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Vincent Forras, on behalf of himself and all others of and in the City of New York, County of New York, similarly situated, Plaintiffs v. Feisal Abdul Rauf, Cordoba House/Park 51, Cordoba Initiative, Soho Properties, and all other aliases known and unknown, Defendants, 111970/2010

Cite as: Forras v. Rauf, 111970/2010, NYLJ 1202577718927, at *1 (Sup., NY, Decided) October, 2012

Justice Lucy Billings

Decided: October, 2012

ATTORNEYS

For Plaintiffs: Larry Klayman Esq., Raymond Negron Esq., Freedom Watch, Inc., Washington, DC.

For Defendants: Adam Leitman Bailey Esq., New York, NY.

DECISION AND ORDER

I. BACKGROUND

*1

Plaintiff sues to recover damages for a public and private nuisance, intentional and negligent infliction of emotional distress, and assault arising from defendants' planned construction of a mosque and Islamic cultural center at Park Place and Church Street, New York County, near Ground Zero, which has sparked public controversy. Plaintiff leases

*2

office space, which he also allegedly uses as a part-time residence, at 257 Church Street, approximately 8-10 blocks north of Park Place.

Defendants move to dismiss plaintiff's complaint based on its failure to state a claim. C.P.L.R. §3211(a)(7).

Plaintiff cross-moves for sanctions against defendants and their attorneys, and defendants separately move for sanctions against plaintiff and his attorneys, based on their adversaries' controversial public statements both in court documents and otherwise. 22 N.Y.C.R.R. §130-1.1. Defendants' motion also is based on plaintiff's failure to serve an amended complaint timely. Defendants further move to dismiss any permitted amended complaint on the grounds earlier raised. Plaintiff separately moves to amend his complaint and join additional defendants. C.P.L.R. §3025(b). Plaintiff withdrew his motion for class certification at oral argument July 14, 2011. For the reasons explained below, the court grants defendants' motion to dismiss the complaint in its entirety and their motion for sanctions to the limited extent delineated, but otherwise denies the parties' motions.

II. DEFENDANTS' MOTION TO DISMISS THE COMPLAINT

A. Applicable Standards

Upon defendants' motion to dismiss the complaint pursuant to C.P.L.R. §3211(a)(7), the court must accept the complaint's allegations as true, liberally construe them, and draw all reasonable inferences in plaintiff's favor. Nonnon v. City of New York, 9 N.Y.3d 825, 827 (2007); Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 316, 326 (2002); Harris v. IG Greenpoint Corp., 72 A.D.3d 608, 609 (1st Dep't 2010); Vig v. New York Hairspray Co., L.P., 67 A.D.3d 140, 144-45 (1st Dep't 2009). In short, the court may dismiss a claim based on C.P.L.R. §3211(a)(7) only if the allegations completely fail to state a claim. Leon v. Martinez, 84 N.Y.2d 83, 88 (1994); Harris v. IG Greenpoint Corp., 72 A.D.3d at 609; Frank v.

*3

DaimlerChrysler Corp., 292 A.D.2d 118, 121 (1st Dep't 2002); Scott v. Bell Atl. Corp., 282 A.D.2d 180, 183 (1st Dep't 2001).

Despite this forgiving standard, the very distance between plaintiff's premises and defendants' activity of which plaintiff complains poses an obvious impediment to showing any nuisance, extreme or outrageous conduct as required for infliction of emotional distress, or assaultive conduct that would emanate from a religious institution to cause injury several blocks away. Plaintiff alleges increased anxiety and fear due to Islamic rituals in one room inside the building at 45-51 Park Place, but nothing akin to a congregation's animated, frenzied, threatening, or assaultive behavior outside the building, let alone spewing out to its environs.

B. Nuisance Claims

A public nuisance claim requires factual allegations that defendants substantially interfered with the exercise of a common right of the public that offended public morals; impeded use of a public place; or

injured or endangered property, health, safety, or comfort. 532 Madison Ave. Gourmet Foods v. Finlandia Ctr., 96 N.Y.2d 280, 292 (2001); Copart Indus. v. Consolidated Edison Co. of N.Y., 41 N.Y.2d 564, 568 (1977); Wall St. Garage Parking Corp. v. New York Stock Exch., Inc., 10 A.D.3d 223, 227 (1st Dep't 2004). An individual seeking recovery for a public nuisance must have suffered special injury beyond the common injury to public rights. 532 Madison Ave. Gourmet Foods v. Finlandia Ctr., 96 N.Y.2d at 292; Wall St. Garage Parking Corp. v. New York Stock Exch., Inc., 10 A.D.3d at 227.

