

Wlody v Birch Family Servs., Inc.

2018 NY Slip Op 34539(U)

December 20, 2018

Supreme Court, Queens County

Docket Number: Index No. 715248/2018

Judge: Robert J. McDonald

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK
CIVIL TERM - IAS PART 34 - QUEENS COUNTY
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD
Justice

TRUDY WLODY, JACK WLODY, and CORINNE WLODY,

Index No.: 715248/2018

Motion Date: 12/20/18

Plaintiffs,

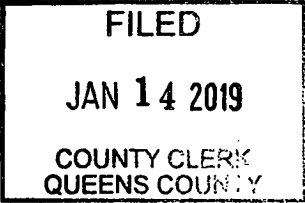
Motion No.: 45

- against -

Motion Seq.: 1

BIRCH FAMILY SERVICES, INC.,

Defendant.



The following electronically filed documents read on this motion by defendant for an Order pursuant to CPLR 3211(a)(2) and (7), dismissing this action on the grounds that one of the claims has already been settled, plaintiffs do not have standing to bring some of the claims they allege, and the complaint fails to state a cause of action:

Table with 2 columns: Document Name, Papers Numbered. Includes: Notice of Motion-Affirmation-Exhibits (EF 5 - 8), Affirmation in Opposition-Exhibits-Memo. of Law (EF 9 - 18), Reply Affirmation (EF 19 - 20)

Plaintiffs commenced this action by filing a summons and complaint on October 5, 2018. The complaint alleges three causes of action: nuisance, trespass, and prima facie tort.

As set forth in the complaint, defendant is a group home for six adults with disabilities. On a regular basis, while in their home, plaintiffs hear and observe staff at defendant's facility emotionally abusing the residents, including yelling at them. Plaintiffs hear and observe from their home the residents being physically abused, with the staff kicking, yanking, taunting, threatening, and loudly cursing at the residents. Plaintiffs regularly witness from their home the staff reducing residents to tears and yelling at the residents, making it incredibly unpleasant to be living in their home. On a daily basis, plaintiffs observe the staff leaving residents unattended, which

often results in the residents trespassing onto plaintiffs' property. When plaintiffs complained, the staff retaliated by sitting on plaintiffs' vehicles, positioning their vehicles against plaintiffs' vehicles, and allowing residents to lean on plaintiffs' vehicles and drag items across the hoods. The residents also hit and pound plaintiffs' vehicles. The staff allows residents to yell from the windows, and plaintiffs are unable to use their balcony because residents have threatened and yelled expletives at them while not being supervised by the staff. At all hours of the day and night, the staff has loud conversations, yell, laugh, curse and play loud music that plaintiffs can clearly hear in their home. These sounds disturb plaintiffs' ability to rest and sleep. The staff routinely and inappropriately uses defendant's vehicles by driving backwards down the street, speeding, running stop signs, and taking off before the van door is shut, all with residents inside the vehicle. The staff slams the front door and leave the alarm ringing for hours, which can be heard in plaintiffs' home. Plaintiffs also hear the residents' constant screams, cries, pounding walls, and shaking floors at all hours of the night and day. The pounding and shaking has caused multiple cracks on the walls in plaintiffs' home. The staff, at all hours of day and night, plays loud music from their cars, which can be heard in plaintiffs' home. The staff illegally parks vehicles, parking over sidewalks and blocking the driveway. Defendant has also improperly put out garbage, which has strewn across plaintiffs' lawn on a regular basis.

Defendant now seeks to dismiss the complaint on the grounds that defendant has already compensated plaintiffs for any damage to their vehicle, plaintiffs lack standing to complaint about defendant's treatment of the residents and most of the allegations pertaining to public nuisance, and plaintiffs fail to state a cause of action for private or public nuisance, trespass, and prima facie tort.

Initially, that branch of the motion to dismiss based on the grounds that defendant has already compensated plaintiffs for any damage to their vehicle is denied. Defendant has not provided a general release.

On a motion to dismiss pursuant to CPLR 3211(a)(7) for failure to state a cause of action, the court must accept the facts alleged in the pleading as true, accord the plaintiff the benefit of every possible inference, and determine only whether the facts as alleged fit within any cognizable legal theory (Goshen v Mutual Life Ins. Co. of N.Y., 98 NY2d 314 [2002]; Leon v Martinez, 84 NY2d 83 [1994]; Greer v National Grid, 89 AD3d 1059 [2d Dept. 2011]; Prestige Caterers, Inc. v Siegel, 88 AD3d 679 [2d Dept. 2011]).

