452 E. 118th St. LLC. v 329 Pleasant Ave. Mazal Holdings LLC
2019 NY Slip Op 31204(U)
May 1, 2019
Supreme Court, New York County
Docket Number: 151437/2017
Judge: Arlene P. Bluth

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **IAS MOTION 32**

Justice

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452 EAST 118TH ST. LLC., TORRESCO REALTY LLC., LAURENA TORRES,

Plaintiffs,

- v -

329 PLEASANT AVENUE MAZAL HOLDINGS LLC,HAP INVESTMENT LLC., UMF CONTRACTING CORP., S.I. SERVICES OF N.Y. INC.,MARIO BULFAMANTE & SONS, WEXLER ASSOCIATES

Defendants.

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INDEX NO. 151437/2017

MOTION DATE

MOTION SEQ. NO. 002, 003

DECISION AND ORDER

The following e-filed documents, listed by NYSCEF document number (Motion 002) 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 97, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118

were read on this motion to/for DISMISS.

The following e-filed documents, listed by NYSCEF document number (Motion 003) 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 119

were read on this motion to/for DISMISS.

Motion sequence 002 and 003 in this action are consolidated for disposition. In motion sequence 002, the branch of defendant 329 Pleasant Avenue Mazal Holdings, LLC ("Mazal") and defendant HAP Investments, LLC's ("HAP") motion to dismiss plaintiffs' causes of action for intentional infliction of emotional distress ("IIED"), negligent infliction of emotional distress ("NIED"), and nuisance is granted.[1] The branch of these defendants' motion to strike the 38th paragraph of the second amended verified complaint is granted. The branch of these defendants'

[1] The causes of action as referred to in all the moving defendants' notices of motion refer to the causes of action as stated in the second amended verified complaint (NYSCEF Doc. No. 88). The Court notes, however, that the numbering of the causes of action as stated in defendants' notices of motion to dismiss do not match up with the numbering of the causes of action as stated in the second amended verified complaint. In order to ensure that the correct causes of action were denied or granted, this Court referred to the Memoranda of Law and Affirmations in Support submitted by the various defendants.

motion to dismiss the strict liability claim is granted because plaintiffs withdrew this claim. The branches of these defendants' motion to dismiss plaintiffs' causes of action for negligence and attorney's fees is denied.

Defendant S.I. Services of N.Y. Inc.'s cross-motion to dismiss the causes of action for NIED and IIED is granted. The branch of the motion to strike the 38th paragraph of the second amended verified complaint is granted. The branch of the motion to dismiss the strict liability claim is granted because plaintiffs withdrew this claim. The branch of the motion for attorney's fees is denied.

In motion sequence 003, the branches of defendant Mario Bulfamante & Sons' motion to dismiss the causes of action for IIED, NIED, and nuisance is granted. The branch of the motion to strike the 38th paragraph of the second amended verified complaint is granted. The branch of defendants' motion to dismiss the strict liability claim is granted because plaintiffs withdrew this claim. The branch of defendants' motion to dismiss plaintiffs' cause of action for negligence is denied.

Background

Defendant HAP is a real estate development firm that was developing and constructing an eight-story twenty-unit residential building on the premises located at 329 Pleasant Avenue, New York, New York, which is between 117th and 118th Streets. Defendant Mazal owns that property. Plaintiff Lorena Torres ("Torres") lives on the neighboring property located at 452 East 118th Street. Plaintiff 452 East 118th Street LLC ("452 East") is the title owner of the 452 premises. Plaintiff Torresco Realty, LLC is a real estate company that has its main office in the 452 premises. Torres is the principal of 452 East and Torresco Realty.

The construction project at 329 Pleasant Avenue began in 2014. Torres alleges that since the inception of the construction, she has suffered damages individually and to her property. She alleges that the construction was performed in a negligent manner causing physical damage to her property, preventing her from the use and enjoyment of her property for an unreasonable period of time, and causing her mental anguish. Torres claims that because of the manner in which defendants performed their construction, water migrated from the 329 property onto her property and ruined her back yard and patio, destroying its structural integrity. Because of the construction, Torres claims that debris and concrete consistently fell onto her property, preventing her from enjoying her property.

Furthermore, Torres alleges that defendants caused her to suffer PTSD due to their purported actions during the construction. Torres says that she feared for her physical safety because the construction was performed in an unsafe manner, causing her to be in a constant state of stress. Due to this stress, Torres claims her emotional and mental health suffered.

