215 W. 84th St Owner LLC v Bailey
2022 NY Slip Op 33100(U)
September 12, 2022
Supreme Court, New York County
Docket Number: Index No. 153752/2022
Judge: Sabrina Kraus
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. SABRINA KRAUS** **PART** **57TR**

Justice

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215 WEST 84TH ST OWNER LLC,

Plaintiff,

- v -

ADAM LEITMAN BAILEY, ADAM LEITMAN BAILEY, P.C.

Defendant.

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INDEX NO. 153752/2022

MOTION DATE 9/15/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 13,15, 16, 17, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37

were read on this motion to/for DISMISS.

BACKGROUND

Plaintiff is the owner and developer of a building on the Upper West Side of Manhattan. Defendants are an attorney and law firm representing a tenant in that building in a summary holdover proceeding in Housing Court. Plaintiff commenced this action asserting two causes of action abuse of process and tortious interference with prospective economic advantage, based on defendants' conduct in the course of the representation of their client.

PENDING MOTION

On July 14, 2022, defendants moved for an order dismissing the complaint pursuant to CPLR § 3211(a)(7), seeking an award of costs and attorneys' fees pursuant to CVR §70-a(1)(a) and punitive damages pursuant to CVR § 70-a(1)(c).

On September 15, 2022, the court heard oral argument and reserved decision. For the reasons set forth below, defendants' motion is granted to the extent of dismissing the complaint.

ALLEGED FACTS

Ahmet Ozsu (AO), has lived as the tenant of record in Apt. PH4 at 207-221 West 84th Street a/k/a 2320-2326 Broadway, New York, New York since 2007. Plaintiff bought the building, and emptied it of most of the tenants, including doing buy outs with some tenants. AO is the last tenant in the building. Plaintiff intends to develop the property. Plaintiff has a pending holdover eviction proceeding in Housing Court based on a termination of what it alleges is AO's unregulated month to month tenancy. Defendants represent AO in the holdover proceeding.

AO asserts that he was unemployed throughout the height of the Covid-19 pandemic, suffered immense financial hardship and was only able to resume gainful employment at the end of March 2022. AO fell behind in the payment of rent for the subject premises as of October 2021.

Shortly after plaintiff commenced its holdover proceeding against AO, AO applied to the Emergency Rental Assistance Program for New York State (ERAP) for assistance paying for rental arrears. Under New York Law, the application stayed the holdover proceeding.

Additionally, plaintiff installed some device outside AO's apartment. Plaintiff asserts it benefits the residents of the building; defendants assert it was intended to harass AO.

DISCUSSION

The Complaint Fails to Set Forth A Cause of Action for Abuse of Process

"When a party moves to dismiss a complaint pursuant to CPLR 3211(a)(7), the standard is whether the pleading states a cause of action, not whether the proponent of the pleading has a cause of action" (*Sokol v. Leader,* 74 A.D.3d 1180, 1180-1181; *see Guggenheimer v. Ginzburg,* 43 N.Y.2d 268, 275). "In considering such a motion, 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" (*Sokol v. Leader,* 74 A.D.3d at 1181, 904 N.Y.S.2d 153; *see Nonnon v. City of New York,* 9 N.Y.3d 825, 827; *Leon v. Martinez,* 84 N.Y.2d 83, 87–88).

A cause of action for abuse of process has three elements: (1) regularly issued process (2) an intent to harm without excuse or justification and (3) use of process in a perverted manner to obtain a collateral objective. *See, Curiano v. Suozzi*, 63 N.Y.2d 113 (1984); *Board of Educ. of Farmingdale Union Free School Dist. v. Farmingdale Classroom Teachers Assn. Local 1889, AFT AFL–CIO*, 38 N.Y.2d 397, 403 (1975).

The complaint fails to state a cause of action for abuse of process.

Plaintiff claims that defendants' abuse of process constituted advising AO to file for ERAP and then advancing the argument that the pending holdover proceeding against AO was automatically stayed by the application. However, AO's filing of an ERAP application with the New York State's Office of Temporary and Disability Assistance does not constitute issuance of process by defendants and effectuates an automatic stay as a matter of law.

Process is a "direction or demand that the person to whom it is directed shall perform or refrain from the doing of some prescribed act." *Matter of Smith*, 175 Misc. 688, 692-693 (Surr. Ct. Kings Co. 1940). Thus, "[t]he gist of the action for abuse of process lies in the improper use of process after it is issued." *Dean v. Kochendorfer*, 237 N.Y. 384, 390 (1924); *Hauser v. Bartow*, 273 N.Y. 370 (1937).

In *Williams v. Williams*, 23 N.Y.2d 592, n.1 (1969) the Court of Appeals enumerated the types of writs which can create such a cause of action as follows (Prosser, Torts, [3d ed.], pp. 877-878): "attachment, execution, garnishment, or sequestration proceedings, or arrest of the

person, criminal prosecution, or even such infrequent cases as the use of a subpoena for the collection of a debt." None of these are alleged to be present in the complaint.