Plaintiff, even in his proposed amended complaint, pleads his own physical and psychological effects, but only from the attack on September 11, 2001, and economic harm, but only in common with the public who use the areas around Ground Zero. Thus, while

*4

plaintiff's allegations, accepted as true, may demonstrate special physical and psychological injuries, they are from the attack in 2001, not defendants' more recent actions. His alleged injuries from defendants' recent actions, on the other hand, are the same as the injury to the community: interference with use of business premises, increased costs for security, and reduced property values. Wall St. Garage Parking Corp. v. New York Stock Exch., Inc., 10 A.D.3d at 228; Rebecca Moss, Ltd. v. 540 Acquisition Co., 285 A.D.2d 416 (1st Dep't 2001). Even if the injury to him is greater than to the public, the harm is not of a different kind. 532 Madison Ave. Gourmet Foods v. Finlandia Ctr., 96 N.Y.2d at 293; Roundabout Theatre Co. v. Tishman Realty & Constr. Co., 302 A.D.2d 272, 273 (1st Dep't 2003).

A private nuisance claim requires factual allegations that defendants' action or omission substantially, intentionally, and unreasonably interfered with plaintiff's right to use and enjoy real property. Copart Indus. v. Consolidated Edison Co. of N.Y., 41 N.Y.2d at 570; Berenger v. 261 W. LLC., 93 A.D.3d 175, 182 (1st Dep't 2012); Chelsea 18 Partners, LP v. Sheck Yee Mak, 90 A.D.3d 38, 41 (1st Dep't 2011); 61 W. 62 Owners Corp. v. CGM EMP LLC, 77 A.D.3d 330, 334 (1st Dep't 2010). Defendants' objectionable conduct must be continuous or recurring. Berenger v. 261 W. LLC, 93 A.D.3d at 182; Chelsea 18 Partners, LP v. Sheck Yee Mak, 90 A.D.3d at 43. In claiming a nuisance from construction of the mosque, since it has not yet been built, plaintiff pleads only defendants' intentions and not their actual conduct, let alone any continuous or recurrent interference with his rights. 225 E. 64th St., LLC v. Janet H. Prystowsky. M.D. P.C., 96 A.D.3d 536, 537 (1st Dep't 2012). See Duane Reade v. Reva Holding Corp., 30 A.D.3d 229, 230, 237-38 (1st Dep't 2006); Chelsea 18 Partners, LP v. Sheck Yee Mak, 90 A.D.3d at 43. Any conduct by defendants that plaintiff does allege is protected speech, other expression, or assembly. U.S. Const., Amend. 1; N.Y.

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Const. Art I, §§8, 9(1); Golden v. Clark, 76 N.Y.2d 618, 627 (1990); People ex rel. Arcara v. Cloud Books, 68 N.Y.2d 553, 556 (1986).

As injuries, plaintiff claims interference with use of his leased business premises, increased costs for security at the premises, and their reduced value. Even if, as a tenant, he has incurred the increased security costs, or reduced property value has increased his costs, rather than reducing his rent, he acknowledges that he incurred those costs due to fears engendered by the attack September 11, 2001, not due to defendants' interference with the use of his leased space or any other action by defendants.

C. Emotional Distress Claims

To establish plaintiff's claim of intentional infliction of emotional distress, plaintiff must show (1) that defendants engaged in extreme and outrageous conduct, (2) with intent to cause or in disregard of a substantial probability that the conduct would cause severe emotional distress, (3) a causal connection between defendants' acts and plaintiff's injury, and (4) severe emotional distress. Howell v. New York Post Co., 81 N.Y.2d 115, 121 (1993); Suarez v. Bakalchuk, 66 A.D.3d 419 (1st Dep't 2009). Negligent infliction of emotional distress must be based on defendants' breach (1) of a duty owed to plaintiff (2) that unreasonably endangered him or caused him to fear for his own safety. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d 590, 591 (1st Dep't 2010); Sheila C. v. Povich, 11 A.D.3d 120, 130 (1st Dep't 2004). Extreme and outrageous conduct is also an element of negligent infliction of emotional distress. Bernstein v. East 51st St. Dev. Co., LLC, 78 A.D.3d at 592; Lau v. S&M Enters., 72 A.D.3d 497, 498 (1st Dep't 2010); Goldstein v. Massachusetts Mut. Life Ins. Co., 60 A.D.3d 506, 508 (1st Dep't 2009); Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d 361, 362 (1st Dep't 2005).