Discussion

"On a CPLR 3211(a)(7) motion to dismiss for failure to state a cause of action, the complaint must be construed in the light most favorable to the plaintiff and all factual allegations must be accepted as true. Further, on such a motion, the complaint is to be construed liberally and all reasonable inferences must be drawn in favor of the plaintiff" (*Alden Global Value Recovery Master Fund L.P. v Key Bank Natl. Assoc.*, 159 AD3d 618, 621-622, 74 NYS3d 559 [1st Dept 2018] [internal quotations and citations omitted]).

"A motion to dismiss based on documentary evidence "may be appropriately granted only where the documentary evidence utterly refutes plaintiff's factual allegations, conclusively

establishing a defense as a matter of law" (*Goshen v Mutual Life Ins. Co. of New York*, 98 NY2d 314, 326, 746 NYS2d 858 [2002]).

Intentional Infliction of Emotional Distress

"The tort of intentional infliction of emotional distress predicates liability on the basis of extreme and outrageous conduct, which so transcends the bounds of decency as to be regarded as atrocious and intolerable in a civilized society" (*Freihofer v Hearst Corp.*, 65 NY2d 135, 143, 490 NYS2d 735 [1985]). "The tort has four elements: (i) extreme and outrageous conduct; (ii) intent to cause, or disregard of a substantial probability of causing, severe emotional distress; (iii) a causal connection between the conduct and injury; and (iv) severe emotional distress" (*Howell v New York Post Co., Inc.*, 81 NY2d 115, 121, 612 NE2d 699 [1993]).

"[W]here severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation, a remedy is available in the form of an action for the intentional infliction of emotional distress" (*Nader v General Motors Corp.*, 25 NY2d 560, 569, 255 NE2d 765 [1970]).

Torres claims to have suffered from emotional distress caused by defendants. In support of her claim, she points to a report by her expert (not her treating) psychiatrist Dr. Salvage (NYSCEF Doc. No. 112). Dr. Salvage claims in his report that plaintiff is suffering from PTSD due to the construction project. Plaintiffs state that the findings in this report by the expert are sufficient to establish a cause of action for IIED. Defendants claim that any alleged actions taken by defendants are not enough to constitute extreme and outrageous conduct. They also claim that the psychiatrist's report alone cannot establish that there is a cause of action for IIED.

The IIED claim is dismissed. There is no indication that defendants engaged in extreme and outrageous conduct. Furthermore, the report of the psychiatrist does not conclusively establish that a claim of IIED has been met. Although the psychiatrist's report indicates that Torres was distressed from the construction, this does not amount to a cause of action for IIED, although it may be part of her claim for damages on her negligence cause of action. There is no evidence that during the course of this construction project defendants intended to inflict harm upon the plaintiff that was so severe that it goes "beyond all possible bounds of decency" so as "to be regarded as atrocious, and utterly intolerable in a civilized community" (Restatement (Second) of Torts § 46 [1965]). Construction projects cause noise, lead to the spread of dirt and debris, and can potentially cause damage to neighboring properties. This is especially true for cramped cities like New York. But that does not mean that doing construction, even loud and dirty construction, states a claim for IIED.

Negligent Infliction of Emotional Distress

To support its claim for NIED, plaintiff cites a Second Department case where the court held that extreme and outrageous conduct is no longer a necessary element for a NIED claim (*Taggart v Costabile*, 131 AD3d 243, 251, 14 NYS3d 388 [2d Dept 2015]). That is not the law in this Department. Cases from the First Department hold that if extreme and outrageous conduct is not met, a cause of action for NIED cannot be established (*see Kornicki v Shur*, 132 AD3d 403, 404, 17 NYS3d 396 [1st Dept 2015]; *see also Kerzhner v G4S Gov't Sols., Inc.*, 138 AD3d 564, 566, 30 NYS3d 620 [1st Dept 2016]); *see also Lau v S & M Enterprises*, 72 AD3d 497, 498, 898 NYS2d 42 [1st Dept 2010]), holding, "The existence of extreme and outrageous conduct is also a necessary element for a claim of negligent infliction of emotional distress." Because plaintiffs have

failed to establish that defendants engaged in extreme and outrageous conduct, the claim for NIED in this Department must also fail.

Plaintiffs' cause of action for NIED should also be dismissed because it does not meet the other requirements of a NIED claim. Plaintiff was not in the "zone of danger." "The zone-of-danger rule, which allows one who is himself or herself threatened with bodily harm in consequence of the defendant's negligence to recover for emotional distress resulting from viewing the death or serious physical injury of a member of his or her immediate family" (*Bovsun v Sanperi*, 61 NY2d 219, 228, 461 NE2d 843 [1984]). Plaintiff here makes no allegation of injury or death to an immediate family member. Nor does plaintiff allege a "[v]iolation of a duty to plaintiff which results in physical injury to a third person but only financial or emotional harm or both to plaintiff" (*Kennedy v McKesson Co.*, 58 NY2d 500, 505, 448 NE2d 1332 [1983]).

