Alliance to End Chickens as Kaporos v New York City Police Dept.
2015 NY Slip Op 32216(U)
November 13, 2015
Supreme Court, New York County
Docket Number: 156730/2015
Judge: Debra A. James
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES *Justice* **PART 59**

The Alliance to End Chickens as Kaporos, RINA DEYCH, individually, and RINA DEYCH, as member of The Alliance to End Chickens as Kaporos, LISA RENZ, individually and LISA RENZ, as member of the Alliance to End Chickens as Kaporos, MICHAL ARIEH, JOY ASKEW, ALEKSANDRA SAHA BROMBERG, STEVEN DAWSON, VANESSA DAWSON, RACHEL DENT, JULIAN DEYCH, DINA DICENSO, FRANCES EMERIC, KRYSTLE KAPLAN, CYNTHIA KING, MORDECHAI LERER, CHRISTOPHER MARK MOSS, DAVID ROSENFELD, KEITH SANDERS, LUCY SARNI, LOUISE SILNIK, DANIEL TUDOR,

Plaintiffs,

- against-

THE NEW YORK CITY POLICE DEPARTMENT, COMMISSIONER WILLIAM BRATTON, in his official Capacity as Commissioner of the New York City Police Department, THE CITY OF NEW YORK, NEW YORK CITY DEPARTMENT OF HEALTH AND MENTAL HYGIENE, CENTRAL YESHIVA TOMCHEI TMIMIM LUBAVITZ, INC., SHLOMIE ZARCHI, ABRAHAM ROSENFELD, NATIONAL COMMITTEE FOR THE FURTHERANCE OF JEWISH EDUCATION AND AFFILIATES, RABBI SHEA HECHT, RABBI SHALOM BER HECHT, RABBI SHLOMA L. ABROMOVITZ, YESHIVA OF MAZCHZIKAI HADAS, INC., MARTIN GOLD, CONGREGATION BEIS KOSOV MIRIAM LANYNSKI, LMM GROUP, LLC, ISAAC DEUTCH, LEV TOV CHALLENGE, INC., ANTHONY BERKOWITZ, YESHIVA SHEARETH HAPLETAH SANZ BNEI, BEREK INSTITUTE, MOR MARKOWITZ, NELLIE MARKOWITZ and BOBOVER YESHIVA BNEI ZION, INC. d/b/a KEDUSHAT ZION, RABBI HESHIE DEMBITZER,

Defendants.

Index No.: 156730/2015

Motion Date: 10/27/2015

Motion Seq. No.: 003

Resettled Decision and Order

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

Check One: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

ORDERED that the Decision and Order of October 29, 2015 in this action is VACATED, RESETTLED AND CORRECTED AS FOLLOWS PURSUANT TO CPLR 5019. See Kiker v Nassau County, 85 NY2d 879 (1995).

By motion sequence number 002, defendant Rabbi Heshie Dembitzer seeks to dismiss the complaint for lack of personal jurisdiction pursuant to CPLR 3211[a][8]). In motion sequence number 003, defendants National Committee for the Furtherance of Jewish Education and Affiliates, Rabbi Shea Hecht, Rabbi Shalom Ber Hecht, Rabbi Shloma L. Abromovitz, Bobover Yeshiva Bnei Zion Inc. (non-City defendants) seek to dismiss the complaint on the grounds of another action pending pursuant to CPLR 3211(4), or alternatively, to consolidate this action with Deych v New York City, Kings County Supreme Court Index No. 14064/2014 pursuant to CPLR 602(a), or to dismiss the complaint pursuant to CPLR 3211[a][7]).

The motions are consolidated for disposition.

The affirmation in which non-City defendant Rabbi Heshie Dembitzer (Dembitzer) states "someone left a copy of legal papers with my name on them in the coffee room of a Yeshiva (school building) on 48th Street in Brooklyn. That is not my office or place of work" constitutes more than mere denial of receipt of process. (See National Union Fire Insurance Company of Pittsburgh, Pa v Montgomery, 245 AD2d150 [1st Dept 1997]; Pilot v St Barnabas Hosp, 286 AD 271 [1st Dept 2011]). Such statements raise issues of fact that contest the amended affidavit of service in which plaintiff's process server states that on July 20, 2015, he delivered the summons and complaint, show cause order and other supporting papers to a person of

suitable age and discretion at Dembitzer's actual place of business.

On that basis at the conclusion of oral argument on October 27, 2015, this court verbally ruled that a traverse "hear and report" by a special referee, would be granted. However, upon further deliberation, and for reasons stated below, the court grants Motion Sequence Number 003, thereby rendering moot the question of personal jurisdiction over defendant Dembitzer and the traverse hearing. (See Jana Master Fund, Ltd. v JP Morgan Chase & Co, 19 Misc3d 1106(A) [New York County Sup Ct 2008]).

"Service of a summons with notice is insufficient to create a prior action pending pursuant to CPLR 3211(a)(4) " (United Enterprises, Ltd v Hill, 185 AD2d 206 [1st Dept 1992], citing Louis R. Shapiro, Inc. v Milspemes Corp., 20 AD2d 857 [1st Dept 1964]).

