

Barakos v Airitan Mgt. Inc.

2014 NY Slip Op 33543(U)

November 14, 2014

Supreme Court, Queens County

Docket Number: 28420/11

Judge: Augustus C. Agate

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SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE AUGUSTUS C. AGATE IAS PART 24
Justice

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PURA BARAKOS,
Plaintiff,

-againstk-

Index No. 28420/11
Motion Date: July 8, 2014
Seq. # 3

AIRITAN MANAGEMENT INC., et al.,

Defendants.

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The following papers numbered 1 to 8 read on this motion by defendants Anthony Cucich, R.A. and Anthony Cucich Architect for an order for leave to re-file the motion for summary judgment, and upon re-filing, granting summary judgment dismissing the complaint on the grounds that it fails to state a cause of action.

	<u>PAPERS NUMBERED</u>
Notice of Motion - Affidavits - Exhibits.....	1 - 5
Affirmation in Opposition - Exhibits.....	6 - 8
Memorandum of Law	

Upon the foregoing papers it is ordered that this motion is determined as follows:

Background

Pura Barakos and her former husband, George Barakos, are the owners of a single family house located at 31-62 31st Street, Astoria, New York. Said premises consists of a basement; a main floor with a living room, kitchen, dining room, and bathroom; a second floor with three bedrooms and a bathroom; and an attic with a bathroom. Ms. Barakos resides at the subject premises. George Barakos does not reside at the subject premises.

On August 3, 2009 the New York City Department of Buildings (DOB) inspected the premises and issued the following three notices of violation to George Barakos:

NOV 34778006J (6J) a Class 2 violation of the

Administrative Code of the City of New York §28-118.3.2, the creation of illegal sleeping quarters and living room space in the basement of the premises. The property owner was directed to discontinue the illegal occupancy and the notice set forth a cure date of September 28, 2009, and a hearing date of October 13, 2009.

NOV 34778005H (5H), a Class 2 violation of the Administrative Code of the City of New York §28-105.1, work performed without a permit, installed water and waste lines for two bathrooms on the first floor and attic. The property owner was directed to obtain a permit or restore the premises to its prior legal condition. The notice set forth a cure date of September 26, 2009 and a hearing date of October 13, 2009.

NOV 34778007L (7L), a Class 1 immediately hazardous violation of the Administrative Code of the City of New York §§28-210.1 and 28-202.2, an illegal conversion of the approved one-family home to a one family with three SROs; two SROs had been created on the second floor and third SRO had been created in the attic. The SROs were observed as having key locking devices, beds, tvs, personal effects, toiletries, refrigerator, food, cooking equipment, microwave, attic kitchen and bathroom. The property owner was directed to restore the premises to its original condition. No cure date was permitted for said violation, and a hearing was to be held on October 13, 2009.

With respect to NOV 6J, the property owners removed the bed from the basement and Airtan filed an affidavit containing Mr. Barakos' signature and photographs to the DOB, establishing that the violation had been cured. The DOB approved the certificate of correction for NOV 6J on September 24, 2009; no penalty was imposed; and the property owner was not required to attend the hearing scheduled for October 13, 2009 in connection with said NOV.

With respect to NOV 5H, Mr. Barakos, or his representative executed a stipulation agreement dated October 13, 2009, in which the property owner agreed to settle the matter without a hearing; admitted all of the material facts; and acknowledged that he would be found guilty of the charges set forth in the NOV. Compliance with the order was extended until the expiration of 75 days from the first scheduled hearing date (December 27, 2009); a certificate of correction was required to be filed with the DOB; and a pre-hearing stipulation penalty was required to be paid within 10 days of the mailing of said stipulation. A penalty of \$800.00 was imposed, however, only \$400.00 appears to have been paid. An affidavit containing Mr. Barakos's name dated June 9,

2010 was submitted to the DOB, stating that the work had been performed by Anthony Cucich, an architect, and the DOB approved the certificate of correction on June 15, 2010.

