

Short Form Order

NEW YORK STATE SUPREME COURT - QUEENS COUNTY

Present: HONORABLE PATRICIA P. SATTERFIELD IAS Part 19

Justice

-----X
SOLOMON SHANY,

Plaintiff,

-against-

99-60/64TH STREET LLC., and DANIEL J.
POMERANTZ,

Defendants.
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Index No.:28754/07
Motion Date: 2/20/08
Motion Cal. No.: 30
Motion Seq. No.: 1

The following papers numbered 1 to 10 read on this motion by plaintiff Solomon Shany for an order, pursuant to CPLR § 325(A), granting plaintiff’s request to transfer the Civil Court case bearing Index Number 62728 QCV 2006, to the Queens County Supreme Court and staying all proceedings in the Civil Court, and pursuant to CPLR §3025(b), granting the plaintiff’s request for leave to amend the pleadings in their entirety.

	<u>PAPERS</u> <u>NUMBERED</u>
Order to Show Cause-Affidavits-Exhibits.....	1 - 5
Affirmation in Opposition-Exhibits.....	6 - 8
Affidavit in Reply.....	9 - 10

Upon the foregoing papers, it is hereby ordered that the motion is decided as follows:

Plaintiff Solomon Shany (“plaintiff”), pro se, commenced an action in the Civil Court of the City of New York, Queens County, on May 19, 2006, against his landlord, defendant 99-60/64th Street LLC (“defendant”), to recover damages for injuries sustained as a result of an alleged assault upon him by a co-tenant on June 12, 2005. Plaintiff now moves for an order, pursuant to CPLR §325(a), removing the action now pending in the Civil Court on the ground that one or more of the causes of action asserted exceed the limited subject matter jurisdiction of the Civil Court; and, pursuant to CPLR §3025(b), permitting plaintiff to “amend the pleadings **in their entirety**, including, but not limited to the ad damnum clause, causes of action and the caption to include an additional defendant [emphasis in original].” Section 325(a) of the CPLR empowers the supreme court to remove to itself an action from another court “[w]here a mistake was made in the choice of the court in which an action is commenced,” “upon such terms as may be just.” Section 325(b)

“[w]here it appears that the court in which an action is pending does not have jurisdiction to grant the relief to which the parties are entitled, a court having such jurisdiction may remove the action to itself upon motion.” The relief pursuant to that section generally includes an application, such as is the case here, for leave to serve an amended complaint increasing the ad damnum clause.

To demonstrate his entitlement to removal and for leave, inter alia, to serve an amended complaint, plaintiff was required to submit “evidence showing the merits of the case, the reasons for the delay in asserting the present claims, and that the increase in damages resulted from facts that only recently came to [his] attention.” Cohen v. Kim, 23 A.D.3d 602 (2nd Dept. 2005); Barsoum v. Wilson, 255 A.D.2d 537 (2nd Dept. 1998). Moreover, plaintiff was required to submit a physician's affirmation specifying the claimed change in his condition, any injuries which have not been considered previously, or the extent to which the condition has worsened. See, Cohen v. Kim, supra; Joefeld v. New York City Tr. Auth., 11 A.D.3d 586, 587 (2nd Dept. 2004); Savory v. Romex Realty Corp., 194 A.D.2d 601, 602 (2nd Dept. 1993).

Plaintiff alleges that, without the assistance of counsel, he filed a summons and endorsed complaint in the Civil Court on May 19, 2006, in which he inartfully asserted five causes of action; served a bill of particulars that was not in proper form or worded in proper English, that informed defendants that as a result of being assaulted and harassed by his neighbor, slipping and falling on the lobby steps, and being harassed by the landlord who wrongfully brought two housing actions against him for eviction, he was bringing suit against them. He further alleges that as a result of the attack on June 12, 2005, he was “taken to North Shore Hospital by ambulance and treated for the human bite wounds, chest pain from being punched and damage to [his] left thumb.” He alleges that he thereafter received treatment for his thumb, which consisted of casting, physical therapy and evaluation by a hand specialist, that has been unsuccessful in relieving his pain. Plaintiff alleges that the only “possible solution for pain relief is to have surgery to fuse [his] left thumb.” He further alleges injury as a result of falling on the lobby steps on October 15, 2005, consisting of “severe injuries to [his] neck and back. He further alleges that he was on the steps because the landlord refused to provide him with a key to access the handicap ramp. He argues that the action must be removed to the Supreme Court because his causes of action exceed the subject matter jurisdiction of the Civil Court, and contends that, because of the causal relationship between the original injury and the recent determination of the need for surgical intervention, he has demonstrated good and meritorious causes of action that mistakenly were filed in the wrong court.

