149 Mercer Owner LLC v 151 Mercer Retail LLC
2017 NY Slip Op 32569(U)
December 5, 2017
Supreme Court, New York County
Docket Number: 656649/2016
Judge: Robert R. Reed
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 43

149 MERCER OWNER LLC and 149 MERCER REALTY LLC, Plaintiffs, -against- 151 MERCER RETAIL LLC, TORY BURCH LLC, SKANSKA USA BUILDING INC., THORNTON TOMASETTI, INC. and LANGAN ENGINEERING ENVIRONMENTAL SURVEYING & LANDSCAPING ARCHITECTURE, D.P.C., Defendants.	Index No. 656649/2016 Motion Seq. No. 002 **DECISION AND ORDER**

Robert R. Reed, J.:

In motion sequence number 002, plaintiffs 149 Mercer Owner LLC and 149 Mercer Realty LLC (collectively, Mercer) move to dismiss all the counterclaims asserted against them by defendant Tory Burch LLC (Burch), under CPLR 3211 (g), and Civil Rights Law §§ 70-a and 76-a (hereinafter, the SLAPP Statute), and to recover from Burch its attorneys' fees and costs, under Civil Rights Law § 70-a (1) (a). In the alternative to dismissal under the SLAPP Statute, Mercer seeks dismissal of five of Burch's six counterclaims for failure to state a cause of action under CPLR 3211 (a) (7). For the reasons set forth below, Mercer's motion under the SLAPP Statute, to dismiss all of

Burch's counterclaims and to recover attorneys' fees and costs, is denied. Mercer's motion to dismiss under CPLR 3211 (a) (7) is granted with respect to Burch's fourth and sixth counterclaims, but denied with respect to Burch's first, third and fifth counterclaims.[1]

BACKGROUND

This action arises out of allegations of damage to a building at 149 Mercer Street in New York County (149 Mercer), caused by construction work performed at the adjoining property at 151 Mercer Street (the Project).

Plaintiff 149 Mercer Owner LLC, a New York limited liability company, is the owner of 149 Mercer. Plaintiff 149 Mercer Realty LLC, also a New York limited liability company, is the net lessee of 149 Mercer. Defendant Burch is a retailer, a Delaware limited liability company, and the net lessee of the property located at 151 Mercer Street.

In its verified complaint, dated December 19, 2016, and in the papers it submitted herein, Mercer alleges that work performed on the Project, from 2015 through the date of this motion, caused structural and other damage to 149 Mercer's adjoining foundation wall, and flooding in its basement. This work included the demolition of the existing building at 151

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[1] Mercer did not move under CPLR 3211 (a) (7) to dismiss Burch's second counterclaim, for declaratory judgment.

Mercer and the start of construction of a new building on the site. Mercer also alleges that, among other things, Burch failed to dig diagnostic test pits, to help Mercer determine the existence, nature and extent of the damage to 149 Mercer, and failed to make full repairs to the damage caused by the work performed on the Project.

The causes of action Mercer asserts against Burch, and the other defendants, are: (1) strict liability for violation of the New York City Building Code; (2) negligence; and (3) breach of contract, requiring defendants to repair damage caused by the Project, to indemnify Mercer for any damage caused to 149 Mercer, and to indemnify it for any costs and expenses incurred because of the Project.[2]

In its verified answer with cross and counterclaims and third-party complaint, dated February 22, 2017 (Answer), Burch denies that construction work on the Project caused any damage to 149 Mercer. It also alleges that, despite its efforts to cooperate with Mercer, to monitor the effects of its construction work and to ensure that it caused no damage to 149 Mercer, Mercer refused to enter a license agreement with Burch to facilitate these efforts, and instead made bad-faith efforts

[2] Mercer also asserts a claim for contractual indemnification against defendant Skanska USA Building Inc. as its fourth cause of action.

to stop any further construction. Burch contends that Mercer's bad-faith efforts included making repeated unsubstantiated complaints to the New York City Department of Buildings (DOB).

Burch asserts five counterclaims: (1) tortious interference with prospective business advantage; (2) declaratory judgment, to define the parties' rights and obligations regarding 149 Mercer and construction work on the Project; (3) private nuisance; (4) public nuisance; (5) breach of contract; and (6) breach of the implied covenant of good faith and fair dealing.