With respect to NOV 7L, the cited violations include a standard civil penalty of \$2,400.00, and an additional daily penalty of \$1,000.00. The maximum accrual rate for the daily penalty is \$25,000.00. Pura Barakos submitted an affidavit to the DOB, dated September 30, 2010, stating that the work was completed on May 1, 2010; that the work was performed by Robert Midroy, a licensed plumber; that the key locking devices on the second floor and attic had been removed; that the refrigerator on the second floor and microwave in the attic had been removed; and that the toilet, sink and shower had been removed from the attic, and capped. The DOB issued a certificate of correction on September 30, 2010. A penalty totaling \$27,400.00 was imposed.

Documentary evidence

Anthony Cucich, R.A., entered into a written agreement with Paula (Pura) Barakos dated January 26, 2010, for professional services, described as "[t]o legalize partition and plumbing in order to cure violations. Disconnect bathroom on the third floor. Remove open violations, to be filed as directive 14." Ms. Barakos agreed to pay Mr. Cucich a fee totaling \$7,350.00, which included stated sums for "Removing of violations with ECB"; "Filing Fee & penalties"; "Obtaining permit"; "Disconnecting bathroom in the attic, with permit"; and an "Architect fee" which totaled \$3,500.00.

The pleadings

Plaintiff Pura Barakos commenced this action on December 20, 2011 and alleges in her complaint that on June 9, 2009, New York City 311 received an anonymous tip alleging the existence of a single room occupancy (SRO) at her residence located at 31-62 31st Street, Astoria, New York, and that on June 29, 2009, New York City 311 received an anonymous tip alleging there was an "illegal conversion/occupancy" at said premises, and requested that it be investigated immediately. Plaintiff alleges that an agent of defendant Airitan Construction Corporation (Airitan) was the source of these anonymous tips; that on August 3, 2009, an inspector from the New York City Department of Buildings (DOB) arrived at said premises and entered it in order to conduct an inspection; and that on August 15, 2009 said inspector issued three violations. Plaintiff alleges that the following day she received a solicitation from Airitan, and that she contacted Airitan in order to correct the DOB violations. She alleges that she had a conversation with defendant Kevin Zou president of the

Airitan entities with respect to the DOB violations and that she entered into a written contract on September 2, 2009 with Airitan Management Inc. to provide services to correct the DOB violations. Plaintiff alleges that although she paid Airitan Management Inc. the sum of \$5,000.00 to begin the performance of its services, and was billed for at least \$19,000.00, DOB inspectors continued to inspect the property. She alleges that Airitan Management failed to perform the services as promised; that they caused delay when they requested the first adjournment of a hearing, as their corrective plans were rejected by the DOB; and that she was unable to demonstrate that the violations had been cured.

Plaintiff alleges that she discharged Airitan and hired defendants Anthony Cucich, R.A. and Anthony Cucich Architect (Cucich) on January 26, 2010 to cure the DOB violations. She alleges that she hired these defendants for the sum of \$7,500.00 and paid at least \$6,000.00; that she paid additional charges to the DOB that were to be included the Cucich fee; and that contractors requested additional payments for work that had to be performed. Plaintiff alleges that the Cucich defendants were not qualified to appear before the DOB, and they forged documentation in order to cover up the fact that Mr. Cucich had surrendered his DOB privileges and could no longer independently cure plaintiff's open violations. It is alleged that the Cucich defendants caused serious delays, including requesting a second adjournment at a DOB hearing on March 23, 2010; that the Cucich defendants requested another adjournment at a DOB hearing on August 17, 2010 and sent an agent or employee representative who was not proficient in English to the hearing and failed to submit any proof that the violation had been cured. Plaintiff alleges that the Cucich defendants exacerbated the violations, and that the Administrative Law Judge imposed a \$27,400.00 penalty, as no proof was presented that the violations had been cured.

Plaintiff's first, third and seventh causes of action are against Airitan and Zou. Plaintiff's second cause of action against the Cucich defendants is for fraud; the fourth cause of action against the Cucich defendants is for breach of contract. The fifth cause of action against all of the defendants is for breach of fiduciary duty; the sixth cause of action against Anthony Cucich, R.A. is for negligent misrepresentation; the seventh cause of action against Airitan and Zou is for a violation of Business Law §349. Plaintiff seeks to recover the sum of \$300,000.00 on each of her causes of action, attorney's fees, costs and pre-judgment and post judgment interest. In addition, plaintiff seeks to recover punitive damages on each of the fraud claims.

