Farinella v Avalon Riverview N.
2018 NY Slip Op 32521(U)
October 3, 2018
Supreme Court, New York County
Docket Number: 159093/2017
Judge: Barbara Jaffe
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. BARBARA JAFFE**, *Justice* — **PART** **12**

GUS FARINELLA,

Plaintiff,

- v -

AVALON RIVERVIEW NORTH, AVALON RIVERVIEW NORTH, LLC, AVALON BAY COMMUNITIES, INC. FOR AVALON RIVERVIEW NORTH, LLC, CONSERVICE, LLC, ASSURANT INC., LAUREN VINCENT,

Defendants.

INDEX NO. 159093/2017

MOTION DATE

MOTION SEQ. NO. 2

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41

were read on this motion to dismiss.

Plaintiff brings this action for breach of contract, fraudulent inducement, negligent misrepresentation, intentional infliction of emotional distress, negligent infliction of emotional distress, and *prima facie* tort, and seeks compensatory and punitive damages. Defendants move pursuant to CPLR 3211 (a) (1), (5), and (7) for an order dismissing the complaint. Plaintiff opposes.

I. AMENDED COMPLAINT (NYSCEF 31)

Plaintiff alleges the following:

On May 27, 2017, the parties entered into a lease commencing June 26, 2017. In it, the parties agree that "[p]ets, including dogs . . . are permitted at the Community only with [defendants'] permission," and that "[s]hould [a resident's] pet injure any other pets, residents or AvalonBay Communities associates, or other individual not listed here while on community premises, [the resident] will be asked to remove the pet from the premises immediately." (NYSCEF 22).

Some time before plaintiff moved in to the apartment, he engaged in an email correspondence with the property manager, defendant Vincent, which reflects her antipathy toward him that resulted from his complaints about the apartment and Vincent's pattern and practice of unprofessionalism, hostility, and vindictiveness, within and outside the scope of her employment. His request for the floor plans of the apartment were not satisfied and his inquiries concerning the parking space were met with inaccurate information. He references security issues in the building and in the parking garage.

On June 26, 2017, the commencement date of his lease, plaintiff attempted to move into the apartment but could not do so due to its condition, which fell far short of being the "luxury" apartment advertised and guaranteed by defendants. It was not until he moved in that he realized the extent of defendants' misrepresentation: the apartment was not cleaned or painted, the appliances were defective, outdated, inefficient, and in disrepair, the garbage disposal was broken, the ceilings were water damaged as a result of a flood, the window blinds were filthy, damaged, and the windows were dirty, the shower in the master bedroom was filthy and mildewed, the toilets were old and dirty, the bathroom mirrors were permanently stained and broken, and doors were broken. On June 28, he leased a new vehicle, relying on a provision in his lease providing him with a parking space. Defendants also sent him, albeit mistakenly,

information concerning an apartment identical to his on the same floor at a monthly rental of $330 less than his.

By email dated August 8, 2017, Vincent wrote plaintiff as follows:

> Dear Mr. Farinella,
> I hope this message finds you well. I am writing to provide a response to your request for a credit equal to the prorated rent for the first five days of your residency, June 26th-June 30th. We recognize and agree that your apartment was delivered in a condition not consistent with our standard and as such we are willing to grant your request and issue a credit in the amount of $800.83. Please be advised that this credit is being issued to address all difficulties you've experienced from the touring and application stage, the leasing process, the move-in condition of your apartment and any additional concerns raised thereafter. We look forward to delivering you a great residential experience from here on out and as such, must insist that all past and present complaints are put to rest per the issuance of this credit. To be clear, discussions regarding any expectations that were not met prior to today's date are closed and no further consideration for additional financial compensation will be granted for any issues that arose prior to today's date.

(NYSCEF 31, Exh. B).

Plaintiff accepted the credit of $800.83 and relied on defendants' promise to remedy the other defects, unaware that they had no intent to do so. Rather, they intended to prevent him from canceling the lease during the grace period set forth in the lease.

On or about August 12, 2017, Vincent called plaintiff and told him that his dog had that day "mauled" a co-resident who was "severely injured" and "rushed to the hospital," thereby intimidating him and exceeding the scope of her employment. By letter dated August 17, 2017, defendants' attorneys informed him that a co-resident had reported that he had been bitten by plaintiff's dog in the building's terrace dog run, and advised him of two options under the lease: remove his dog from his apartment by September 16, 2017, or face legal action including an eviction proceeding, pending which he was prohibited from entering the dog run, or termination of his lease on or before September 27, 2017, without penalty and with an executed surrender agreement.

