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Analysis
As of: Dec 26, 2013

[1] JENNIFER CANGRO, Plaintiff, -against- PARK SOUTH TOWERS ASSOCIATES and ROSE & ROSE, Defendants. INDEX NUMBER 117524/2009**

117524/2009

SUPREME COURT OF NEW YORK, NEW YORK COUNTY

2010 N.Y. Misc. LEXIS 4658; 2010 NY Slip Op 32670(U)

September 21, 2010, Decided
September 21, 2010, Filed

NOTICE: THIS OPINION IS UNCORRECTED AND WILL NOT BE PUBLISHED IN THE PRINTED OFFICIAL REPORTS.

SUBSEQUENT HISTORY: Subsequent appeal at, Dismissed by Jennifer Cangro v. Park S. Towers Assoc., 2012 N.Y. LEXIS 3510 (N.Y., Nov. 27, 2012)

PRIOR HISTORY: Park S. Towers Assocs. v. Cangro, 24 Misc. 3d 130A, 890 N.Y.S.2d 370, 2009 N.Y. Misc. LEXIS 1676 (2009)

JUDGES: [*1] PRESENT: HON. PAUL WOOTEN, Justice.

OPINION BY: Paul Wooten

OPINION

DECISION & ORDER

Motions with the sequence numbers 001 and 002 are hereby consolidated for decision. Defendants Rose & Rose (the Law Firm) (mot. seq. 001) and Park South Towers Associates (the Landlord) (mot. seq. 002) each moves to dismiss the complaint as against it on the grounds that the complaint fails to state a cause of action and is barred by the doctrine of collateral estoppel. Plaintiff pro se, Jennifer Cangro, opposes both motions.

Plaintiff is a tenant at 124 West 60th Street, New York County (the Building), owned and/or operated by the Landlord. Plaintiff first leased her apartment for one year commencing July 1, 2006, at $ 2,500 monthly. The Landlord and tenant executed a one-year renewal lease, effective July 1, 2007, at the increased rate of $ 2,700 (Exhibit E attached to Notice of Motion), which she paid for the month of July 2007. However, in August 2007, she stopped paying all or part of the increased rent, resulting in a summary nonpayment proceeding In Civil Court (index [**2] No. 59656/2008). After trial in the housing part of Civil Court, the Landlord was granted a possessory money judgment in the amount of $ 2,402.32 on [*2] July 7, 2008, allowing plaintiff five days to make

full payment to avoid a warrant of eviction. Exhibit H attached to Notice of Motion. On July 11, 2008, she filed a notice of appeal with the Appellate Division, First Department, requesting a stay of execution of the Civil Court decision granting the possessory money judgment. On September 18, 2008, the Appellate Division denied the stay and dismissed the appeal. On September 23, 2008, plaintiff filed an amended notice of appeal with the Appellate Term, which issued a conditional stay of execution of the July 7, 2008 judgment on November 26, 2008. Exhibit T attached to the Notice of Motion.

Meanwhile, the Landlord commenced a summary holdover proceeding against plaintiff on July 14, 2008 in the housing part of Civil Court (index No. 7706712008), after her lease expired on June 20, 2008. On September 8, 2008, the Landlord's motion for summary judgment to recover possession of the apartment was granted, and a hearing ordered to determine use and occupancy fees and legal fees. Exhibit M attached to Notice of Motion. Plaintiff's motion to reargue the September 8, 2008 judgment was denied on October 23, 2008. Exhibit P attached to Notice [*3] of Motion. On November 6, 2008, the Landlord was awarded $ 13,500 use and occupancy fees, but no legal fees were awarded. Exhibit Q attached to Notice of Motion. On November 26, 2008, the Appellate Term issued a conditional stay of the September 8, 2008 judgment to allow plaintiff to perfect her appeal in tandem with her appeal of the July 7, 2008 judgment. On March 30, 2009, the Appellate Term vacated both stays resulting in plaintiff bringing an order to show cause in Civil Court on June 15, 2009 to stay the execution of the warrant of eviction. On June 22, 2009, the Civil Court denied plaintiff's motion upon her failure to appear and she was evicted on June 23, 2009. Another order to show cause was denied on June 26, 2009, except to allow her to remove her property from the premises.

[**3] On July 1, 2009, the Appellate Term ruled on plaintiff's appeals of the July 7, 2008 and September 8, 2008 judgments. The appeal of the July 7, 2008 judgment was dismissed for failure to perfect the appeal, and the September 8, 2008 judgment was affirmed.

Plaintiff commenced the instant action on December 15, 2009, asserting 23 causes of action including failure to provide heat in December 2006 and January [*4] 2007, failure to eliminate disturbing sounds from the apartment above, repair and maintenance deficiencies, unlawful entries to her apartment, harassment, unlawful eviction, unlawful demand for legal fees, and false statements to various courts. The first 14 causes of action deal with the Landlord's alleged wrongful acts or omissions, while the remainder, causes of action 15 through 23, address the alleged misconduct of the Landlord's counsel in the Civil Court proceedings.

