AA Senior Relation Assoc. v Hillock, LLC
2016 NY Slip Op 32911(U)
September 22, 2016
Supreme Court, Queens County
Docket Number: 1871/2013
Judge: Robert J. McDonald
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SHORT FORM ORDER

FILED
SEP 29 2016
COUNTY CLERK
QUEENS COUNTY

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : **HON. ROBERT J. MCDONALD**
Justice

- x

AA SENIOR RELATION ASSOC. and CHUN HYUNG LEE,

Plaintiffs,

- against -

HILLOCK, LLC,

Defendant.

- x

AMENDED ORDER

Index No.: 1871/2013

Motion Date: 8/1/16

Motion No.: 1

Motion Seq.: 3

The decision dated August 8, 2016 and entered on August 11, 2016 is hereby amended only to the extent that the index number, motion date and sequence number are corrected. The decision dated August 8, 2016 and entered on August 11, 2016 shall remain in full force and effect.

The following papers numbered 1 to 10 read on the motion by defendant, HILLOCK, LLC, for an order pursuant to CPLR 2005 and 5015(a), quashing the Note of Issue and Certificate of Readiness and the subsequent assignment of this case to the trial scheduling part; vacating defendant's default in answering plaintiff's September 9, 2015 Motion to Restore; and renewing defendant's previously filed summary judgment motion:

	Papers Numbered
Order to Show Cause-Affidavits-Exhibits	1 - 5
Affirmation in Opposition-Exhibits	6 - 8
Reply Affirmation	9 - 10

This is an action to recover damages due to the alleged destruction of plaintiffs' property by defendant, the owner of the building located at 45-19 162nd Street Flushing New York, 11358. Plaintiffs allege that in March 2012, defendant accepted plaintiffs as occupants of its building. Plaintiffs did not sign a lease with defendant, but did sign a sublease agreement with the prior tenant, 99 Antiaging Management, LLC. Plaintiff alleges that it made renovations to the space prior to moving in and opened its business, a senior center on May 1, 2012. Plaintiff asserts it also hired an architect to comply with defendant's request for

permits and a new certificate of occupancy. Plaintiff alleges that in June 2012 the building owner entered plaintiffs' senior center with three construction workers and "dismantled, destroyed, damaged, ruined, and tore down all of plaintiffs' new improvements." Plaintiffs further allege that the owner damaged the kitchen, air conditioning, heating, electrical and water such that the premises were not habitable. Based upon the above allegations, plaintiff asserts causes of action for intentional and negligent damage to property, intentional infliction of emotional distress based upon plaintiffs suffering physical injuries due to defendant's damage to plaintiff's premises, constructive eviction, and punitive damages.

Issue was joined by service of defendant's verified answer with affirmative defenses dated April 15, 2013. Plaintiff filed a Note of Issue on May 2, 2014 and the matter appeared on the Trial Scheduling Part's Calendar for December 2, 2014. Neither party appeared for trial and the matter was dismissed by the Court. Thereafter, defendant moved to dismiss the complaint for failure to state a cause of action. By Short Form Order dated December 23, 2014, this Court denied defendant's motion as academic since the complaint was already dismissed.

On or about September 9, 2015, plaintiff moved to restore this matter. Defendant failed to oppose the motion, and this Court restored the matter to the trial calendar. Plaintiff filed a new Note of Issue on October 16, 2015, and this matter is currently on the Trial Scheduling Part's Calendar for September 13, 2016. Defendant now seeks to vacate the Note of Issue, vacate its default in opposing the motion to restore, and restore its prior motion to dismiss.

Upon a review of the Order to Show Cause, opposition, and reply thereto, this Court finds as follows:

Defendant has failed to demonstrate grounds to vacate the Note of Issue. Pursuant to 22 NYCRR 202.21(3), to vacate a Note of Issue when there is a discovery dispute, a party must move to vacate the Note of Issue within 20 days after service of the Note of Issue and must demonstrate that the Certificate of Readiness is incorrect in some material way. It is undisputed that the Note of Issue was filed on October 16, 2015. Defendant does not contest service of the Note of Issue. Thus, defendant failed to timely move to vacate the Note of Issue. Additionally, defendant fails to set forth what discovery is currently pending and fails to include an affirmation of good faith regarding any attempts to resolve any discovery issues.