*6

To support the element of extreme and outrageous conduct, plaintiff must show that defendants' conduct was "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 11 N.Y.3d 15, 22-23 (2008); Howell v. New York Post Co., 81 N.Y.2d at 122; Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303 [1983]; Suarez v. Bakalchuk, 66 A.D.3d 419. Simply stated, defendants' use of their property as a mosque and Islamic cultural center near Ground Zero alleged by plaintiff is not extreme and outrageous conduct.

Although plaintiff suggests fear for his safety due to defendants describing him as an enemy of Islam, his complaint nowhere alleges any threatening conduct by defendants. See Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d at 363. Nor has plaintiff alleged that defendants breached any duty owed to him so as to unreasonably endanger his safety or cause him to fear for his safety. Bernstein v. East 51st St. Dev. Co.,

LLC, 78 A.D.3d at 591.

Just as plaintiff may allege threatening activities in the Ground Zero area that cause a nuisance, so, too, he may allege that they cause him emotional distress, but the connection between defendants' conduct and those activities is lacking. For all these reasons, plaintiff's claims for intentional and negligent infliction of emotional distress fail. Lau v. S&M Enters., 72 A.D.3d at 498; Goldstein v. Massachusetts Mut. Life Ins. Co., 60 A.D.3d at 508; McRedmond v. Sutton Place Rest. & Bar. Inc., 48 A.D.3d 258, 259 (1st Dep't 2008); Berrios v. Our Lady of Mercy Med. Ctr., 20 A.D.3d at 362-63.

D. Assault Claim

Assault requires a showing of physical conduct causing plaintiff apprehension of immediate harmful contact. Nicholson v. Luce, 55 A.D.3d 416 (1st Dept 2008); Holtz v.

*7

Wildenstein & Co., 261 A.D.2d 336 (1st Dep't 1999); Charkhy v. Altman, 252 A.D.2d 413, 414 (1st Dep't 1998); Hassan v. Marriott Corp., 243 A.D.2d 406, 407 (1st Dep't 1997). Plaintiff bases his assault claim on the report of Robert Cancro M.D., which the complaint incorporates, that plaintiff suffers post-traumatic stress disorder and is in immediate fear of injury and death from the mosque and defendant Rauf's published statements.

Plaintiff's assault claim fails for at least two reasons. First the mosque, which has not yet been constructed, poses no threat of immediate harmful contact. Holtz v. Wildenstein & Co., 261 A.D.2d 336. Second, plaintiff nowhere alleges any physical conduct that caused an apprehension of harmful contact. Hassan v. Marriott Corp., 243 A.D.2d at 407. See Nicholson v. Luce, 55 A.D.3d 416.

III. THE PARTIES' SUBSEQUENT MOTIONS

A. Plaintiff's Motion to Amend the Complaint

Plaintiff served an amended complaint as of right based on the parties' mistaken belief that defendants had not yet answered. C.P.L.R. §3025(a). Since defendants had answered, plaintiff moved to amend his complaint. C.P.L.R. §3025(b). At oral argument July 14, 2011, plaintiff withdrew the motion insofar as it sought to join additional defendants. Plaintiff's amended complaint merely repeats the original complaint's rhetoric and vitriolic allegations and adds irrelevant factual details that do not cure any of the deficiencies in pleading discussed above. Thus even if the court considered plaintiff's amended complaint, the claims pleaded still fail. Therefore the court denies plaintiff's motion to amend his complaint based on the lack of merit to the proposed amended complaint's pleaded claims. BGC Partners, Inc. v. Refco Sec.,

LLC, 96 A.D.3d 601, 603 (1st Dep't 2012); Sepulveda v. Dayal, 70 A.D.3d 420, 421 (1st Dep't 2010); Board of Mgrs. of

*8

Alexandria Condominium v. Broadway/72nd Assoc., 285 A.D.2d 423, 424 (1st Dep't 2001).

B. Defendants' Second Motion to Dismiss the Complaint

Defendants moved a second time to dismiss the complaint due to plaintiff's failure to serve an amended complaint according to the stipulated schedule and repeated the grounds set forth in defendants' first motion for dismissal. Because the court grants their first motion to dismiss the complaint, the court denies their second motion as academic.

C. Motions for Sanctions

The parties seek sanctions against each other and their attorneys, claiming that their sole purpose has been to harass each other and attract media attention and that their actions therefore were frivolous. Defendants also request sanctions in connection with their second motion for dismissal because plaintiff did not timely serve an amended complaint.

