

Golding v Spencer

2024 NY Slip Op 32201(U)

June 18, 2024

Supreme Court, Kings County

Docket Number: Index No. 512749/2020

Judge: Ingrid Joseph

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At an IAS Part 83 of the Supreme Court of the State of New York held in and for the County of Kings at 360 Adams Street, Brooklyn, New York, on the 18th day of JUNE 2024.

PRESENT: HON. INGRID JOSEPH, J.S.C.
SUPREME COURT OF THE STATE OF
NEW YORK COUNTY OF KINGS

-----X
KEVIN GOLDING and DONALD CREARY
Plaintiff(s)

Index No: 512749/2020
Motion Seq. 1-2

-against-
CHRISTIAN SPENCER
Defendant(s)

ORDER

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The following e-filed papers read herein:

	<u>NYSCEF Nos.:</u>
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/Reply.....	3-8; 19
Affirmation in Opposition/Affidavits Annexed/Exhibits Annexed.....	11-17
Notice of Motion/Affirmation in Support/Affidavits Annexed Exhibits Annexed/Reply.....	20-27; 30-34
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In this action, Christian Spencer (“Defendant”) moves (Motion Seq. 1) for an order dismissing Kevin Golding (“Golding”) and Donald Creary’s (“Creary”) (Collectively “Plaintiffs”) complaint in its entirety pursuant to CPLR 3211(a)(7) and 3212. Plaintiffs have opposed the motion. Additionally, Plaintiffs move (Motion Seq. 2) for leave to file an Amended Verified Complaint based upon the grounds of newly discovered evidence pursuant to CPLR 3025(b). Defendant has opposed the motion.

This matter arises out of a housing dispute between the parties. Plaintiff Creary is the owner of a property located at 235 Ralph Avenue Brooklyn, New York (“Subject Premises”). Plaintiff Golding is the Managing Agent for the Subject Premises. Upon information and belief, Defendant moved into the Subject Premises as a licensee in April 2019. Plaintiffs filed this action to recover damages for breach of contract based upon Defendant’s alleged breach of a Housing Court Stipulation which required the Defendant to vacate the Subject Premises and to pay use and occupancy of \$1800.00 on or before April 20, 2020. Additionally, the complaint sets forth causes of action for unjust enrichment, abuse of process, and defamation per se.

In support of his motion, Defendant argues that Plaintiffs’ complaint must be dismissed for failure to state any viable causes of action. Defendant states that Plaintiff’s claims for unjust enrichment must be dismissed because it is duplicative of their breach of contract claim and that unjust enrichment is not available when a binding agreement between the parties governs the

subject of the claim. Defendant asserts that the basis for Plaintiffs' claims is rooted in the terms of the Housing Court stipulation, which constitutes a binding contract. Additionally, Defendant contends that Plaintiffs' breach of contract claim should be dismissed not only for failure to attach the stipulation, but also because the Housing Court retains jurisdiction of its enforcement. Thus, this matter should be transferred to the Housing Court for resolution. With respect to Plaintiffs' abuse of process claim, Defendant alleges that Plaintiffs have failed to set forth a legal theory upon which relief can be granted because while Plaintiffs allege that Defendant has commenced and maintained multiple actions with various agencies, the mere institution and maintaining of a complaint in and of itself is not legally considered process capable of being abused. Furthermore, Defendant contends that Plaintiffs' cause of action for defamation per se should be dismissed because Plaintiffs have failed to satisfy the pleading requirements by not including the alleged defamatory words complained of in the complaint, nor do Plaintiffs allege the time, place, and manner of the false statement and specify to whom they were made. Defendants argue that because the causes of action on their face, are insufficient as a matter of law, he is also entitled to summary judgment dismissing the complaint.

