

99 Commercial St., Inc. v Pels

2018 NY Slip Op 34462(U)

December 7, 2018

Supreme Court, Kings County

Docket Number: Index No. 523479/17

Judge: Wavny Toussaint

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At an IAS Term, Part 70 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 1st day of December, 2018.

P R E S E N T:

HON. WAVNY TOUSSAINT,

Justice.

-----X
99 COMMERCIAL ST., INC.,

Plaintiff,

- against -

Index No. 523479/17

MARSHA PELS, JOHN DOE, JANE DOE and XYZ CORP., the last three names being fictitious and unknown to Plaintiff, the persons or entities intended being as sub-tenants, occupants, persons, or corporations, if any, having or claiming an interest in the leasehold described in the complaint,

Defendants,

MARTIN KENNEDY, BARBARA KENNEDY, KEVIN KENNEDY and BRIAN KENNEDY,

Additional Defendants on the Counterclaims.

-----X

The following papers numbered 1 to 8 read herein:

Papers Numbered

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____

1-2 3-5

Opposing Affidavits (Affirmations) _____

4-5 6-7

Reply Affidavits (Affirmations) _____

6-7 8

Upon the foregoing papers, plaintiff, 99 Commercial St., Inc. (99 Commercial), and counterclaim defendants, Martin Kennedy, Barbara Kennedy, Kevin Kennedy and Brian Kennedy (collectively, the Kennedys), move for an order, pursuant to CPLR 3211 (a) (1), (a) (5), (a) (6) and (a) (7) and 3016 (b), dismissing the counterclaims asserted by defendant Marsha Pels (Pels).

Defendant Pels cross-moves for an order: (1) granting her partial summary judgment dismissing all causes of action asserted in 99 Commercial's complaint, pursuant to CPLR 3212; and (2) severing the counterclaims asserted in her December 28, 2017 verified answer, and allowing those counterclaims to proceed as against 99 Commercial and the Kennedys.

Background

99 Commercial owns the building at 93-99 Commercial Street in Greenpoint, Brooklyn (Building), which consists of loft units regulated under Article 7-C of the New York State Multiple Dwelling Law (Loft Law). Pels occupies unit 1H at the Building, pursuant to a September 9, 1985 lease agreement. Unit 1H has been registered with New York's Loft Board since 2013. Defendants Martin Kennedy and Barbara Kennedy are officers of 99 Commercial. Defendant Kevin Kennedy is the building manager for the subject premises. Defendant Brian Kennedy is the attorney for 99 Commercial.

On December 6, 2017, 99 Commercial commenced this action against Pels, alleging that in December 2015, Pels caused illegal electrical and plumbing/gas work

to be done in Unit 1H, without obtaining the required permits and without the knowledge, authorization, permission or consent of 99 Commercial. Allegedly, Pels altered the gas piping lines, installed an unvented gas heater in the kitchen/living room area and erected a freestanding structure with a suspended ceiling, which obstructed the overhead sprinklers in the subject Unit. As a result, in February 2016, Department of Building (DOB) inspectors issued 5 violations against 99 Commercial, relative to the Unit: (1) violation number 351240176X for an uncapped gas line; (2) violation number 35123846L for gas work without a permit; (3) violation number 35123847N for illegal gas fitting and piping; (4) violation number 35135082Z for electrical work without a permit; and (5) violation number 35135082K for unapproved and unsafe electrical equipment.

In addition to the DOB violations, National Grid allegedly shut off the gas to Unit 1H. On February 18, 2016, Pels, in response, filed a petition against 99 Commercial and the Department of Housing Preservation and Development of the City of New York (HPD) in Kings County Civil Court, Housing Part(Index No. HP 388, hereinafter Housing Court Proceeding), seeking to restore gas service. Pels' petition alleged that respondents violated the City Administrative Code based on the following conditions: (1) "gas turned off 2/3/16"; (2) "no heat, hot water, stove"; (3) "roof leaks everywhere"; (4) "ceiling falling down"; (5) "roof has a dog run: urine and feces"; (6) "no mailbox or intercom"; (7) "garbage moved across street"; (8) "fire exists blocked"; and (9) "rodent infestation." Pursuant to a December 14, 2016

Stipulation of Settlement, Pels “acknowledge[d] that 99 Commercial . . . has conducted repairs and corrected several conditions alleged in her complaint.” The Housing Court Proceeding was discontinued, with prejudice “for allegations *through the date of this Stipulation*” (emphasis added).

