CGM-LLNR LLC v Sylvia Ward & Po Kim Art Gallery
2018 NY Slip Op 31056(U)
May 29, 2018
Supreme Court, New York County
Docket Number: 153910/2017
Judge: Robert D. Kalish
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 29

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CGM-LLNR LLC , d/b/a ASIA DE CUBA, a Restaurant,

Plaintiff,

Index No. 153910/2017

- against -

Seq. 003

THE SYLVIA WARD AND PO KIM ART GALLERY,

Decision and Order

Defendant.

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HON. ROBERT D. KALISH, J.:

ORDERED that the instant motion by Defendant The Sylvia Ward and Po Kim Gallery to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (1) and (a) (7), is granted in part and denied in part as set forth herein.

BACKGROUND

Plaintiff CGM-LLNR LLC, d/b/a Asia de Cuba, is a commercial tenant at 415 Lafayette Street in Manhattan. (Affirm. in Supp., Ex. 1 [Am. Comp.] ¶¶ 8-9.) Around March 2015, Plaintiff began operating a "deluxe restaurant under the trade name "Asia de Cuba" at said premises. (Am. Comp. ¶ 44.)

Defendant The Sylvia Ward and Po Kim Gallery is the record owner of the adjacent premises located at 417 Lafayette and operates an institution" at said premises "dedicated to the work of artists Sylvia Wald and Kim Po." (Id. ¶¶ 12-14.)

Plaintiff brings the instant action for declaratory and statutory relief—pursuant to RPAPL §§ 871 and 881—as well as for monetary damages that Plaintiff has allegedly suffered due to Defendant's installation of a sidewalk shed in front its own premises that extends in front of Plaintiff's premises.

Plaintiff alleges that after Defendant failed to file required reports on the condition of its building's façade with the Department of Buildings ("DOB") for several years, Defendant eventually retained an engineer to inspect its façade. (Am. Comp. ¶¶ 15-20.) Plaintiff alleges that on July 2, 2014, Defendant filed its façade report and designated the façade as "unsafe" pursuant to New York City Construction Code § 28-302.3 and 1 RCNY § 103-04. (Id. ¶ 20.)

Plaintiff alleges that Defendant was subsequently issued a citation by the DOB for failing to erect scaffolding "as required as the first step towards repair of the 'unsafe' condition." (Id. ¶ 23.) In addition, Plaintiff contends that, pursuant to New York City Building Code §28-302.5 and 1 RCNY §103-04(b)(5)(ii), an owner who reports an "unsafe" façade condition must remediate that façade condition within thirty days, file a report attesting to the remediation, "upon the acceptance of which the scaffolding is to be promptly taken down." (Id. ¶ 24.)

Plaintiff alleges that notwithstanding the requirements for prompt remediation, Defendant did not apply for a permit until September 12, 2014, and did not erect the subject scaffolding until April 20, 2015—just as Asia de Cuba was opening. (Am. Comp. ¶¶ 26-27.)

Plaintiff alleges that Defendant never proceeded thereafter to undertake any attempt to remediate the unsafe façade condition, and that, as such, the "zombie shed" remains in place today.

Plaintiff alleges, in sum and substance, that by failing to timely make repairs to its façade and thereby leaving the shed in place for several years, Defendant has seriously damaged their restaurant business. In particular, Plaintiff alleges that the shed has made it harder for customers to see the restaurant, and made them feel that "that the area under the scaffold might not be safe . . . ." (Am. Compl. ¶ 40.) Plaintiff further complains the "ugly scaffolding visible through the window is obviously incompatible with the décor of a luxury restaurant, planned and executed at great expense by Plaintiff; destroys the ambience which diners at such an establishment understandably expect; and has discouraged repeat business at the Restaurant." (Id. ¶ 42.)

In addition, Plaintiff complains that the scaffolding has prevented them from maintaining an outdoor sidewalk café where they would have expected to generate about $300,000 in separate gross revenue "per season", and an additional $66,000 per season in gross revenue for brunch alone. (Am. Compl. ¶¶ 56-68.)

