Luis Skibar Beatriz Rodriguez LLC v 338 W. 15th St. LLC
2023 NY Slip Op 33275(U)
September 21, 2023
Supreme Court, New York County
Docket Number: Index No. 157241/2018
Judge: Judy H. Kim

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. JUDY H. KIM** **PART** **05RCP**

Justice

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LUIS SKIBAR BEATRIZ RODRIGUEZ LLC,

Plaintiff,

- v -

338 WEST 15TH STREET LLC, JACOB BEN-MOHA, and NYC DEPARTMENT OF BUILDINGS,

Defendants.

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INDEX NO. 157241/2018

MOTION DATE 12/20/2022

MOTION SEQ. NO. 004

DECISION + ORDER ON MOTION

338 WEST 15TH STREET LLC

Third-Party Plaintiff,

-against-

BONILLA & SONS, INC., TUDOR INSURANCE COMPANY

Third-Party Defendants.

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Third-Party
Index No. 595249/2020

The following e-filed documents, listed by NYSCEF document number (Motion 004) 93, 94, 95, 96, 97, 98, 108, 119, 124, 125, 126, 127, 128, 135, 140, 141, 142, 143, 144

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, the motion by defendants 338 West 15th Street LLC ("338 West") and Jacob Ben-Moha ("Ben-Moha" and, collectively with 338 West, the "Moving Defendants"), to dismiss the complaint is granted in part, for the reasons set forth below.

Plaintiff is the owner of the building located at 340 West 15th Street, New York, New York (the "Building"). Plaintiff's members, Luis Skibar and Beatriz Rodriguez De Armas, purchased the Building from Ernesto D. Fuentes in 2016 and transferred ownership to plaintiff in 2019.

Plaintiff alleges that, prior to the 2016 purchase, Fuentes permitted defendant 338 West, the owner of the neighboring building, 338 West 15th Street (the "Neighboring Building"), to enter the Building and perform work necessary for the Neighboring Building to receive a Certificate of Occupancy from defendant the New York City Department of Buildings ("DOB") (NYSCEF Doc. No. 95 [Am. Compl. at ¶13]). Plaintiff alleges, that in exchange for this permission, 338 West agreed to perform the construction in a workman-like manner and be responsible for any damages caused to the Building (Id. at ¶¶13-14). 338 West also agreed to obtain work permits from the DOB relating to its work in the Building and to undertake all work necessary to close out these permits (Id. at ¶14). Plaintiff alleges that 338 West breached its agreement with Fuentes by negligently performing excavation and underpinning work in the Building, resulting in substantial damages to the foundation and basement slab of the Building (Id. at ¶¶17, 22-28). Plaintiff asserts that, as the current owner of the Building, it is a "successor in interest to the agreement between [338 West] and Fuentes" and is "entitled to enforce the[ir] agreement" through this action (Id. at ¶18).

Plaintiff further alleges that, at the time this lawsuit was filed on August 2, 2018, the permits 338 West opened with the DOB with respect to its work in the Building remained open (Id. at ¶¶33-34]). After this action was commenced, 338 West and Ben-Moha (a member of defendant 338 West) filed various forms with the DOB in an effort to close out these permits, including four forms—a PW1 Form, a PW7 Form, a TRI Form, and a TR8 Form—that incorrectly stated that Ben-Moha was the owner of the Building. Based on these permits, DOB issued a final Certificate of Occupancy, effective October 20, 2020, for the Neighboring Building (the "C/O") (Id. at ¶61).

Finally, plaintiff alleges that in 2018, after Fuentes had sold the Building, 338 West installed masonry on the side of the Building's steps, causing damage to the Building and also cut down trees and shrubs on the Building's premises without plaintiff's permission (Id. at ¶¶31-32).

Plaintiff's Amended Complaint asserts claims against 338 West and Ben-Moha for: (1) breach of contract; (2) trespass; (3) nuisance; (4) negligence; (5) prima facie tort; (6) an injunction to remove encroachment and/or monetary damages pursuant to RPAPL §871; and (7) cutting, removing, injuring or destroying trees or timber, and damaging lands thereon, pursuant to RPAPL §861. Plaintiff seeks $750,000.00 in damages as well as an injunction directing 338 West to remove all documents it filed listing Ben-Moha as the owner of the Building from the DOB records and refrain from filing any documents with the DOB stating that Ben-Moha is the owner of the Building (Id. at ¶¶67-117).

