

Lederman v Basile
2024 NY Slip Op 35619(U)
March 6, 2024
Supreme Court, Westchester County
Docket Number: Index No. 64027/2023
Judge: Damaris E. Torrent
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To commence the statutory time for appeals as of right (CPLR 5513[a]), you are advised to serve a copy of this order, with notice of entry, upon all parties.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

-----X
EVAN LEDERMAN,

Plaintiff,

-against-

DECISION AND ORDER

Index No.: 64027/2023

Motion Date: 12/19/2023

Seq. No. 1

CHRISTOPHER M. BASILE and DONALD BASILE,

Defendants.
-----X

DAMARIS E. TORRENT, A.J.S.C.

The following papers were read on the above referenced motion by defendants for an order pursuant to CPLR 3211(a)(1), (5), (7), and (8), dismissing the complaint and for such other and further relief as this Court deems just and proper.

PAPERS

NUMBERED

Notice of Motion / Affirmation in Support / Exhibits / Supplemental
Affirmation / Exhibit
Affirmation in Opposition
Stipulation Adjourning Motion
Affirmation in Reply

1-7
8
9
10

Plaintiff commenced a prior action against Christopher M. Basile, Donald Basile, Ametrine Consulting, Inc. and Ludin Landscaping & Home Improvement, LLC arising from a property dispute between the parties. Plaintiff alleges the conduct at issue started in March 2021 and continued over a six month period (Index No. 65699/2021). In the prior action, plaintiff sought damages for assault, battery, intentional infliction of emotional distress, negligent infliction of emotional distress, negligence, property damage, private nuisance, and trespass. By order dated May 4, 2022, this Court granted defendants' motion to dismiss (Seq. #1) as to Donald Basile

(NYSCEF doc #29, p. 5, 7). By order dated Jun 27, 2023, plaintiff's motion (Seq. #5) seeking an extension of time to serve defendant Christopher Basile and permitting service on defendant's counsel was denied (NYSCEF doc #148, p. 3). The matter is currently pending as against the remaining defendants, Ametrine Consulting, Inc. and Ludin Landscaping & Home Improvement, LLC. Plaintiff commenced the present action against Christopher Basile and Donald Basile on July 21, 2023, asserting the same claims as in the earlier action.

CPLR 3211(a)(8)

Pursuant to CPLR 3211(a)(8), defendant may move for judgment dismissing one or more causes of action asserted against him on the ground that the court does not have personal jurisdiction. Plaintiff filed affidavits of service indicating both defendants were served on July 31, 2023 by affixing the summons and complaint to the door at defendants' last known address, 2877 Paradise Road, Unit 702, Las Vegas, Nevada, and mailing the pleadings to the same address on August 7, 2023 (NYSCEF doc #2, 3). In an exhibit to the affidavit of service, the process server notes two prior unsuccessful attempts at service to the same Nevada address. She also notes that the assessor's website shows Zultanite Consulting Inc. as the owner of the unit and indicates that Christopher Basile is the New York State registered attorney for Zultanite Consulting Inc. (NYSCEF doc #2, p. 3). The Court notes that Christopher Basile is an attorney registered in New York and Nevada. As the address used for service is listed as Christopher Basile's Nevada business address on the registration filed with the Office of Court Administration, he cannot disclaim that this is his actual place of business (*see Day v Davis*, 47 AD3d 750 [2d Dept 2008]).

However, service was not properly effectuated upon Donald Basile. Although CPLR 313 provides that a person domiciled in the state or a non-domiciliary subject to New York jurisdiction under CPLR 302, may be served with the summons outside the state, such service must be made in the same manner as service is made within the state. CPLR 308(4) permits service by affixing the summons to the door of either the actual place of business or usual place of abode and by

mailing the summons within twenty days where personal service and service on a person of suitable age and discretion cannot be made with due diligence under CPLR 308(1) and (2). The due diligence requirement of CPLR 308(4) must be strictly adhered to, given the reduced likelihood that service pursuant to this section will be received (*Niebling v Pioreck*, 222 AD3d 873 [2d Dept 2023]). “For purposes of satisfying the ‘due diligence’ requirement of CPLR 308(4), it must be shown that the process server made genuine inquiries about the defendant’s whereabouts and place of employment” (*Estate of Waterman v Jones*, 46 AD3d 63 [2d Dept 2007]).