Plaintiff further contends that all of the above effects contributed to producing "a downward spiral" for Plaintiff's restaurant and that "in August, 2017, Plaintiff was forced to close the Restaurant, as it was not generating enough income to meet its operating expenses." (Id. ¶ 50.) Plaintiff complains that its $6 million investment in its restaurant has "has been imperiled, if not destroyed, by the loss of custom[ers] caused by the unjustifiable presence of the Encroaching Structures, over the three-year life of the Restaurant." (Id. ¶ 52.)

Plaintiff asserts the following causes of action against Defendant:

- 1st Cause of Action: Nuisance
- 2nd Cause of Action: Trespass
- 3rd Cause of Action: Conversion
- 4th Cause of Action: Tortious Interference with Prospective Business Relations
- 5th Cause of Action: Real Property Actions and Proceedings Law §§ 871 and 881
- 6th Cause of Action: Declaratory Judgment

- 7th Cause of Action: Negligence and Punitive Damages

DISCUSSION

> "Dismissal of a complaint pursuant to CPLR 3211(a)(1) is only appropriate where the documentary evidence presented conclusively establishes a defense to the plaintiff's claims as a matter of law. The documents submitted must be explicit and unambiguous. In considering the documents offered by the movant to negate the claims in the complaint, a court must adhere to the concept that the allegations in the complaint are presumed to be true, and that the pleading is entitled to all reasonable inferences. However, while the pleading is to be liberally construed, the court is not required to accept as true factual allegations that are plainly contradicted by documentary evidence."

(*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626–27 [1st Dept 2017] [internal citations omitted].)

When considering a CPLR 3211 (a) (7) motion to dismiss for failure to state a cause of action, "'the court must afford the pleading a liberal construction, accept all facts as alleged in the pleading to be true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory.'" (*Peery v United Capital Corp.*, 84 AD3d 1201, 1201-02 [2d Dept 2011], quoting *Breytman v Olinville Realty, LLC*, 54 AD3d 703, 703-704 [2d Dept 2008].) Thus, "'a motion to dismiss made pursuant to CPLR 3211 (a) (7) will fail if, taking all facts alleged as true and according them every possible inference favorable to the plaintiff, the complaint states in some recognizable form any cause of action known to our law.'" (*E. Hampton Union Free Sch. Dist. v Sandpebble Builders, Inc.*, 66 AD3d 122, 125 [2d Dept 2009], quoting *Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006].) "Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss." (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005].)

I. First Cause of Action: Nuisance

The elements of a common-law claim for a 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].) "Nuisance is characterized by a pattern of continuity or recurrence of objectionable conduct." (*Berenger v 261 W. LLC*, 93 AD3d 175, 182 [1st Dept 2012].) "A cause of action alleging private nuisance is distinguishable from a cause of action alleging trespass in that trespass involves the invasion of the plaintiff's interest in the exclusive possession of its land, while a private nuisance involves the invasion of the plaintiff's right to the use and enjoyment of its land." (*Volunteer Fire Ass'n of Tappan, Inc. v County of Rockland*, 101 AD3d 853, 856 [2d Dept 2012].)

The sidewalk shed here was required to be built pursuant to the law in order to protect pedestrians walking nearby, and was to remain in place until the dangerous façade condition was remedied. As such, the erection of the sidewalk bridge – in and of itself – cannot form a basis for a private nuisance cause of action.

However, although its mere erection may not by itself form the basis of a cause of action for nuisance, that does not mean that the owner—whose dangerous façade required the sidewalk shed to be built—is free to procrastinate on establishing a permanent remedy for the façade condition and allowed to leave the sidewalk shed up indefinitely without having to compensate its neighbor for the effects of it so procrastinating. To the contrary, such conduct can form the basis for a nuisance cause of action in that: 1) it substantially interferes with adjacent owner's ability to enjoy its property, namely light and air access and to use the abutting sidewalk area; (2) the failure to swiftly remediate the dangerous condition and therefore the leaving up of the scaffolding is intentional; (3) it is arguably unreasonable to not fix the underlying façade condition for so long and leave scaffolding up for years; (4) it affects Plaintiff's ability to use its property interest, as in the instant case, to operate a high-end restaurant by preventing potential customers on the street from noticing the location and by negatively impacting the customer experience; and (5) it was caused by Defendant's failure to promptly remedy the façade condition.