As a result of defendants' conduct, plaintiff vacated his apartment on October 14, 2017, and on October 30, he was coerced into signing a surrender agreement, thereby legally terminating his tenancy. Plaintiff found a new apartment and incurred increased monthly expenses of at least $1,400.

The co-resident's complaint alone constitutes an insufficient basis for terminating the lease, and plaintiff was never given a chance to rebut the accusation. The photograph of the co-resident's injury does not resemble a dog bite but appears to be a scratch which has not been linked to the incident. Having sent a cleaning crew and other staff to plaintiff's apartment, defendants admit that his dog poses no threat. Thus, defendants' conduct toward plaintiff was malicious, reckless, and in wanton disregard of his rights, warranting punitive damages to deter them from future misconduct.

Defendants created a pretext for terminating plaintiff's lease shortly after he moved in and presented him with the "Hobson's choice" of remaining in the building with his dog and facing eviction proceedings or agreeing to the termination of his lease. Defendants refused to provide him with a videotape purporting to show that his dog had bitten a co-resident, and mischaracterized it, and defendant Vincent, the property manager, threatened him and caused him panic and emotional distress by mischaracterizing the alleged dog bite as a "mauling" that caused "severe injury" requiring that the co-resident be "rushed to the hospital." The videotape shows that the co-resident's dog attacked plaintiff's leashed dog.

II. ANALYSIS

On a motion to dismiss an action as barred by documentary evidence, the documentary evidence offered must utterly refute plaintiff's factual allegations and conclusively establish the defense as a matter of law. (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY 314, 326 [2002];

Leon v Martinez, 84 NY2d 83, 88 1994]). For failure to state a claim, the pleading is afforded a liberal construction, the court accepts as true the facts alleged in the complaint, and the plaintiff is accorded the benefit of every favorable inference. (*Ark Bryant Park Corp. v Bryant Park Restoration Corp.*, 285 AD2d 143, 150 [1st Dept 2001]).

A. Breach of contract

The videotaped depiction of plaintiff's dog, plaintiff's assistant, and the complaining co-resident and his dog does not constitute documentary evidence within the meaning of a motion to dismiss pursuant to CPLR 3211(a)(1). (*See, e.g.*, *Hedges v E. River Plaza, LLC*, 43 Misc 3d 278, 281 [Sup Ct, NY County 2013], *affd* 126 AD3d 582 [1st Dept 2015] [even if video recording authenticated, inadmissible to support motion to dismiss]). The report to defendants concerning the incident constitutes inadmissible hearsay. (*See Advanced Glob. Tech., LLC v Sirius Satellite Radio, Inc.*, 44 AD3d 317, 318 [1st Dept 2007] [inadmissible hearsay may not be employed to support a motion to dismiss pursuant to CPLR 3211(a)(1)]). Consequently, defendants fail to sustain their burden with documentary evidence, and thus cannot rely on plaintiff's alleged violation of the pet provision in the lease as justification for revoking their permission for plaintiff to harbor his dog on the premises. And, accepting the facts alleged in the complaint as true, defendant's ultimatum to plaintiff that he cease living with his pet or move out of the apartment is sufficiently definite to constitute an anticipatory breach. (*See Created Gemstones, Inc. v Union Carbide Corp.*, 47 NY2d 250, 256 [1979] [refusing to perform unless the other party accepts "a condition which went beyond the contract" is an anticipatory repudiation]).

Plaintiff's allegation that defendants' conduct is pretextual is irrelevant (*see Forward Publications v Int'l Pictures*, 277 AD 846, 846 [1st Dept 1950] [subjective intentions are not considered in determining whether a party anticipatorily breached a contract]), and that he was

afforded no opportunity to be heard is of no moment (*see Sumner v Hogan*, 73 AD3d 618, 620 [1st Dept 2010] [private conduct invokes no constitutional guarantees of due process]; *cf Union of City Tenants v Koch*, 177 AD2d 328, 329 [1st Dept 1991] [tenants in city-owned buildings have due process rights]). Moreover, plaintiff would have had the opportunity to be heard had he remained and defended an eviction proceeding.

B. Fraudulent inducement/misrepresentation

To state a claim for fraudulent misrepresentation, a plaintiff must allege that a represented fact is false, known to be false, purposefully used to induce the other party, justifiably relied upon, and that he suffered an injury. (*Mandarin Trading Ltd. v Wildenstein*, 16 NY3d 173, 178 [2011]; *see also Gosmile, Inc. v Levine*, 81 AD3d 77, 81 [1st Dept 2010], *lv dismissed* 17 NY3d 382 [2011] [a claim for fraudulent inducement requires a knowing misrepresentation of material fact intended to induce a party to act, resulting in injury]). Here, defendants' alleged representations as to the "luxury" nature of the apartment are nonactionable expressions of opinion. (*Sheth v New York Life Ins. Co.*, 273 AD2d 72, 74 [1st Dept 2000] [statements constituting puffery or opinion not actionable]).