Conduct is frivolous if it is completely meritless and insupportable by a reasonable argument for extension, modification, or reversal of current law or is undertaken to harass or injure another person. 22 N.Y.C.R.R. §130-1.1(c), Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intl., Inc., 94 A.D.3d 580, 581-82 (1st Dep't 2012); Newman v. Berkowitz, 50 A.D.3d 479, 480 (1st Dep't 2008). The parties' and their attorneys' controversial statements related to their litigation do not amount to frivolous conduct. Therefore the court denes plaintiff's cross-motion for sanctions and defendants' motion for sanctions insofar as it is based on such conduct.

While filing meritless claims may constitute frivolous conduct, Visual Arts Found., Inc. v. Egnasko, 91 A.D.3d 578, 579 (1st Dep't 2012), since plaintiff articulated legally cognizable claims, but an incomplete factual basis for them, his conduct in filing the claims

*9

was not entirely frivolous. Parkchester S. Condominium Inc. v. Hernandez, 71 A.D.3d 503, 504 (1st Dep't 2010); Newman v. Berkowitz, 50 A.D.3d at 480; Adelaide Prods., Inc. v. BKN Intl. AG, 38 A.D.3d 221, 227 (1st Dep't 2007); Parametric Capital Mgt., LLC v. Lacher, 26 A.D.3d 175 (1st Dep't 2006). No evidence establishes that plaintiff's claims, although poorly pleaded, were pursued solely to harass defendants or

other persons. Komolov v. Segal, 96 A.D.3d 513, 514 (1st Dep't 2012); Parkchester S. Condominium Inc. v. Hernandez, 71 A.D.3d at 504; Peach Parking Corp. v. 346 W. 40th St., LLC, 52 A.D.3d 260, 261 (1st Dep't 2008). See Cadlerock Joint Venture, L.P. v. Sol Greenberg & Sons Intl., Inc., 94 A.D.3d at 582. Nevertheless, should plaintiff commence a further similar action, the history of this litigation may lead to a finding that he and his attorneys have engaged in vexatious, frivolous litigation. See Komolov v. Segal, 96 A.D.3d at 514; Pentalpha Enters., Ltd. v. Cooper & Dunham LLP, 91 A.D.3d 451, 452 (1st Dep't 2012).

Since plaintiff attributed his late amended complaint to a delay in receiving a transcript of court proceedings outlining the original complaint's deficiencies, plaintiff's untimeliness was not ill-willed and therefore did not amount to frivolous conduct. Eggert v. GCD Rec. Studios, 90 A.D.3d 425 (1st Dept 2011). Neither did this untimeliness or plaintiff's adjournment requests unduly delay the progress of the action. His unauthorized sur-replies only delayed this decision. Insofar as defendants seek sanctions for the failure of plaintiff's attorneys to appear for oral argument March 3, 2011, leading to an adjournment to April 5, 2011, however, the attorneys' absence March 3, 2011, remains unexplained, entitling defendants to their costs, including attorneys' fees, for their needless and duplicative appearances. Hughes v. Farrey, 48 A.D.3d 385; Borgenicht v. Bloch, 280 A.D.2d 306, 307 (1st Dep't 2001).

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IV. DISPOSITION

In sum, the court grants defendants' motion to dismiss the original complaint based on its failure to state a claim. C.P.L.R. §3211(a)(7). The court denies plaintiff's motion to amend his complaint, because his proposed amended complaint remedies none of his original complaint's deficiencies, C.P.L.R. §3025(b), and denies defendants' second motion to dismiss the complaint as academic.

The court denies plaintiff's cross-motion for sanctions and grants defendants' separate motion for sanctions only to the extent of awarding costs, including reasonable attorneys' fees, of $1,500.00 for the unexplained failure of plaintiff's attorneys to appear for oral argument March 3, 2011, 22 N.Y.C.R.R. §130-1.1(a), but otherwise denies defendants' motion for sanctions. Plaintiff's attorneys shall, without charge to their client, reimburse defendants for attorneys' fees of $1,500.00 by delivering payment of that amount to defendants' attorneys and shall provide written proof of that payment to the Clerk of Part 46 within 30 days after service of this order with notice of entry. In the event this proof of payment is not timely provided, the Clerk of the court, upon service of this order with notice of entry and an affirmation or affidavit reciting the nonpayment, shall enter a judgment of $1,500.00 in favor of defendants and against plaintiff's attorneys jointly and individually.

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