

Beach v Ginder

2011 NY Slip Op 33721(U)

March 11, 2011

Sup Ct, New York County

Docket Number: 106201/10

Judge: Eileen A. Rakower

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

PRESENT: HON. EILEEN A. RAKOWER
Justice

PART 15

Index Number : 106201/2010
BEACH, DAVID
VS.
GINDER, JASON
SEQUENCE NUMBER : 003
DISMISS ACTION

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

1
2
3

notice of motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

FILED

MAR 17 2011

NEW YORK
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.**

Dated: 3/16/11



HON. EILEEN A. RAKOWER

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG. SETTLE ORDER/ JUDG.

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

FILED

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 15

MAR 17 2011

DAVID BEACH and YANILEFF BEACH

NEW YORK
COUNTY CLERK'S OFFICE

Plaintiffs,

Index No.106201/10

- against -

Mot. Seq. 003
Decision and Order

JASON GINDER, KAREN GINDER, TANIA GINDER,
CHARLES II. GREENTHAL MANAGEMENT CORP.
and SAINT-JAMES TOWER CONDO ASSOCIATION,

Defendants.

-----X
HON. EILEEN A. RAKOWER, J.S.C.

Plaintiffs, a couple residing in the St. James Tower, located at 415 East 54th Street in the County and State of New York, bring this action for damages incurred as a result of encounters with their neighbors, the Ginders, also residing in the same building. These encounters culminated in Jason Ginder assaulting David Beach in January 26, 2010. Jason Ginder later entered a plea of guilty in the Criminal Court to violating Penal Law §240.20 based upon his actions of January 26, 2010. The Ginders, Jason and Karen, a married couple, and Tania, Jason's mother, bring separate motions to dismiss various causes of action as against each of them individually. The instant motion, brought by Karen Ginder, seeks dismissal of the 2nd, 7th and 9th Causes of action as against her. Plaintiffs oppose.

The second cause of action accuses Karen Ginder of inciting and aiding and abetting a battery. It alleges that Karen threatened David Beach as he was about to board an elevator that she was in, that she threatened to contact her husband, that David did not board the elevator, that soon after David exited the service elevator and walked toward the sidewalk, that Karen was standing on the sidewalk in front of the building, that Jason ran toward David yelling to Karen "is that the guy," and Jason proceeded to assault David.

A cause of action for inciting and aiding and abetting a battery must allege evidence that Karen committed an overt act in furtherance of the battery, acted in concert to plan the battery, or asked that the battery be committed. It is satisfied where the evidence shows that Karen encouraged the battery and such encouragement was a substantial factor in causing the battery.

On a motion to dismiss under CPLR 3211(a)(7) "...the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory." (*Ladenburg Thalmann & Co., Inc. v. Tim's Amusements, Inc.*, 275 AD2d 243, 245 [1st Dept. 2000]).

Here, the focus is on the period of time between when Karen first encountered David while she was on the elevator, threatened him, and went down without him and when David again sees her on the sidewalk in front of the building. During that time, David alleges he opted not to join her on the elevator, went back to his apartment, reported the incident by telephone to building personnel, returned to the service elevator, went down with his dog and saw Karen next while she was on the sidewalk outside the building.

Movant urges that plaintiffs fail to articulate specific facts which demonstrate that Karen encouraged the battery or asked that the battery be committed. However, it is reasonable to infer that during that period noted above, Karen had some communication with Jason, who, running toward David, asked her, "is that the guy?" According plaintiff every possible favorable inference, the motion to dismiss must be denied.

Karen next urges that the 7th cause of action, alleging intentional infliction of emotional distress, must be dismissed. Unlike the 2nd cause of action, which speaks to the events of January 26, 2010, the 7th cause of action speaks to a course of conduct that spanned more than three years, and culminated in the January 26, 2010 incident. The complaint alleges:

Commencing on or about June, 2006 defendants Karen Ginder and Tania Ginder began engaging in a campaign of verbal harassment and intimidation directed towards Plaintiffs and their young children. Tania Ginder and Karen Ginder claimed that Plaintiffs' dog was an "evil,

devil-dog” and would shout, yell and utter profanities directed at Plaintiffs, as well as their family and friends. These profanities and insults would be uttered when Plaintiffs or their children would encounter Tania Ginder and Karen Ginder in and around the St. James Tower. Such conduct continued on a regular basis from June, 2006 through January, 2010.

Karen argues that the seventh cause of action is duplicative of the torts alleged in the 2nd and 4th causes of action (the 4th cause of action alleges nuisance in defendants repeatedly and regularly directing profanities at plaintiffs). Karen points out that “a cause of action for intentional infliction of emotional distress is defective as a matter of law if it is duplicative of other tort or contract causes of action in the complaint.”

Plaintiffs, in opposition, argue that the 7th cause of action is not duplicative. Indeed, Nuisance does not requires extreme and outrageous conduct, and intentional infliction of emotional distress does not require that the conduct be related to plaintiffs’ use and enjoyment of their home. Thus, plaintiffs urge that these alternative pleadings stand.

Plaintiffs have alleged a campaign of harassment, which on its face, is sufficient to survive a motion to dismiss. Indeed, as plaintiffs point out, “there could be a fuller record developed following discovery setting forth further evidence of outrageousness beyond the general allegations of the complaint.” (*See 164 Mulberry St. Corp. v. Columbia University*, 4 AD3d 49 [1st Dept. 2004]).

Finally, both sides agree that the 9th cause of action for loss of services will survive a motion to dismiss if the 2nd cause of action remains. In light of the above, the motion to dismiss the 9th cause of action is denied.

Wherefore, it is hereby

ORDERED that the motion is to dismiss is denied in its entirety.

Dated: March 11, 2011


Eileen A. Rakower, J.S.C.

FILED

MAR 17 2011

NEW YORK
COUNTY CLERK'S OFFICE