The Cucich defendants have served an answer and have interposed affirmative defenses; a cross claim against all defendants for common law contribution and indemnification; and a counterclaim by Anthony Cucich against the plaintiff for breach of contract and to recover additional sums expended for general construction services performed at the subject premises. Plaintiff served a reply to the counterclaims.

Plaintiff in her bill of particulars alleges, among other things, that on June 17, 2010 Anthony Cucich surrendered his DOB privileges and that he did not provide the plaintiff with any notice that said surrender would render him unable to fulfill his contractual obligations, specifically obtaining permits, removing violations, filing paperwork with the DOB and obtaining proper certifications to prove the violations were removed.

Plaintiff, in her bill of particulars, alleges that in connection with NOV 5H, a penalty of \$800.00 was imposed; that on June 9, 2010 her representative submitted a certificate of correction to the DOB; that plaintiff paid the sum of \$400.00 to the DOB, and that she owes the remaining \$400.00, which pursuant to the contract was to be paid by Anthony Cucich; and that Anthony Cucich did not pay the remaining \$400.00 that he was contractually obligated to pay.

Plaintiff alleges that in April or May 2010, Mr. Cucich had a dispute with the plumber who performed the work in the premises, and as a result did not obtain a sign off from the plumber that was needed to certify a completion letter prior to the hearing date. It is alleged that as a result, Cucich or his representative was unable to produce evidence at the hearing showing that the work had been completed. She alleges that on June 17, 2010 Anthony Cucich submitted a document to the DOB indicating that plaintiff had changed architects to Dario Pasquariello, and that Cucich signed George Barakos name on this document; that Cucich thereafter submitted numerous documents to the DOB that were purportedly signed by George Barakos, which were not executed by George Barakos.

Plaintiff alleges that in August 2010, Mr. Cucich promised to attend the hearing scheduled for August 17, 2010; that he assured her that he would take care of everything; that two weeks prior to the hearing, plaintiff telephoned Cucich's office and was informed that Mrs. Cucich would appear at the hearing; that Marcos Castillo appeared at the hearing, rather than Cucich, and was unable to produce evidence at the hearing showing that the work had been completed, as the sign off had not been obtained from the plumber Robert Midroy.

It is further alleged that on September 30, 2010, plaintiff submitted a certificate of correction to the DOB with respect to NOV 7L, along with documentation, and that said certificate of correction was approved on said date, although plaintiff was not the named respondent identified in the NOV, she is a co-owner of the subject real property.

Plaintiff alleges that had she been aware that Cucich had surrendered his privileges she could have obtained an extension of time from the DOB, as she needed to obtain the proper permits from a licensed architect with the required DOB privileges. She alleges that the DOB attached a penalty to her premises for \$27,400.00, and that with respect to the penalty imposed she is only seeking to recover the portion of the penalty for continued non-compliance, which is \$25,000.00, plus interest.

Pura Barakos' deposition testimony

Ms. Barakos testified, in relevant part, that she has resided in the subject premises for over 30 years and in 1988 she became a 50% owner of said real property. In 1982, there were tenants living at the premises; that she lived in Greece for a period of time, and thereafter resided at the premises from 1990 to the present; that for some period of time two of her children also resided at the premises; that in 1990, a Mr. Crane was a tenant who resided in second floor bedroom for several years; that she did not know when Crane moved out; and that Albert Buonogura was a tenant for nine years, and was residing at the premises when it was inspected in August 2009 and continued to reside at the premises until June 2010 when he died.

She testified that she did not hire the Cucich defendants until January 2010; that she did not know who appeared at hearings on NOV 7L, held on March 23, 2010 and August 7, 2010; that she was not permitted to enter the August hearing; that she did not know who filed the certificate of correction in September 2010; and that it was her understanding that if Mr. Castillo had provided proof that the work had been performed at the August 7, 2010 hearing, no penalty would have been imposed. She also testified that in April or May 2010, the plumber retained by Cucich to remove and cap the bathroom fixtures in the attic has some conflict regarding payment with Cucich, but that she did not pay the plumber any additional sums.

