

Jerulee v Sanchez

2005 NY Slip Op 30288(U)

May 20, 2005

Supreme Court, New York County

Docket Number: 0102888/2002

Judge: Marilyn Shafer

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

PRESENT: HON. MARILYN SHAFER, JSC

PART 36

0102888/2002

JERULEE CO.
vs
SANCHEZ, RAYMOND

SEQ 2

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

*is denied
pursuant to attached Memorandum*

FILED

MAY 31 2005

NEW YORK
COUNTY CLERK'S OFFICE

Dated: _____

[Signature]
HON. MARILYN SHAFER, JSC

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

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

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

PRESENT: HON. MARILYN SHAFER
Justice

PART 36

JERULEE CO.,

Plaintiff,

INDEX NO. 102888/02

MOTION DATE _____

-against-

MOTION SEQ. NO. 01

RAYMOND SANCHEZ and NATALYA NIZHNY,
Defendants.

The following papers, number 1 to 4, were read on this motion for Summary Judgment

PAPERS NUMBER

Notice of Motion/ Order To Show Cause - Affidavits - Exhibits... 1

Answering Affidavits - Exhibits _____ 2-3

Replying Affidavits _____ 4

Cross Motion: YES X NO

Upon the foregoing papers, it is ordered that this motion is denied.

Background

Defendant Raymond Sanchez resided in apartment 6F at 145 East 22nd Street in New York County ("premises") from April 1, 1996 to December 31, 2001. The premises is owned by plaintiff Jerulee Co. ("Jerulee"). Within days or weeks of the commencement of Mr. Sanchez's lease, defendant Natalya Nizhny, his significant other at the time, moved in with him as an occupant. Ms. Nizhny's name was never on the lease as a co-tenant. Prior to December 21, 2001, Mr. Sanchez asked Jerome Messinger, the former principal and managing partner of Jerulee, for a larger

apartment for his family because he was residing in apartment 6H, a small studio, with Ms. Nizhny and their infant daughter. In December 2001, Mr. Sanchez asked Mr. Messinger to include Ms. Nizhny's and his daughter's names on the lease along with his name. Mr. Messenger offered Mr. Sanchez a lease for apartment 2H, a one bedroom unit, in the same building. However, the lease did not include the other requested names. Mr. Sanchez notified Mr. Messinger that Ms. Nizhny would not move into the larger apartment with him unless her name was on the lease as a tenant. He had initially declined the apartment for that reason. However, Mr. Sanchez changed his mind, and Mr. Messinger offered him the lease again for Apartment 2H, with his name as the sole tenant. Mr. Sanchez gave Mr. Messinger a check for the January 2002 rent for apartment 6F, to enable Ms. Nizhny to continue her occupancy there. Mr. Sanchez gave Mr. Messinger a surrender letter dated December 27, 2001, wherein Mr. Sanchez surrendered all of his rights to apartment 6F since he was given the lease to apartment 2H. When Ms. Nizhny and his daughter did not accompany him to apartment 2H, he told Mr. Messinger that he hoped they would eventually accompany him to the larger apartment.

Jerulee is suing for fraud and for rescission by reason of mistake. Mr. Sanchez is seeking leave to make a motion pursuant to CPLR 3212 for summary judgment dismissing the first cause of action of the complaint for fraud and the second cause of action for rescission by reason of mistake against defendant Mr. Sanchez, and for partial summary judgment on the first and second counterclaims for attorney's fees and sanctions.

