Rice v Pennoyer
2021 NY Slip Op 32064(U)
January 27, 2021
Supreme Court, Nassau County
Docket Number: 6072472/2020
Judge: Helen Voutsinas

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NASSAU - IAS/TRIAL PART 19
Present: Hon. Helen Voutsinas, J.S.C.

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GINA RICE, IRA ZIMMERMAN and NICOLE PAIGE,

Plaintiffs, **Index No. 6072472/2020**

-against- **Motion Seq. Nos. 001 & 002**

PAUL G. PENNOYER, GERARD L. EASTMAN, JR., LISA M. EASTMAN and WILLIAM BOURNE a/k/a BILL BOURNE, **Short Form Order**

Defendants.

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The following papers were read on these motions:

Notice of Motion, Affidavit, Exhibits .....,.....1
Notice of Cross Motion, Affidavit and Affirmation, Exhibits.....2
Reply Affirmation.....3

Defendant William Bourne a/k/a Bill Bourne, pro se ("Bourne") moves for an Order pursuant to CPLR §3211[a][7] dismissing the complaint of Gina Rice, Ira Zimmerman and Nicole Page, as against Bourne. Plaintiffs cross move for an Order deeming the affidavits of service timely filed and, pursuant to CPLR §3215, granting a default judgment as against defendant Paul G. Pennoyer ("Pennoyer"). The motions are determined as hereinafter provided.

Plaintiffs commenced this action seeking to recover damages suffered from the alleged illegal operation of a business on property adjacent to their home. In their verified complaint, plaintiffs assert causes of action for nuisance, negligent infliction of emotional distress, and punitive damages.

Plaintiffs allege in their verified complaint, in sum and substance, as follows: Plaintiffs are the owners and residents of premises 4 Matinecock Farms Road, Glen Cove, New York. Defendant Pennoyer is the owner of premises 16 Underhill Road, Glen Cove, New York ("16 Underhill Road"). Defendants Gerard L. Eastman, Jr. and Lisa M. Eastman (the "Eastmans") are the owners of premises 18 Underhill Road, Glen Cove, New York ("18 Underhill Road"). Defendant Bourne is a tenant living at 18 Underhill Road, and is conducting a commercial business at both 16 and 18 Underhill Road. Plaintiffs' property is immediately adjacent to both 16 and 18 Underhill Road. All of the properties are located in a residential zoning district pursuant to the Glen Cove City Zoning Code (the "Code"), which prohibits the operation of a commercial business in that residential zone. Bourne's operation of his business at 16 and 18 Underhill Road has caused the creation of a nuisance. Plaintiffs allege that the business is operated at all hours of the day and night, seven (7) days a week, and that as a result of the operation of the illegal business and the

conduct of Bourne and his employees in operating said business, defendants have caused the negligent infliction of emotional distress to plaintiffs. Plaintiffs also claim that as a result of the actions of defendant Bourne, they have been caused to suffer the loss, use and enjoyment of their property, and to suffer the diminished value of their property.

Defendant Bourne's Motion to Dismiss

Bourne asserts that plaintiffs have commenced this action in bad faith. He states that the allegations against him are false. He denies running a business at 16 and 18 Underhill Road and states that he only parks his work truck there. Bourne asserts that plaintiffs are harassing him, and have previously made baseless complaints to the police and made verbal threats to have him thrown off the property.

Bourne argues that plaintiffs fail to specify how he has created a nuisance. He states that, even assuming he was running a business (which he denies), plaintiffs fail to state how the alleged running of a business interfered with their enjoyment of their property or harmed them. Bourne further states that there is not a single allegation or fact that supports any claim that his actions have caused the value of plaintiffs' property to diminish.

In regard to the negligent infliction of emotional distress claim, Bourne argues that plaintiffs have failed to allege that they felt that their physical safety was endangered and thus fail to state an actionable claim.