By motion brought by order to show cause, entered August 25, 2017, bearing motion sequence number 003, Mercer sought a preliminary injunction barring, among other things, all further work on the Project until after Mercer's engineers, in their sole discretion, determined that all repairs to 149 Mercer which they deemed necessary had been "performed and completed."

On September 7, 2017, the Court held a hearing on Mercer's application for an injunction. At the close of the hearing, the Court denied Mercer's motion for preliminary injunctive relief.

DISCUSSION

Mercer moves to dismiss Burch's counterclaims, contending that they are meritless and asserted solely to stifle Mercer's exercise of its rights to public petition and participation, in violation of the SLAPP Statute. Mercer also seeks to recover

its attorneys' fees and costs under the SLAPP Statute. Mercer further contends that, even if it is determined that Burch's counterclaims do not violate the SLAPP Statute, Burch's first, third, fourth, fifth and sixth counterclaims still fail to state causes of action and so should be dismissed under CPLR 3211 (a) (7).

Burch denies Mercer's allegations, contending that its counterclaims do not violate the SLAPP Statute, so neither dismissal nor an award of attorneys' fees and costs is merited. Burch also asserts that it has properly stated its causes of action, satisfying CPLR 3211 (a) (7). In opposition, Burch does not request leave to replead, in the event one or more of its counterclaims is dismissed under CPLR 3211 (a) (7).

A. The SLAPP Statute

The SLAPP Statute was adopted:

> ". . . to prevent well-heeled public permit holders (or those seeking such permits) from using the threat of personal damages and litigation costs. . . as a means of harassing, intimidating or . . . punishing individuals, unincorporated associations ... and others who have involved themselves in public affairs by opposing them. *See* Citizen Participation Act, 1992 Consol. Laws, ch. 767 Sect. 1 (effective January 1, 1993)."

Street Beat Sportswear, Inc. v National Mobilization Against Sweatshops, 182 Misc 2d 447, 451 (Sup Ct, NY County 1999, Abdus-Salaam, JSC) (citation and internal quotation marks omitted). *See also 600 W. 115th St. Corp. v Von Gutfeld*, 80 NY2d 130, 137

n1 (1992) (SLAPP suits "are characterized as having little legal merit but are filed nonetheless to burden opponents with legal defense costs and the threat of liability and to discourage those who might wish to speak out in the future").

The SLAPP Statute allows:

> "[a] defendant in an action involving public petition and participation. . . [to] maintain an action, claim, cross claim or counterclaim to recover damages, including costs and attorney's fees, from any person who commenced or continued such action. . .."

Civil Rights Law § 70-a (1).

Civil Rights Law § 76-a (1) (a) defines "an action involving public petition and participation" as:

> "an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission."

A "public applicant or permittee" is defined by Civil Rights Law § 76-a (1) (b) as:

> "any person who has applied for or obtained a permit, zoning change, lease, license, certificate or other entitlement for use or permission to act from any government body, or any person with an interest, connection or affiliation with such person that is materially related to such application or permission."

Once it has been determined that an action falls within the SLAPP Statute, the aggrieved defendant may recover its costs and attorneys' fees from the plaintiff "public applicant or permitee," provided it can show that the action "*was commenced*

or continued without a substantial basis in fact and law and could not be supported by a substantial argument for the extension, modification or reversal of existing law." Civil Rights Law § 70-a (1) (a) (emphasis added).[3]

The CPLR was amended, in conjunction with the adoption of the SLAPP Statute, to "require entities bringing such an action addressing public petition and participation to demonstrate that the claim is not frivolous in the face of a motion to dismiss or for summary judgment." *Entertainment Partners Group v Davis*, 155 Misc 2d 894, 899 (Sup Ct, NY County 1992), *affd*, 198 AD2d 63 (1st Dept 1993), *citing* CPLR 3211 [g] and CPLR 3212 (h).