In the exhibit to the affidavit of service, the process server notes that Donald Basile was the previous owner of the unit from May 17, 2011 to July 20, 2018. There is no indication that the Nevada address was his actual place of business or usual place of abode on the date of service. The affidavit of service does not indicate any efforts were made to ascertain Donald Basile’s whereabouts, residence, or business address (NYSCEF doc #3, p. 2). Service at the Nevada address by affix and mail service is insufficient to obtain personal jurisdiction over Donald Basile. As plaintiff has failed to properly serve the summons and complaint upon him within one hundred and twenty days after commencement of the action, the complaint is dismissed without prejudice as to Donald Basile only (*see* CPLR § 306-b). The Court declines to address the remaining branches of the motion as to Donald Basile.

CPLR 3211(a)(5)

Defendant Christopher Basile (hereinafter defendant or Mr. Basile) moves to dismiss the intentional tort claims against him as time barred under CPLR 3211(5). Defendant contends that plaintiff’s claims for assault, battery and intentional infliction of emotional distress arose from events that occurred in 2021, are subject to a one year statute of limitations, and are time-barred (Affirmation in Support, p. 1). On a motion to dismiss a cause of action based on expiration of the statute of limitations, defendant bears the initial burden of establishing, *prima facie*, that the time to commence an action has expired. The burden then shifts to plaintiff to offer evidence

demonstrating that his cause of action falls within an exception to the statute of limitations, that there is a question of fact as to whether such an exception applies, or that there is a question of fact as to whether the cause of action was interposed within the applicable statute of limitations (*Morrow v Vibration Mountings & Controls, Inc.*, 223 AD3d 736 [2d Dept 2024]).

The statute of limitations for assault, battery, and intentional infliction of emotional distress is one year (CPLR § 215[3]; *Scifo v Taibi*, 198 AD3d 704 [2d Dept 2021]). Although plaintiff's allegations arose from events that occurred in 2021, defendant notes that Mr. Lederman brought criminal charges against Mr. Basile and all criminal charges were dismissed (Affirmation in Support, p. 2). CPLR 215(8)(a) provides that "[w]henever it is shown that a criminal action against the same defendant has been commenced with respect to the event or occurrence from which a claim governed by [CPLR 215] arises, the plaintiff shall have at least one year from the termination of the criminal action as defined in section 1.20 of the criminal procedural law in which to commence the civil action." Defendants submit the transcript from the criminal proceeding against Mr. Basile in Larchmont Village Court on April 11, 2023, at which time the parties agreed to a six month adjournment in contemplation of dismissal (Defendants' Exhibit D). Plaintiff's causes of action alleging assault, battery, and intentional infliction of emotional distress are governed by the statute of limitations set forth in CPLR 215(3), and arise from the same event or occurrence which gave rise to the criminal proceeding against Mr. Basile. As this action was commenced within one year of the termination of the criminal action, plaintiff's intentional tort claims are not subject to dismissal under CPLR 3211(a)(5) (*see Walker v Estate of Lorch*, 136 AD3d 805 [2d Dept 2016]).

CPLR 3211(a)(1)

Defendant argues dismissal is warranted under CPLR 3211(a)(1), arguing documentary evidence establishes a defense to plaintiff's claims. Dismissal of an action on the ground that a defense is founded upon documentary evidence pursuant to CPLR 3211(a)(1) is warranted only when the documentary evidence utterly refutes the plaintiff's factual allegations, conclusively

establishing a defense as a matter of law. “To constitute documentary evidence, the evidence must be unambiguous, authentic, and undeniable, such as judicial records and documents reflecting out-of-court transactions such as mortgages, deeds, contracts, and any other papers, the contents of which are essentially undeniable” (*Karpovich v City of New York*, 162 AD3d 996 [2d Dept 2018])[internal quotations and citations omitted]). Where evidence submitted on the motion establishes that a material fact, as claimed by plaintiff, is not a fact at all and there is no significant dispute, dismissal is warranted (*see Greenstein v Danzy*, 2022 NY Slip Op 06232 [2d Dept 2002]).