The issue before the Court is whether Plaintiff has sufficiently pleaded a cause of action for private nuisance—not whether Plaintiff is likely to ultimately prevail on the merits. This Court finds that, based on the facts alleged in the complaint, Plaintiff has stated a valid cause of action for recovery based on a theory of private nuisance.

II. Second Cause of Action: Trespass

"The elements of a cause of action sounding in trespass are an intentional entry onto the land of another without justification or permission." (*Marone v Kally*, 109 AD3d 880, 882 [2d Dept 2013].)

Here, it is undisputed that the erection of the sidewalk shed was required by law and was done for public safety. As such, the erection itself was justified. Accordingly, the second cause of action for trespass is dismissed.

III. Third Cause of Action: Conversion

Plaintiff has withdrawn its cause of action for conversion pursuant to its Memorandum of Law in Opposition. (Memo in Opp. at 6.) Accordingly, Plaintiff's third cause of action for conversion is hereby withdrawn.

IV. Fourth Cause of Action: Tortious Interference with Prospective Business Relations

The elements for a cause of action for tortious interference with prospective business relations are: "(a) business relations with a third party; (b) the defendant's interference with those business relations; (c) the defendant acting with the sole purpose of harming the plaintiff or using wrongful means; and (d) injury to the business relationship." (*Advanced Glob. Tech. LLC v Sirius Satellite Radio, Inc.*, 15 Misc 3d 776, 779 [Sup Ct, NY County 2007], *affd as mod*, 44 AD3d 317 [1st Dept 2007] [affirming dismissal of tortious interference claim but modifying to grant leave to replead]; *see also Carvel Corp. v Noonan*, 3 NY3d 182, 190 [2004].)

Based upon the operative amended complaint, Plaintiff has failed to allege the third element that Defendant acted for the sole purpose of harming Plaintiff or that it used wrongful conduct. Rather, the complaint appears to only suggest that Defendant has been extremely dilatory in commencing the repairs to its façade. This is not enough to prima facie meet the intent element for a claim for tortious interference. (*See Aramid Entertainment Fund Ltd. v Wimbledon Fin. Master Fund, Ltd.*, 105 AD3d 682 [1st Dept 2013] [holding that plaintiffs failed to "sufficiently alleged any facts suggesting that defendants undertook actions with the sole purpose of harming plaintiffs"]; *Anesthesia Assoc. of Mount Kisco, LLP v N. Westchester Hosp. Ctr.*, 59 AD3d 473, 477 [2d Dept 2009] ["If a defendant shows that the interference is intended, at least in part, to advance its own interests, then it was not acting solely to harm the plaintiff."].) Further, the Court finds that a failure to complete work in a timely manner, as alleged in the complaint, is not within the meaning of "wrongful means" for the purpose of satisfying the elements of this tort. (*Carvel Corp. v Noonan*, 3 NY3d 182, 191 [2004] ["'Wrongful means' include physical violence, fraud or misrepresentation, civil suits and criminal prosecutions, and some degrees of economic pressure; they do not, however, include persuasion alone although it is knowingly directed at interference with the contract.'" [quoting Restatement (Second) of Torts § 768, Comment e; § 767, Comment c].)

Accordingly, the fourth cause of action for tortious interference with prospective business relations is dismissed.

V. Fifth Cause of Action: Real Property Actions and Proceedings Law §§ 871 and 881

The fifth cause of action brought pursuant to RPAPL §§ 871 and 881 has been withdrawn, without prejudice, pursuant to a stipulation, dated May 24, 2018. (NYSCEF Document No. 59.) Accordingly, the fifth cause of action, pursuant to RPAPL §§ 871 and 881, is withdrawn.