With respect to her claim for damages Ms. Barakos testified that she wanted the \$27,400.00 penalty paid; that she borrowed money from a friend but that the funds were not used for anything related to this action; that she had a line of credit from Citibank and borrowed \$5000.00, \$8,000.00 and \$10,000.00, and

that some money was given to a lawyer to hold in escrow, and other sums were used to pay her taxes and other expenses that were not unrelated to this action. She also stated that she was shocked by the \$27,500.00 penalty; that she paid Mr. Cucich the initial sums he requested; that she did not pay the remainder of the sum contracted for and that she did not think that he deserved to be paid more.

The Cucich defendants' motion for summary judgment

The court, in an order dated March 7, 2014, marked off without prejudice defendants' motion for summary judgment, as it was improperly noticed for a time in which the Centralized Motion Part was not in session. After the within motion for summary judgment was fully submitted, the Honorable Jeremy S. Weinstein, in an order dated August 14, 2014 vacated the note of issue and restored this action to pre-note status. Accordingly, defendants' request for leave to "refile" the motion for summary judgment is granted.

It is well established that the proponent of a summary judgment motion "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact" (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]). Failure to make out a prima facie case requires denial of the motion regardless of the sufficiency of the opposing papers (*Winegrad v New York University Medical Center*, 64 NY2d 851 [1985]).

On a motion to dismiss the complaint pursuant to CPLR 3211 (a) (7) for failure to state a cause of action, "the court must afford the pleadings a liberal construction, accept the allegations of the complaint as true and provide plaintiff the benefit of every possible favorable inference" (*AG Capital Funding Partners, L.P. v State St. Bank & Trust Co.*, 5 NY3d 582, 591 [2005]; see *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]; *Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). The court's "sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law, a motion for dismissal will fail" (*Polonetsky v Better Homes Depot, Inc.*, 97 NY2d 46, 54 [2001], quoting *Guggenheimer v Ginzburg*, 43 NY2d 268, 275 [1977]; see also *Sokoloff v Harriman Estates Dev. Corp.*, 96 NY2d 409, 414 [2001]; *Leon v Martinez*, 84 NY2d at 87-88; *Tom Winter Assoc., Inc. v Sawyer*, 72 AD3d 803 [2d Dept 2010]; *Uzzle v Nunzie Court Homeowners Assn. Inc.*, 70 AD3d 928 [2d Dept 2010]; *Feldman v*

Finkelstein & Partners, LLP, 76 AD3d 703 [2nd Dept 2010]). The facts pleaded are to be presumed to be true and are to be accorded every favorable inference, although bare legal conclusions as well as factual claims flatly contradicted by the record are not entitled to any such consideration (see *Morone v Morone*, 50 NY2d 481 [1980]; *Gertler v Goodgold*, 107 AD2d 481 [1st Dept 1985], affirmed 66 NY2d 946 [1985]). "Whether the complaint will later survive a motion for summary judgment, or whether the plaintiff will ultimately be able to prove its claims, of course, plays no part in the determination of a prediscovery CPLR 3211 motion to dismiss" (*Shaya B. Pac., LLC v Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, 38 AD3d 34, 38 [2d Dept 2006]; *Endless Ocean, LLC v Twomey, Latham, Shea, Kelley, Dubin & Quartararo*, 113 AD3d 587, 588-589 [2d Dept 2014]).

"When evidentiary material is considered, the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one (*Guggenheimer v Ginzburg*, 43 NY2d at 275). This entails an inquiry into whether or not a material fact claimed by the pleader is a fact at all and whether a significant dispute exists regarding it (see, *id.*; accord, Siegel, Practice Commentaries, McKinney's Cons Laws of NY, Book 7B, CPLR C3211:25, at 39)" (*Gershon v Goldberg*, 30 AD3d 372 [2nd Dept 2006], quoting *Doria v Masucci*, 230 AD2d 764,765 [2d Dept 2006]; *lv. to appeal denied* 89 NY2d 811 [1997]).