According to petitioner, pursuant to the Stipulation, 99 Commercial “was required to remove and/or correct the illegal electrical work and illegal plumbing/gas work in Unit 1H caused by Pels, and the several resulting DOB violations issued against [it].” 99 Commercial further alleges that it “spent considerable time and expense to cure the illegal electrical work and illegal plumbing/gas work in Unit 1H caused by Pels, including electric and plumbing contractor fees, DOB and ECB¹ fines and penalties, and legal fees to respond to the DOB violations at ECB hearings.”

99 Commercial asserted the following 5 causes of actions against Pels: (1) breach of lease; (2) property damage; (3) waste; (4) a judgment declaring that “the Loft Law provides no prohibition of enforcement of any applicable code (such as building and fire code, and safety and fire protection standards) for Unit 1H and no exemption for Pels from responsibility for any illegal alterations and conditions in the subject unit caused by her”; and (5) a permanent injunction “enjoin[ing] Pels from making or causing to be made illegal alterations and conditions to Unit 1H.”

¹ New York City Environmental Control Board.

Pels' Answer with Counterclaims

On December 29, 2017, Pels answered the complaint, denying the material allegations therein and asserting several affirmative defenses. In addition, Pels asserted the following 11 counterclaims against 99 Commercial and the Kennedys : (1) harassment in violation of Real Property Law (RPL) § 235-d; (2) breach of the warranty of habitability under RPL § 235 (b); (3) harassment and retaliatory eviction in violation of RPL §§ 223-b and 235-d; (4) abuse of legal process “by commencing and serving three (3) summary nonpayment proceedings . . .”; (5) malicious prosecution “by commencing and serving three (3) summary nonpayment proceedings against [Pels] . . .”; (6) malicious prosecution “[i]n commencing and litigating an action for defamation, tortious interference with contract, and injunction in Supreme Court, Westchester County . . .”; (7) commencing “strategic lawsuits against public participation [that] were filed with the intent to harass [Pels] . . .”; (8) for intentional infliction of emotional distress; against 99 Commercial for (9) breach of the lease; and (10) against Kevin and Brian Kennedy for “engag[ing] in deceit and collusion . . . with the intent of deceiving [Pels] and the Courts as to [Pels]’ rights under the Loft Law, in violation of Judiciary Law § 487 (1) . . .”; and (11) against 99 Commercial for an award of attorneys’ fees, pursuant to the lease.

In support of her counterclaims, Pels alleges that 99 Commercial and the Kennedys “embarked upon a systematic and escalating campaign of harassment against [her]” including “a fraudulent scheme to fabricate evidence of [Pels]’ status

as a ‘commercial’ tenant for the purpose of undermining her judicially acknowledged Loft Law rights” after she sought rent regulatory protection under the Loft Law in November, 2010.

99 Commercial and the Kennedys’ Dismissal Motion

99 Commercial and the Kennedys collectively move for an order, pursuant to CPLR 3211 and 3016, dismissing Pels’ counterclaims. They contend that “the circumstances constituting such ‘fraudulent scheme’ and ‘deceit and collusion’ are not stated in detail, as required for pleading purposes.” Additionally, movants argue that the Kennedys, who are corporate officers and/or shareholders of 99 Commercial, cannot be held personally liable as “Pels fails to make allegations in the counterclaims sufficient to show that each of the individual Kennedys abused or perverted doing business in the corporate form.” The movants further contend that “Pels’ counterclaims against each of the individual Counterclaim Defendants for intentional torts and under RPL 223-b are subject to the one-year limitation, and thus, are time-barred.” The movants also argue that “[t]he Court should preclude [Pels’] counterclaims under the doctrine[s] of collateral or judicial estoppel, res judicata, and prior settlement” because “Pels rehashes the same complaints in her counterclaims that were previously raised, and then settled . . . in [the Housing Court Proceeding].”