The sole criterion on a motion to dismiss pursuant to CPLR §3211[a][7] is whether the pleading states a cause of action. If from its four corners there are factual allegations which, taken together, manifest any cause of action cognizable at law, a motion for dismissal will fail (*Kopelowitz & Co., Inc. v. Mann*, 83 AD3d 793, 796-797 [2d Dept 2011] citing *Leon v. Martinez*, 84 NY2d 83, 87-88 [1994]; *Hense v. Baxter*,79 AD3d 814 [2d Dept 2010]).

The complaint must be construed liberally, the factual allegations deemed to be true, and the nonmoving party granted the benefit of every possible favorable inference (*Leon v. Martinez*, supra at 87; *Sokol v. Leader*, 74 AD3d 1180 [2d Dept 2010]). However, bare legal conclusions are not entitled to the benefit of the presumption of truth and are not accorded every favorable inference (*Morris v. Morris*, 306 AD2d 449, 451 [2d Dept 2003]). Nevertheless, inartfully drawn complaints may be supplemented by affidavits on such a motion in order to sustain a claim. (*Rovofello v. Orofino Realty Co.*, 40 NY2d 633, 635 [1976]). Unless the motion is converted into one for summary judgment pursuant to CPLR 3211[(c), "affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint," and such affidavits "are not to be examined for the purpose of determining whether there is evidentiary support for the pleading" (*Id.*, at 636). When such affidavits are considered, the test is whether the plaintiff possesses a cognizable claim, "not whether he has stated one" (*Guggenheimer v. Ginzburg*, 43 NY2d 268 [1977]); *Sposato v. Paboojian*, 110 AD3d 979 [2d Dept 2013]).

The test to be applied is whether the complaint gives sufficient notice of the transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from the factual averments. (See *Treeline 990 Stewart Partners, LLC v. MIT Atria, LLC*, 107 AD3d 788 [2d Dept 2013]).

Affidavits submitted by a defendant "will almost never warrant dismissal under CPLR 3211 unless they establish conclusively that [the plaintiff] has no cause of action" (*Sokol v. Leader*, 74 AD3d 1180, 1182 [2d Dept 2010](internal quotations and citations omitted)). A motion to dismiss pursuant to CPLR 3211(a)(7) must be denied "unless it has been shown that a material fact as claimed by the pleader to be one is not a fact at all and unless it can be said that no significant dispute exists regarding it" (*Guggenheimer v. Ginzburg,* 43 NY2d 268, 275 [1977].

In opposition to Bourne's motion, plaintiffs submit the affidavit of plaintiffs Ira Zimmerman ("Zimmerman"). In his affidavit, Zimmerman repeats the allegations of the complaint, and asserts more factually detailed statements regarding the alleged business operations of Bourne at 16 and 18 Underhill Road. Zimmerman asserts that the business includes the use of commercial vehicles and heavy duty commercial equipment including wood chippers and wood splitters on a daily basis, at all hours of the day and night. He states further that there is commercial traffic and extremely loud and often unbearable noises, and that trucks roll in and out of the property transporting large trees, firewood and chips.

The first cause of action alleges both nuisance and negligent infliction of emotional distress against Bourne. The second cause of action appears to further address the nuisance cause of action. The Court must review plaintiff's complaint in order to ascertain whether plaintiffs "possess a cognizable claim".

A claim of negligent infliction of emotional distress must be "premised upon a breach of duty owed directly to the plaintiff which either endangered the plaintiff's physical safety or caused the plaintiff to fear for his or her own physical safety." (*Lancelotti v. Howard*, 547 NYS2d 654, 655 [2d Dept 1989]). *Perry v Val. Cottage Animal Hosp*., 261 AD2d 522 [2d Dept 1999]).

Plaintiffs' complaint is devoid of any alleged duty owed by the defendant Bourne to plaintiffs. Nor does it allege any threat to the physical safety of plaintiffs, or that plaintiffs feared for their physical safety, as noted in Bourne's motion papers. In their opposition papers, plaintiffs do not address this argument. While plaintiff Zimmerman submits his affidavit adding details to the plaintiffs' claims, nothing is added regarding the claim of negligent infliction of emotional distress claim.

Accordingly, to the extent that plaintiff's first cause of action states a claim for negligent infliction of emotional distress against Bourne, such claim is dismissed pursuant to CPLR 3211[a][7].