CPLR 3211 (g), which governs motions to dismiss SLAPP claims for failure to state a cause of action, provides:

> "A motion to dismiss based on paragraph seven of subdivision (a) of this section, in which the moving party has demonstrated that the action, claim, cross claim or counterclaim subject to the motion is an action involving public petition and participation as defined in paragraph (a) of subdivision one of section seventy-six-a of the civil rights law, shall be granted *unless the party responding to the motion demonstrates that the cause of action has a*

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[3] A SLAPP suit defendant may *only* recover other compensatory damages, "upon an additional demonstration that the action . . . was commenced or continued for the purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights," and may recover punitive damages only "upon an additional demonstration that the action was commenced or continued for the *sole* purpose of harassing, intimidating, punishing or otherwise maliciously inhibiting the free exercise of speech, petition or association rights." Civil Rights Law § 70-a (b) and (c).

> *substantial basis in law or is supported by a substantial argument for an extension, modification or reversal of existing law.* The court shall grant preference in the hearing of such motion (emphasis added)."

This "substantial basis in law" requirement is met where the claimant makes specific allegations to establish the elements of its cause of action and pleads facts sufficient to support its claim. *See Street Beat Sportswear, Inc.*, 182 Misc 2d at 454-55.

> "As . . . the anti-SLAPP law is in derogation of common law, it must be narrowly construed. A narrow construction of the anti-SLAPP law requires that a SLAPP-suit defendant must directly challenge an application or permission in order to establish a cause of action under the Civil Rights Law."

Guerrero v Carva, 10 AD3d 105, 117 (1st Dept 2004) (citation omitted).

B. Motions to Dismiss under CPLR 3211

"In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference." *EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 (2005) (citation omitted). "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." *Id.*

C. Mercer's Motion to Dismiss

To show that a cause of action is a retaliatory SLAPP suit, the movant must first show that it constitutes an

> "'action . . . for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report, comment on, rule on or challenge or oppose such application or permission.'"

Guerrero, 10 AD3d at 116, quoting Civil Rights Law § 76-a (1) (a). Burch does not deny its status as a "public applicant or permittee." Burch also fails to show that its counterclaims are not "materially related" to Mercer's complaints or other communications to the DOB. Thus, as a threshold matter, Burch's counterclaims technically fall within the SLAPP Statute.[4] Nevertheless, Mercer's motion to dismiss Burch's counterclaims under the SLAPP Statute must be denied.

First, Mercer is not the sort of defendant the SLAPP Statute is intended to protect. This dispute is between presumably well-funded commercial entities. This is not a dispute where a citizen activist or civic group, trying to exercise petition and participation rights, is purportedly being harassed by a financially superior opponent by means of baseless

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[4] A claim must seek damages to fall within the ambit of the SLAPP Statute. Civil Rights Law § 76-a (1) (a). Burch's second cause of action, for a declaratory judgment, seeks no damages. Mercer does not move to dismiss this counterclaim under CPLR 3211 (a) (7). Accordingly, Mercer's motion to dismiss regarding this counterclaim, solely under 3211(g), must be denied.

complaints and claims. *See, e.g., Rubel v Daily News, LP*, 2010 NY Slip Op 32407 (U) (Sup Ct, NY County 2010) (in dicta, court states defendant media company and reporters were not "citizen activists" SLAPP Statute intended to protect, who face retaliatory suits they cannot afford to defend, brought solely "to quell [their] opposition"); *see also Street Beat Sportswear, Inc.*, 182 Misc 2d at 451 (SLAPP Statute intended "to prevent well-heeled" litigants from "'using . . . the threat of personal damages and litigation costs. . . as a means of harassing, intimidating or... punishing individuals, unincorporated associations... and others who have involved themselves in public affairs by opposing them'") (citation omitted).

More importantly, Burch shows that its counterclaims (including its two counterclaims subject to dismissal under the less burdensome standard of CPLR 3211 [a] [7][5]), have a substantial basis at law. Here, Burch not only set out the elements of each of those counterclaims but has also provided a detailed narrative of what occurred, in its allegations about Mercer's continuous interference and refusal to cooperate. *See*

[5] Neither of the counterclaims dismissed under CPLR 3211 (a) (7), discussed below, are dismissed because they are frivolous or otherwise lacking in substance. The fourth counterclaim, for public nuisance, is dismissed because of a misconstruction of law. The sixth counterclaim, for breach of the implied covenant of good faith and fair dealing, is dismissed because it is duplicative of Burch's breach of contract counterclaim.

Answer, ¶¶ 128-46. Burch thereby meets its burden to defeat dismissal under 3211 (g). *Street Beat Sportswear, Inc.*, 182 Misc 2d at 454-55.