VI. Sixth Cause of Action: Declaratory Judgment

Plaintiff agreed to withdraw its sixth cause of action for declaratory judgment during oral argument. Accordingly, the sixth cause of action for a declaratory judgment is withdrawn.

VII. Seventh Cause of Action: Negligence and Punitive Damages

(a) Negligence

In order to prevail on a negligence claim, "a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom." (*Pasternack v Lab. Corp. of Am. Holdings*, 27 NY3d 817, 825 [2016], *rearg denied*, 28 NY3d 956 [2016] [internal quotation marks omitted].)

Defendant argues, in sum and substance, that it had no duty to complete repairs and remove the shed as a matter of law, because it has received repeated and continuing extensions to complete its repair work. Defendant, however, cites no law for the proposition that an extension to make repairs from the Department of Buildings relieves it of an obligation to its neighbors to timely make repairs, and this Court is aware of none.

Although Defendant does not raise the argument, this Court finds that Plaintiff's negligence cause of action, as stated, is duplicative of its nuisance cause of action. Here, Plaintiff claims that Defendant breached its duty to "erect and maintain scaffolds so as to mitigate and minimize harm to Plaintiff's business and interference with Plaintiff's enjoyment of its leasehold." (Am. Comp. ¶ 145.) This is, in sum and substance, the same as Plaintiff's argument for recovery under a theory of nuisance. Accordingly, the branch of the seventh cause of action for negligence is hereby dismissed as being duplicative of the first cause of action for nuisance. (*70 Pinehurst Ave. LLC v RPN Mgt. Co., Inc.*, 123 AD3d 621, 622 [1st Dept 2014] ["Where nuisance and negligence elements are so intertwined as to be practically inseparable, a plaintiff may recover only once for the harm suffered." [internal quotation marks omitted]]; *see also* 81 N.Y. Jur. 2d Nuisances § 2 ["While frequently the difference between nuisance and negligence is not very plainly marked, and the distinction between the two is not always easy to make, it has been said that nuisance consists in the wrongful maintenance of a thing while negligence usually consists in the manner of doing a thing."].)

Accordingly, the seventh cause of action for negligence is hereby dismissed.

(b) Punitive Damages

The Court of Appeals has recently reiterated that punitive damages are only appropriate for "essentially conduct having a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard." (*Chauca v Abraham*, 30 NY3d 325, 331 [2017] [internal quotation marks and emendation omitted].) Punitive damages "may only be awarded for exceptional misconduct which transgresses mere negligence" and "where aggravating factors demonstrate an additional level of wrongful conduct." (Id. at 331-32.)

On the instant facts, Plaintiff merely alleges a failure on the part of Defendant to make timely repairs that has resulted in a sidewalk shed essentially ruining the vibe and aesthetic of its high-end restaurant. This is not the conscious or reckless disregard of the rights of others—this is a run-of-the-mill dispute between urban neighbors.

Accordingly, it is hereby ordered that the branch of the seventh cause of action seeking punitive damages is dismissed.

CONCLUSION

Accordingly, it is hereby

ORDERED that the instant motion by Defendant The Sylvia Ward and Po Kim Gallery to dismiss the complaint in its entirety, pursuant to CPLR 3211 (a) (1) and (a) (7), is granted in part and denied in part to the extent that second, fourth, and seventh causes of action are dismissed and to the extent that the third, fifth and sixth causes of action are withdrawn; and it is further

ORDERED that defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it is further

ORDERED that counsel are directed to appear for a preliminary and settlement conference in Room 104, 71 Thomas Street, on Monday, July 16, 2018, at 9:30 AM.

The forgoing constitutes the decision and order of the Court.

Dated: May 29, 2018
New York, New York

ENTER:

Hon. Robert D. Kalish, J.S.C.
HON. ROBERT D. KALISH
J.S.C.