In opposition, Plaintiffs argue that they have asserted viable causes of action in their complaint. With respect to their unjust enrichment claim, Plaintiffs assert that Defendant managed to live rent free at the Subject Premises from April 2019 until on or around August 2020. Plaintiffs contend that Defendant should not be allowed to retain the benefit of residing at the Subject Premises for free while causing Plaintiffs to incur legal fees and costs to evict him. Additionally, Plaintiffs allege that Defendant's claim that this matter should be before the Housing Court is baseless and that pursuant to the stipulation, the Defendant agreed to pay use and occupancy for the month of April 2020 in the amount of \$1800.00. Plaintiffs state that Defendant abused process by filing multiple complaints with various agencies, oftentimes based on the same allegations. Plaintiffs allege that Defendant filed complaints for the sole purpose of causing harm to Plaintiffs and that Defendant falsely alleged that he worked for Plaintiff Golding as a full-time employee for several months in order to file a complaint with the Department of Labor despite admitting that he is an independent contractor. Furthermore, Plaintiffs allege that Defendant knowingly made false statements and published them online with the sole intent of destroying their personal and professional reputation.

In support of Motion Seq. 2, Plaintiff Golding also seeks leave to file an Amended Verified Complaint, on the ground that a motion to dismiss extends a defendant's time to answer the complaint until ten days after service of notice of entry of the order deciding the motion pursuant to CPLR 3211(f), and since the court had not yet decided Defendant's motion he may move to amend their complaint as of right.¹ Plaintiff Golding seek leave to amend pursuant to CPLR 3025(b) based upon newly discovered evidence regarding the defamation cause of action, as well as to add a new cause of action for conversion and property damage. Plaintiff Golding states that the discovered evidence consists of additional defamatory postings made by Defendant on social media websites as of July 7, 2023. Plaintiff Golding seeks to add the specific defamatory language that was made in the posts and also requests leave to add new claims based on allegations that when Defendant vacated the Subject Premises, he left the unit in a filthy state and took a mattress which did not belong to him.

In opposition, Defendant argues that Plaintiff Golding cannot seek to amend while there is a pending motion to dismiss, especially since Plaintiff did not cross-move in response to Defendant's motion. Defendant states that Plaintiff Golding's motion is defective under CPL3025(b) because Plaintiffs failed to attach a copy of his proposed amended complaint or a redline version demonstrating his proposed changes. Additionally, Defendant contends that Plaintiff Golding's new evidence does not rise to the level of defamation necessary to state a valid cause of action.

Under CPLR 3025(a), a party is entitled to amend his or her pleading once without leave of court within 20 days after its service, or at any time before the period for responding to it expires, or within 20 days after service of a pleading responding to it. Under CPLR 3025 (b), a party may amend his or her pleading, or supplement it, by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties." In the absence of prejudice or surprise resulting directly from the delay in seeking leave, applications to amend or supplement a pleading are to be freely granted unless the proposed amendment is palpably insufficient or patently devoid of merit (*Myung Hwa Jang v Mang*, 164 AD3d 803, 804 [2d Dept 2018], quoting *Lucido v Mancuso*, 49 AD3d 220, 222 [2d Dept 2008], see also *Jeffrey Gardens Apt. Corp. v LH Mgt., Inc.*, 157 AD3d 941, 942 [2d Dept 2018]; *Mannino v Wells*

¹ Plaintiffs' original complaint and opposition to Motion Seq. 1 were submitted by Evelyn Abiola, Esq. on behalf of both Plaintiffs. Motion Seq. 2 and the Amended Complaint are submitted on behalf of Plaintiff Golding only.

Fargo Home Mtge., Inc., 155 AD3d 860, 862 [2d Dept 2017]; *Emigrant Sav. Bank v Walters*, 155 AD3d 829, 830 [2d Dept 2017]).

Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading (CPLR 3025[b]). The function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion (*Ditech Financial, LLC v Connors*, 206 AD3d 694 [2d Dept. 2022]; *Wells Fargo Bank, N.A. v Marchione*, 69 AD3d 204 [2d Dept. 2009]; quoting *Harleysville Ins. Co. v Rosario*, 17 AD3d 677 [2d Dept. 2005]). Thus, documents submitted for the first time in reply papers generally should be disregarded by the court, unless the documents submitted is in response to allegations raised for the first time in opposition papers, or when the other party is given the opportunity to respond to the reply papers (*Citimortgage, Inc v Espinal*, 134AD3d 876 [2d Dept. 2015]; *Central Mortg. Co. v Jahnsen*, 150 AD3d 661 [2d Dept. 2017]).