The movants further assert that Pels’ counterclaims, as pleaded, are legally insufficient. They contend that the first and fourth counterclaims for harassment

and retaliation “do[] not embrace a landlord’s attempt to enforce its rights under a lease.” The movants contend that the second and third counterclaims for breach of the warranty of habitability and breach of the lease, respectively, are subject to dismissal because they fail to allege “a clear violation of the terms of the lease, and an alleged condition which is dangerous, hazardous, or detrimental to the tenant’s life, health, or safety.” The movants argue that Pels’ fifth counterclaim for abuse of process fails to allege “the deliberate premeditated infliction of economic injury without economic or social excuse or justification.” In addition, the movants contend that the sixth and seventh counterclaims for malicious prosecution do not sufficiently allege that the prior lawsuits lacked probable cause or involved malice. The movants argue that Pels’ eighth counterclaim fails because they “cannot be deemed as public applicants or permittees, and Plaintiff’s action is not materially related to any of Defendant’s efforts.” They argue that Pels’ ninth counterclaim fails to allege conduct that was sufficiently outrageous and extreme to support a claim for intentional infliction of emotional distress.

Pels’ Opposition and Summary Judgment Cross Motion

Pels’ cross motion is supported by her affidavit, in which she attests that her gas was shut off in February 2016, because National Grid found “flex hoses” on unit heaters, which “were installed by Landlord and the Kennedys before 1995.” Pels explains that she commenced the Housing Court Proceeding against 99 Commercial for “among other things, its failure to restore gas service to [her] Premises for ten

(10) months.” Pels asserts that the instant action “is simply the latest salvo in Landlord and the Kennedys’ years-long and ongoing campaign of harassment directed against the protected tenants of the building.”

Pels also submits an attorney affirmation asserting that “Landlord is unlawfully attempting to shift its own legal obligations to legalize, maintain, and repair the Premises onto Pels . . .” Defense counsel contends that 99 Commercial’s claims are all barred because “Multiple Dwelling Law [MDL] § 284 imposes the burden to obtain a certificate of occupancy, which by necessity requires the curing of violations, by the ‘owner’ and not the ‘occupant.’” According to counsel, “no conceivable set of facts could ever support Landlord’s recovery of money damages from Pels, or an award of declaratory or injunctive relief, relating to illegal conditions at the Premises that are Landlord’s sole responsibility to correct.”

Pels’ counsel, argues that Pels’ settlement of the Housing Court Proceeding does not bar her from asserting counterclaims because “[t]he scope of the settlement only included the ‘allegations through the date of th[e] stipulation.’” Defense counsel also argues that, unlike the claims in the Housing Court Proceeding, Pels’ counterclaims here do not allege violations of the New York City Administrative Code. Defense counsel further contends that Pels’ counterclaims are not time-barred because “Landlord’s harassment of Pels, breach of lease, and breach of warranty of habitability, are continuously accruing and ongoing.”

Regarding Pels' counterclaims against the Kennedys, defense counsel argues both that the doctrine of piercing the corporate veil "is not relevant here" and "is warranted here." Defense counsel explains that RPL § 235-d "prohibits the harassment of tenants by landlords 'or any person acting on his behalf.'" He further argues that the Kennedys are "owners" under the applicable provisions of the MDL. Defense counsel contends that "the elements of the doctrine of piercing the corporate veil are also satisfied" because "[e]ach and every one of the Kennedys' harassing acts . . . constitutes an abuse of the privilege of doing business in the corporate form . . ."