The documents referenced and submitted in support of defendant’s motion, including decisions and orders in the related action, are insufficient to establish a defense founded upon documentary evidence pursuant to CPLR 3211(a)(1). As these documents do not utterly refute plaintiff’s factual allegations and conclusively establish a defense as a matter of law, the branch of defendant’s motion seeking to dismiss pursuant to CPLR 3211(a)(1) must be denied (*see Granada Condominium III Assn. v Palomino*, 78 AD3d 996 [2d Dept 2010]).

CPLR 3211(a)(7)

In considering a motion to dismiss for failure to state a cause of action, the pleading must be liberally construed. The Court must accept the facts as alleged in the complaint as true, accord the plaintiff the benefit of every favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory. However, bare legal conclusions are not presumed to be true and are not accorded every favorable inference (*Grant v DiFeo*, 165 AD3d 897 [2d Dept 2018]). The standard is whether the pleading states a cause of action (*Houtenbos v Fordune Assn., Inc.*, 200 AD3d 662 [2d Dept 2021]). When the moving party submits evidentiary material in support of the motion, the criterion becomes whether the proponent of the pleading has a cause of action, not whether he has stated one (*Sokol v Leader*, 74 AD3d 1180 [2d Dept 2010]). Whether a plaintiff can ultimately establish the allegations is not part of the calculus (*Dee v Rakower*, 112 AD3d 204 [2d Dept 2013]).

Plaintiff's first cause of action alleges assault and the second cause of action alleges 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" (*Bastein v Sotto*, 299 AD2d 432 [2d Dept 2002]). To recover damages for battery, a plaintiff must prove that there was bodily contact, the contact was made with intent, and it was offensive in nature (*Fugazy v Corbetta*, 34 AD3d 728 [2d Dept 2006]). Plaintiff alleges Mr. Basile intentionally did a violent or menacing act which threatened imminent harm to the plaintiff. It is alleged that Mr. Basile grabbed what appeared to be an axe, raised it over his head, and lunged at Mr. Lederman with the weapon (Defendants' Exhibit A, p. 7, 9). Plaintiff alleges that Mr. Basile intentionally charged at and tackled plaintiff to the ground prior to grabbing the axe (*Id.* at 7, 9). Plaintiff pleads cognizable causes of action for assault and battery.

Plaintiff's third cause of action is for intentional infliction of emotional distress, alleging Mr. Basile engaged in extreme and outrageous conduct, which caused plaintiff severe emotional and psychological injuries. "The elements of intentional infliction of emotional distress are (1) extreme and outrageous conduct; (2) the intent to cause, or the disregard of a substantial likelihood of causing, severe emotional distress; (3) causation; and (4) severe emotional distress" (*Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708 [2d Dept 2012]). To state a cause of action to recover damages for intentional infliction of emotional distress, plaintiff must allege "conduct that has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency and to be regarded as atrocious, and utterly intolerable in a civilized community" (*Ratto v Olivia*, 195 AD3d 870 [2d Dept 2021]). The conduct must be more than mere insults, threats, obscenities or indignities (*see Ajie Chen v Deliso*, 169 AD3d 761 [2d Dept 2019]). However, under certain circumstances, a deliberate and malicious campaign of harassment or intimidation may be sufficient to establish the tort (*see Eves v Ray*, 42 AD3d 481 [2d Dept 2007]). Here, plaintiff alleges Mr. Basile's conduct included a months long campaign to threaten and harass plaintiff, verbally

and physically, over a property line dispute, alleging that an order of protection was eventually issued. Plaintiff has sufficiently plead facts alleging a cognizable cause of action for intentional infliction of emotional distress.