Here, Defendant served an answer to the original complaint on September 14, 2020. Inasmuch as the 20-day period set forth in CPLR 3025 (a) has expired, plaintiffs are required to seek leave of court in order to serve the amended summons and complaint. Initially, upon review of Plaintiffs' submissions, the proposed Amended Verified Complaint and redlined amendments were proffered for the first time with their reply after Defendant raised the issue of their absence in opposition to the motion. Since, the documents were submitted after Defendant's opposition and raise new allegations, which Defendant has not been given an opportunity to respond to, the Amended Verified Complaint and redlined amendments are procedurally improper and warrants dismissal.

Assuming arguendo that the Amended Verified Complaint was not procedurally improper, the court still finds that it still warrants dismissal because it is palpably insufficient and patently devoid of merit. To begin with, it appears to only be submitted on behalf of Plaintiff Golding, whereas the original complaint was submitted on behalf of and verified by both Plaintiffs. Additionally, the proposed complaint is not verified by a party. Plaintiff Golding's who asserts to be an attorney, submits a sworn affidavit and affirmation on behalf of himself, which does not constitute verification. Plaintiff Creary has not submitted any papers or asserted any allegations. The newly discovered evidence and amended complaint submitted by Plaintiff

Golding attempts to cure the deficiencies of the defamation per se claim in the original complaint and assert additional causes of action. The newly plead defamation claim however still fails to adequately plead a viable cause of action.

To state a cause of action alleging defamation, a plaintiff must allege that the defendant published a false statement, without privilege or authorization, to a third party (*Davydov v Youssefi*, 205 A.D.3d 881 [2d Dept. 2022]; *Gottlieb v Wayne*, 159 A.D.3d 799 [2d Dept. 2018] quoting *Rosner v Amazon.com*, 132 A.D.3d 835 [2d Dept. 2015]). Defamation claims are not actionable unless the plaintiff pleads special damages or the loss of something having economic pecuniary value (*Lieberman v Gelstein*, 80 NY2d 429 [1992]). The four established exceptions, collectively known as defamation per se consist of statements that (1) charge the plaintiff with a serious crime; (2) tend to injure the plaintiff in their trade, business or profession; (3) impute to the plaintiff a “loathsome disease”; and (4) impute unchastity to a woman (*Id.*). The law presumes that damages will result from statements in these categories and damages need not be alleged or proven (*Id.*; *Laguerre v Maurice*, 192 AD3d 44 [2d Dept. 2020]; *Gatz v Otis Ford, Inc.*, 274 AD2d 449 [2d Dept. 2000]).

When drafting a complaint alleging defamation, a plaintiff must set forth the particular words complained of and must also specify the time, place and manner of the false statement and to whom it was made (CPLR 3016[a]; *Jesberger v CVS Health Sols., LLC*, 222 AD3d 849 [2d Dept 2023]; *Arsenault v Forquer*, 197 AD2d 554 [2d Dept 1993]). Whether particular words are defamatory presents a legal question to be resolved by the court in the first instance (*Aronson v Wiersma*, 65 NY2d 592, 593 [1985]; *Kamalian v Reader's Digest Ass'n, Inc.*, 29 A.D.3d 527 [2d Dept. 2006]). The words must be construed in the context of the entire statement or publication as a whole, tested against the understanding of the average reader, and if not reasonably susceptible of a defamatory meaning, they are not actionable and cannot be made so by a strained or artificial construction (*Id.*; *Gjonklekaj v Sot*, 308 A.D.2d 471 [2d Dept. 2003]).