NIED claims are sometimes allowed when a defendant breaches a duty of care which leads directly to emotional harm even though no physical injury occurred. Here, the emotional harm must be a direct result of the breach, as opposed to a consequential result (*id.* at 506) and the claim must possess "some guarantee of genuineness" (*Ferrara v Galluchio*, 5 NY2d 16, 21, 152 NE2d 249 [1958]). The guarantee of genuineness is not an easy burden to meet and approaches extreme and outrageous conduct, such as mistakenly implanting plaintiffs' embryo in another woman's uterus (*Perry-Rogers v Obasaju*, 282 AD2d 231, 232, 723 NYS2d 28 [1st Dept 2001]) or defendants' negligence in falsely informing plaintiff that her mother had died (*Johnson v State*, 37 NY2d 378, 383, 334 NE2d 590, 593 [1975]). The facts of the instant case do not get close to the outrageous conduct alleged in the cases cited above. The inconvenience of the construction and alleged damage to the back yard do not establish a direct emotional harm with the guarantee of

genuineness. Constructing a building is simply not comparable to negligently allowing someone else to get pregnant with your embryo or leading someone to think her mother was dead.

Negligence

To establish a prima facie case of negligence, a plaintiff must demonstrate (1) a duty owed by the defendant to the plaintiff, (2) a breach thereof, and (3) injury proximately resulting therefrom (*Solomon by Solomon v City of New York*, 66 NY2d 1026, 1027, 489 NE2d 1294 [1985]). Plaintiffs allege that defendants owed plaintiffs a duty of care pursuant to the New York City Administrative Code to perform construction in a manner consistent with generally accepted professional construction practices, that defendants breached that duty, thereby causing plaintiffs damages. The Court finds that there is enough of an inference of negligence raised in the second amended verified complaint to defeat the motion to dismiss. There was a duty, and the allegations regarding the damage to the property, including water damage, the cracks in the foundation of the property, the damage to the patio and rear yard, and the affidavit of the expert witness, are enough to establish damages and a possible breach of duty; it defeats the motion to dismiss.

Nuisance

"One is subject to liability for a private nuisance if his or her conduct is a legal cause of the invasion of an interest in the private use and enjoyment of land, and such invasion is (1) intentional and unreasonable, (2) negligent or reckless, or (3) actionable under the rules governing liability for abnormally dangerous conditions or activities" (*Murphy v Both*, 84 AD3d 761, 762-763, 922 NYS 2d 483 [2d Dept 2011]). "A nuisance based on negligence is but a single wrong, whether characterized as negligence or nuisance" (*id.* at 763). "[I]f negligence is the gravamen of the wrong, if one negligently uses his property in such a way as to create a dangerous or noxious

condition resulting in another's injury, the offender may be guilty either of negligence or of maintaining a nuisance stemming from negligence. It matters not, as we have already indicated, which label the plaintiff employs, for quite obviously he may not have a double recovery" (*Morello v Brookfield Const. Co.*, 4 NY2d 83, 91, 149 NE2d 202, 205 [1958]).

Defendants claim that the nuisance action must be dismissed because it is duplicative of the negligence claim and that New York courts routinely dismiss nuisance claims where the underlying cause of action is negligence. In opposition, plaintiffs state that the claims are not duplicative because the nuisance and negligence claims are properly pled in the alternative. Plaintiffs state that the negligence claim is based on the damages done to Torres' property and the nuisance claim is premised on the deprivation of Torres' use of her back yard.

Plaintiffs' nuisance claim is dismissed as duplicative. The deprivation of the use of the back yard is rooted in a claim of negligence. Because of the allegedly negligent actions of the defendants, Torres's back yard was apparently damaged, and this damage allegedly prevented Torres from enjoying the use of her back yard. There is no indication that defendants acted intentionally to prevent Torres from enjoying her property. Because the negligence and nuisance claim are inextricably related and because the nuisance claim is based on allegations of negligent conduct, the nuisance claim must be dismissed.

