

Bischof v Gountas-Ortiz
2018 NY Slip Op 31344(U)
May 10, 2018
Supreme Court, Queens County
Docket Number: 707980/2017
Judge: Salvatore J. Modica
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS: PART 37

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STELLA BISCHOF; RICHARD BISCHOF,

DECISION AND ORDER

Index No. 707980/2017

HON. SALVATORE J. MODICA

Plaintiffs,

-- against --

VICTORIA GOUNTAS-ORTIZ; CARLOS ORTIZ,

Motion Sequence Number 1

Defendants.
-----X

Papers Numbered.....NYSCEF Doc. Nos. 4-20

The aforementioned papers, filed on NYSCEF, were read on defendants' motion, pursuant to CPLR 3211(a)(1) and (a)(7), to dismiss the verified complaint in its entirety, and on the plaintiffs' cross motion, pursuant to CPLR 3025(a), for leave to amend their complaint to allow incoming plaintiffs Stelmar Enterprises LLC ("Stelmar") and Marisa Bischof to be named as necessary plaintiffs in this action, and seeking also, pursuant to 22 NYCRR 1200.0 Rule 3.7, to disqualify defendants' attorney, Lawrence Glynn, on the grounds that there exists a genuine conflict of interest between defense counsel and plaintiffs.

SALVATORE J. MODICA, J.:

This is an action by plaintiffs against defendants seeking declaratory and/or injunctive relief and monetary damages for, among other things, private nuisance.

Plaintiffs Stella Bischof and Richard Bischof, upon the foregoing papers, assert that they are the owners of a home located at 53-08 193rd Street, Fresh Meadows, Queens County, New York, which they do not occupy, but which is occupied by their adult daughter, nonparty Marisa Bischof, and her two children. The property next door at 53-10 193rd Street, Fresh Meadows, New York is owned by defendants Victoria Gountas-Ortiz and Carlos Ortiz. Plaintiffs allege that they and their daughter continually have been subjected to abuse by defendants, who regularly yell, scream, threaten, and harass them, their tenants, occupants, and guests. Plaintiffs also allege that defendants have caused City agencies to visit the subject premises. Plaintiffs further allege that defendant Carlos Ortiz spread falsehoods about plaintiffs and their daughter Marisa, causing them great stress and mental harm.

Plaintiffs commenced this action by filing a summons with notice on June 8, 2017. Defendants filed a notice of appearance and demand for complaint on June 22, 2017, and

H:\May 2018\Bischof v. Gountas-Ortiz.wpd

plaintiffs filed a verified complaint, dated July 12, 2017, setting forth causes of action for: (1) private nuisance and harassment; (2) negligent and intentional infliction of emotional distress; and (3) economic loss.

Defendants now move to dismiss the complaint for failure to state a cause of action (*see* CPLR 3211 [a] [7]) and based on, among other things, documentary evidence (*see* CPLR 3211 [a] [1].) Plaintiffs cross-move for leave to amend the complaint to add Stelmar and Marisa Bischof as plaintiffs, and to disqualify defendants' attorney on the ground that a conflict of interest exists between plaintiffs and defendants' attorney.

On a motion to dismiss a complaint, pursuant to CPLR 3211(a)(7), the court must "accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994].) Although a court is "permitted to consider evidentiary material submitted by a defendant in support of a motion to dismiss pursuant to CPLR 3211 (a) (7)" (*Sokol v Leader*, 74 AD3d 1180, 1181 [2010]), where the motion is not converted to one for summary judgment, "the criterion is whether the [plaintiff] has a cause of action, not whether he [or she] has stated one, and, unless it has been shown that a material fact as claimed by the [plaintiff] to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it . . . dismissal should not eventuate." (*Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; *see Weill v East Sunset Park Realty, LLC*, 101 AD3d 859 [2012].)

A motion to dismiss a complaint, based upon CPLR 3211(a)(1), "may be appropriately granted only where the documentary evidence utterly refutes [the] plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *see Rodolico v Rubin & Licatesi, P.C.*, 114 AD3d 923 [2014].)

