

PH-105 Realty Corp. v Elayaan
2017 NY Slip Op 30952(U)
May 3, 2017
Supreme Court, New York County
Docket Number: 656160/2016
Judge: Gerald Lebovits
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**NEW YORK STATE SUPREME COURT
NEW YORK COUNTY: PART 7**

PH-105 REALTY CORP., 12 WHITWELL REALTY CORP.,
181 EDGEWATER LLC, FARHOUD JABER,

Plaintiffs,

-against-

MUNZER ELAYAAN, PH-FULTON CORP., JOHN AND JANE
DOES 1-20, XYZ CORPORATION/LLCs 1-20,

Defendants.

Index No.: 656160/2016
DECISION/ORDER
Motion Seq. Nos. 01-03

Recitation, as required by CPLR 2219 (a), of the papers considered in reviewing plaintiffs' order to show cause (mot. seq. 01, 02) and defendants' motion to dismiss (mot. seq. 03).

Papers	Numbered
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Plaintiffs' Order to Show Cause	1
Plaintiffs' Affidavit in Support	2
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Papers from Motion Seq. No. 02:	
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Aboushi Law Firm, PLLC, New York (Aymen A. Aboushi of counsel), for plaintiffs.

McKool Smith, P.C., New York (Natasha Romagnoli, Virginia I. Weber, and Elisa Lee of counsel), for defendants Munzer Elayaan and PH-Fulton Corp.

Gerald Lebovits, J.

Motion sequences 01 and 02, in which plaintiffs move for a temporary restraining order to maintain the status quo of 12 Whitwell Place, Staten Island, New York 10304, and motion sequence 03, in which defendants move for partial dismissal of the complaint, are consolidated for disposition.

On November 26, 2016, plaintiffs commenced this action against defendants regarding three different properties,¹ asserting six causes of action — fraud, unjust enrichment, misrepresentation, declaratory judgment, conversion, and prima facie tort — for “unlawfully transferr[ing] the penthouse worth nearly two million dollars to PH-Fulton Corp.,” for “unlawfully plac[ing] a mortgage and lien on the property owned by Whitwell in the amount of \$1,200,000.00,” and for “unlawfully remov[ing] Jaber as the managing member of Edgewater.” (Defendants’ Affirmation in Support, Exhibit A.)

On February 2, 2016, plaintiffs moved for a temporary restraining order “[e]njoining Defendants and anyone acting on their behalf from interfering in any way with the use, right, possession or title to 12 Whitwell Place, Richmond County, NY”² (Plaintiffs’ Order to Show Cause.) The court denied that request. On February 13, 2016, plaintiffs moved for the same relief. Also on February 13, 2016, defendants moved to dismiss plaintiffs’ complaint, claims 1, 3, 5, and 6. (Defendants’ Notice of Motion.)

Plaintiffs’ Order to Show Cause

Plaintiffs’ order to show cause is denied because plaintiff Farhoud Jaber lacks standing to sue on his own behalf and on behalf of plaintiff 12 Whitwell Realty Corp.

For individual to file a claim on a corporation’s behalf, they must be “a holder of shares or of voting trust certificates of the corporation” and establish that they are “such a holder at the time of bringing the action and that he was such a holder at the time of the transaction of which he complains.” (Business Corporation Law §§ 626 [a], [b].) In providing proof of ownership of shares, “corporate and personal tax returns, even when filed with government agencies, are not in and of themselves determinative.” (*Bhanji v Baluch*, 99 AD3d 587, 587-588 [1st Dept 2012] [internal quotation omitted].)

Jaber has failed to establish that he was a holder of shares of 12 Whitwell Realty Corp. The only document he has submitted as proof of his ownership of 12 Whitwell Realty is a 2012

¹ 111 Fulton Street, Penthouse 105, New York, New York 10038; 12 Whitwell Place, Staten Island, New York 10304; and 181 Edgewater Street, Staten Island, New York 10305. (Defendants’ Affirmation in Support, Exhibit A.)

² A pending holdover proceeding exists in Housing Court, Richmond county, under L&T Index No. 50360/17.

New York State e-file tax authorization form listing Jaber as an officer of 12 Whitwell Realty. (Plaintiffs' Affidavit in Support, Exhibit D.) This document alone is insufficient to establish Jaber's ownership of 12 Whitwell Realty. (*See Bhanji*, 99 AD3d at 587-588.)

With respect to Jaber's moving on his own behalf, he does not reside at 12 Whitwell Place and is not a named party in the Richmond County holdover proceeding. (*Asherson v Schuman*, 106 AD2d 340, 341 [1st Dept 2012] ["[T]here existed no privity of estate or contract between appellants and plaintiff, critical to the existence of a landlord-tenant relationship. Thus, plaintiff lacked standing to enjoin the summary proceeding brought [by the landlord]."]) Therefore, Jaber lacks standing to sue in his individual capacity to stop the Richmond County proceeding from going forward. All stays regarding the Housing Court proceeding in Richmond County are vacated.

Defendants' Motion to Dismiss under CPLR 3211 (a) (7)

Defendants' motion to dismiss under CPLR 3211 (a) (7) is granted. Plaintiffs' first, third, fifth, and sixth causes of action are dismissed. On a CPLR 3211 (a) (7) motion to dismiss, the court determines only whether the facts, as a plaintiff alleges them, fit within any cognizable legal theory. (*Nonnon v City of New York*, 9 NY3d 825, 827 [2007].) A court must accept as true the facts alleged in a complaint and give a plaintiff the benefit of every possible favorable inference. (*Nonnon*, 9 NY3d at 827; *Rovello v Orofino Realty Co.*, 40 NY2d 633, 635 [1976]; *Leder v Spiegel*, 31 AD3d 266, 267 [1st Dept 2006].)

