Underwood v Urban Homesteading Assistance
2020 NY Slip Op 32533(U)
July 31, 2020
Supreme Court, New York County
Docket Number: 161908/18
Judge: Lynn R. Kotler

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON.LYNN R. KOTLER, J.S.C. PART 8

JEFFREY UNDERWOOD et al.

INDEX NO. 161908/18

MOT. DATE

- v -

MOT. SEQ. NO. 005

URBAN HOMESTEADING ASSISTANCE et al.

The following papers were read on this motion to/for reargue and x-mot to dismiss

Notice of Motion/Petition/O.S.C. — Affidavits — Exhibits NYSCEF DOC No(s)._____
Notice of Cross-Motion/Answering Affidavits — Exhibits NYSCEF DOC No(s)._____
Replying Affidavits NYSCEF DOC No(s)._____

Previously, the court denied plaintiffs' motion for a default judgment against defendant 544 East 13th Street Housing Development Fund Corp ("544 East") in a decision/order dated July 10, 2019. In another decision/order, the court: [1] denied plaintiffs' motion to renew the application for a default judgment against 544 East; [2] granted motions to dismiss by defendants Urban Homesteading Assistance (U-HAB), Inc. d/b/a Uhab d/b/a Urban Homesteading Assistance Board, Uhab Housing Development Fund Corporation d/b/a Uhab HDFC (collectively "UHAB") and B&N Housing LLC ("B&N"); and [3] *sua sponte* dismissed the balance of plaintiffs' complaint because it "fail[ed] to state any *prima facie* cause of action" (see decision/order dated 11/22/19). The court also noted that "[p]laintiffs have failed to file affidavits of service on any of the other defendants and it otherwise appears according to the court's file that no other defendant was served."

Plaintiffs now move tor reargue the 11/22/19 decision. UHAB opposes the motion. Defendants Nicky Scott, Isabel Dawson, and Gregory Dawson (collectively, the "Dawson Defendants") cross-move for an order dismissing plaintiffs' complaint against them in the event the court grants reargument and addresses the merits of plaintiffs' claims against them. Plaintiffs oppose the cross-motion. The court's decision follows.

A motion to reargue is addressed to the court's discretion, and permission to reargue will only be granted if the court believes some error has been made (see CPLR § 2221[d][2]). In order to succeed on a motion for reargument, the movant must demonstrate that the Court overlooked or misapprehended the law or facts when it decided the original motion (*Foley v. Roche*, 68 AD2d 558 [1st Dept 1979]). A motion to reargue is not designed to provide an unsuccessful party with another opportunity to relitigate the same issues previously decided against him or her (*Pro Brokerage, Inc. v. Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984]). Nor does a motion to reargue permit a litigant to present new arguments

Dated: 7/31/20

HON. LYNN R. KOTLER, J.S.C.

1. Check one: ☒ **CASE DISPOSED** ☐ **NON-FINAL DISPOSITION**

2. Check as appropriate: Motion is ☐**GRANTED** ☐ **DENIED** ☒ **GRANTED IN PART** ☐ **OTHER**

3. Check if appropriate: ☐**SETTLE ORDER** ☐ **SUBMIT ORDER** ☐ **DO NOT POST**

☐**FIDUCIARY APPOINTMENT** ☐ **REFERENCE**

not previously advanced on the prior motion (*Amato v. Lord & Taylor, Inc.*, 10 AD3d 374 [2d Dept 2004]; *see also DeSoignies v. Cornasesk House Tenants' Corp.*, 21 A.D.3d 715 [1st Dept 2005]).

As the court stated in the 11/22/19 decision, "plaintiffs seek title to real property or money damages because they were allegedly defrauded into leaving an apartment while the building was under renovations under the assumption that they would be allowed to return."

By way of this motion, plaintiffs' notice three grounds for reargument: [1] the court incorrectly *sua sponte* found no personal jurisdiction over the Dawson Defendants; [2] the court incorrectly dismissed plaintiffs' claims against UHAB "despite numerous clear factual allegations"; and [3] the court should have granted plaintiffs' motion for a default judgment against 544 East because 544 East has not appeared int his action and plaintiffs stated a claim against it.

Plaintiffs' first argument is based upon assertions that the court overlooked a stipulation wherein the Dawson Defendants waived objections to service on them and that the court should not have dismissed the complaint against them for lack of personal jurisdiction. The court, however, did not dismiss the complaint against the Dawson Defendants due to lack of service. The court simply noted that affidavits of service were not filed on any of the remaining defendants, a fact which remains true. Therefore, plaintiffs' argument on this point is unavailing.

Although they didn't notice an argument on the merits of their claims against the Dawson Defendants, plaintiffs' counsel states:

> While Plaintiffs believe the best reading of the Court's dismissal of their claims against the Dawsons is that the Court believed that the Dawson Defendants had not expressly waived service, the Court's decision contains one line bringing forward its prior conclusion that "[s]ince plaintiffs' complaint fails to state any prima facie cause of action" to apply as against the Dawsons, suggesting perhaps the Court believed that the VC failed to state a prima facie case against the Dawson Defendants.