Initially, Plaintiffs' complaint alleges that Defendant “made false statements, which he published to twitter, with the sole intent of destroying the Plaintiff Kevin Golding's reputation,” and that the Defendant falsely accused Plaintiff Kevin Golding of plagiarizing several author's work and passing it off as original content on his online magazine called Nu. Origins and published these false statements on public websites.” The complaint does not allege what specific statements were made, nor alleges specifically how Plaintiff Golding's trade, business,

or profession was harmed as required under the second-defamation per se exception. Thus, the complaint fails to sufficiently plead a cause of action. In the proposed Amended Complaint, Plaintiff Golding states that recently he discovered defamatory postings made by the Defendant on July 7, 2023², on social media platforms. Plaintiff submits a screenshot of the alleged defamatory statement, but the entire statement is not shown, and Plaintiff Golding only cites portions of it in his proposed Amended Complaint, and again, it fails to specifically allege how Plaintiff Golding's trade, business, or profession was harmed. These statements without context cannot be construed in their entirety to be susceptible to a defamatory meaning. Thus, the proposed Amended Complaint fails to sufficiently plead a cause of action for defamation per se and must be dismissed.

Additionally, Plaintiff Golding alleges that Defendant started a Go-Fund-Me page which also contained defamatory remarks about the Plaintiff. The alleged defamatory remark states that: "The Crown Fried Chicken on Ralph Avenue had a slew of problems including being infested with mice and roaches as well as giving off a musty, swampy odor." Plaintiff also submits a screenshot of the Go-Fund-Me page created on June 29, 2020. Upon review of the post, the Go-Fund-Me states that it was created to help raise funds for Defendant's homeless friend who use to work at the Crown Fried Chicken restaurant, which had a slew of problems. The post again does not include the entire statement made. Additionally, Plaintiff Golding submits Exhibit C, a Facebook post allegedly made by Defendant, wherein he states, "Don't support the restaurant replacing the Crown Fried Chicken on 235 Ralph Ave. – Vegetarian Juice Bar and Restaurant operated by Kevin Golding and Family," and that "landlord and property agent, Golding, a lawyer who is doing business as Donald Creary unwittingly contributed to an immigrant's homeless demise." Neither Plaintiff Golding nor Plaintiff Creary allege to have owned the Crown Fried Chicken restaurant at the time the alleged defamatory statements were made. Nonetheless, Plaintiff has failed to establish a cause of action for defamation per se since he cannot assert defamation claim on behalf of Plaintiff Creary, the entire statements made is not proffered, and Plaintiff Golding fails to specifically allege what or how his trade, business, or profession was harmed as a result of the posting.

To establish a cause of action to recover damages for conversion, a plaintiff must show legal ownership or an immediate superior right of possession to a specific identifiable thing and

² The Court notes that the posting is dated July 7, 2020 (see Plaintiff's Exhibit C NYSCEF Doc. No. 25).

must show that the defendant exercised an unauthorized dominion over the thing in question to the exclusion of the plaintiff's rights (*RD Legal Funding Partners, LP v Worby Groner Edelman & Napoli Bern, LLP*, 195 AD3d 968 [2d Dept. 2021]; *Schwartz v Sayah*, 72 AD3d 790 [2d Dept. 2010]).

Furthermore, the proposed Amended Complaint seeks to add a cause of action for conversion and property damage based on the allegation that when Defendant vacated the Subject Premises, he left his unit in a dirty condition and took a mattress which did not belong to him. Plaintiff Golding, however, does not allege to be the owner of the Subject Premises and thus would not be entitled to recover damages as a result, nor does he allege ownership of the mattress, and the conclusory allegation alone is insufficient to demonstrate that the defendant exercised an unauthorized dominion over the matters to the exclusion of Plaintiff's rights. Similarly, the allegation regarding property damage is without merit because it does not sufficiently allege any damage created that amounts to more than ordinary wear and tear.

Accordingly, Plaintiff's motion for leave to file an Amended Verified Complaint is denied.

CPLR 3211(e) provides that a motion to dismiss pursuant to CPLR 3211(a)(7), based upon the failure to state a cause of action, may be brought at any time; however, a motion to dismiss pursuant to CPLR 3211 (a)(1), based upon documentary evidence, must be brought before service of the responding pleading. 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 (*Leon* at 88; *Skefalidis v China Pagoda NY, Inc.*, 210 A.D. 3d 925 [2d Dept. 2022]); *Oluwo v Sutton*, 206 A.D.3d 750 [2d Dept. 2022]; *Sokol v Leader*, 74 A.D.3d 1180 [2d Dept. 2010]). Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss (*Eskridge v Diocese of Brooklyn*, 210 A.D.3d 1056 [2d Dept. 2022]; *Zurich American Insurance Company v City of New York*, 176 A.D.3d 1145 [2d Dept. 2019]; *EBC I Inc. v Goldman, Sachs & Co.*, 5 NY3d [2005]).