The elements of a private nuisance cause of action, which has a three year statute of limitations (*see*, CPLR 214) 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], citing Restatement of Torts § 822; *see Taggart v Costabile*, 131 AD3d 243 [2015]; *Massaro v Jaina Network Sys., Inc.*, 106 AD3d 701 [2013].)

As alternatively stated by attorney and law professor Ernest Edward Badway, Esq., in his masterful and indispensable treatise, **Encyclopedia of New York Causes of Action: Elements & Defenses 2018** (New York Law Journal pub. 2018):

There is liability for a private nuisance when it:

- 1) arises from conduct;
- 2) that invades another's interest;
- 3) in the private use and enjoyment of land; and
- 4) the invasion is either
 - a. intentional;
 - b. negligent; or
 - c. related to abnormally dangerous activities.

Badway, *Encyclopedia of New York Causes of Action: Elements & Defenses 2018* §13-1:18, at 151-152, *supra*.

In support of their motion to dismiss, defendants submit, among other things, a copy of the deed to the premises at 53-08 193rd Street, Fresh Meadows, New York, which shows that plaintiffs are not the owners of said premises, as alleged in the complaint, and that the owner is nonparty Stelmar. Plaintiffs, in their cross motion/opposition papers, do not dispute that they are not the owners of the property at 53-08 193rd Street, Fresh Meadows, Queens County, New York.

Thus, the first cause of action for private nuisance must be dismissed as plaintiffs are not the proper parties to bring this cause of action. Moreover, the subject complaint fails to state a cause of action for private nuisance since plaintiffs' allegations against defendants do not rise to the level of substantial and unreasonable interference, nor have plaintiffs sufficiently alleged that they were denied use and enjoyment of the subject property due to the conduct of defendants. (*See Ward v City of New York*, 15 AD3d 392 [2005].)

Plaintiffs, in the first cause of action of the complaint, also assert a claim for harassment. New York, however, does not recognize a common-law cause of action for harassment. (*See Mago, LLC v Singh*, 47 AD3d 772 [2008]; *see also Edelstein v Farber*, 27 AD3d 202 [2006]; *Goldstein v Tabb*, 177 AD2d 470 [1991].)

In their second cause of action, plaintiffs assert claims for both negligent infliction of emotional distress and intentional infliction of emotional distress.

A cause of action to recover damages for negligent infliction of emotional distress, which no longer requires physical injury as a necessary element, "generally must be premised upon the breach of a duty owed to [the] plaintiff which either unreasonably endangers the plaintiff's physical safety, or causes the plaintiff to fear for his or her own safety." (*Sheila C. v Povich*, 11 AD3d 120, 130 [2004]; *see Jason v Krey*, 60 AD3d 735 [2009]; Badway,

Encyclopedia of New York Causes of Action: Elements & Defenses 2018 §§ 15-6:6, at 187, *supra*; see also *Davidovici v Fritzson*, 49 AD3d 488 [2008].) “Such a claim must fail where . . . ‘[n]o allegations of negligence appear in the pleadings’.” (*Daluise v Sottile*, 40 AD3d 801, 803, [2007], quoting *Russo v Iacono*, 73 AD2d 913, 913 [1980].)

In this case, plaintiffs’ allegations in the complaint concern alleged intentional actions by defendants. Moreover, plaintiffs have not alleged any duty owed them by defendants. Thus, plaintiffs, in the complaint, have failed to state a cause of action to recover damages for negligent infliction of emotional distress.

To the extent that plaintiffs have pleaded a negligence claim, the complaint fails to state a cause of action for negligence since, as noted, plaintiffs do not allege any duty owed to them by defendants.