In addition, plaintiff alleges neither that the agreement involving the rent credit contains any falsities nor that defendants knew the statements contained therein are false. Vincent's August 8 email clearly states that the $800.83 credit constitutes compensation for "all difficulties . . . and any additional concerns raised thereafter," and that "all past and present complaints are put to rest per the issuance of this credit." While plaintiff had sought from defendants a credit equal to the prorated rent for the first five days of his residency, defendants in effect counteroffered with their response that the credit was issued "to address all difficulties [he had] experienced from the touring and application stage, the leasing process, the move-in condition of

[his] apartment and any additional concerns raised thereafter. . . . [and] all past and present complaints are put to rest per the issuance of this credit." If that were not clear enough, Vincent added that "discussions regarding any expectations that were not met prior to today's date are closed and no further consideration for additional financial compensation will be granted for any issues that arose prior to today's date." Plaintiff then accepted defendants' counteroffer by accepting the credit. Accordingly, plaintiff fails to state a claim for fraudulent inducement relating to his decision not to terminate his lease during the "grace period."

Defendants demonstrate that plaintiff's reliance on Vincent's statements concerning the alleged dog bite is unjustifiable as the lease does not specify the gravity of injury required for a tenant's pet to be removed, and neither the complaint report nor the videotape supports plaintiff's allegation that defendants knew that the facts imparted to him were false. Any reliance is further dispelled by plaintiff's admitted review of the video before he vacated.

C. Negligent misrepresentation

To state claim for negligent misrepresentation, plaintiff must establish a special relationship with defendant, that false representations were made, and that reliance on those representations were reasonable. (*J.A.O. Acquisition Corp. v Stavitsky*, 8 NY3d 144, 148 [2007]). Again, in light of his own knowledge about the dog-biting incident, plaintiff fails to plead justifiable reliance on defendants' statements (*supra*, II.B.). Absent reasonable reliance, I need not address the remaining contentions.

D. Intentional and negligent infliction of emotional distress

A claim for intentional infliction of emotional distress requires allegations of outrageous conduct intended to and successful in causing severe emotional distress. (*Howell v New York Post Co.*, 81 NY2d 115, 121 [1993]; *Kravtsov v Thwaites Terrace House Owners Corp.*, 267

AD2d 154, 155 [1st Dept 1999] [negligent infliction of emotional distress requires a showing of "atrocious" and "utterly intolerable conduct"]). Plaintiff's email correspondence with Vincent reflects no inappropriate conduct on her part beyond his own self-serving accusations and disproportionate reactions to defendants' various inefficiencies and errors. That plaintiff was annoyed and inconvenienced by defendants, and notwithstanding the alleged mutual animosity, plaintiff offers an insufficient basis for his cause of action for intentional or negligent infliction of emotional distress.

E. *Prime facie* tort

To state a cause of action for *prime facie* tort, a plaintiff must allege an intentional infliction of harm resulting in special damages, without any justification, by a series of acts that are otherwise unlawful. (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143 [1985]). This cause of action may not be used as an alternative to sustain a pleading or cause of action that otherwise fails to state a claim. (*Id.*). As with plaintiff's claims of inducement and infliction of emotional distress, plaintiff does not allege unexcused or unjustified intentional harm sufficient to constitute *prima facie* tort.

F. Claims against Vincent

As explained *supra*, II.B.-E., plaintiff fails to state causes of action for fraudulent inducement, fraudulent and negligent misrepresentation, intentional and negligent infliction of emotional distress, and *prima facie* tort. The facts underlying those claims are the same as those set forth against Vincent in her individual capacity. Accordingly, plaintiff fails to state a cause of action against Vincent.

III. CONCLUSION

Accordingly, it is hereby

ORDERED, that defendants' motion to dismiss is granted to the extent of dismissing all of plaintiff's claims except for the breach of contract claim; it is further

ORDERED, that defendant file and serve an answer to plaintiff's complaint to the extent of the breach of contract claim within 30 days of the date of this order; and it is further

ORDERED, that the parties appear for a preliminary conference on December 19, 2018 at 2:15 pm at 60 Centre Street, Room 341, New York, New York.

10/3/2018
DATE

BARBARA JAFFE, J.S.C.
HON. BARBARA JAFFE

CHECK ONE:	[ ] CASE DISPOSED		[X] NON-FINAL DISPOSITION	
APPLICATION:	[ ] GRANTED	[ ] DENIED	[X] GRANTED IN PART	[ ] OTHER
	[ ] SETTLE ORDER		[ ] SUBMIT ORDER	
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