On a motion made pursuant to CPLR 3211(a)(7) to dismiss a complaint, the burden never shifts to the non-moving party to rebut a defense asserted by the moving party (*Sokol* at 1181; *Rovello v Orofino Realty Co. Inc.*, 40 NY2d 970 [1976]). CPLR 3211 allows a plaintiff to submit affidavits, but it does not oblige him or her to do so on penalty of dismissal (*Id.*; *Sokol* at 1181).

Affidavits may be received for a limited purpose only, serving normally to remedy defects in the complaint and such affidavits are not to be examined for the purpose of determining whether there is evidentiary support for the pleading (*Id.*; *Rovello* at 635; *Nonon* at 827). Thus, a plaintiff will not be penalized because he has not made an evidentiary showing in support of its complaint.

Unlike on a motion for summary judgment, where the court searches the record and assesses the sufficiency of evidence, on a motion to dismiss, the court merely examines the adequacy of the pleadings (*Davis v. Boenheim*, 24 NY3d 262, 268 [2014]). The appropriate test of the sufficiency of a pleading is whether such pleading gives sufficient notice of the transactions, occurrences, or series of transactions or occurrences intended to be proved and whether the requisite elements of any cause of action known to our law can be discerned from its averments (*V. Groppa Pools, Inc. v. Massello*, 106 AD3d 722, 723 [2d Dept 2013]; *Moore v Johnson*, 147 AD2d 621 [2d Dept 1989]).

To plead a cause of action for abuse of process, a plaintiff must allege (1) regularly issued process, either civil or criminal, (2) an intent to do harm without excuse or justification, and (3) use of the process in a perverted manner to obtain a collateral objective (*Curiano v Suozzi*, 63 NY2d 113, 116 [1984]). The gist of a claim for abuse of process lies in the improper use of process after it is issued by an unlawful interference with one's person or property (*Kaufman v Kaufman*, 206 AD3d 805 [2d Dept 2022]; *Tenore v Kantrowitz, Goldhamer & Graifman, P.C.*, 76 AD3d 556, 557 [2d Dept 2010]). The institution of a civil action by summons and complaint in and of itself is insufficient to support a cause of action for abuse of process (*Curiano* at 116; *Krellman v Livingston*, 64 AD2d 621 [2d Dept. 1978]). Similarly, malicious intent alone does not give rise to a cause of action for abuse of process (*Curiano* at 117; *Hauser v Bartow*, 273 NY 310 [1937]).

Here, Plaintiff fails to state a viable cause of action for abuse of process. The complaint alleges that Defendant has commenced and maintained an action to recover unpaid wages and overtime against Plaintiff Golding and that Defendant made several reports to the New York City Department of Housing Preservation Department and the Fire Department of New York misrepresenting the condition of the Subject Premises after he intentionally damaged his unit. Additionally, it alleges that the sole purpose of Defendant's action is to cause harm to them and that "upon information and belief Defendant is seeking some collateral advantage corresponding

detriment to the Plaintiffs which is outside the legitimate ends of the process,” as well as retribution against the Plaintiffs for commencing an eviction process against him. These allegations, however, fail to allege that any of the actions commenced by Defendant resulted in process being issued that was then used to interfere with the Plaintiffs’ person or property. Merely stating that Defendant is seeking some collateral advantage is insufficient to demonstrate that he abused process beyond the purpose which the law intended.

Accordingly, Defendant’s motion to dismiss Plaintiffs’ cause of action for abuse of process is granted.

