Timmerman v Gentile
2024 NY Slip Op 35395(U)
May 13, 2024
Supreme Court, Queens County
Docket Number: Index No. 728380/2021
Judge: Nicole McGregor Mundy
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: **HON. NICOLE McGREGOR MUNDY** IA PART 7
Acting Justice

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ROBERT L. TIMMERMAN and
BARBARA H. TIMMERMAN,,

Plaintiff(s),

-against-

FLORENCE GENTILE, SCOTT NORRIS, and
MARISSA GENTILE,

Defendant(s).

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Index No.: 728380/2021

Motion Date: September 19, 2023

Motion Seq No.: 007

The following papers numbered EF99 to EF102, EF124, and EF129, read on this motion by plaintiff for an Order granting leave to file an amended complaint pursuant to CPLR § 3025.

	PAPERS NUMBERED
Notice of Motion - Affidavit - Exhibits	EF99-102
Answering Affirmation	EF124
Reply Affidavit	EF129

Upon the foregoing papers it is Ordered that the motion is determined as follows:

On December 24, 2021, plaintiffs commenced this action to recover damages for defendants' breach of lease arising from their non-payment of rent, violation of a policy against smoking, and disabling smoke and carbon monoxide detectors. Plaintiffs now move to amend the Complaint (see CPLR 3025 [b]).

"A motion for leave to amend a complaint should be freely granted, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit" (*Klein v Signature Bank, Inc.*, 204 AD3d 892, 898 [2d Dept 2022]; *see Fox Paine & Co., LLC v Houston Cas. Co.*, 153 AD3d 678, 679 [2d Dept 2017]; *Katz v Beil*, 142 AD3d 957, 960 [2d Dept 2016]). Determination of a motion to amend is a matter of the court's discretion (*see Fox Paine & Co., LLC*, 153 AD3d at 679; *Katz*, 142 AD3d at 960-61).

Here, plaintiffs first seek to join as plaintiffs Susan T. Holzman and Robert S. Timmerman, who the proposed amended complaint alleges are "the only children, caretakers, and sole heirs by will and descent of [plaintiffs]" (NY St Cts Elec Filing [NYSCEF] Doc No. 102 at 2). "Parties may be added at any stage of the action by leave of court or by stipulation of all parties who have appeared" (CPLR §1003). A party's failure to seek leave to join a party in compliance with CPLR §1003 is a jurisdictional defect rendering an amended complaint a legal nullity (*see Bodkin v 112 Auto. Ctr., Inc.*, 214 AD3d 620, 621–22 [2d Dept 2023]; *Hulse v Wirth*, 175 AD3d 1276, 1279 [2d Dept 2019]). Since the CPLR contemplates joinder made by parties other than the new parties (*see* CPLR 305 [a]; *Jones v Bill*, 10 NY3d 550, 554 [2008]), contrary to defendants' contention, plaintiffs could properly move to join their children. Here, plaintiffs contend, in effect, that their children should be plaintiffs in order to allow complete relief to be accorded to the parties because they are plaintiffs' sole heirs and co-property managers of the premises. Those allegations do not demonstrate that the children possess an interest in the property or that they were parties to the lease such that they are indispensable parties to the action, which would prevent it from proceeding without them (*see Smith v Pasqua*, 110 AD3d 710, 710 [2d Dept 2013]; *NC Venture I, L.P. v Complete Analysis, Inc.*, 22 AD3d 540, 543 [2d Dept 2005]; *cf. Stevens v Eaton*, 267 AD2d 450, 451 [2d Dept 1999]). Since the children are not necessary parties, joining them as plaintiffs is unwarranted (*see Smith*, 110 AD3d at 710; *Strough v Incorporated Vil. of W. Hampton Dunes*, 78 AD3d 1037, 1039–40 [2d Dept 2010]; *NC Venture I, L.P.*, 22 AD3d at 543; *Yecies v Sullivan*, 221 AD2d 433, 433–34 [2d Dept 1995]). Although plaintiffs contend that a trust which names the children as beneficiaries owned the property since 2010, they improperly raise this contention for the first time in reply (*see Grassfield v JUPT, Inc.*, 208 AD3d 1219, 1220 [2d Dept 2022]; *OneWest Bank, FSB v Filimon*, 205 AD3d 1041, 1042 [2d Dept 2022]).

Next, plaintiffs seek to amend the Complaint by adding factual allegations and separately alleging causes of action. The proposed first cause of action for breach of contract incorporates the portion of the original Complaint alleging damages and alleges additional damages. The original Complaint asserted that plaintiffs "continue to sustain damages, including . . . lost rental income" (NYSCE] Doc No. 102 at 20). The proposed first cause of action separately asserts recovery of continuing damages from lost rental income and specifies the amount of income lost each month. Defendants correctly contend in opposition, that damages for mental or emotional distress may not be recovered under a breach of contract theory (*see Johnson v Jamaica Hosp.*, 62 NY2d 523, 528 [1984]; *Perlbinder v Vigilant Ins. Co.*, 190 AD3d 985, 990 [2d Dept 2021]), but the proposed breach of contract cause of action does not allege emotional distress damages. Although the amendment is arguably unnecessary as it was already generally pleaded in the original Complaint, no basis for denying the amendment exists (*see Rabinowitz v American Tire Works*, 146 AD2d 760, 761 [2d Dept 1989]).