Defendants now move, pursuant to CPLR §3211(a)(5) and (a)(7), for an order: (1) dismissing all the causes of action in plaintiff's complaint except for its RPAPL §861 claim; and (2) removing this remaining RPAPL §861 claim to New York County Civil Court, pursuant to CPLR §325-d. For the reasons set forth below, the Moving Defendants' motion is granted in part, to the extent that plaintiff's claims for breach of contract, nuisance, prima facie tort, and injunctive relief are dismissed, and is otherwise denied.

DISCUSSION

In addressing a motion to dismiss pursuant to CPLR § 3211(a)(7), the pleading is to be afforded a liberal construction and the court should accept as true the facts alleged in the complaint, accord the pleading the benefit of every reasonable inference, and only determine whether the facts, as alleged, fit within any cognizable legal theory (See Leon v Martinez, 84 NY2d 83 [1994]).

However, "bare legal conclusions and inherently incredible facts are not entitled to preferential consideration" (M & E 73-75, LLC v 57 Fusion LLC, 189 AD3d 1, 5 [1st Dept 2020]).

Breach of Contract

Plaintiff's complaint fails to state a claim for breach of contract. To state such a claim, plaintiff must allege "the existence of a contract, the plaintiff's performance under the contract, the defendant's breach of that contract, and resulting damages'" (JP Morgan Chase v JH Elec. of NY, Inc., 69 AD3d 802, 803 [2d Dept. 2010] [internal citations omitted]). Plaintiff has failed to allege that a contract was formed between plaintiff and the Moving Defendant. It is well-settled that "[t]o establish the existence of an enforceable agreement, a plaintiff must establish an offer, acceptance of the offer, consideration, mutual assent, and an intent to be bound" (Kolchins v Evolution Markets, Inc., 128 AD3d 47, 59 [1st Dept 2015] affd, 31 NY3d 100 [2018]) and none of the allegations in plaintiff's complaint establish any consideration to Fuentes in exchange for permitting 338 West to enter the Building and perform work therein. To the extent plaintiff argues that 338 West's assurance that it would perform such work properly and pay for any damage done constitutes consideration, the Court disagrees; such an assurance does not convey a benefit to Fuentes but is simply an expression of the obligation of good faith and fair dealing implicit in any agreement.

In fact, the allegations set out in the Amended Complaint establish, if anything, that 338 West was granted a "revocable privilege … to do one or more acts of a temporary nature upon the property without granting any interest in land itself," i.e., a license (Union Sq. Park Community Coalition, Inc. v. New York City Dept. of Parks and Recreation, 22 NY3d 648, 649 [2014]). This conclusion is buttressed by the fact that the facts outlined in the Amended Complaint—a building

owner permitting a neighbor to enter the premises in order to perform work necessary for the neighboring building—is precisely that contemplated by RPAPL §881. That statute provides that:

> When an owner or lessee seeks to make improvements or repairs to real property so situated that such improvements or repairs cannot be made by the owner or lessee without entering the premises of an adjoining owner or his lessee, and permission so to enter has been refused, the owner or lessee seeking to make such improvements or repairs may commence a special proceeding for a license so to enter pursuant to article four of the civil practice law and rules … Such license shall be granted by the court in an appropriate case upon such terms as justice requires …

Notably, such entry and work performed pursuant to RPAPL §881—which can include the excavation and underpinning contemplated here—is expressly defined under that statute as a license (See Cucs Hous. Dev. Fund Corp. IV v Aymes, 2019 NY Slip Op. 30450[U] [Sup Ct, NY County 2019], affd, 2020 NY Slip Op 02711 [1st Dept 2020]; N.N. Intern. (USA) Corp. v Gladden Properties, LLC, 52 Misc 3d 1206(A) [Sup Ct, NY County 2016]). In the Court's view, the fact that 338 West LLC did not need to resort to RPAPL §881 to gain access to the Building does not alter the nature of its agreement with Fuentes. Contrary to plaintiff's contention, any rights and obligations under this license did not transfer to plaintiff upon the sale of the Building. A license is revoked and terminated when a licensor conveys the land in question and, therefore, "does not run with the land" (SJWA LLC v Father Realty Corp., 2022 NY Slip Op 32170[U] [Sup Ct, NY County 2022] [internal citations omitted]). Accordingly, plaintiff's breach of contract claim is dismissed.