Here, on September 29, 2014, plaintiff Deych, as plaintiff in Deych v New York City, (Kings County Sup Ct Index No. 14064/2014) (the Kings Action) went to the Brooklyn Supreme Court Clerk's Office and purchased an index number, which was endorsed on the show cause order. On October 8, 2015, the ex parte Kings County Supreme Court judge declined to sign such show cause order. Though plaintiff Deych had every right to proceed with the filing of some other initiatory process (i.e. a summons or notice of petition), she never did either within the 120 day period set forth in CPLR § 306-b or any time thereafter.

If service of a summons is insufficient to establish that an action is pending for the purpose of CPLR 3211(a)(4), a priori, the failure to serve a signed or unsigned show cause order or any other initiatory process, is insufficient as well. As the Kings Action does not constitute a prior action pending, there is no basis for dismissal of the complaint herein pursuant to CPLR

3211(a)(4).

Upon the same rationale, the action at bar cannot be consolidated with the Kings Action, because the Kings Action is not pending, in light of the fact that no complaint was ever served or filed. Unlike in John J. Campagna, Jr., Inc. v Dune Alpin Farm Associates, (81 AD2d 633 [2d Dept 1981]), a consolidation would not serve the interest of judicial economy while preserving the rights of the parties, since more than eight months have lapsed since the initiatory process in the Kings Action was required to be served pursuant to CPLR 306-b. [1]

Turning to defendants' motion to dismiss the complaint for failure to allege facts that state a cognizable claim, it is axiomatic that on such motion

> the pleading is to be afforded a liberal construction...[and the court must] accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and ...[and] may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint...and 'the criterion is whether the proponent of the pleading has a cause of action, not whether he has stated one'

(Leon v Martinez, 84 NY2d 83, 87-88 [1993) [citations omitted]).

Applying the foregoing standard to the allegations set forth in the complaint as well as the affidavits submitted by plaintiffs on their motion for a preliminary injunction (motion sequence no. 001), "the facts as alleged [fail to] fit within any cognizable legal theory" (Leon, supra).

First, defendants are correct that the first cause of action for "judicial mandamus" does not lie against the non-City defendants.

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[1] Though technically commenced by filing, and marked "Active" in the entries of the Kings County Clerk, no signed show cause order, summons, notice of petition, and/or complaint was ever filed and thus, the Kings Action is literally in legal limbo.

Nor does the second cause of action of the complaint, captioned "Permanent Injunction", state a cognizable claim, as such is only a remedy.

Plaintiffs allege sixteen additional causes of action, fifteen of which claim that the non-city defendants violated various state and local public health and safety laws, rules and regulations. The nineteenth[2] cause of action, which is captioned "public nuisance", asserts that in violating the foregoing state and local statutes, rules and regulations, the non-City defendants have created a public nuisance that "has a significant effect upon the public right".

> Plaintiffs contend that they stated valid causes of action for public nuisance, alleging that the collapses forced closure of their establishments, causing special damages beyond those suffered by the public.
>
> A public nuisance exists for conduct that amounts to a substantial interference with the exercise of a common right of the public, thereby offending public morals, interfering with the use by the public of a public place or endangering or injuring the property, health, safety or comfort of a considerable number of persons. A public nuisance is a violation against the State and is subject to abatement or prosecution by the proper governmental authority (*Copart Indus. v. Consolidated Edison Co.,* 41 N.Y.2d 564, 568, 394 N.Y.S.2d 169, 362 N.E.2d 968).
>
> A public nuisance is actionable by a private person only if it is shown that the person suffered special injury beyond that suffered by the community at large (*see, Burns Jackson Miller Summit & Spitzer v. Lindner,* 59 N.Y.2d 314, 334, 464 N.Y.S.2d 712, 451 N.E.2d 459 [citing Restatement (Second) of Torts § 821C, comment *b*]). This principle recognizes the necessity of guarding against the multiplicity of lawsuits that would follow if everyone were permitted to seek redress for a wrong common to the public (Restatement [Second] of Torts § 821C, comment *a;* Prosser, *Private Action for Public Nuisance,* 52 Va L Rev 997, 1007 [1966]).
>
> A nuisance is the actual invasion of interests in land, and it may arise from varying types of conduct *Copart Indus. v. Consolidated Edison Co.,* 41 N.Y.2d, at 569, 394 N.Y.S.2d 169,

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[2]In an apparent scrivener's error, the complaint omits the eighteenth cause of action.

> 362 N.E.2d 968, *supra*). In the cases before us, the right to use the public space around Madison Avenue and Times Square was invaded not only by the building collapses but also by the City's decision, in the interest of public safety, to close off those areas. Unlawful obstruction of a public street is a public nuisance, and a person who as a consequence sustains a special loss may maintain an action for public nuisance (*Callanan v. Gilman,* 107 N.Y. 360, 370, 14 N.E. 264). Indeed, "in a populous city, whatever unlawfully turns the tide of travel from the sidewalk directly in front of a retail store to the opposite side of the street is presumed to cause special damage to the proprietor of that store, because diversion of trade inevitably follows diversion of travel" (*Flynn v. Taylor,* 127 N.Y. 596, 600, 28 N.E. 418).
>
> The question here is whether plaintiffs have suffered a special injury beyond that of the community so as to support their damages claims for public nuisance (*see, Graceland Corp. v. Consolidated Laundries Corp.,* 7 A.D.2d 89, 91, 180 N.Y.S.2d 644, *affd* 6 N.Y.2d 900, 190 N.Y.S.2d 708, 160 N.E.2d 926). We conclude that they have not.

