364(U)
October 17, 2024
Supreme Court, Queens County
Docket Number: Index No. 714106/2022
Judge: Joseph Risi
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Short Form Order

NEW YORK SUPREME COURT – QUEENS COUNTY

Present: HONORABLE JOSEPH RISI

IA PART 3

A. J. S. C.

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JOHN LIARIKOS and MLS ELECTRIC LLC.,

Index Number: 714106/2022

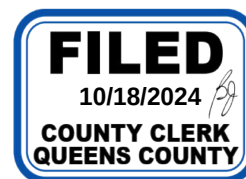
Plaintiff,

Motion Sequence #1 & 2

-against-

DECISION/ ORDER

ANGELO LITOURGIS, SPIROS LITOURGIS,
APL ELECTRIC CORP., GEORGE
TSIMOYIANIS, VAN DAM PARKING INC. and
ALL CITY REMODELING, INC.,



Defendants.

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The following numbered papers read on the motion by defendants George Tsimoyianis, Van Dam Parking Inc., and All City Remodeling, Inc. (moving defendants), made pursuant to CPLR §3211(a)(7), to dismiss the complaint; and by notice of motion by plaintiffs John Liarikos and MLS Electric LLC (collectively referred to as plaintiffs), made pursuant to CPLR §3212, for summary judgment against defendants Angelo Litourgis and APL Electric Corp. (“APL”), and pursuant to CPLR §6301, for an injunction, together with costs of this motion.

	Papers Numbered
Notices of Motion - Affidavits - Exhibits	EF 23-36
Answering Affidavits - Exhibits.....	EF 37-45, 48-51
Reply Affirmation.....	EF 63, 52-62

Upon the foregoing papers, it is ordered that the motions are consolidated for determination as follows:

This is an action to recover damages for “forcible and wrongful eviction,” conversion, intentional and tortious interference with contractual “arrangements,” conspiracy to defraud and interfere with contractual “arrangements,” breach of contract, unjust enrichment, assault, and battery, and for a stay. Plaintiffs have alleged that John Liarikos (“Liarikos”), MLS’s managing member, operated an electrician business under the name MLS, and that MLS employed Angelo Litourgis. Plaintiffs have also alleged that on or about July 30, 2021, although Van Dam Parking Inc. (“Van Dam Parking”), leased certain office space to APL on the first floor of premises located at 47-14 32nd Place, in the County of Queens, MLS was the tenant in possession of said premises

pursuant to an agreement between Liarikos, Angelo Litourgis, Van Dam Parking and Van Dam Parking's officer, George Tsimoyianis ("Tsimoyianis").

Plaintiffs have further alleged that Angelo Litourgis and defendant Spiros Litourgis physically attacked Liarikos, that defendants were in conspiracy with each other, and that despite various agreements between the parties, Angelo Litourgis wrongfully evicted plaintiffs from the premises located at 47-14 32nd Place, and converted and seized all property belonging to MLS. Plaintiffs have further alleged that Angelo Litourgis interfered with, and took control of plaintiffs' corporate contracts, collected payment for work completed and/or in progress, and interfered with future contracts from third parties.

Moving defendants have now moved pursuant to CPLR §3211(a)(7), to dismiss the complaint, while plaintiffs have moved for summary judgment. The court will first address moving defendants' motion to dismiss the complaint. As an initial matter, despite plaintiffs' contention, moving defendants' motion made pursuant to CPLR §3211(a)(7), is not procedurally improper inasmuch as such a motion may be made before or after the filing of an answer (CPLR §3211[e]).

CPLR §3211(a)(7) provides that a party may move to dismiss an action on the ground that "the pleading fails to state a cause of action." "On a motion to dismiss pursuant to CPLR 3211, the complaint is to be afforded a liberal construction" (*Benitez v Bolla Operating LI Corp.*, 189 AD3d 970 [2d Dept 2020]; CPLR §3026; *see Gorbatov v Tsirelman*, 155 AD3d 836 [2d Dept 2017]). " 'In reviewing a motion pursuant to CPLR 3211(a)(7) to dismiss the complaint for failure to state a cause of action, the facts as alleged in the complaint must be accepted as true, the plaintiff is accorded the benefit of every possible favorable inference, and the court's function is to determine only whether the facts as alleged fit within any cognizable legal theory' " (*Benitez v Bolla Operating LI Corp.*, 189 AD3d at 970, quoting *Mendelovitz v Cohen*, 37 AD3d 670, 671 [2d Dept 2007]; *see Bianco v Law Offices of Yuri Prakhin*, 189 AD3d 1326 [2d Dept 2020]; *Gorbatov v Tsirelman*, 155 AD3d at 836). In general, "[t]he court is limited to 'an examination of the pleadings to determine whether they state a cause of action' " (*Dolphin Holdings, Ltd. v Gander & White Shipping, Inc.*, 122 AD3d 901, 902 [2d Dept 2014], quoting *Miglino v Bally Total Fitness of Greater N.Y., Inc.*, 20 NY3d 342, 351 [2013]).