On a motion to dismiss for failure to state a cause of action, the pleading is afforded a liberal construction. The court "accept[s] the facts as alleged in the complaint as true, accord[s] plaintiffs the benefit of every possible favorable inference, and determine[s] only whether the facts as alleged fit within any cognizable legal theory." *Leon v Martinez*, 84 NY2d 83, 87-88, 638 N.E.2d 511, 614 N.Y.S.2d 972 (1994).

Law Firm's Motion to Dismiss (Mot. Seq. 001)

All the causes of action against the Law Firm claim that it caused plaintiff not only damages, but "distress, anxiety, [and] mental anguish" as well. The conduct complained of for each cause of action follows:

. demand for legal fees on 03/06/08 and 07/14/08 (15);

. changed amount alleged in nonpayment [*5] proceeding (16);

. false statements in court on 07/28/08 and 06/24/09 (17);

. presented two versions of tampered renewal lease for 07/2007-06/2008 (18);

. backdated holdover petition of 07/14/08 (19);

. lied to court about return date of order to show cause dated 06/15/09 (20);

. lied, miscited case law to court on 04/10/08 (21);

. false statements in papers on 08/19/08 and untimely service (22); and

. false statement in holdover proceeding; persisted with proceeding in spite of payment (23).

[**4] On the whole, plaintiff is attempting to charge the Law Firm with intentional infliction of emotional distress, since a party cannot be held responsible for the disappointment, aggravation or distress to others that is

merely an unintentional byproduct of Its actions. Restatement (Second) of Torts § 46, Comment *d* ("The liability clearly does not extend to mere insults, indignities, threats, annoyances, petty oppressions, or other trivialities"). However, the standard in New York for the intentional infliction of emotional distress is quite high, as discussed in *Seltzer v Bayer* (272 AD2d 263, 264-265, 709 N.Y.S.2d 21 [1st Dept 2000]):

> "Plaintiff's cause of action for intentional infliction of emotional distress should [*6] have been dismissed. His allegations, even if true, do not describe conduct so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community. This threshold of outrageousness is so difficult to reach that, of the intentional infliction of emotional distress claims considered by the Court of Appeals, every one has failed because the alleged conduct was not sufficiently outrageous. Those few claims of intentional infliction of emotional distress that have been upheld by this Court were supported by allegations detailing a longstanding campaign of deliberate, systematic and malicious harassment of the plaintiff" (citations and internal quotations omitted).

None of the Law Firm's conduct complained of by plaintiff approaches such an outrageous level, if outrageous at all. Most of this conduct occurred in court or in papers submitted to the court and has passed the scrutiny of several members of the judiciary at the trial and appellate levels.

An attempt to view the Law Firm's conduct as the basis for a cause of action for a prima facie tort also fails. The elements of a [*7] prima facie tort are "(1) intentional infliction of harm, (2) resulting in special damages, (3) without excuse or justification, and (4) by an act or series of acts that would otherwise be lawful" (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332, 451 N.E.2d 459, 464 N.Y.S.2d 712 [1983]), and "an allegation that plaintiff suffered specific and measurable loss" must be present (*Wehringer v Helmsley-Spear, Inc.*, 91 AD2d 585, 586, 457 N.Y.S.2d 78 [1st Dept 1982], *affd* 59 NY2d 688, 450 N.E.2d 223, 463 N.Y.S.2d 417 [1983]). That is not the case here.

Allegations of misconduct by opposing counsel are not properly the subject of a [**5] separate action, but should be resolved within the confines of the underlying action. *Melnitzky v Owen*, 19 AD3d 201, 201, 796 N.Y.S.2d 612 (1st Dept 2005) ("The action was properly dismissed on the ground that plaintiff's remedy, if any, for defendant's alleged deception of Civil Court lies exclusively in the Civil Court action itself, not a second plenary action collaterally attacking the Judgment in that action"); *Yalkowsky v Century Apts. Assoc.*, 215 AD2d 214, 215, 626 N.Y.S.2d 181 (1st Dept 1995) (Assuming Landlord's attorney made false statements resulting in the dismissal of his claim for constructive eviction, "plaintiff's remedy lies exclusively in that lawsuit [*8] itself, i.e., by moving pursuant to CPLR 5015 to vacate the civil judgment due to its fraudulent procurement, not a second plenary action collaterally attacking the Judgment in the original action").

Plaintiff's opposition to the Law Firm's motion repeats her allegations that, at every step of the various proceedings encompassed by this dispute, the Law Firm's misconduct went undetected or uncorrected, resulting in her eventual eviction from her residence. This action cannot, for the reasons discussed above, address her concerns. The Law Firm's motion to dismiss the complaint against it is granted.