A complaint must allege the material elements of the cause of action (see Lewis v Village of Deposit, 40 AD2d 730 [1972]; Kohler v Ford Motor Company, Inc., 93 AD2d 205 [3d Dept. 1983]). Generally, the test of the sufficiency of the complaint is whether it gives sufficient notice of the transaction, 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 (see Moore v Johnson, 147 AD2d 621 [1989]; JP Morgan Chase v J.H. Elec. of New York, Inc., 69 AD3d 802 [2d Dept. 2010]). However, a court may consider evidentiary material submitted by a defendant in support of a motion to dismiss a complaint pursuant to CPLR 3211(a)(7) (see CPLR 3211[c]; Sokol v Leader, 74 AD3d 1180 [2d Dept. 2010]). Moreover, a court may freely consider affidavits submitted by the plaintiff to remedy any defects in the complaint (see Leon v Martinez, 84 NY2d 83 [1994]). When evidentiary material is considered on a motion to dismiss a complaint pursuant to CPLR 3211(a)(7), the criterion is whether the plaintiff has a cause of action, not whether he or she has stated one (see Basile v Wiggs, 98 AD3d 640 [2d Dept. 2012]).

Nuisance:

To state a cause of action for a private nuisance, a plaintiff must allege an interference substantial in nature, intentional in origin, unreasonable in character, with a person's property right to use and enjoy land, caused by another's conduct in acting or failing to act (see Behar v Quaker Ridge Golf Club, Inc., 118 AD3d 833 [2d Dept. 2014]; Aristides v Foster, 72 AD3d 1105 [2d Dept. 2010]).

Here, the complaint sets forth specific types of constant behavior, including, inter alia, loud parties and music at all hours of the day and night, jumping and shaking that has caused cracks in the walls of plaintiffs' home, hitting and pounding plaintiffs' vehicles, and the dangerous use of motor vehicles, all of which interferes with plaintiffs' ability to use and enjoy their property. As such, the complaint states a cause of action for a private nuisance (see Taggart v Costabile, 131 AD3d 243 [2d Dept. 2015] [finding that large parties and loud music at all hours of the night have the potential to interfere with the use and enjoyment of another's property]; Aristides v Foster, 73 AD3d 1105 [2d Dept. 2010] [finding that delivery trucks that block access to another's property may constitute a private nuisance]; Broxmeyer v United Capital Corp., 79 AD3d 780 [2d Dept. 2010] [finding that the noise produced by the HVAC unit may constitute a private nuisance]).

Trespass:

The elements of a cause of action for trespass are an intentional entry onto the land of another without justification or permission (see Marone v Kally, 109 AD3d 880 [2d Dept. 2013]; Volunteer Fire Assn. of Tappan, Inc. v County of Rockland, 101 AD3d 853 [2d Dept. 2012]).

Here, the complaint alleges, inter alia, that the staff allows residents and garbage to come onto plaintiffs' property without plaintiffs' permission. Accordingly, the complaint states a cause of action for trespass.

Prima Facie Tort:

The elements for a cause of action for prima facie tort are intentional infliction of harm resulting in special damages, without excuse or justification, and by an act or series of acts that would otherwise be lawful (see Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314 [1983]). There is no recovery in prima facie tort unless malevolence is the sole motive for the defendant's unlawful act (see American Bank & Trust Co. v Federal Reserve Bank of Atlanta, 256 US 350 [1921]; Burns Jackson Miller Summit & Spitzer v Lindner, 59 NY2d 314 [1983]).


Here, the complaint fails to allege that defendant's sole motivation was disinterested malevolence (see American Bank & Trust Co. v Federal Reserve Bank of Atlanta, 256 US 350 [1921]). Moreover, the complaint does not even allege that defendant intentionally inflicted harm. Accordingly, the complaint fails to state a cause of action for prima facie tort.

Accordingly, and for the reasons stated above, it is hereby

ORDERED, that those branches of the motion seeking to dismiss the causes of action for private nuisance and trespass are denied; and it is further

ORDERED, that the branch of the motion seeking to dismiss the cause of action for prima facie tort is granted.

Dated: December 20, 2018
Long Island City, NY


ROBERT J. MCDONALD
J.S.C.