Where process has issued that interferes with property rights, such as the filing of a *lis pendens*, New York courts have held that even if malice or a vindictive motive is demonstrated, if the *lis pendens* was used for the purpose for which it was intended, to give notice of the existence of the pending action affecting the property, an action for abuse of process does not lie. (*See Hauser v. Batrow*, 273 N.Y. 370 (1937), *Klass v. Frazer et al.*, 290 F.Supp.2d 425).

The stay attendant to an ERAP filing is automatic under New York Law and plaintiff was free to move to vacate said stay in Housing Court if it felt the stay was not applicable to AO. Such motions are regularly determined in the context of summary holdover proceedings.

> … numerous courts of concurrent jurisdiction have ruled on whether the automatic stay imposed by the filing of an ERAP application can be lifted by the court, and, if so, under what circumstances. The considerations for vacating the stay include, the regulatory status of the premises, the nature of the cause of action, the relationship between the applicant and the landlord, does the applicant meet the basic criterion for assistance as outlined in the statute, and whether the equities favor the landlord. *See e.g. Actie v. Gregory*, 2022 N.Y. Slip Op. 50117(U), 2022 WL 534305 (Civ. Ct. Kings Co, J. Slade) (court vacated an ERAP stay in a holdover proceeding where Petitioner sought to recover possession of an apartment in a building with less than four units for his own personal use and applicant had already vacated the premises), *Kelly v. Doe*, 75 Misc.3d 197, 166 N.Y.S.3d 481 (Civ Ct. Kings Co, J., Cohen) (court vacated a stay in a post-foreclosure holdover proceeding finding that Respondent had no contractual obligation to pay rent to landlord), *Abuelafiya v. Orena*, 73 Misc. 3d 576, 155 N.Y.S.3d 715 (Dist. Ct. 3rd Dist., Suffolk Co., 2021) (court vacated stay when it was determined that applicant had second home), *2986 Briggs LLC v. Evans, et al.*, 2022 N.Y. Slip Op. 50215(U), 2022 WL 853132 (Civ. Ct. Bronx Co., J. Lutwak)(court vacated ERAP stay in a licensee holdover proceeding where there was no contractual obligation for Respondent to pay rent or use and occupancy), *Ben Ami v. Ronen, et al.*, 75 Misc.3d 335, 167 N.Y.S.3d 339 (Civ. Ct. Kings Co., March 23, 2022, Barany, J., index no. 59050/20) (court vacated ERAP stay in a holdover proceeding where Petitioner sought to recover the premises, an unregulated apartment, for his personal use), *Silverstein v. Huebner, et al.,* Civ. Ct. Kings Co., March 29, 2022, Stoller, J., index no. 94101/18 (court vacated an ERAP stay in a holdover proceeding where remaining occupant was licensee in an unregulated apartment and Petitioner sought to recover the apartment for his personal use); *see cf. 204 W. 55th Street, LLC v. Mackler,* 2021 N.Y. Slip Op. 32901(U), 2021 WL 6805121 (Civ. Ct. N.Y. Co., J. Fang)

> (ERAP stay upheld in a licensee holdover proceeding, where respondents allege succession to the subject rent regulated premises), *560-566 Hudson LLC v Hillman, et al.,* NYLJ 1646709605NY30044621 (Civ. Ct. NY Co., 2022, J. Ferdinand) (upholding the ERAP stay in a licensee proceeding in a rent regulated building).

Papandrea-Zavaglia v. Arroyave, 75 Misc. 3d 541, 544–45 (N.Y. Civ. Ct. 2022).

In fact, plaintiff conceded at oral argument that it did move to vacate the stay in Housing Court and that motion was denied. In a decision and order dated August 9, 2022, the court (Arrindell, J) denied the motion to vacate the stay and, after a detailed evaluation of the applicable law and facts, held "(t)he Court is satisfied that Respondent, under these factual circumstances has a colorable claim to benefit under ERAP."[1]

AO states he filed for ERAP relief shortly after the holdover proceeding was commenced and prior to being represented by defendants. This is confirmed by defendants and uncontroverted by plaintiff. Even if that were not true and AO filed on advice of counsel, it's hard to see how an attorney giving its client advice pertaining to the defense of a holdover proceeding amounts to abuse of process, particularly where the court sided with defendants as to the applicability of the stay.

The additional elements of an intent to harm without justification and use of process in a perverted manner to obtain a collateral objective are also lacking here.

Nor do the allegations concerning the events of April 19, 2022 warrant a different result. Mr. Leitman Bailey was at the building to meet with his client inside AO's apartment. Plaintiff's agent called the police to attempt to stop defendant and AO from speaking with the press. The fact that defendant asked or even demanded that the police arrest the agent for what defendant alleges was harassment of his client, does not support a cause of action for abuse of process.

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[1] The court takes judicial notice of the file of *215 West 84th St. Owner LLC v Ozsu* Index No L&T 300443/22, New York County Housing Court.