Defendants, in opposition to the motion, take issue with plaintiff's present claim of mistake, and point to plaintiff's Verified Bill of Particulars in which, in response to a query as to damages, he responded: “The Damage Dollars & Compensation And Punitive Damages Are Over Million Dollars. This Court Has Limits And I Cannot Afford Lawyer to File in Supreme Court Case. . .” They contend that his statement “demonstrates that plaintiff clearly opted to go Civil Court rather than Supreme Court. There was no mistake involved.” Further, defendants challenge plaintiff's claim of injury to his left thumb as a result of the May 2005 assault, and refer to a medical record, that is annexed to the moving papers and dated November 14, 2005, in which it is stated:

This is a follow up orthopedic medical report on the above referenced patient. This patient, who is well known to this facility and has been under treatment extensively for a left gamekeeper's thumb, returns today advising that he fell at his home when a handicap ramp was not provided for him at a set of stairs.

Defendants conclude that plaintiff does not meet the criteria for removal under either CPLR 321(a) of (b). This Court agrees.

Plaintiff's present claim that he mistakenly brought his action in the Civil Court is belied by his own statement and actions in that Court; since May 2006 he has been actively litigating this action in Civil Court with full knowledge of its \$25,000.00 jurisdictional limit, and did not seek removal to this court until August 2007, when he retained a lawyer. Since plaintiff has thus failed to establish that he mistakenly brought its action in Civil Court, he is not entitled to remove the action to this court pursuant to CPLR 325(a).

Nor has he made the requisite showing for removal pursuant to section 325(b). As set forth above, in order to establish his or her entitlement to such relief, a plaintiff must demonstrate the merits of the case, the reason for the delay in asserting his or her present claims and that the increase in damages resulted from facts that only recently came to the plaintiff's attention. See, Barsoum v. Wilson, 255 A.D.2d at 537. Here, the medical records presented defeat plaintiff's present claim that he only recently became aware of his alleged injury to his thumb from the assault, and the injuries to his neck and back from his fall were more significant than previously recognized or would entitle him to compensation greater than that available in the Civil Court. As set forth above, he had previously been diagnosed with a gamekeeper's thumb, and the same record of Forest Hills Orthopedic Group, it was stated:

He had a seizure and fell backwards, striking his head and hitting his body in multiple places. The patient was transported to North Shore Hospital where he was admitted and kept for approximately eleven days and he was discharged from the hospital and comes here today for treatment and evaluation of his injuries. . . . The patient is started in physical therapy on a two to three time per week basis for the next four weeks. Additionally in view of the fact that he has had repeated falls with trauma to the low back and repetitive complaints of buckling of his knees on a spontaneous basis, I believe an MRI of the lumbar spine is indicated. . . .”

Moreover, the recommendation that plaintiff have surgery to fuse his left thumb was made in October 2007, after plaintiff retained counsel; previous medical records of Dr. Paksima contained language suggesting no need for surgical intervention. On January 10, 2007, Dr. Paksima stated: “The MRI result did arrive today and we reviewed it, which showed that the ligaments and tendons in the thumb are intact;” on that same date, she also reported “I think he should do well with

nonoperative treatment.” In September 2007, her medical report set forth:

After discussing risks, benefits and alternatives, under sterile technique, I injected his MP joint with mixture of lidocaine and Marcaine. Few minutes later, I reexamined him. On reexamination, I am able to stress the ulnar collateral ligament and there is solid endpoint. There is the same degree of laxity on the left side that there is on the right side. Furthermore, there is no joint pain whatsoever now after he has been blocked with the lidocaine and Marcaine. The injection produced 100% relief of his pain. With this in mind, he may benefit from fusion of the thumb, although radiographically there are no signs of posttraumatic arthritis and intraarticular injection dye relieve 109% of his pain.

Plaintiff clearly failed to establish through medical evidence that his condition had changed since the filing of the original summons and complaint, that he had any causally related injuries not previously considered, or the extent to which his condition had worsened.

Accordingly, since plaintiff failed to demonstrate that this action was “mistakenly” commenced in the Civil Court (see CPLR 325[a]) or that he is entitled to money damages in an amount that the Civil Court was without jurisdiction to award (see CPLR 325 [b]), plaintiff’s motion is hereby denied in its entirety. R&T Holding Corp. v. Commack Realty, Inc., 30 A.D.3d 574 (2nd Dept. 2006); Cohen v. Kim, *supra*; Barsoum v. Wilson, *supra*.

Dated: March 5, 2008

J.S.C.