Plaintiff's sixth cause of action alleges property damage. It is alleged that defendant raised the grade of his property, causing substantial drainage and water runoff into plaintiff's property, cut down and removed dozens of trees from plaintiff's property, and removed permanent fixtures from plaintiff's property. Plaintiff alleges decreased property value and cost of restoration. Plaintiff asserts a cognizable claim to recover damages for injury to property.

Plaintiff's eighth cause of action alleges trespass. The elements of trespass are intentional entry onto the land of another without justification or permission (*Reyes v Carroll*, 137 AD3d 886 [2d Dept 2016]). The intrusion upon the property must at least be the immediate or inevitable consequence of what defendant does willfully, or what he does so negligently as to amount to willfulness (*Behar v Quaker Ridge Golf Club, Inc.*, 118 AD3d 833 [2d Dept 2014], quoting *Phillips v Sun Oil Co.*, 307 NY 328 [1954]). Plaintiff alleges that Mr. Basile instructed employees of Ludin Landscaping & Home Improvement, LLC to rip up foliage and trees on plaintiff's property. It is alleged that Mr. Basile and employees of the landscaping company ripped up permanent fixtures on plaintiff's property, including a fence, stone steps and stone walkways (NYSCEF doc #1, p. 6, 7, 8). Plaintiff asserts a cognizable cause of action for trespass.

Plaintiff's fourth cause of action alleges negligence. The fifth cause of action alleges negligent infliction of emotional distress. Negligence is distinguished from intentional torts by the absence of intent, which is a necessary element of assault, battery and trespass. Where, as here, the only inference that may be drawn from the allegations in the complaint is that plaintiff's damages resulted solely from defendant's intentional acts, plaintiff fails to assert a cognizable claim based on a negligence theory (*see Chiesa v McGregor*, 209 AD3d 963 [2d Dept

2022][finding negligent assault or battery is not a cognizable claim in New York]). As such, plaintiff's fourth and fifth causes of action are dismissed.

Plaintiff's seventh cause of action alleges private nuisance. A private nuisance is an interference with the use and enjoyment of property, which is actionable by the individuals whose rights have been disturbed (*Bronxmeyer v United Capital Corp.*, 79 AD3d 780 [2d Dept 2010]). The elements of a private nuisance cause of action are "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act" (*Curry v Matranga*, 194 AD3d 1011 [2d Dept 2021]). Plaintiff alleges defendant's acts and omissions, including those of their agents and employees, caused an unreasonable and substantial interference with plaintiff's right to use and enjoy his property. It is alleged that defendant "created and maintained a continuing nuisance on plaintiff's property, by allowing the destruction of plaintiff's fence, landscaping, walkways, driveways and taking over a portion of plaintiff's land" (NYSCEF doc #1, p. 12). Insofar as plaintiff's allegations arise solely from the same facts and assert the same damages as plaintiff's property damage and trespass claims, the private nuisance cause of action is dismissed as duplicative.

To the extent the parties' contentions are not specifically referenced herein, they have been considered and are without merit.

Accordingly, it is hereby

ORDERED that the branch of defendants' motion to dismiss based on lack of personal jurisdiction is granted to the extent that the complaint is dismissed without prejudice as to Donald Basile only; and it is further

ORDERED that the branch of defendants' motion to dismiss for failure to state a cause of action is granted to the extent that plaintiff's fourth, fifth, and seventh causes of action are dismissed, and the motion is otherwise denied; and it is further

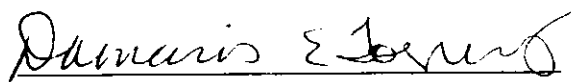
ORDERED that the parties are directed to file to NYSCEF by April 19, 2024 a fully executed preliminary conference stipulation to be so ordered; and it is further

ORDERED that plaintiff shall serve a copy of this decision and order with notice of entry upon all parties and file proof of service on NYSCEF within ten (10) days.

The foregoing constitutes the Decision and Order of the Court.

Dated: March 6, 2024
White Plains, New York

ENTER:


HON. DAMARIS E. TORRENT, A.J.S.C.

TO: All parties via NYSCEF

FILED VIA NYSCEF