The proposed second and third causes of action respectively allege fraud by concealment or omission and fraud by misrepresentation. The elements of a fraud cause of action are misrepresentation or material omission of a fact that defendant knew was false, to induce the other party's reliance on it, the other party's justifiable reliance on the misrepresentation or omission, and injury (*see Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 31 NY3d 569, 578–79 [2018]; *Pasternack v Laboratory Corp. of Am. Holdings*, 27 NY3d 817, 827 [2016]). The proposed second cause of action alleges that defendants filed a false Covid-19 hardship declaration to impede debt collection for unpaid rent, did not disclose to plaintiffs that they received funds from FEMA (Federal Emergency Management Agency) after flood damage from Hurricane Ida to inflate the cost of repairing a damaged refrigerator, and concealed their purchase of another residence but remained at the leased premises rent-free which prevented plaintiffs from seeking redress in the courts. Plaintiffs fail to allege any basis for their justifiable reliance on defendants' omission. The proposed amended complaint does not allege that defendants were plaintiffs' agents (*see Chi Lo Liu v Radmin*, 106 AD3d 1042, 1043 [2d Dept 2013]) or had a confidential or fiduciary relationship with plaintiffs which would render plaintiffs' reliance on defendants' misrepresentations or omissions justifiable (*see Scott v Fields*, 85 AD3d 756, 758 [2d Dept 2011]; *First Keystone Consultants, Inc. v DDR Constr. Servs.*, 74 AD3d 1135, 1138 [2d Dept 2010]; *cf. Mitchell v Diji*, 134 AD3d 779, 781 [2d Dept 2015]). Thus, the second proposed cause of action fails to state a fraud claim (*see Chi Lo Liu*, 106 AD3d at 1043; *First Keystone Consultants, Inc.*, 74 AD3d at 1138; *Jacobs v Haber*, 232 AD2d 372, 372 [2d Dept 1996]). Moreover, since the first two allegations supporting the proposed second cause of action are identical to the allegations supporting the breach of contract cause of action relating to the lease, a fraud cause of action does not lie (*see Genovese v State Farm Mut. Auto. Ins. Co.*, 106 AD3d 866, 867 [2d Dept 2013]; *Fromowitz v W. Park Assoc., Inc.*, 106 AD3d 950, 951 [2d Dept 2013]; *Weinstein v Natalie Weinstein Design Assoc., Inc.*, 86 AD3d 641, 642 [2d Dept 2011]; *Yenrab, Inc. v 794 Linden Realty, LLC*, 68 AD3d 755, 757 [2d Dept 2009]).

Plaintiffs' failure to properly plead justifiable reliance on defendants' misrepresentations or omissions also demonstrates that the proposed third cause of action lacks merit. In any event, the proposed third cause of action merely alleges that defendants' counsel advised plaintiffs that defendants would file a Covid-19 hardship declaration and filed an affirmation supporting defendants' motion for a default judgment on their counterclaims against plaintiff. Thus, the proposed Complaint fails to allege any misrepresentation upon which plaintiffs relied (*see Oppedisano v D'Agostino*, 196 AD3d 497, 500 [2d Dept 2021]; *Hausen v North Fork Radiology, P.C.*, 171 AD3d 888, 891 [2d

Dept 2019]; *Scott*, 85 AD3d at 757). Therefore, the proposed second and third causes of action lack merit and amendment to add them is unwarranted.

Finally, turning to the proposed fourth cause of action of elder abuse, the proposed amended complaint generally pleads that defendants took advantage of the elderly plaintiffs' maintaining rent at the original amount which enabled defendants to purchase a residence, inflicted emotional and psychological harm on plaintiffs through the litigation, required plaintiffs to move back to their New York home after residing in assisted living in California, and deprived them of the benefits of their income property by withholding rent and damaging the premises to prevent it from generating income. Since this claim of elder abuse does not fall into any a cognizable cause of action (*see Mariano v Fiorvante*, 118 AD3d 961, 962 [2d Dept 2014]), amending the Complaint to add the cause of action is inappropriate.

Accordingly, the branch of plaintiffs' motion to amend the Complaint to add a breach of contract cause of action is granted, but the remaining branches of the motion are denied. Leave is granted to add the proposed first cause of action as set forth in the proposed amended Complaint in the form annexed to the moving papers, but leave is denied with respect to adding the proposed second, third and fourth causes of action. Within twenty (20) days of entry of this Order, plaintiffs shall serve a copy of this Order, with notice of entry and the Amended Complaint, in conformity herewith. Defendants shall answer the Amended Complaint, or otherwise respond to it, within twenty (20) days of said service.

Dated: May 13, 2024

NICOLE McGREGOR MUNDY
A.J.S.C.

FILED
5/15/2024
COUNTY CLERK
QUEENS COUNTY