(532 Madison Avenue Gourmet Foods, Inc. v Finlandia Center, Inc., 96 NY2d 280, 292- 293 [2001]).

As in Madison Avenue Gourmet, supra, plaintiffs at bar make no allegations, either in their complaint or in their affidavits in support of the preliminary injunction (motion sequence number 001) that they suffered any injury beyond that of the community as a whole arising out of the alleged illegal conduct of the non-City defendants. Plaintiffs have not alleged that the harm that they suffered as a result of the unsanitary and unsightly conditions of the non-City defendants' Kaporos ritual was any different from that experienced by other members of the communities that live and work in the populous areas where the plaintiffs claim the ritual slaughters take place. For failure to allege any special injury, the causes of action three through nineteen must fall.

In his motion to dismiss based upon lack of personal jurisdiction over defendant Dembitzer, defense counsel seeks an order imposing costs "upon plaintiff (sic), jointly and severally, pursuant to the Religious Freedom Restoration Act 2000 bb-1 and 22 NYCRR 130 of

this Court". Imposition of costs is wholly unwarranted (see L & M Bus Corp. v New York City Dept. of Educ., 83 AD3d 432 [1st Dept 2011]). In fact, this court disapproves of defense counsel's appending to his reply affirmation a photograph of plaintiff's counsel, which constitutes an "ad hominem attack" concerning her dietary practices, a matter wholly irrelevant to the merits of this case (see Hunts Point Terminal Produce Co-Op Ass'n, Inc v New York City Economic Development Corp., 54 AD3d 296 [1st Dept 2008] Catterson, J., concurring).[3]

Accordingly, it is

ORDERED that the motion of defendant Rabbi Heshie Dembitzer to dismiss the

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[3]This court likewise takes a very dim view of defense counsel's gratuitous comments about a parade, which takes place annually in the County of Kings, and the recent murder of a bystander by gun violence that occurred on the eve of this year's event. Defense counsel's comments not only denigrate the rights of plaintiffs' counsel to advance arguments vigorously on behalf of her clients but also trivializes the terrible tragedy visited on the murdered victim and his family.

Nor is the court persuaded by defense counsel's fleeting reference to the Religious Freedom Restoration Act (42 U.S.C. §2000 bb, et seq.), which is inapplicable to plaintiffs' position in this lawsuit, as such federal law in no way restricts the rights of private persons, such as plaintiffs, to access the court.

The purpose of that federal law is to ensure that

> "a law of general applicability [does not] substantially burden[] the exercise of religion, [unless] such application..[is] in furtherance of a compelling state interest and... constitute(s) 'the least restrictive means of furthering that compelling state interest' ***Moreover, while the First Amendment to the United States Constitution prohibits regulation of religious beliefs, conduct by a religious entity 'remains subject to regulation for the protection of society'"

(Kenneth R. v Roman Catholic Diocese of Brooklyn, 229 AD2d 159, 165 [2nd Dept 1997] [citation omitted]).

complaint for lack of personal jurisdiction (motion sequence number 002) is denied as moot; and it is further

ORDERED that the motion of defendants The National Committee for the Furtherance of Jewish Education and Affiliates, Rabbi Shea Hecht, Rabbi Shalom Ber Hecht, Rabbi Shloma I. Abromovitz, and Bobover Yeshiva Bnei Zion Inc. (motion sequence number 003) to dismiss the complaint on the grounds of another action pending pursuant to CPLR 3211(4), or alternatively, to consolidate this action with Deych v New York City, Kings County Supreme Court Index No. 14064/2014 pursuant to CPLR 602(a) is denied, but to the extent it seeks to dismiss the complaint against them pursuant to CPLR 3211[a][7] is granted, and the complaint against The National Committee for the Furtherance of Jewish Education and Affiliates, Rabbi Shea Hecht, Rabbi Shalom Ber Hecht, Rabbi Shloma I. Abromovitz, Bobover Yeshiva Bnei Zion Inc., and Rabbi Heshie Dembitzer is severed and dismissed ; and it is further

ORDERED that the Clerk is directed to enter judgment dismissing the complaint against defendants The National Committee for the Furtherance of Jewish Education and Affiliates, Rabbi Shea Hecht, Rabbi Shalom Ber Hecht, Rabbi Shloma I. Abromovitz, Bobover Yeshiva Bnei Zion Inc., and Rabbi Heshie Dembitzer, and it is further

ORDERED that the remaining parties are directed to appear in IAS Part 59, 71 Thomas Street, Room 103, for a preliminary conference on December 1, 2015, 9:30 A.M.

This is the decision and order of the court.

Dated: November 13, 2015

ENTER:

J.S.C.
DEBRA A. JAMES
J.S.C