Based on the foregoing, defendants' motion to dismiss the first cause of action for abuse of process is granted.

The Complaint Fails to State a Cause of Action for Tortious Interference with Economic Advantage

To establish a claim for tortious interference with economic advantage, "a plaintiff must demonstrate that the defendant's interference with its prospective business relations was accomplished by 'wrongful means' or that defendant acted for the sole purpose of harming the plaintiff." *Carvel Corp. v. Noonan*, 3 N.Y.3d 182, 190 (2004); *NBT Bancorp v. Fleet/Norstar Fin. Group*, 87 N.Y.2d 614, 624 (1996); *Snyder v. Sony Music Entertainment, Inc.*, 252 A.D.2d 294, 299-300 (1st Dept. 1999).

Generally, such wrongful conduct must amount to a crime or an independent tort, and may consist of physical violence, fraud, misrepresentation, civil suits and criminal prosecution. (*Tsatskin v. Kordonsky*, 189 A.D. 3d 1296, 1298 (2d Dept. 2020).

Furthermore, "[u]nder New York law, in order for a party to make out a claim for tortious interference with prospective economic advantage, the defendant must ... direct some activities towards [a] third party...". *Fonar Corp. v. Magnetic Resonance Plus, Inc.*, 957 F.Supp. 477, 482 (S.D.N.Y.1997).

In interpreting New York law, federal courts have held that "(i)n order to state a claim for tortious interference with prospective economic advantage, a plaintiff must show (1) business relations with a third party; (2) defendants' interference with those business relations; (3) defendants acted with the sole purpose of harming the plaintiff or used dishonest, unfair, or improper means; and, (4) injury to the relationship." (*Purgess v. Sharrock*, 33 F.3d 134, 142 (2d Cir. 1992).

New York courts have rejected claims containing general allegations of interference with customers without detailed allegations of interference with specific business relationships. *McGill v. Parker*, 179 A.D. 98 (1st Dept. 1992). "In order to state a cause of action to recover for tortious interference with prospective economic advantage, the plaintiff must allege a specific business relationship with an identified third party with which the defendants interfered." *Mehrhof v. Monroe-Woodbury Cent. Sch. Dist.*, 168 A.D. 3d 713, 714 (2d Dept. 2019); *Bus. Networks of N.Y., Inc. v. Complete Network Sols., Inc.*, 265 A.D. 2d 194 (1st Dept. 1999); *Korn v. Princz*, 226 A.D.2d 278 (1st Dept. 1996).

In addition, to state a cause of action for tortious interference with economic advantage requires plaintiff must allege defendants engaged in conduct for the sole purpose of harming the plaintiff. In *Havana Central NY2 v. Lunney's Pub, Inc.*, 49 A.D.3d 70, 74 (1st Dept. 2007), the Appellate Division highlighted the necessity of sufficiently pleading this element. There, although the commercial tenant, was aware that the landlord had entered into a new lease with another commercial tenant, Lunney's held over for approximately six months "in an attempt to secure a renewal lease from the landlord and/or to avoid closing its business and losing clientele while it sought to secure a new, nearby business location." 49 A.D.3d at 71. The new tenant brought suit against Lunney's alleging, *inter alia*, tortious interference with economic advantage. In affirming the dismissal of this claim, the Appellate Division found no evidence that Lunney's engaged in any wrongful means or for the sole purpose of harming Havana Central, but rather that Lunney's held over for "multiple reasons" including "to reap holiday profits, potentially obtain a renewal lease at the premises, and avoid shutting its business down and losing its clientele." Id. at 74.

Similarly, in the case at bar, defendants were acting to zealously represent their client and not solely to harm plaintiff, and plaintiff has failed to allege any business relationship that was interfered with.

Based on the foregoing, the motion to dismiss the second cause of action is granted.

Defendants Are Not Entitled to Costs Fees or Punitive Damages

Plaintiff's causes of actions do not involve public petition and participation and are therefore not subject to Civil Rights Law § 70-a ("the anti-SLAPP statute"). Civil Rights Law § 76–a(1)(a) defines "[a]n action involving public petition and participation" as "an action, claim, cross claim or counterclaim for damages that is brought by a public applicant or permittee, and is materially related to any efforts of the defendant to report on, comment on, rule on, challenge or oppose such application or permission".

The fact that the public has commented online about media reports pertaining to the parties' dispute is insufficient to meet this criterion. Based on the foregoing defendants' request for attorneys' fees and punitive damages is denied.

WHEREFORE it is hereby:

ORDERED that defendants' motion is granted to the extent of dismissing the complaint herein and is otherwise denied; and it is further

ORDERED that, within 20 days from entry of this order, defendants shall serve a copy of this order with notice of entry on the Clerk of the General Clerk's Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh);]; and it is further

ORDERED that any relief not expressly addressed has nonetheless been considered and is hereby denied; and it is further

ORDERED that this constitutes the decision and order of this court.

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9/12/2022
DATE

SABRINA KRAUS, J.S.C.

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