Denial of Mercer's motion under the SLAPP Statute is bolstered by the Court's recent decision to deny Mercer preliminary injunctive relief. On September 7, 2017, the Court held a hearing on Mercer's application for injunctive relief. After considering the parties' submissions and arguments, the Court denied Mercer's motion for a preliminary injunction. In doing so, the Court found the equities balanced against Mercer and in favor of Burch, because facts adduced on the motion, including "the multitude of complaints" Mercer made to DOB, "just a few of which resulted in violations," tended to show that this case is "simply [about] a neighbor who is not happy that a building is going up and is doing everything it can to interfere with the construction process." September 7, 2017 Hearing Transcript, at 50:8-9 and 11-13. For these reasons, Mercer's motion to dismiss Burch's counterclaims under the SLAPP Statute is denied.

Mercer's motion to dismiss Burch's first, third and fifth counterclaims under CPLR 3211(a)(7) must also be denied. As to the first counterclaim, for tortious interference with prospective business advantage, Mercer argues, among other things, that Burch did not state a cause of action because "it

does not, and cannot allege that disinterested malevolence was [Mercer's] sole motivating intent." Mercer memorandum of law in support, at 16. This is incorrect, and gives this element too narrow a scope:

> "To state a cause of action for tortious interference with prospective business advantage, it must be alleged that the conduct by defendant that allegedly interfered with plaintiff's prospects either was undertaken for the sole purpose of harming plaintiff, *or that such conduct was wrongful or improper independent of the interference allegedly caused thereby.*"

Jacobs v Continuum Health Partners, Inc., 7 AD3d 312, 313 (1st Dept 2004) (*emphasis added*), citing *Alexander & Alexander of New York v Fritzen*, 68 NY2d 968, 969 (1986).

Burch has alleged that Mercer interfered with its prospective business advantage by, among other things, filing frivolous claims and exerting economic pressure. Such conduct may constitute "wrongful means" to satisfy this element of Burch's cause of action. *See Guard-Life Corp. v Parker Hardware Mfg. Corp.*, 50 NY2d 183, 191 (1980) ("[w]rongful means 'include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure . . .'") (citation omitted). This element of the cause of action may also be satisfied by showing the defendant's interference amounts to an independent tort, *Carvel Corp. v*

Noonan, 3 NY3d 182, 190 (2004), such as Burch alleges in its counterclaim for private nuisance.

As to Burch's third counterclaim, the elements of a cause of action for private nuisance are: "(1) an interference substantial in nature, (2) intentional in origin, (3) unreasonable in character, (4) with a person's property right to use and enjoy land, (5) caused by another's conduct in acting or failure to act." *Copart Indus. v Consolidated Edison Co. of N.Y.*, 41 NY2d 564, 570 (1977).

Burch's allegations, which must be taken as true, *EBC I, Inc.*, 5 NY3d 19, state a cause of action for private nuisance. In support of dismissal, Mercer contends New York case law establishes the "principle" that "a private nuisance arises, if at all, only from the continuous and unreasonable impact that a person's use of *his own* property has upon his neighbor." Mercer's memorandum of law in support, at 17-18 (emphasis in original). Mercer argues Burch's counterclaim, based on its allegations of interference arising from Mercer's purportedly protected communications with DOB, must be dismissed because Burch's situation does not fit the framework of this principle.

Mercer offers no authority that endorses this principle. More to the point, New York does not require that, to be actionable as a private nuisance, a defendant's misconduct must consist of some sort of physical invasion of its neighbor's

property. Unmerited complaints to city and state agencies may suffice. *See Chelsea 18 Partners, LP v Sheck Yee Mak*, 90 AD3d 38, 41-43 (1st Dept 2011) ("pattern of recurring objectionable conduct" sufficient to establish landlord's cause of action for private nuisance included tenants' complaints to DOB and Environmental Control Board for plumbing and electrical violations tenants created by their own unauthorized "handiwork," which they worsened by denying landlord access to apartment to cure violations, to create pretext so they could apply for rent reductions).

