

Katz Park Avenue Corporation v Jagger

2005 NY Slip Op 30126(U)

October 4, 2005

Supreme Court, New York County

Docket Number: 0104524/2005

Judge: Leland G. DeGrasse

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. LELAND DEGRASSE

PART 25

Justice

Index Number : 104524/2005
KATZ PARK AVENUE CORPORATION
vs
JAGGER, BIANCA
Sequence Number : 001
CONSOLIDATION/JOINT TRIAL

INDEX NO. _____
MOTION DATE JUN 24 2005
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion

is decided in accordance with
the accompanying Memorandum Decision.

FILED
OCT 12 2005
NEW YORK
COUNTY CLERK'S OFFICE

Dated: OCT 04 2005

YD

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
KATZ PARK AVENUE CORPORATION,

Plaintiff,

-against-

Index No. 104524/05

BIANCA JAGGER, et al,

Defendants.

FILED

OCT 12 2005

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DeGrasse, J.:

Plaintiff moves for summary judgment and an order ~~constraining~~ ^{constraining} this action and Katz Park Avenue Corp. v Jagger (Katz I) which is pending in this court under index number 109310/04. Defendant Bianca Jagger cross-moves for summary judgment. Plaintiff, Jagger's landlord, sues for a judgment of ejectment on the ground that Jagger does not maintain the subject rent stabilized apartment as her primary residence. The predicate notice of termination was allegedly served on or about November 23, 2004.

NEW YORK COUNTY CLERK'S OFFICE

Jagger, a British citizen, is a nonimmigrant who has entered the United States on a B-2 tourist visa. Plaintiff seeks summary judgment on the ground that Jagger's immigration status precludes any assertion that she maintains a primary residence in the United States. Pursuant to 22 CFR § 41.31, an alien can be classified as a nonimmigrant visitor for business (B-1) or pleasure (B-2) if the consular office is satisfied that the alien qualifies for entry into the United States under the provisions of the Immigration and Nationality Act § 101 (a) (15) (B) (8 USC § 1101 [a] [15] [B]). To qualify for entry under the Act, an alien must have a residence in a foreign country which she does not intend to abandon and must be visiting the United States temporarily for business or pleasure. To obtain a B-2 visa, an alien must establish that her stay in the United States is temporary, or, stated differently, that her domicile is in another country. A person's domicile is where she has established a fixed habitation and intends to remain permanently or

indefinitely (*Lew v Moss*, 797 F2d 747, 749-750 [9th Cir 1986]). Primary residence is an “ongoing, substantial, physical nexus with the controlled premises for actual living purposes” (*see Berwick Land Corp. v Mucelli*, 249 AD2d 18 [1998]). Plaintiff bases its motion on the erroneous premise that domicile and primary residence are synonymous. As explained by the court in *Sommer v Turkel, Inc.* (137 Misc 2d 7, 9-10 [App Term, 1st Dept 1987] *lv denied* 139 Misc 2d 892),

“The two are not synonymous. Thus, one may be domiciled in another state, reside predominantly in a New York City apartment, and be viewed as a primary resident of that apartment. On the other hand, a tenant's domicile may be in New York City, but if he is residing elsewhere almost all of the time, year after year, it would be illusory to maintain that the New York apartment is the tenant's primary residence.”

Jagger cross-moves for summary judgment on the ground that the notice of termination was not properly served. The cross motion warrants summary denial because it is supported only by the affirmation of an attorney who lacks personal knowledge of the facts alleged (*see Citibank, N. A. v Joffe*, 265 AD2d 291 [1999]). Moreover, Jagger cites no authority to support her argument that service of the notice of termination at her alleged primary residence is vitiated by her claims of conditions which constituted a constructive eviction. Jagger's similar argument with respect to service of the summons and complaint is equally untenable.

Plaintiff makes no argument for the consolidation of this action and Katz I. Moreover, copies of the Katz I pleadings have not been submitted by either party. The parties' remaining arguments lack merit. For the foregoing reasons plaintiff's motion is granted only to the extent that Jagger's first (failure to state a cause of action), second (another action pending), third (lack of subject matter jurisdiction) and fourth (lack of personal jurisdiction) affirmative defenses are dismissed pursuant to CPLR 3212. In all other respects the motion and cross motion are denied.

Upon the court's initiative, discovery shall be supervised by a special referee pursuant to CPLR 3104. All subsequent discovery motions and applications shall be made before the special referee in the first instance. Plaintiff shall file a copy of this order with the IAS Judicial Support Office within 20 days after entry. A preliminary conference shall be conducted on November 21, 2005 at 2:00 p. m.

Dated: October 4, 2005

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J. S. C.

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OCT 12 2005
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