99 Commercial and the Kennedys' Reply and Opposition

In reply and in opposition to Pels' summary judgment cross motion, movants submitted an affidavit from Kevin Kennedy, the Building's manager, in which he primarily denies the factual allegations made in support of Pels' counterclaims. Kevin Kennedy attests that "99 Commercial is taking all necessary and reasonable action for the legalization of the Building. However . . . the illegal alterations and conditions caused by Defendant . . . has caused and/or contributed to delay in the legalization process . . ." Kevin Kennedy further attests that "National Grid shut off the gas in Unit 1H because of Defendant's illegal, unsafe, and unpermitted gas tampering and unvented gas heater installation."

Movants further argue that Pels "is not immunized [from liability] just because she is a Loft Law tenant." They also contend that "the accompanying affidavit of Kevin Kennedy . . . contradicts in detail each and every allegation that Defendant

purports as the basis for her counterclaims.” Regarding the counterclaims against the Kennedys, the memorandum of law argues that “there is no real allegation . . . that [the Kennedys] control the corporation or that [they] individually abused the corporate form to commit some kind of wrong against Defendant.”

Discussion

99 Commercial and the Kennedys’ Dismissal Motion

“In determining whether a complaint is sufficient to withstand a motion to dismiss pursuant to CPLR 3211 (a) (7) ‘the sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail’” (*Quinones v Schaap*, 91 AD3d 739, 740 [2d Dept 2012] [quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 (1977)]). “The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference” (*Hense v Baxter*, 79 AD3d 814, 815 [2d Dept 2010]). Affidavits submitted in support of a motion to dismiss, which contradict factual allegations in the complaint cannot, establish the failure to state a legally cognizable cause of action (*Alsol Enterprises, Ltd. v Premier Lincoln-Mercury, Inc.*, 11 AD3d 493, 494 [2d Dept 2004]). In contrast, “a court may consider any factual submissions made in opposition to a motion to dismiss in order to remedy pleading defects” (*Quinones*, 91 AD3d at 740).

Pels' first counterclaim against 99 Commercial and the Kennedys is for harassment in violation of RPL § 235-d. That section "prohibits a landlord or a person acting on its behalf from engaging in a course of conduct intended to cause a tenant to vacate the premises . . ." (*Visken v Oriole Realty Corp.*, 305 AD2d 493, 494 [2d Dept 2003]). Pels alleges that movants' "installation of an illegal unit heater in the Premises connected to gas service with flexible tubing [caused] National Grid [to] shut off Defendant's gas service, which was not restored for another ten (10) months" and movants "intended to cause Defendant to vacate the Premises and the Building and to surrender Defendant's rights under the written leases . . ." These allegations sufficiently state a claim for harassment, pursuant to RPL § 235-d.

Pels' second counterclaim against 99 Commercial and the Kennedys sufficiently pleads a breach of the implied covenant of habitability in violation of RPL § 235-b, as the alleged failure to provide heat can constitute a breach of the warranty of habitability under RPL § 235-b (*see Leris Realty Corp. v Robbins*, 95 Misc 2d 712, 714 [Civ Ct. New York County 1978]).

Pels' third counterclaim against 99 Commercial for breach of the lease is subject to dismissal because Pels fails to identify any provision of her lease that was breached (*767 Third Ave. LLC v Greble & Finger, LLP*, 8 AD3d 75, 75 [2d Dept 2004] [holding that "Plaintiff's failure to identify any portion of the lease allegedly breached was fatal to its cause of action for breach of contract"]).

Pels' fourth counterclaim alleges that 99 Commercial and the Kennedys "have engaged in the illegal harassment and retaliatory eviction of a rent-regulated tenant . . ." in violation of RPL §§ 223-b and 235-d. RPL § 223-b provides for a rebuttable presumption of retaliation where a landlord serves a notice to quit or commences a proceeding to recover possession *within six months after* the tenant makes a complaint to a governmental authority of the landlord's violation of any health or safety law, regulation, code, or ordinance (*see Barr v Huggins*, 41 Misc 3d 605, 610-611 [Civ Ct Bronx County 2013]). Pels' fourth counterclaim for retaliation is based on her November 2010 application with the New York City Loft Board for coverage under the Loft Law. Because the alleged retaliation took place several years after Pels' 2010 application to the Loft Board, her claim is subject to dismissal. Additionally, to the extent that Pels' fourth counterclaim is premised on a violation of RPL § 235-d, it is subject to dismissal because it is duplicative of her first counterclaim.