Trespass

Defendants' motion to dismiss plaintiff's trespass claim is denied. "[T]he essence of a trespass is intentional entry onto the property of another without justification or permission" (Schwartz v Hotel Carlyle Owners Corp., 132 AD3d 541, 542 [1st Dept 2015] [internal citations

omitted]). The Court agrees with the Moving Defendants that no trespass claim can be stated based upon any work performed by 338 West prior to Fuentes's sale of the Building as it is undisputed that 338 West had permission from the prior owner of the Premises to enter and perform the work at issue during this period (NYSCEF Doc No. 95 [Am. Complaint at ¶¶12- 13]). However, the plaintiff has stated a trespass claim to the extent that plaintiff alleges that in 2018, after Fuentes sold the Building, 338 West entered the Building without plaintiff's permission and installed masonry on the side of the steps of the Building causing damage (NYSCEF Doc. No. 95 [Am. Compl. at ¶¶30-31]).

Negligence

The Moving Defendants' motion to dismiss plaintiff's negligence claim is also denied. As with plaintiff's trespass claim, to the extent plaintiff basis its negligence claim on work performed prior to the sale of the Building, such a claim does not lie, as 338 West does not owe plaintiff a duty of care for work performed prior to its ownership of the Building. Ultimately, however, the complaint alleges that 338 West negligently performed work affecting the Building after Fuentes sold the Building, which sufficiently alleges a trespass (See e.g., 905 5th Assoc., Inc. v Weintraub, 85 AD3d 667 [1st Dept 2011] [property owners owed duty of care to those who suffered property damage as a result of construction on their property]).

Nuisance

The Moving Defendants' motion to dismiss plaintiff's nuisance claim is granted. The allegations underlying this claim—that defendant, by its defective construction, substantially and continually interfered with Plaintiff's use and enjoyment of the Building and caused damages to the Building (NYSCEF Doc. No. 95 [Am. Compl. at ¶¶81-84])—are "so intertwined" with its negligence claim "as to be practically inseparable," mandating dismissal (70 Pinehurst Ave. LLC

v RPN Mgt. Co., Inc., 123 AD3d 621, 622 [1st Dept 2014] [internal citations and quotations omitted]; see also Caldwell v Two Columbus Ave. Condominium, 92 AD3d 441, 441-442 [1st Dept 2012]).

Prima Facie Tort

The Moving Defendants' motion to dismiss plaintiff's prima facie tort claim is also granted. Such a claim does not lie where complete relief is available through traditional tort causes of action—in this case, trespass and negligence (See Jones v City of New York, 161 AD2d 518, 519 [1st Dept 1990]; see also Royal Abstract Corp. v Golenbock and Barell, 129 Misc 2d 929, 930-31 [Sup Ct, NY County 1985] [internal citations omitted], affd, 121 AD2d 852 [1st Dept 1986]).

Injunctive Relief

The Moving Defendants' motion to dismiss plaintiff's demand for injunctive relief demanding the removal of records from DOB is granted. Although denominated as a separate cause of action, such injunctive relief is, in fact, "a remedy for an underlying wrong, not a cause of action" (Talking Capital LLC v Omanoff, 169 AD3d 423, 424 [1st Dept 2019]; Tarlo v 270 Fifth St. Corp., 201 AD3d 837, 839 [2d Dept 2022]) and, as the only claim this relief relates to is the now-dismissed breach of contract claim, no grounds for such relief lies.

Accordingly, it is

ORDERED that 338 West 15th Street LLC and Jacob Ben-Moha's motion to dismiss is granted to the limited extent that plaintiff's first, third, and fifth causes of action (for breach of contract, nuisance, and prima facie tort, respectively) are hereby dismissed, and is otherwise denied; and it is further

ORDERED that within thirty days from entry of this decision and order, counsel for plaintiff shall serve a copy of this decision and order, with notice of entry, on plaintiff as well as the Clerk of the Court (60 Centre St., Room 141B) and the Clerk of the General Clerk's Office (60 Centre St., Rm. 119); and it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office 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 "EFiling" page on this court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.

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9/21/2023
DATE

HON. JUDY H. KIM, J.S.C.

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