Plaintiffs' First and Third Causes of Action

A claim rooted in fraud or misrepresentation must be pleaded with particularity. (CPLR 3016 [b].) A plaintiff pleads fraud or misrepresentation with particularity when the facts provided are sufficient to permit a reasonable inference of the alleged conduct. (*Sargiss v Magarelli*, 12 NY3d 527, 531 [2009].) To assert a claim for fraud, a plaintiff must allege a material misrepresentation of fact, knowledge of its falsity, intent to induce reliance, justifiable reliance by the plaintiff, and damages. (*Eurycleia Partners, LP v Seward & Kissel, LLP*, 12 NY3d 553, 559 [2009].) To assert a claim for (fraudulent) misrepresentation, plaintiffs must allege, among other things, "that they justifiably relied on the plaintiff's alleged misrepresentations, and were injured as a result of those misrepresentations." (*Glezelis v Halkiopoulos*, 61 AD3d 633, 633 [2d Dept 2009].) Absent from plaintiffs first and third causes of action are allegations that the defendants made any fraudulent statements or misrepresentations to plaintiffs on which plaintiffs then relied. (*See Eurycleia Partners, LP*, 12 NY3d at 559.) Plaintiffs' first and third causes of action are dismissed.

Plaintiffs' Fifth Cause of Action

A claim for conversion "must constitute identifiable tangible personal property; real property and interests in business opportunities will not suffice." (*C & B Enterprises USA, LLC v Koegel*, 136 AD3d 957, 958 [2d Dept 2016].) In their amended complaint, plaintiffs allege that

“[a]s a result of the Defendants’ conduct as described herein, the Defendants have converted the property of the Plaintiffs by unlawfully taking ownership of it, depriving the Plaintiffs use of their property, and impugning the clear title to the property. *Defendants’ actions unlawfully converted Plaintiffs property, right to ownership, use, as well as management of Edgewater.* Defendants have unlawfully converted title and ownership of 111 Fulton Street, Penthouse 105, New York, NY 10038, 12 Whitwell Place, Staten Island, NY 10304 and 181 Edgewater Street, Staten Island, NY 10305.” (Defendants’ Affirmation in Support, Exhibit A, ¶¶ 61-63. [Emphasis added].)

Because plaintiffs’ fifth cause of action involves real property and Jaber’s interest in businesses, a cause of action in conversion does not lie. (*See C & B Enterprises USA, LLC*, 136 AD3d at 958.) Plaintiffs’ fifth cause of action is dismissed.

Plaintiffs’ Sixth Cause of Action

A prima facie tort is defined as the infliction of intentional harm, resulting in special damages, without excuse or justification, by an act or series of acts that would otherwise be lawful. (*Freihofner v Hearst Corp.*, 65 NY2d 135, 142–143 [1985]; *Curiano v Suozzi*, 63 NY2d 113, 117 [1984].) A cause of action for a prima facie tort must be pleaded with a particularized statement of the reasonable, identifiable, and measurable special damages. (*Broadway & 67th St. Corp. v City of New York*, 100 AD2d 478, 486 [1st Dept 1984].) Broad and conclusory allegations are insufficient to sustain a cause of action for a prima facie tort. (*Miller v Geloda/Briarwood Corp.*, 136 Misc 2d 155, 157 [Sup Ct, NY County 1987].) Defendant’s intent must be motivated solely by malice or “a disinterested malevolence to injure plaintiff.” (*Havell v Islam*, 292 AD2d 210, 210 [1st Dept 2002].)

In pleading prima facie tort in their amended complaint, plaintiffs failed to plead “a particularized statement of the reasonable, identifiable, and measurable special damages.” (*Broadway & 67th St. Corp.*, 100 AD2d at 486.) Further, plaintiffs’ use broad and conclusory allegations, namely, “Defendants engaged in a series of fraudulent, unauthorized, and unlawful transactions that deprived the Plaintiffs of the lawful right to their property. Defendants’ actions had no legitimate basis in law or fact. Defendants’ sole motivations were to harm the economic and other interest of the Plaintiffs.” (Defendants’ Affirmation in Support, Exhibit A, ¶¶ 61-63. [Emphasis added].)

Also, a prima facie tort should not become a “catch-all” alternative for every cause of action that cannot stand on its legs. (*Belsky v Lowenthal*, 62 AD2d 319, 323 [1st Dept 1978], *aff’d* 47 NY2d 820 [1979].) In this action, plaintiffs’ cause of action for a prima facie tort sounds in fraud — defendants’ alleged series of fraudulent transactions depriving plaintiff of the properties. (*See Eurycleia Partners, LP*, 12 NY3d at 559.) As discussed above, plaintiff’s cause of action for fraud was improperly pleaded. Plaintiffs’ sixth cause of action is dismissed.

Accordingly, it is

ORDERED that seq. no. 01 is denied; and it is further

ORDERED that, under seq. no. 02, all stays regarding Housing Court proceeding in Richmond County, L&T Index No. 50360/17, are vacated, and the Richmond County, Housing Court proceeding may move forward; and it is further

ORDERED that defendants' motion to dismiss plaintiffs' first, third, fifth, and sixth causes of action is granted; and it is further

ORDERED that counsel for all parties shall appear at 111 Centre Street, Room 1127A, Part 7, for a preliminary conference on August 2, 2017, at 10:00 a.m.; and it is further

ORDERED that defendants shall serve a copy of this decision and order with notice of entry on all parties and on the County Clerk's Office, which is directed to enter judgment accordingly.

Dated: May 3, 2017

J.S.C. 
HON. GERALD LEBOVITS
J.S.C.