The Court now turns to the nuisance claim asserted against Bourne. "The elements of a private nuisance cause of action are an interference (1) 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" (*Aristides v. Foster,* 73 AD3d 1105, 1106, [2d Dept 2010]; *see Copart Indus. v. Consolidated Edison Co. of N.Y.,* 41 NY2d 564, 568 [1977] *Donnelly v. Nicotra,* 55 AD3d 868, 868–869 [2d Dept 2008]. "[E]xcept for the issue of whether the plaintiff has the requisite property interest, each of the other elements is a question for the jury, unless the evidence is undisputed" (*Weinberg v. Lombardi,* 217 AD2d 579, 579 [2d Dept 1995]).

The Court finds that, plaintiffs' allegations, taken together, are sufficient to show that they possess a cognizable claim for private nuisance. Such a claim, predicated upon allegations of excessive noise emanating from neighbor's properties, is sufficient. (See e.g. *Zimmerman v. Carmack*, 292 AD2d 601 [2d Dept 2002], *61 W. 62 Owners Corp. v. CGM EMP LLC*, 77 AD3d 330 [1st Dept 2010]).

The nuisance claim is also properly based upon the alleged continuing violation of City of Glen Cove zoning ordinances by the operation of a commercial business upon residential property, which adversely affects plaintiffs' property. Also, the obligation of City of Glen Cove officials to enforce such ordinances does not prevent plaintiffs, as property owners, from maintaining this action against their neighbors to obtain damages to vindicate a separate legal interest of their own. (*Nemeth v. K-Tooling*, 100 AD3d 1271 [3d Dept 2012], citing *Little Joseph Realty v. Town of Babylon*, 41 NY2d 738 [1977]); See also *61 W. 62 Owners Corp. v. CGM EMP LLC*, 77 AD3d 330 [1st Dept 2010]).

In the instant motion, Bourne denies plaintiffs' allegations that he is running a business on the property or creating excessive noise, and argues that, since plaintiffs fail to offer any proof of either the operation of any business or the claimed excessive noises, the nuisance claims against him must be dismissed. However, at the pleading stage, plaintiffs are not required to prove their allegations.

Accordingly, the Court deems the allegations of the plaintiffs' first cause of action and second cause of action to constitute a claim sounding in private nuisance, and to that extent, this claim is sustained as a matter of pleading.

Plaintiff's seventh cause of action states that that defendants have taken "punitive actions" and as a result "Plaintiffs have suffered addition [sic] negligent infliction of emotional distress and further diminished value in their real property." Plantiffs further state that, as a result of the foregoing, "Plaintiffs have suffered punitive damages . . . ."

To the extent that the seventh cause of action asserts a claim for negligent infliction of emotional distress against Bourne, such claim is dismissed, for the reasons set forth above, pursuant to CPLR 3211[a][7]. To the extent that the seventh cause of action states a claim for private nuisance, same is dismissed as duplicative of the nuisance claim already recognized by the Court, as discussed above.

New York does not recognize an independent cause of action for punitive damages. (*Gershman v. Ahmad*, 156 AD3d 868, 868 [2d Dept 2017]). Accordingly, to the extent the seventh cause of action asserts a claim for punitive damages, the same is dismissed.

Plaintiffs' Cross Motion to Deem Affidavits of Service Timey Filed and for Default Judgment as Against Defendant Paul G. Pennoyer

In support of their cross motion plaintiffs submit their attorney's affirmation as to the default, the verified complaint, an affidavit of merit of plaintiff Ira Zimmerman, and the affidavits of service. Plaintiffs also submit a copy of a deed into Pennoyer, which counsel states is the last

deed of record regarding 16 Underhill Road. The deed is dated May 5, 2009 and was recorded on October 7, 2010.

In the affidavit of service regarding defendant Paul G. Pennoyer, it is alleged that process was served on July 23, 2020 at 16 Underhill Road, Glen Cove, New York, by delivery of the papers to "Hannah 'Doe', a person of suitable age and discretion." Presumably, this person refused to give her last name, but the process server does not state so. The process server also does not provide any other information as to who this person is or her relationship to Pennoyer.