Discussion

Pursuant to CPLR 3212(a), a motion for summary judgment may not be brought more than 120 days after the filing of a Note of Issue without "leave of court or good cause shown". A trial court

“is afforded wide latitude with respect to determining whether good cause exists for permitting . . . belated but meritorious motions” (*See Williams v Nicolaou*, 284 AD2d 451 [2d Dept. 2001]). The Note of Issue was filed March 31, 2004, and the instant motion was filed July 23, 2004 (less than 120 days after the filing of the Note of Issue). The Compliance Conference Order required the filing of the summary judgment motion 30 days after the taking of the non-party deposition of Paula Denner which was taken on April 7, 2004. Mr. Sanchez’s counsel received Ms. Denner’s deposition transcript on May 16, 2004. Mr. Sanchez contends that he had until June 16, 2004 to make the instant motion because Ms. Denner had the right to make changes to her deposition transcript. Furthermore, there were ongoing settlement discussions between the parties. The last settlement proposal faxed from Jerulee’s counsel to Mr. Sanchez’s counsel is dated June 29, 2004. The instant motion was made within 30 days thereafter. These settlement negotiations did not result in a global settlement, only with Ms. Nizhny. In the interest of justice, this court finds that Mr. Sanchez had “good cause” to file this summary judgment motion later than required by the Compliance Conference Order.

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION FOR FRAUD OR FOR RECISSION BY REASON OF MISTAKE

It is well settled that the proponent of a summary judgment motion must make a prima facie case showing entitlement to judgment as a matter of law, submitting sufficient evidence to demonstrate the absence of any material issues of fact (*Alvarez v Prospect Hospital*, 68 NY2d 320 [1986]). The failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York University Medical Center*, 64 NY2d 851

[1986]). Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action (*Zuckerman v City of New York*, 49 NY2d 557 [1980]). The primary purpose of a summary judgment motion is issue finding, not issue determination (*Garcia v J.C. Duggan, Inc.*, 180 AD2d 579 [1st Dept 1992]).

This Court finds that the movant, Mr. Sanchez, has demonstrated that it is entitled to judgment as a matter of law, thus shifting the burden to Jerulee to establish that material issues of fact remain to preclude summary judgment. Plaintiff has failed to meet this burden. In fact, not only does the plaintiff's case fail to survive scrutiny pursuant to section 3212 of the CPLR, but the complaint also fails to even adequately state a cause of action.

CPLR 3016(b) states "where a cause of action or defense is based on . . . fraud . . . the circumstances constituting the wrong shall be stated in detail". The Court in *Kaufman v Cohen*, 307 AD2d 113, 122 (1st Dept. 2003) held that fraud is adequately pleaded when a plaintiff alleges with specificity, ". . . a misrepresentation or failure to disclose a material fact, falsity, scienter, justifiable reliance by plaintiff and damages". In the instant action, Jerulee does not allege with any particularity what the defendants did to defraud it. The complaint fails to set forth specific and detailed allegations of fraud. The complaint does not state the alleged fraudulent representation, the date when Mr. Sanchez made the fraudulent misrepresentations and to whom the representation was made, as required by CPLR 3016(b). Mrs. Messinger, who was deposed on behalf of Mr. Sanchez, testified that she did not know how the defendants represented that they would relinquish their rights to Apartment 6F, and she was unable to state the date when the defendants represented that they would relinquish their rights to apartment 6F (See Messinger EBT at 51). The complaint fails

to differentiate between the fraud allegedly perpetrated by each defendant and mentions only one cause of action for fraud. Accordingly, summary judgment is granted dismissing Jerulee's first cause of action for fraud.

When a cause of action is based on mistake, the circumstances constituting the wrong must be stated in detail. Thus, a cause of action for reformation or rescission founded on fraud, mistake or other enumerated causes will be dismissed for legal insufficiency if the complaint does not allege the particular facts warranting equitable relief (*See New York Fruit Auction Relief*, 81 AD2d 159 [1st Dept. 1981]). Since Jerulee's second cause of action is based on mistake, the circumstances constituting the wrong must be stated in detail (*See McCollum v Billings*, 53 Misc.2d 661 [Sup. Ct. Onondaga Co. 1967]). Jerulee's second cause of action for rescission based on mistake also fails to allege any factual basis for said claim. Furthermore, there is no evidence in the deposition transcripts of the parties and non-party witness that support a cause of action for rescission based on mistake. Paula Denner, the non-party witness who typed and prepared the lease testified that Mr. Messinger told her the names of the parties to the lease, the date it would take effect, and that she prepared the lease accordingly (*See Denner EBT*, pgs. 6,16-17). Ms. Denner also testified that Mr. Messinger never asked her to add Ms. Nizhny's name to the lease and he never said he made a mistake (*See Denner EBT*, pg. 38). Mrs. Messinger further testified that she had no knowledge of a mistake. When she was asked "[w]hose mistake was it that the lease 2-H was procured?" She replied, "I have no idea" (*See Messinger EBT*, pg. 61). Mr. Sanchez also testified that Mr. Messinger never represented that he would rent the apartment to Ms. Nizhny (*See Sanchez EBT*, pg. 63). Accordingly, summary judgment is also granted dismissing Jerulee's second cause of action for rescission by mistake.