The first cause of action in the complaint is for forcible and wrongful eviction pursuant to Real Property Actions and Proceedings Law §853. Real Property Actions and Proceedings Law §853, entitled "Action for forcible or unlawful entry or detainer; treble damages," provides the following:

"If 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 in an action therefor against the wrong-doer."

Based upon a thorough review of the allegations in the complaint, plaintiffs have sufficiently alleged a legally cognizable cause of action and moving defendants are not entitled to the dismissal of this cause of action.

The second cause of action is for conversion of corporate funds in the sum of \$125,000.00, by check. “In order to succeed on a cause of action to recover damages for conversion, a plaintiff must show (1) legal ownership or an immediate right of possession to a specific identifiable thing and (2) that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff’s right” (*Giardini v Settanni*, 159 AD3d 874, 875 [2d Dept 2018]). Based upon a thorough review of the allegations in the complaint, plaintiffs have sufficiently alleged the elements of this cause of action. Therefore, moving defendants are not entitled to the dismissal of this cause of action.

The third cause of action is for intentional and tortious interference with contractual “arrangements.” “The elements of a cause of action alleging tortious interference with contract are: (1) the existence of a valid contract between the plaintiff and a third party, (2) the defendant’s knowledge of that contract, (3) the defendant’s intentional procurement of a third-party’s breach of that contract without justification, and (4) damages’ ” (*Tri-Star Light. Corp. v Goldstein*, 151 AD3d 1102, 1105 [2d Dept 2017], quoting *Nagan Constr., Inc. v Monsignor McClancy Mem. High Sch.*, 117 AD3d 1005, 1006 [2d Dept 2014]). Based upon a thorough review of the allegations in the complaint, plaintiffs have sufficiently alleged the elements of this cause of action. Therefore, moving defendants are not entitled to the dismissal of this cause of action.

The fourth cause of action is for conspiracy to defraud and interfere with contractual “arrangements.” “Under New York law, conspiracy to commit a tort is not a separately cognizable cause of action from the underlying tort” (*Arvanitakis v Lester*, 145 AD3d 650, 652 [2d Dept 2016]). As such, this cause of action is dismissed.

The fifth cause of action is for breach of contract. “The essential elements of a cause of action to recover damages for breach of contract, are the existence of a contract, the plaintiff’s performance pursuant to the contract, the defendant’s breach of its contractual obligations, and damages resulting from the breach” (*WMC Realty Corp. v City of Yonkers*, 193 AD3d 1018 [2d Dept 2021]). Based upon a thorough review of the allegations in the complaint, plaintiffs have sufficiently alleged the elements of this cause of action. Therefore, moving defendants are not entitled to the dismissal of this cause of action.

The sixth cause of action is for unjust enrichment. “The elements of a cause of action to recover for unjust enrichment are ‘(1) the defendant was enriched, (2) at the plaintiff’s expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered’ ” (*GFRE, Inc. v US. Bank, NA.*, 130 AD3d 569, 570 [2d Dept 2015], quoting *Mobarak v Mowad*, 117 AD3d 998, 1001 [2d Dept 2014]). Based upon a thorough review of the allegations in the complaint, plaintiffs have sufficiently alleged the elements of this cause of action. Therefore, moving defendants are not entitled to the dismissal of this cause of action.