To plead a cause of action for unjust enrichment, a plaintiff must allege (1) the defendant was enriched, (2) at the plaintiff’s expense, and (3) that it is against equity and good conscience to permit the defendant to retain what is sought to be recovered (*Mobarak v Mowad*, 117 A.D.3d 998 [2d Dept. 2014]; *Mandarin Trading Ltd. v Wildenstein*, 16 N.Y.3d 173 [2011]). The theory of unjust enrichment lies as a quasi-contract claim and contemplates an obligation imposed by equity to prevent injustice, in the absence of an actual agreement between the parties (*Georgia Malone & Co., Inc. v Rieder*, 19 NY3d 511 [2012]; *Bedford-Carp Construction, Inc. v Brooklyn Union Gas Company*, 219 AD3d 1293 [2d Dept. 2023]). Causes of action alleging unjust enrichment and breach of contract may be pleaded alternatively (CPLR 3014; *Gold v 29-15 Queens Plaza Realty, LLC*, 43 A.D. 3d 866 [2d Dept. 2007]; *Auguston v Spry*, 282 AD2d 489 [2d Dept. 2001]; *Katcher v Browne*, 19 A.D.2d 744 [2d Dept. 1963]). However, an unjust enrichment claim is not available where it simply duplicates, or replaces, a conventional contract or tort claim (*Weinstein v Levitin*, 208 AD3d 531 [2d Dept. 2022]; *Scifo v Taibi*, 198 AD3d 704 [2d Dept. 2021]; quoting *Corsello v Verizon New York, Inc.*, 18 NY3d 777 [2012]). Thus, the existence of a valid and enforcement written contract governing a particular subject matter ordinarily precludes recovery in quasi contract claims arising out of the same subject matter (*Clark-Fitzpatrick, Inc. v Long Is. R. Co.*, 70 NY2d 382, 388 [1987]; *Jaybar Realty Corp. v Armato*, 175 AD2d 1391 [2d Dept. 2019]).

Here, Plaintiffs’ cause of action for unjust enrichment seeks to recover damages for Defendant residing at the subject premises without paying rent or use and occupancy charges. However, the Plaintiffs’ fail to allege or provide admissible evidence regarding how long Defendant resided at the premises, failure of payment, nor is Plaintiff Golding entitled to recover since he does not allege that is he is the landlord or owner of the property.

Accordingly, Defendant's motion to dismiss Plaintiffs' cause of action for unjust enrichment is granted.

To plead a cause of action for breach of contract, a plaintiff must allege (1) the existence of a contract, (2) plaintiff's performance pursuant to the contract, (3) defendant's breach of the contractual obligations; and (4) damages resulting from that breach (*34-06 73, LLC v Seneca Insurance Company*, 39 NY3d 44 [2022]). Plaintiff's allegations must identify the provisions of the contract that were breached (*Id.*).

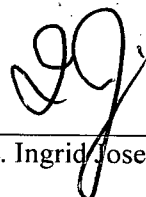
Plaintiffs' complaint adequately states a cause of action for breach of contract regarding the Housing Court stipulation. Pursuant to the agreement, a warrant was issued but execution of it was stayed until April 20, 2020. In order to stay execution of the warrant, Defendant was ordered to pay use and occupancy of \$1,800.00 on or before April 20, 2020. Defendant was also ordered to leave the Subject Premises in a clean condition, and that upon any breach of the terms of the stipulation a warrant was to be accelerated. Therefore, Plaintiff has adequately stated a claim for entitlement for \$1800.00 pursuant to the stipulation. Plaintiff however has not plead facts sufficient to establish a cause of action for any separate damages pertaining to unjust enrichment for additional use and occupancy charges beyond what was granted in the stipulation.

Accordingly, it is hereby,

ORDERED, that Plaintiff's motion (Motion Seq. 2) for leave to file an amended complaint is denied, and it is further,

ORDERED, that Defendant's motion (Motion Seq. 1) to dismiss Plaintiff's complaint is granted to the extent that Plaintiff's first, third, and fourth causes of action are dismissed. Defendant's motion to dismiss Plaintiff's second cause of action for breach of contract, is denied.

This constitutes the decision and order of the court.



Hon. Ingrid Joseph J.S.C.

**Hon. Ingrid Joseph
Supreme Court Justice**