Plaintiffs' counsel proceeds to argue that plaintiffs have successfully asserted claims against the Dawson Defendants for tortious interference with contract and prospective economic advantage and unjust enrichment. While the court disagrees, the court will grant reargument on this point. Upon reargument, the court vacates that portion of the 11/22/19 decision which dismissed plaintiff's claims against the Dawson Defendants. However, the court grants the Dawson Defendants' cross-motion to dismiss plaintiff's claims against them.

On a motion to dismiss pursuant to CPLR § 3211, the pleading is to be afforded a liberal construction (*Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]). The court must accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory (*id.* citing *Morone v. Morone*, 50 NY2d 481 [1980]; *Rovello v. Orofino Realty Co.*, 40 NY2d 633 [1976]).

Plaintiffs have seemingly abandoned their fraud-based claims against the Dawson Defendants. Nonetheless, such claims require a heightened pleading standard (CPLR 3016[b]) which plaintiffs have clearly not met. For at least this reason, these claims must be dismissed.

To state a claim for tortious interference with prospective economic advantage, the plaintiff must allege that (1) he had a business relationship with a third party; (2) the defendant knew of that relationship and intentionally interfered with it; (3) the defendant acted solely out of malice or used improper or illegal means that amounted to a crime or independent tort; and (4) the defendant's interference caused injury to the relationship with the third party (*Amaranth LLC v. J.P. Morgan Chase & Co.*, 71 AD3d 40 [1st Dept 2009]; see also *Carvel Corp. v. Noonan*, 3 NY3d 182 [2004]).

Tortious interference with contract is a corollary of a claim for tortious interference with prospective economic advantage. Naturally, a plaintiff asserting a claim for tortious interference with contract must allege a valid, enforceable contract that was interfered with (*Kickertz v. New York University*, 110 AD3d 268 [1st Dept 2013]). Both claims are subject to a three-year statute of limitations when, as here, "the gravamen of [the] complaint is economic injury, rather than merely reputational harm" (*Amaranth LLC*, 71 AD3d at 48).

Plaintiffs' tortious interference claims against the Dawson Defendants are time-barred, since their allegations against the Dawson Defendants occurred more than three years before this action was commenced. Fatal to the contract-based claim is the absence of an allegation that plaintiffs had a valid, enforceable contract which the Dawson Defendants interfered with. Further, plaintiffs have failed to allege that the Dawson Defendants acted solely to harm them or used improper or illegal means to cause their damages. Accordingly, this cause of action is severed and dismissed.

The unjust enrichment claim must also be dismissed. An unjust enrichment claim is a quasi-contract arising when a defendant was enriched at plaintiff's expense and it is against equity and good conscience that defendant retain what is sought to be recovered (*Travelsavers Enterprises, Inc. v. Analog Analystics, Inc.*, 149 AD3d 1003 [2d Dept 2017]). An unjust enrichment claim does not lie where there is an enforceable agreement between the parties (*Accurate Copy Serv. of America, Inc. v. Fisk Bldg. Assocs. L.L.C.*, 72 AD3d 456 [1st Dept 2010] citing *Singer Asset Fin. Co., LLC v. Melvin*, 33 AD3d 355, 358 [2006]).

Plaintiffs' counsel asserts that the unjust enrichment claim is viable because "[p]laintiffs gave up the value of their apartment unit by leaving, which the Defendants, either acting individually or as agents of each other, then turned around and sold, pocketing the profits." This argument fails for two reasons. The argument is not an accurate representation of the allegations contained in the complaint. Further, since it has been established not only based upon plaintiffs' allegations but also documentary evidence that the Dawson Defendants did not own the building or subject apartment, they could not have pocketed the profits.

Meanwhile, the complaint alleges that the Dawson Defendants, among others, "kept an allocation of three thousand dollars [] per month, part of which was that was (sic) supposed to be allocated to covering Plaintiffs' moving, rent and other expenses during renovations. In total, this allocation was for well over $70,000, some substantial portion of which value Plaintiffs are entitled to." The complaint also cryptically asserts: "Plaintiff's monthly maintenance payment was partially allocated to pay the tax incurred by the Building when it was sold to UHAB Defendants and became a HDFC cooperative." Neither allegation supports a claim for unjust enrichment. As to the former, the allegation is conclusory and necessarily lacking sufficient details to state a *prima facie* claim. With respect to the latter, plaintiffs do not allege that their maintenance payments were collected or kept by the Dawson Defendants.

For at least these reasons, the Dawson Defendants' cross-motion to dismiss is granted.

The balance of plaintiffs' motion is a rehash of previously unsuccessful arguments which have been previously addressed by the court. Therefore, it is denied.

CONCLUSION

In accordance herewith, it is hereby

ORDERED that plaintiffs' motion to reargue is granted to the extent that the court grants reargument as to dismissal of their claims against the Dawson Defendants; and it is further

ORDERED that plaintiffs' motion is otherwise denied; and it is further

ORDERED that upon reargument, the court grants the Dawson Defendants' cross-motion to dismiss the claims against them; and it is further

ORDERED that the court otherwise adheres to the 11/22/19 decision; and it is further

ORDERED that plaintiffs' complaint remains dismissed and to the extent that the Clerk has not already done so, the Clerk is directed to enter judgment accordingly.

Any requested relief not expressly addressed herein has nonetheless been considered and is hereby expressly denied and this constitutes the Decision and Order of the court.

Dated: 7/31/20
New York, New York

So Ordered:

Hon. Lynn R. Kotler, J.S.C.