It is asserted that with respect to each of plaintiff's causes of action against the Cucich defendants, plaintiff is unable to prove that the defendants were the proximate cause of her alleged damages. The Cucich defendants assert that with respect to NOV 7L, in order to avoid the imposition of civil penalties against the named respondent George Barakos, he was required to cure the violation by the first scheduled hearing before the Environmental Control Board (ECB), and within 45 days of the issuance of the SRO violation. It is further asserted that said violation has a civil fine of \$2,400.00, plus a civil penalty of \$1,000.00 a day for the length of time the condition stated in the NOV is allowed to persist, and that the maximum daily penalty is \$25,000.00. It is asserted that in order to avoid the civil penalty of \$1,000.00 a day, the named respondent is required to submit proof that the condition has been corrected by the first scheduled hearing date and within 45 days of the date that the NOV was issued; and that the respondent remains subject to the \$1,000.00 daily penalty for the time the violation existed subsequent to the issuance of the NOV.

The Cucich defendants assert that NOV 7L was not eligible for an early cure date and mandated that the named respondent

George Barakos appear for the ECB hearing on October 13, 2009, and that plaintiff has admitted that said violation was not cured or corrected prior to October 13, 2009. It is asserted that George Barakos could not have avoided any civil penalties, as the first hearing date and 45 day period had already expired prior to plaintiff's retention of the Cucich defendants on January 26, 2010. It is also asserted that as the civil penalty was imposed solely against George Barakos, and as plaintiff is divorced from George Barakos, any judgment that may be docketed against George Barakos would only become a lien on his interest the subject real property. Defendants, thus, assert that plaintiff has not sustained any damages, and therefore, the complaint should be dismissed.

The court notes that the civil penalties for NOV 5H and NOV 7L were imposed solely against George Barakos. To the extent that the ECB has or may seek to obtain a judgment against George Barakos with respect to said penalties, it is noted that pursuant to CPLR 5203(a), a judgment becomes a lien against real property as soon as it is docketed (see CPLR 5203[a]; *Ptaszynski v Flack*, 263 App Div 831 [2d Dept 1941]). It attaches to any property in which the debtor has an interest at that time (see CPLR 5201[b]), and remains effective against such property for a period of 10 years (see CPLR 5203 [a]) (*Cadle Co. v Calcador*, 85 AD3d 700, 702 [2d Dept 2011]). A judgment for the debt of any one tenant in common is enforceable against the property, but only up to the tenant's interest in the property (CPLR 5201(b), *Viggiano v Viggiano*, 136 AD2d 630 [2d Dept 1988]; *Ptaszynski v Flack*, 263 AD 831, *supra*). Plaintiff, thus, cannot establish that she personally sustained damages as a result of the imposition of said civil penalties.

Plaintiff, however, does not allege that the only damage she sustained was the imposition of the civil penalty in connection with NOV 7L or NOV5H. The Cucich defendants do not deny that Mr. Cucich surrendered his filing privileges with the DOB on June 17, 2010, and thereafter lacked the ability to file any documents on behalf of the plaintiff, and could not perform the services promised under the parties' contract. Nor do defendants offer any explanation as to why they failed to submit proper certifications to the DOB prior to June 17, 2010, in connection with the work performed by the plumber. The court further notes that defendants do not deny that they arranged for another architect's name to appear on documents submitted to the DOB, without the plaintiff's knowledge or consent, and they do not contest the affidavit submitted by George Barakos in which he states he did not sign the document consenting to a change of architects. To the extent that Mr. Cucich asserts that he could

not sign off on the necessary paperwork, as the tenants were still residing at the premises at the time of the August 17, 2010 hearing, it is noted that Cucich no longer had any filing privileges with the DOB at the time of the hearing. Furthermore, the only tenant who resided at the premises in 2010 died in June of that year. Accordingly, the court finds that defendants' assertion that plaintiff cannot establish the element of damages in each of her causes of action is without merit. The court need not determine at this time the amount of damages plaintiff may be entitled to, should she prevail on her claims.

In view of the foregoing, defendants' motion to dismiss the complaint is denied.

Dated: November 14, 2014

AUGUSTUS C. AGATE, J.S.C.