As to the fifth counterclaim, and notwithstanding Mercer's assertions to the contrary, Burch's breach of contract claim was properly stated and adequately supported by factual allegations. In its Complaint, at ¶26, Mercer alleged that it agreed to grant the defendants license to enter 149 Mercer, to monitor the effects of their construction work, so long as they promised to pay for Mercer's "legal, engineering and related costs incurred" relating to the Project. Burch denies that it entered such a contract. If the Court should determine Burch had contracted with Mercer, Burch alleges that it performed its duties but Mercer did not, and so Mercer is answerable for Burch's resulting damages. Answer, ¶¶ 179-81.

Further, Burch's allegation, that no contract exists between it and Mercer, is no bar to its assertion of this

counterclaim. Alternate theories may be advanced in pleadings. *EBC I Inc. v Goldman Sachs & Co.*, 7 AD3d 418, 420 (1st Dept 2004), *affd as mod on other grounds*, 5 NY3d 11 (2005).

However, dismissal for failure to state a cause of action under CPLR 3211 (a)(7) is warranted for Burch's two remaining counterclaims: its fourth counterclaim, for public nuisance, and its sixth counterclaim, for breach of the implied covenant of good faith and fair dealing.

To state a cause of action for a public nuisance under New York law, Burch needed to allege that Mercer has engaged in

> "*conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all*, in a manner such as to offend public morals, interfere with use by the public of a public place or endanger or injure the property, health, safety or comfort of a considerable number of persons."

Copart Indus. v Consolidated Edison Co. of N.Y., 41 NY2d 564, 568 (1977) (citations omitted and emphasis added). A public nuisance is only actionable by a private plaintiff where the plaintiff shows that it "suffered special injury beyond that suffered by the community at large." *532 Madison Ave. Gourmet Foods v Finlandia Ctr.*, 96 NY2d 280, 292 (2001) (citation omitted).

Burch's counterclaim for public nuisance is flawed because it identifies Mercer's interference with Burch's use of *its own* property at 151 Mercer Street as the "particular damage to

[Burch's] use of its property" arising from Mercer's wrongful conduct. Interference with Burch's own property is not "conduct or omissions which offend, interfere with or cause damage to the public in the exercise of rights common to all," Copart Indus., 41 NY2d at 568, but instead is actionable as a private nuisance. *See id.*, quoting Prosser, Torts (4th ed.), at 573 ("As observed by Professor Prosser, public and private nuisances 'have almost nothing in common, except that each causes inconvenience to someone, and it would have been fortunate if they had been called from the beginning by different names'").

Finally, Burch's sixth counterclaim, for breach of the implied covenant of good faith and fair dealing, is redundant, as Mercer points out. That cause of action is "intrinsically tied to the damages allegedly resulting from a breach of the contract." *Canstar v Jones Constr. Co.*, 212 AD2d 452, 453 (1st Dept 1995) (citation omitted), and so properly dismissed under CPLR 3211 (a) (7).

The court has considered the parties' other arguments and find them unavailing.

CONCLUSION AND ORDER:

For the foregoing reasons, it is hereby

ORDERED that Mercer's motion to dismiss Burch's counterclaims, and to recover its attorneys' fees and costs,

pursuant to CPLR 3211 (g) and Civil Rights Law §§70-a and 76-a, is DENIED; and it is further

ORDERED that Mercer's motion to dismiss Burch's first, third, fourth, fifth and sixth counterclaims under CPLR 3211 (a)(7) is **GRANTED** with respect to the fourth counterclaim, for public nuisance, without prejudice, and **GRANTED**, with prejudice, with respect to the sixth counterclaim, for breach of the implied covenant of good faith and fair dealing, but **DENIED** with respect to the first counterclaim, for tortious interference with prospective business advantage, the third counterclaim, for private nuisance, and the fifth counterclaim, for breach of contract; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference in Part 43 of this Court on January 11, 2018, at 9:30 am.

Dated: December 5, 2017

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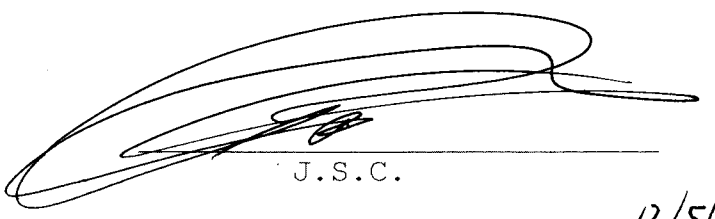

J.S.C.

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