According to the affidavit of service, copies of the summons and complaint were mailed on the same day, July 23, 2020. The affidavit of service should have been filed within (20) days thereafter, or August 12, 2020. (CPLR 308[2]). Once timely filing is accomplished, service is deemed completed 10 days thereafter. (*Id.)* Here, the affidavit of service was not filed within 20 days of either the mailing or affixing; thus, service was never completed. Since service was never completed, the defendant's time to answer the complaint had not yet started to run and, therefore, he could not be in default (*see First Fed. Sav. & Loan Ass'n of Charleston v. Tezzi*, 164 AD3d 758, 759–60 [2d Dept 2018]; *Pipinias v. J. Sackaris & Sons, Inc.,* 116 AD3d 749, 750 [2d Dept 2014]).

However, failure to file proof of service within the time specified in CPLR 308[2] is not a jurisdictional defect but, rather, a procedural irregularity that may be cured by an order permitting the late filing of proof of service *nunc pro tunc* (*Pipinias*, supra); *Zareef v. Lin Wong*, 61AD3d 749 [2d Dept 2009]). A court may not, however, make that relief retroactive to a defendant's prejudice by placing the defendant in default as of a date prior to the order allowing the late filing of proof of service. (*Discover Bank v Eschwege*, 71 AD3d 1413 [4th Dept 2010]; *Paracha v County of Nassau*, 228 AD2d 422 [2d Dept 1996]).

Under the circumstances, the branch of the plaintiffs' cross motion, in effect, permitting the late filing of proof of service of the summons and complaint *nunc pro tunc* as against defendants Paul G. Pennoyer and defendant Lisa M. Eastman (also served pursuant to CPLR 308[2], on July 23, 2020) is granted to the extent that the late filing is permitted to the date that proof of service was actually filed, to wit: August 25, 2020. Defendants Paul G. Pennoyer and Lisa M. Eastman may appear and answer within 30 days of the date of service of the within order with notice of entry.

The Court notes that, even if proof of service had been timely filed, the application for a default judgment would have been denied as plaintiffs failed to submit an affidavit of a person with knowledge stating whether or not the defendant is in military service. (See, 50 U.S.C.A. App. §521). Furthermore, in the reply affirmation submitted by defendant Bourne in further support of his motion, he states that defendant "Paul G. Pennoyer, against whom plaintiffs seek a default judgment, is dead and has been since around 2010." Plaintiffs counsel should investigate this further.

Accordingly, based upon the foregoing, is hereby

ORDERED, that defendant William Bourne's motion to dismiss (Motion Seq. No. 001) is **GRANTED IN PART AND DENIED IN PART. GRANTED** to the extent that any cause of action for negligent infliction of emotional distress as stated in the first, second or seventh cause

of action of plaintiffs' complaint, and any cause of action for punitive damages as stated in the seventh cause of action, are **DISMISSED**, and the motion is otherwise denied**.** Defendant Bourne shall serve and file an answer to the complaint within twenty (20) days of the date of service of this Order with Notice of Entry. It is further,

ORDERED, that plaintiffs' cross motion for an Order (Motion Seq. No. 002) deeming the affidavits of service timely filed is **GRANTED** to the extent that the affidavits of service pertaining to defendants Paul G. Pennoyer and defendant Lisa M. Eastman are deemed timely filed, *nunc pro tunc*, as of August 25, 2020. Defendants Paul G. Pennoyer and Lisa M. Eastman may appear and answer within 30 days of the date of service of the within Order with Notice of Entry. It is further

ORDERED, that plaintiffs' cross motion (part of Motion Seq. No. 002) for a default judgment as against Defendant Paul G. Pennoyer, is **DENIED**, without prejudice.

Any other relief sought herein but not specifically ruled upon is **DENIED.**

This constitutes the Decision and Order of the Court.

Dated: January 27, 2021
Mineola, NY

Helen Voutsinas
Justice of the Supreme Court

ENTERED
Feb 03 2021
NASSAU COUNTY
COUNTY CLERK'S OFFICE