Landlord's Motion to Dismiss (Mot. Seq. 002)

None of plaintiff's allegations are new. They arose and were examined in whole or in part by the summary payment proceeding, the summary holdover proceeding, the appeal to the Appellate Division, the motion to reargue the decision on the summary holdover proceeding, and the two appeals to the Appellate Term. The courts have ruled that the Landlord and plaintiff had a valid lease calling for monthly rent of $ 2,700, which she failed to honor. When offered the opportunity to eliminate her arrears, she did not, and the Landlord was entitled to evict [*9] her.

Specifically, causes of action 6, 7, 8, 9, 10, and 13 (alleging, respectively, service of an unsigned five-day notice, retaliatory eviction, unlawful prosecution of the non-payment proceeding, falsifying one renewal lease document, unlawful eviction, and gaining possession

[**6] of the apartment by falsifying two renewal lease documents) address transactions between the Landlord and tenant that have been fully resolved. They are, therefore, dismissed under the doctrine of collateral estoppel. *McGrath v Gold*, 36 NY2d 406, 411, 330 N.E.2d 35, 369 N.Y.S.2d 62 (1975) ("Collateral estoppel means simply that, when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties In any future lawsuit").

The remaining causes of action, numbers 1, 2, 3, 4, 5, 11, 12, and 14 are consistent in describing acts of omission or commission by the Landlord that allegedly resulted in interference with plaintiff's peace and quiet, interrupted sleep, distress, unnecessary inconvenience, endangered health, fear and anxiety. Trouble with heating her apartment (1), noise from her apartment's heating unit (2), noise from the apartment above (3), problems with appliances [*10] and fixtures and the appearance of one cockroach (4), a disagreement in scheduling a repair call (11), and a dispute over allowing access to her apartment to check a leak (14) might annoy any New York City apartment dweller and evoke sympathy from friends and family, but plaintiff offers no evidence of any ensuing damages that would justify compensation. The court is not obliged to manufacture a legally cognizable cause of action from "factual allegations that do not state a viable cause of action, that consist of bare legal conclusions, or that are inherently incredible." *Skillgames, LLC v Brody*, 1 AD3d 247, 250, 767 N.Y.S.2d 418 (1st Dept 2003). Accordingly, causes of action numbers 1, 2, 3, 4, 11, and 14 are dismissed for failure to state a cause of action.

The remaining two causes of actions, 5 and 12, appear related. Cause of action 5 states: "Repeat[ed] unlawful entries to apartment damaged alarm and properties and removed properties and more than two thousand five hundred pages legal paper." It describes the doormen on duty, without specifying any dates and times, and claims that the Landlord had "not maintained security [and, thereby,] caused unnecessary fear and distress and damages." [**7] Complaint [*11] §§ 53-55. Plaintiff's opposition to the Landlord's instant motion adds an allegation that the legs of a chair in her apartment had been deliberately removed, causing her to fall. Affidavit in Opposition at § 52. A picture of a chair is attached to plaintiff's Affidavit in Opposition as Exhibit 18 and a letter to the Landlord, dated December 3, 2007, charging "unlawful entries" Is attached as Exhibit 30. The letter gives as examples the chair incident and the theft of rechargeable batteries and groceries, and describes the same two doormen on duty during the daytime hours when the events allegedly occurred in her absence. However, no dates or other details, other than the physical description of the doormen, are given. Nothing else is told about the missing groceries and rechargeable batteries. The legal papers, not otherwise identified, "required hours and thousands of dollars to replace" (Affidavit in Opposition at § 52), but plaintiff never discloses when and by whom this work was done. No police report is referenced for any of these events. Assuming the disappearance of groceries, rechargeable batteries and legal papers from, and the breaking of a chair in, plaintiff's apartment, [*12] it is purely speculative, without any other information, to attribute these events to the Landlord. Cause of action 12 claims that, on April 10, 2008, the Landlord, probably in a Civil Court proceeding, denied plaintiff's allegations about repeated unlawful entries and contended that plaintiff had never "voiced" the issue. Plaintiff asserts that the Landlord's statement "caused stress[,] mental anguish and damages." Complaint at §§ 95-98. Receiving opposition, written or oral, to even sincerely-held beliefs may cause stress and mental anguish, but that is not the basis for a cause of action. Causes of action 5 and 12 are, therefore, dismissed for failing to state a cause of action.

Accordingly, it is

ORDERED that the motion by Rose & Rose is granted and the complaint against it is dismissed in its entirety with costs and disbursements to Rose & Rose as taxed by the Clerk of the Court upon submission of an appropriate bill of costs (mot. seq. 001); and it is further

[**8] ORDERED that the motion by Park South Towers Associates is granted and the complaint against it is dismissed in its entirety with costs and disbursements to Park South Towers Associates as taxed by the Clerk of the Court upon [*13] submission of an appropriate bill of costs (mot. seq. 002); and it is further

ORDERED that the Clerk shall enter judgment accordingly.

This constitutes the Decision and Order of the Court.

Dated: September 21, 2010

/s/ Paul Wooten

Paul Wooten, J.S.C.