The seventh cause of action is for assault and battery. “ ‘To sustain a cause of action to recover damages for assault, there must be proof of physical conduct placing the plaintiff in imminent apprehension of harmful contact’ ” (*Del Vecchio v Gangi*, 225 AD3d 666, 669-670 [2d Dept 2024], quoting *Barnett v Fusco*, 206 AD3d 962, 963 [2d Dept 2022]). “To recover damages for battery, a plaintiff must prove that there was bodily contact, made with intent, and offensive in nature’ ” (*Hines v Westchester County*, 207 AD3d 621, 622 [2d Dept 2022], quoting *Thaw v North*

Shore Univ. Hosp., 129 AD3d 937, 938–939 [2d Dept 2015]). Based upon a thorough review of the allegations in the complaint, plaintiffs have failed to sufficiently allege the elements of a cause of action for assault. However, plaintiffs have sufficiently alleged the cause of action for battery. As such, moving defendants are entitled to the dismissal of the cause of action for assault, but are not entitled to the dismissal of the cause of action for battery.

The eighth cause of action is for the value of a truck, estimated to be \$7,500.00, and has been asserted by MLS against Angelo Litourgis and APL. Based upon a thorough review of the allegations set forth in the complaint, plaintiffs have failed to identify a cause of action or to allege a legally cognizable cause of action. Therefore, moving defendants are entitled to the dismissal of this cause of action (CPLR §3211[a][7]).

The ninth cause of action is for a stay, preliminary injunction, and a permanent injunction, and has been asserted by plaintiffs against all defendants. Similar to a preliminary injunction, “[t]o sufficiently plead a cause of action for a permanent injunction, a plaintiff must allege that there was a ‘violation of a right presently occurring, or threatened and imminent,’ that he or she has no adequate remedy at law, that serious and irreparable harm will result absent the injunction, and that the equities are balanced in his or her favor” (*Caruso v Bumgarner*, 120 AD3d 1174, 1175 [2d Dept 2014], quoting *Elow v Svenningsen*, 58 AD3d 674, 675 [2d Dept 2009]). Based upon a thorough review of the allegations in the complaint, plaintiffs have failed to sufficiently allege the elements of this cause of action or a basis for a stay. Therefore, moving defendants are entitled to the dismissal of this cause of action.

Next, the court will address plaintiffs’ motion for summary judgment against defendants Angelo Litourgis and APL for conversion of MLS’s funds in the sums of \$125,000.00, and \$13,753.20, by Angelo Litourgis, and for conversion of a truck with a value of \$7,500.00. As moving defendants contend, the instant motion for summary judgment is premature (CPLR §3212[f]).

Lastly, plaintiffs have moved pursuant to CPLR §6301, for an injunction. CPLR §6301, entitled “Grounds for preliminary injunction and temporary restraining order,” provides, in relevant part, the following:

“A preliminary injunction may be granted in any action where it appears that the defendant threatens or is about to do, or is doing or procuring or suffering to be done, an act in violation of the plaintiff’s rights respecting the subject of the action, and tending to render the judgment ineffectual, or in any action where the plaintiff has demanded and would be entitled to a judgment restraining the defendant from the commission or continuance of an act, which, if committed or continued during the pendency of the action, would produce injury to the plaintiff.”

“ ‘To obtain a preliminary injunction, a movant must demonstrate, by clear and convincing evidence, (1) a likelihood of success on the merits, (2) irreparable injury if a preliminary injunction is not granted, and (3) a balance of equities in his or her favor’ ” (*Silver Towers Owners, Corp. v Cromwell Silver Towers Group Ltd. Partnership*, 144 AD3d 783, 784 [2d Dept 2016], quoting *M.H. Mandelbaum Orthotic & Prosthetic Servs., Inc. v Werner*, 126 AD3d 859, 860 [2d Dept

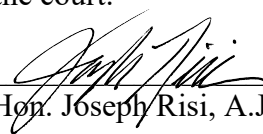
2015]; CPLR §6301). Plaintiffs have failed to make the requisite showing in order to satisfy the applicable three-pronged standard by clear and convincing evidence. Therefore, plaintiff is not entitled to the relief sought on this branch their motion.

The parties' remaining contentions have been considered and found to be unavailing.

Accordingly, the branches of moving defendants' motion to dismiss the fourth cause of action for conspiracy to defraud and interfere with contractual "arrangements," the seventh cause of action for assault, the eighth cause of action for the value of a truck, and the ninth cause of action for a stay, preliminary injunction, and a permanent injunction, are granted, and their motion is denied in all other respects. Plaintiffs' motion is denied in its entirety.

The foregoing constitutes the Decision and Order of the court.

Date: October 17, 2024


Hon. Joseph Risi, A.J.S.C.