DEFENDANT SANCHEZ'S FIRST COUNTERCLAIM FOR SANCTIONS IS DENIED

Pursuant to the Rules of the Chief Administrator, 22 N.Y.C.R.R., Part 130-1.1: “[C]onduct is frivolous if: (1) it is completely without merit in law and cannot be supported by a reasonable argument for an extension, modification, or reversal of existing law; or (2) is undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another; or (3) it asserts material factual statements that are false.”

Mr. Sanchez contends that in the instant action because Jerulee failed to establish each and every requisite for a cause of action for fraud, that plaintiff's conduct meets the criteria for frivolous conduct under 22 N.Y.C.R.R., Part 130-1.1. The Court finds that Jerulee's conduct does not rise to the level of “frivolous” conduct that is meant under 22 N.Y.C.R.R., Part 130-1.1. In the case cited by Mr. Sanchez, *Levy v Carol Management*, 260 AD2d 27 [1st Dept. 1999], the Court held that, “[w]here motions are redundant to matters already decided on the merits constituting a lengthy barrage of litigation . . . to relitigate those already decided matters . . . but that protracted litigation continues, with rulings ignored, despite the court's warnings to cease delaying tactics . . . sanctions are appropriate to punish frivolous litigation.” Jerulee's actions are not similar to those in *Levy (id.)*.

Defendants' contentions that Jerulee and its attorneys have vigorously pursued a non-meritorious action and therefore should be granted sanctions is not warranted in the present action.

DEFENDANT SANCHEZ'S SECOND COUNTERCLAIM FOR ATTORNEYS FEES IS DENIED

Mr. Sanchez requests attorneys' fees, citing Real Property Law section (“RPL”) 234 and Paragraph 20(b) of the lease. RPL 234 provides that a tenant may recover attorney's fees if he prevails in an action commenced by the landlord against the tenant arising out of the lease. The

court in *Greco v GSL Enterprises Inc*, 137 Misc2d 714 (NYC Civ. Ct. NY Co. 1987) held: "there is implied in every lease an agreement that such fees . . . may be recovered as provided by law in an action commenced against the landlord or by way of counterclaim in any action or summary proceeding commenced by the landlord against the tenant." In *245 Realty v Abe Sussis*, 243 AD2d 29 (1st Dept 1998), the Court granted the tenant's motion for attorney's fees holding that "Real Property Law 234 is triggered when the lease contains a provision regarding recovery of attorneys' fees in lease disputes. It was intended to 'level the playing field' between landlords and residential tenants". This action did not arise out of a lease dispute, as required by Paragraph 20 of the lease, but rather out of the allegation that a lease was obtained by Mr. Sanchez by fraud or mistake. Accordingly, RPL 234 does not apply to the facts at bar.

Conclusion

For all the foregoing reasons, the Court finds that defendant Sanchez's motion for summary judgment dismissing plaintiff's complaint is granted. It is further Ordered that defendant, Sanchez's motion for partial summary judgment on his counterclaims for sanctions and attorneys' fees are denied.

This reflects the decision and order of the court.

Dated: May 20, 2005

FILED
 'MAY 31 2005
 NEW YORK
 COUNTY CLERK'S OFFICE
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 J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION