

**Donohue v Buell**

2017 NY Slip Op 30108(U)

January 20, 2017

Supreme Court, New York County

Docket Number: 154506/16

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: MANUEL J. MENDEZ Justice

PART 13

JAMES DONOHUE,

Plaintiff

INDEX NO. 154506/16

MOTION DATE 11-30-2016

- v -

NANCY MORGAN BUELL, EDWARD RICK BUELL II, MIZRAHI LAW OFFICES LLC, and ROBERT N. MIZRAHI,

MOTION SEQ. NO 001 MOTION CAL. NO

Defendant.

The following papers, numbered 1 to 6 were read on this motion to Dismiss complaint against defendants for failure to state a cause of action pursuant to CPLR 3211(a)(1),(7) and (8), and cross-motion to amend verified complaint.

Table with 2 columns: Paper Description and PAPERS NUMBER. Rows include Notice of Motion/ Order to Show Cause, Answering Affidavits, and Replying Affidavits.

Cross-Motion: X Yes No

Upon a reading of the foregoing cited papers, it is ordered that this motion to dismiss the complaint against the defendants for failure to state a cause of action is granted, the cross motion is denied, all the causes of action asserted in the complaint as against all the defendants are dismissed.

Plaintiff is the tenant of a Rent Stabilized apartment in a building located at 313 West 78th Street, Apt. 3F, New York, N.Y., which is owned by defendant Nancy Morgan Buell. In 2013 the Defendant Nancy Morgan Buell commenced a Landlord and Tenant proceeding in New York County under index number L & T 85784/2013 seeking to evict plaintiff for his non-payment of rent. That proceeding was settled by stipulation of settlement between the parties dated February 4, 2014 wherein Plaintiff consented to the entry of a final judgment in the sum of \$8,080.48, agreed to a payment schedule to satisfy the judgment, and was allowed to remain in the apartment. At this non-payment proceeding defendant Nancy Morgan Buell was represented by defendant Robert N. Mizrahi of the Mizrahi Law Offices, LLC. ( see Mot. Seq.# 003 Exhibit B).

On September 12, 2014 defendant Mizrahi Law Offices, LLC, in representation of defendant Nancy Morgan Buell served plaintiff with a "Notice of Non-Renewal" of his lease for his chronic late payment of rent. A "Holdover" Notice of Petition and Petition dated January 7, 2015 was filed by the defendants Nancy Morgan Buell and Mizrahi under index number L & T 51194/2015, seeking to evict plaintiff from the rent stabilized

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

apartment for his chronic non-payment of rent ( See Mot. Seq.#003 Exhibit A). On February 15, 2015 Plaintiff Pro-se moved for summary judgment dismissing the "Holdover" Petition ( see Mot. Seq.#003 Exhibit C). On September 4, 2015 the Hon. Maria Milin denied the motion for summary judgment, found that there were issues of fact as to the notice and found that in a prior motion the court had previously denied a motion to dismiss the proceeding for insufficiency of the Notice [ to terminate]. ( see Mot. Seq.#003 Exhibit D). The proceeding was referred to Justice Michelle Schreiber for trial. On October 23, 2015 Judge Schreiber dismissed the proceeding.

In a written decision/order judge Schreiber held that "this alleged chronic rent delinquency holdover case is predicated upon a 'Notice of Non-Renewal' purporting to end a rent stabilized tenancy. However, chronic rent delinquency is not a recognized basis for refusing to renew a rent stabilized lease, *Grun v. Patterson*, 55 NY2d 631 [1981], and accordingly the matter is dismissed." ( see Mot. Seq.#003, Exhibit E). After the determination of that "Holdover" proceeding favorably to the plaintiff herein he commenced this action.

Plaintiff Pro-se filed a summons and verified complaint dated May 10, 2016 against the defendants asserting causes of action for Malicious Prosecution and Intentional Infliction of Emotional Distress. Plaintiff asserts these causes of action against all the defendants. Defendants now move to dismiss this complaint in its entirety on various grounds. Defendant Nancy Morgan Buell moves (under motion sequence #002) on the ground that the complaint fails to state a cause of action. Defendant Mizrahi Law Offices LLC and Robert Mizrahi move ( under Motion sequence #003) on the ground that the complaint fails to state a cause of action and on documentary evidence. Defendant Edward Rick Buell II moves ( under Motion Sequence #001) on the ground that the complaint fails to state a cause of action and for lack of personal jurisdiction.

Following the making of this motion to dismiss the plaintiff cross-moves to deny the motion and to amend the verified complaint. In the Complaint in essence Plaintiff alleges that the defendants without probable cause commenced a landlord and tenant proceeding against plaintiff, that the proceeding terminated favorably to plaintiff and that he sustained damages as a result. Plaintiff also alleges that the filing of the Holdover proceeding was extreme and outrageous, and that this conduct caused him extreme emotional distress.

Under CPLR §3211(a)(7) a court may dismiss a complaint for failure to state a cause of action. The court's role on this motion is to determine when a cause of action is stated within the four corners of the complaint ( *Frank v. Daimler Chrysler Corp.*, 292 A.D. 2d 118, 741 N.Y.S. 2d 9 [1<sup>st</sup>. Dept. 2012]); *Sokoloff v. Harriman Estates Development Corp.*, 96 N.Y. 2d 409, 754 N.E. 2d 184, 729 N.Y.S. 2d 425 [2001] a court must search the complaint for a cognizable legal theory). Although on a motion to dismiss plaintiff's allegations are presumed to be true and accorded every favorable inference, conclusory allegations - claims consisting of bare legal conclusions with no factual specificity - are insufficient to survive a motion to dismiss ( *Godfrey v. Spano*, 13 N.Y. 2d 358, 920 N.E. 2d 328, 892 N.Y.S. 2d 272 [2009]).

**“A malicious Civil prosecution is one that is begun in malice, without probable cause to believe it can succeed. To succeed, the plaintiff must prove malice, or a purpose other than the adjudication of a claim, and must further prove an entire lack of probable cause in the prior proceeding.” ( Engel v. CBS, Inc., 93 N.Y.2d 195, 711 N.E.2d 626, 689 N.Y.S.2d 411 [1999]; Purdue Frederick Co., v. Steadfast Ins. Co., 40 A.D.3d 285, 836 N.Y.S.2d 28 [1<sup>st</sup>. Dept. 2007]). To maintain a cause of action for malicious prosecution a plaintiff must plead and prove (1) the commencement or continuation of a proceeding by the defendant against the plaintiff, (2) the termination of the proceeding in favor of the plaintiff, (3) the absence of probable cause for the proceeding, (4) actual malice and (5) a special injury.” ( Wilhelmina Models, Inc., v. Fleisher, 19 A.D.3d 267, 797 N.Y.S.2d 83 [1<sup>st</sup>. Dept. 2005]). “An action brought with actual malice is one brought with conscious falsity.” ( See Wilhelmina Models, Inc., v. Fleisher, Supra).**

**“ To Support a Malicious prosecution cause of action based on prior civil litigation, the plaintiff must show that the defendant initiated an action or proceeding that terminated in the plaintiff’s favor, there was no probable cause for the action or proceeding, the defendant acted with malice and the plaintiff suffered a special injury. Partial success by defendants in the underlying civil litigation... preclude a malicious prosecution claim.”( See Black v. Green Harbour Homeowners Association, Inc., 37 A.D.3d 1013, 829 N.Y.s.2d 764 [3<sup>rd</sup>. Dept. 2007] dismissing Malicious Prosecution action where supreme court denied plaintiff’s motion for summary judgment and for a directed verdict during the trial, thereby recognizing the conflicting facts and issues and the potential merit of at least some causes of action in the underlying complaint; See also I.G.Second Generation Partners, L.P., v. Duane Reade, 17 A.D.3d 206, 793 N.Y.S.2d 379 [1<sup>st</sup>. Dept. 2005]).**

**“It has been held that the key to the first element of the cause of action is the defendant’s commencement of the underlying proceeding. Even where the defendant testified falsely in the underlying action, that is not a basis for liability under Malicious Prosecution where the defendant did not initiate the lawsuit. A prior judicial finding that the underlying civil claim, although not ultimately successful, was not frivolous or unsupportable creates a presumption that it did not lack probable cause, and where plaintiff fails to rebut that presumption, the result must be dismissal of the malicious prosecution complaint.” ( Loftus v. Arthur, 16 Misc.3d 1126(A), 847 N.Y.S.2d 902 [Sup. Ct. Madison Cty, 2007]).**

**Finally the Plaintiff must prove special injury, that is “ some concrete harm that is considerably more cumbersome than the physical, psychological or financial demands of defending a lawsuit...the loss of one client along with vague allegations of reputational loss are not sufficient.”( see Engel v. CBS, Inc., Supra).**

**Defendant Edward Rick Buell II was not a party in the underlying litigation. According to the complaint it is claimed that he persuaded his wife ( Nancy Morgan Buell) to commence the underlying litigation. This conduct by this defendant is not sufficient to support a cause of action for Malicious Prosecution. Plaintiff has failed to plead the first element of a Malicious Prosecution cause of action as against this defendant, therefore as to this defendant the Malicious prosecution claim must be dismissed.**

Judge Milin denied plaintiff's motion which was for summary judgment and to dismiss the underlying civil proceeding. This raises the presumption that the underlying action did not lack probable cause. Indeed, there had been a prior non-payment proceeding which was settled favorably to the defendants when plaintiff consented to the entry of a money judgment and agreed to a payment schedule. That the Notice of Non-Renewal was found to be insufficient for terminating a rent stabilized lease does not establish that the defendants lacked probable cause for bringing the Holdover proceeding due to plaintiff's chronic non-payment or late payment of rent.

Finally, plaintiff has failed to plead a special injury. The loss of a business opportunity during the litigation or reputational loss with other landlords is not the type of special injury contemplated. Therefore, the Malicious Prosecution cause of action is dismissed as against all defendants.

“ The Tort of Intentional Infliction of Emotional Distress consists of four elements: (1) extreme and outrageous conduct, (2) intent to cause, or disregard of substantial probability of causing, severe emotional distress, (3) causal connection between conduct and injury, and (4) severe emotional distress. Liability has been found only where the conduct 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. Courts are reluctant to allow recovery under the banner of intentional infliction of emotional distress absent a deliberate and malicious campaign of harassment or intimidation.”( see *Cohn-Frankel v. United Synagogue Conservative Judaism*, 246 A.D.2d 332, 667 N.Y.S.2d 360 [1<sup>st</sup>. Dept. 1998] reversing denial of motion to dismiss student's cause of action of intentional infliction of emotional distress for failure to state a cause of action. Student felt humiliated, embarrassed, angry and distressed after being expelled from religious tour group).

In *Kay v. Trump*, 58 A.D.3d 579, 873 N.Y.S.2d 5 [1<sup>st</sup>. Dept. 2009] the court affirmed dismissal of an intentional infliction of emotional distress cause of action for failure to state a cause of action, where plaintiff alleged that “the defendants variously made rude remarks to and about her, commenced two baseless lawsuits, filed a criminal complaint against her and frightened her and her daughter by attempting to instigate her arrest.” The Court found that “ this conduct, while not being condoned, is not 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.”

The conduct plaintiff alleges the defendants engaged in the underlying litigation does not even come close to the conduct the defendants in *Kay v. Trump*, *Supra* were engaged in. Under the facts as alleged plaintiff has failed to state a cause of action for intentional infliction of emotional distress.

Leave to amend pleadings pursuant to CPLR 3025 (b) should be freely given upon such terms as may be just. However, free leave is limited to pleadings which have merit and are neither surprising or prejudicial ( *Moon v. Clear Channel Communications, Inc.*, 307 A.D. 2d 628, 763 N.Y.S. 2d 157 [3<sup>rd</sup>. Dept. 2003]). Leave to amend a pleading after time to amend as of right has expired is discretionary. Such discretion is often exercised with liberality to ensure determination of all pertinent questions affecting the interests of the parties, but when the amendment is to assert facts of which the pleader had full knowledge when the pleading was first interposed it must be factually explained

and satisfactorily excused ( see Carranza v. Brooklyn Union Gas Co, 233 A.D.2d 287, 649 N.Y.S.2d 464 [2<sup>nd</sup>. Dept.]).

Plaintiff's cross motion fails to explain why he failed to include in his pleadings any facts of which he had full knowledge when the pleadings were first interposed. In any event for the reasons previously stated there is no merit to plaintiff's causes of action for Malicious Prosecution and Intentional Infliction of Emotional Distress.

Accordingly, it is ORDERED that the motion to dismiss the complaint is granted, and it is further


ORDERED that the cross motion to amend is denied, and it is further

ORDERED, that the complaint is dismissed as against all the defendants, and it is further

ORDERED that the clerk of the court enter judgment in favor of the defendants dismissing the complaint as against all of them it in its entirety.

ENTER:

Dated: January 20, 2017

  
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Manuel J. Mendez  
J.S.C.

MANUEL J. MENDEZ  
J.S.C.

Check one:     FINAL DISPOSITION         NON-FINAL DISPOSITION  
Check if appropriate:     DO NOT POST                       REFERENCE