As for a cause of action for intentional infliction of emotional distress, the elements of such claim 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.” (*Klein v Metropolitan Child Servs., Inc.*, 100 AD3d 708, 710 [2012]; see *Marmelstein v Kehillat New Hempstead: Rav Aron Jofen Community Synagogue*, 11 NY3d 15 [2008]; *Brunache v MV Transp., Inc.*, 151 AD3d 1011 [2017]; *Badway, Encyclopedia of New York Causes of Action: Elements & Defenses 2018* § 15-6:5, at 186-187, *supra*). “In order to state a cause of action to recover damages for intentional infliction of emotional distress, the complaint must allege conduct that was ‘so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency . . . and [was] utterly intolerable in a civilized community’.” (*Baumann v Hanover Community Bank*, 100 AD3d 814, 816-817 [2012], quoting *Marmelstein v Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, supra* at 22-23.)

Even accepting as true the allegations in the complaint regarding defendants’ improper conduct, and according plaintiffs the benefit of every possible favorable inference, defendants’ alleged conduct was not so outrageous or extreme as to support an intentional infliction of emotional distress cause of action. (See *Brunache v MV Transp., Inc., supra*; see also *Petkewicz v Dutchess County Dept. of Community & Family Servs.*, 137 AD3d 990 [2016]; *Borawski v Abulafia*, 117 AD3d 662 [2014].) Therefore, plaintiffs’ complaint fails to state a cause of action for intentional infliction of emotional distress.

Although plaintiffs in their third cause of action assert a claim for “economic loss,” the complaint fails to state a cause of action for same. Moreover, to the extent that this claim is one for prima facie tort - - or intentional or malicious harm to another, the elements of such claim or cause of action include (1) the intentional infliction of harm, (2) which results in

special damages, (3) without any excuse or justification, (4) by an act or series of acts which would otherwise be lawful (see *Freihofer v Hearst Corp.*, 65 NY2d 135 [1985]; Badway, *Encyclopedia of New York Causes of Action: Elements & Defenses 2018* § 15-6:13, at 190, *supra*; see also, *Curiano v Suozzi*, 63 NY2d 113 [1984]), and plaintiffs, here, have failed to allege special damages with the required specificity. (See *Freihofer v Hearst Corp.*, *supra*.)

To the extent that plaintiffs have pleaded a defamation claim, the complaint still fails to state a cause of action for defamation. “The elements of a cause of action [to recover damages] for defamation are a ‘false statement, published without privilege or authorization to a third party, constituting fault as judged by, at a minimum, a negligence standard, and it must either cause special harm or constitute defamation per se’,” (*Salvatore v Kumar*, 45 AD3d 560, 563 [2007], quoting *Dillon v City of New York*, 261 AD2d 34, 38 [1999].) The complaint must set forth the particular words allegedly constituting defamation (see CPLR 3016 [a]), and it must also allege the time when, place where, and manner in which the false statement was made, and specify to whom it was made. (See, *Dillon v City of New York*, *supra*; Badway, *Encyclopedia of New York Causes of Action: Elements & Defenses 2018* §§ 15-2:1 through and inclusive 15-2:3.2, at 174-176, *supra*).

Plaintiffs’ complaint fails to set forth the allegedly defamatory statements with the requisite specificity that were said by defendants of and concerning the plaintiffs.

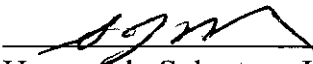
Accordingly, defendants’ motion to dismiss is granted, and plaintiffs’ complaint is dismissed in its entirety.

To the extent that plaintiffs in the branch of their cross motion to amend the complaint only seek to add Stelmar and Marisa Bischof as party plaintiffs and do not seek to add any new allegations or causes of action, and, in light of the Court’s foregoing determination that the original complaint fails to state any causes of action, the branch of plaintiffs’ cross motion seeking to amend the complaint is denied.

The branch of plaintiffs’ cross motion seeking to disqualify defendants’ attorney is denied as academic.

The foregoing constitutes the decision, order, and opinion of the Court.

Dated: Jamaica, New York
May 10, 2018



Honorable Salvatore J. Modica
J.S.C.

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