Pels' fifth through eighth counterclaims asserted against 99 Commercial and the Kennedys are for abuse of legal process (5th counterclaim), malicious prosecution (6th and 7th counterclaims) and for commencing "strategic lawsuits against public participation [that] were filed with the intent to harass [Pels] . . ." (8th counterclaim).

Pels' fifth and sixth counterclaims are based on the alleged commencement of "three (3) non-payment special proceedings against Defendant when Plaintiff was

statutorily barred from recovering rent from Defendant . . .” Pels confirms that “[u]pon review, I have not found records of any such proceedings and withdraw my allegation to that extent.” Consequently, dismissal of Pels’ fifth and sixth counterclaims is warranted.

Pels’ seventh counterclaim against 99 Commercial and the Kennedys is based on the allegations that Kevin Kennedy “maliciously initiated” “an action for defamation, tortious interference with contract, and injunction in Supreme Court, Westchester County against Defendant . . .” “The elements of the tort of malicious prosecution of a civil action are (1) prosecution of a civil action against the plaintiff, (2) by or at the instance of the defendant, (3) without probable cause, (4) with malice, (5) which terminated in favor of the plaintiff, and (6) causing special injury” (347 Cent. Park Assocs., LLC v Pine Top Assocs., LLC, 144 AD3d 785, 785-786 [2d Dept 2016], *lv denied*, 29 NY3d 909 [2017] [internal quotations omitted]). In support of her seventh counterclaim, Pels makes the conclusory, unsubstantiated allegation that she incurred “special injuries . . . including but not limited to attorneys’ fees, interference with Defendants’ business, and damage to reputation . . .” However, “[t]he mere bringing of a civil suit, even if groundless and ill motivated, does not result in special damage or injury sufficient to sustain an action for malicious prosecution” (*Hornstein v Wolf*, 109 AD2d 129, 132 [2d Dept 1985], *aff’d*, 67 NY2d 721 [1986]). Furthermore, “in order to set forth a cause of action to recover damages for malicious prosecution, more than conclusory, unsubstantiated

allegations are necessary” (*id.* at 133). Dismissal of Pels’ seventh counterclaim for malicious prosecution is warranted.

Pels’ eighth counterclaim alleges that 99 Commercial and the Kennedys commenced three non-payment proceedings (now withdrawn) and the defamation action in Westchester County, which were “strategic lawsuits against public participation . . .” (SLAPP) “to discourage Defendant and other tenants in the Building from asserting their rights and speaking out in the future regarding a vindictive campaign of harassment, mismanagement of the Building, and incompetence in the field of property ownership/management . . .” in violation of the New York Civil Rights Law. “The anti-SLAPP statute is intended for the protection of citizens facing litigation arising from their public petitioning and participation” (*Bridge Capital Corp. v Ernst*, 61 AD3d 496 [1st Dept 2009] [internal quotations omitted]). Here, Pels does not allege that she engaged in the type of public advocacy or participation protected under the anti-SLAPP statute, and thus, dismissal of the eighth counterclaim is warranted.

Pels’ ninth counterclaim against 99 Commercial and the Kennedys for intentional infliction of emotional distress is also subject to dismissal. “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” (*Brunache v MV Transp., Inc.*, 151 AD3d 1011, 1014 [2d Dept 2017] [internal

quotations omitted]). Even accepting as true the allegations made in support of Pels' counterclaim, and according Pels the benefit of every possible favorable inference, 99 Commercial and the Kennedys' alleged conduct was not so outrageous or extreme as to support a claim for intentional infliction of emotional distress.