Striking Paragraph 38 of the Complaint

Pursuant to CPLR 3024(b) "a party may move to strike any scandalous or prejudicial matter unnecessarily inserted in a pleading." "A motion to strike scandalous or prejudicial material from a pleading (*see* CPLR 3024[b]) will be denied if the allegations are relevant to a cause of action" (*New York City Health & Hosps. Corp. v St. Barnabas Cmty. Health Plan*, 22 AD3d 391, 802

NYS2d 363 [1st Dept 2005]). Defendants move to strike number 38 of the plaintiffs' second amended complaint which states:

> "During the construction of the Project, the NYC Department of Buildings ("DOB") issued multiple violations, including stop work orders ("SWO"), because of unreasonable occurrences over an extended period of time during the construction of the Project that were caused by the failure of 329 Pleasant, HAP, SIS, UMF, Bulfamante and Wexler to design and/or construct and/or cause the construction of the Project, including the excavation, to be construed in conformance with: (1) Code; (2) the Professional Standard and (3) Construction Practices. Upon information and belief, in an intentional, indefensible and unconscionable effort to avoid SWOs and other statutory penalties for the violation of Code, the Professional Standard and Construction Practices, 329 Pleasant, HAP, SIS, UMF, Bulfamante and/or Wexler acting jointly, severally and/or independently of each other engaged in an unlawful scheme, plan and device with an employee of DOB to avoid and evade compliance with Code for the construction of the Project so that 329 Pleasant, HAP, SIS, UMF, Bulfamante and/or Wexler, jointly and/or severally, knowingly, wantonly, willfully and maliciously disregarded the Statutory Duty owed to Plaintiffs in a manner that indicated a reckless indifference to the rights of Plaintiffs and, knowingly and intentionally, causing 452 East and Torresco to suffer financial loss and Torres to suffer mental anguish for which 329 Pleasant, HAP, SIS, UMF, Bulfamante and Wexler are jointly, and/or severally liable to Plaintiffs for punitive damages."

(NYSCEF Doc. No. 48 at 10).

Defendants claim that this portion of the complaint contains "scandalous matter unnecessarily inserted in the pleading, and not relevant to the negligence and absolute liability causes of action asserted herein" (NYSCEF Doc. No. 98 at 2). In opposition, plaintiffs allege that this part of the complaint is relevant because it pertains to the emotional distress and negligence claims because it shows a pattern of wrongful behavior related to the construction project which in turn impacted Torres' well-being.

The motion to strike is granted. The allegations in paragraph 38 are irrelevant to the causes of action in the complaint. Had plaintiffs alleged fraud or conspiracy to defraud, these allegations might be relevant. However, that is not the case here. The defendants' alleged non-compliance

with building codes is not relevant to the determination of IIED, NIED, nuisance, or negligence as it relates to plaintiffs, the neighbors.

Strict Liability

Plaintiffs withdraw this cause of action.

Accordingly, it is hereby

ORDERED that in motion sequence 002 the branch of defendant Mazal and defendant HAP's motion to dismiss the causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, nuisance, and strict liability is granted. The motion to strike paragraph 38 of the second amended verified complaint is also granted, and it is further

ORDERED that in motion sequence 002 the branch of defendant Mazal and defendant HAP's motion to dismiss the cause of action for negligence is denied. The branch of the motion for attorney's fees is also denied, and it is further

ORDERED that in motion sequence 002 defendant S.I. Services of N.Y. Inc.'s cross-motion to dismiss the causes of action for intentional infliction of emotional distress, negligent infliction of emotional distress, and strict liability is granted. The branch of the motion to strike the 38th paragraph of the second amended verified complaint is granted, and it is further

OREDERED that in motion sequence 002 defendant S.I. Services of N.Y. Inc.'s cross-motion for attorney's fees is denied, and it is further

ORDERED that in motion sequence 003 the branches of defendant Mario Bulfamante & Sons' motion to dismiss the causes of action for intentional infliction of emotional distress,

negligent infliction of emotional distress, nuisance, and strict liability is granted. The motion to strike paragraph 38 of the second amended verified complaint is also granted, and it is further

ORDERED that in motion sequence 003 the branch of defendant Mario Bulfamante & Sons' motion to dismiss the cause of action for negligence is denied.

The parties are directed to appear for a conference on June 11, 2019.

5.1.19

DATE

ARLENE P. BLUTH, J.S.C.

HON. ARLENE P. BLUTH

CHECK ONE:		CASE DISPOSED			X	NON-FINAL DISPOSITION	
		GRANTED		DENIED	X	GRANTED IN PART	OTHER
APPLICATION:		SETTLE ORDER				SUBMIT ORDER	
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN				FIDUCIARY APPOINTMENT	REFERENCE