Turning to defendant's request to vacate its default in answering plaintiff's motion to restore, as a reasonable excuse

for its default defendant contends that it did not receive the motion to restore until after the return date. In the interest of justice and to further the general policy of the judicial system to have cases decided on the merits, plaintiff's motion to restore the action to the trial calendar would have been granted even if defendant's opposition was considered as defendant failed to demonstrate that plaintiffs lack a meritorious cause of action.

Lastly, as defendant's prior motion to dismiss was denied as academic due to this matter being marked off the trial calendar, defendant's branch of its application to renew the motion to dismiss pursuant to CPLR 3211(a)(7) is granted and will be decided herein.

It is well settled that in considering a motion to dismiss for failure to state a cause of action pursuant to CPLR 3211(a)(7), the pleadings must be liberally construed. The sole criterion is whether, from the complaint's four corners, factual allegations are discerned which taken together manifest any cause of action cognizable at law (Leon v Martinez, 84 NY2d 83 [1994]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; Rochdale Vil. v Zimmerman, 2 AD3d 827 [2d Dept. 2003]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see Morone v Morone, 50 NY2d 481 [1980]; Gertler v Goodgold, 107 AD2d 481 [1st Dept. 1985], affirmed 66 NY2d 946 [1985]). The Court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (see EBC I, Inc. v Goldman, Sachs & Co., 5 NY3d 11 [2005]; Guggenheimer v Ginzburg, 43 NY2d 268 [1977]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]).

Generally, the test of the sufficiency of the complaint is whether it gives sufficient notice of the transaction, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (see Moore v Johnson, 147 AD2d 621 [1989]; JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802 [2d Dept. 2010]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) (see CPLR 3211[c]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]). Moreover, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (see Leon v Martinez, 84 NY2d 83 [1994]). When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see Basile v Wiggs, 98 AD3d 640 [2d Dept. 2012]).

Defendant submits the affidavit of Mun Sung Park, the Manager

of defendant, who affirms that he never had any knowledge that plaintiffs were occupants of the subject premises. He further affirms that plaintiffs are "strangers to Defendant".

Plaintiff Chun Hyung Lee submits as affidavit stating that he is the president of AA Senior Relation Association, and that defendant's manager trespassed and cut off water and air conditioning to the premises occupied by plaintiffs. Additionally, he affirms that defendant barged in with three workmen and destroyed necessary internal facilities.

Here, viewing the factual allegations of the complaint as true, and based on the affidavits of the parties, this Court finds that the complaint sufficiently sets forth a cause of action for intentional and negligent damage to property, intentional infliction of emotional distress based upon plaintiffs suffering physical injuries due to defendant's damage to plaintiff's premises, constructive eviction, and punitive damages based upon defendants' wilful and wanton acts. Additionally, any issues of credibility must be determined by the trier of fact rather than on a motion for summary judgment or a motion to dismiss (see Conciatori v Port Auth. of N. Y. & N. J., 46 AD3d 501 [2d Dept. 2007]).

Accordingly, and based on the above reasons, it is hereby

ORDERED, that defendant's application to vacate the Note of Issue is denied and this matter shall remain on the Trial Scheduling Part's Calendar for September 13, 2016; and it is further

ORDERED, that defendant's branch of its application to vacate its default in answering plaintiff's September 9, 2015 motion to restore is granted and upon considering the opposition to the motion to vacate, the decision to restore this matter is adhered to in its entirety; and it is further

ORDERED, that defendant's branch of its application to renew its previously filed motion to dismiss is granted, and upon renewal, defendant's motion to dismiss is denied in its entirety.

Dated: September 22, 2016
Long Island City, N.Y.

ROBERT J. MCDONALD
J.S.C.

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