Pels' tenth counterclaim is asserted against Kevin and Brian Kennedy for allegedly "engag[ing] in deceit and collusion . . . with the intent of deceiving [Pels] and the Courts as to [Pels'] rights under the Loft Law, in violation of Judiciary Law § 487 (1) . . ." by commencing the defamation action in Westchester County. "Since Judiciary Law § 487 authorizes an award of damages only to 'the party injured,' an injury to the plaintiff resulting from the alleged deceitful conduct of the defendant attorney is an essential element of a cause of action based on a violation of that statute" (*Gumarova v Law Offices of Paul A. Boronow, P.C.*, 129 AD3d 911 [2d Dept 2015] [internal quotations omitted]). Pels' tenth counterclaim is dismissed as it fails to allege that Pels suffered an injury proximately caused by any alleged deceit or collusion on the part of Kevin and Brian Kennedy, and no such injury can reasonably be inferred from the allegations in the complaint.

Pels' eleventh counterclaim against 99 Commercial seeks an award of attorneys' fees, pursuant to "the governing lease as extended by operation of law, and by operation of law . . ." However, a copy of the lease agreement in the record contains a provision requiring the tenant to reimburse the landlord for attorneys' fees incurred as a result of tenant's default. "Under the general rule in New York,

attorneys' fees are deemed incidental to litigation and may not be recovered unless supported by statute, court rule or written agreement of the parties" (*Flemming v Barnwell Nursing Home & Health Facilities, Inc.*, 15 NY3d 375, 379 [2010]; see also *Hooper Assocs., Ltd. v AGS Computers, Inc.*, 74 NY2d 487, 491 [1989]; *Rosenthal v Rosenthal*, 151 AD3d 773, 774 [2017] [same]). For these reasons, Pels' eleventh counterclaim for an award of attorneys' fees is dismissed.

Pels' Cross Motion for Summary Judgment

Summary judgment is a drastic remedy and should be granted only when it is clear that no triable issues of fact exist (see *Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). The moving party bears the burden of prima facie showing its entitlement to summary judgment as a matter of law by presenting evidence in admissible form demonstrating the absence of any material issue of fact (see CPLR 3212 [b]; *Giuffrida v Citibank Corp.*, 100 NY2d 72 [2003]). Failing to make that showing requires denying the motion, regardless of the adequacy of the opposing papers (see *Vega v Restani Constr. Corp.*, 18 NY3d 499, 502 [2012]; *Ayotte v Gervasio*, 81 NY2d 1062 [1993]). Making a prima facie showing then shifts the burden to the opposing party to produce sufficient evidentiary proof to establish the existence of material factual issues (see *Alvarez*, 68 NY2d at 324; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980])

Pels' contention that 99 Commercial's claims are all barred by MDL § 284, as a matter of law, is unsupported. Under MDL § 284, "[a]n owner must prove

compliance with legalization requirements *in order to maintain a non-payment proceeding*" (*Cty. Dollar Corp. v Douglas*, 160 AD2d 537, 538 [1990] [emphasis added]). 99 Commercial's claims asserted in this action for breach of Pels' lease, property damage, waste and for declaratory and injunctive relief do not seek rental payments from Pels, and thus, are not barred.

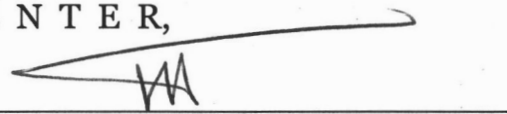
There are issues of fact regarding the electrical and plumbing/gas work performed in Unit 1H, and whether, among other things, these alterations were made by Pels without the landlord's prior authorization and consent, as required under the lease agreement. As the parties have not had an opportunity to conduct any discovery regarding these matters, summary judgment is denied at this time. Accordingly, it is

ORDERED that 99 Commercial and the Counterclaim Defendants' motion to dismiss Pels' counterclaims is granted to the extent that the third, fourth, fifth, sixth, seventh, eighth, ninth, tenth and eleventh counterclaims are hereby dismissed; and is further

ORDERED that Pels' cross motion for partial summary judgment dismissing the complaint is denied with leave to renew at the conclusion of discovery.

This constitutes the decision and order of the court.

E N T E R,



J. S. C.

**HON. WAVNY TOUSSAINT
J. S. C.**

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FILED
KINGS COUNTY CLERK