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

PRESENT: WALTER B. TOLUB PART 15

Index Number : 600428/2005

WISEHART, ARTHUR M.

VS

WIEN & MALKIN LLP

Sequence Number : 002

DISMISS

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

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 decided in accordance with the accompanying memorandum decision

FILED
JUN 08 2006
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 6/6/06

WALTER B. TOLUB J.S.C.

Check one: ☐ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 15

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ARTHUR M. WISEHART,

Plaintiff,

-against-

WEIN & MALKIN LLP, PETER L. MALKIN, ESQ., W&H PROPERTIES, LINCOLN BUILDING ASSOCIATES, LLC, 60 EAST 42nd STREET ASSOCIATES and NEWMARK & COMPANY REAL ESTATE, INC.,

Defendants.

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Index No. 600428/05
Mtn Seq. 002

WALTER B. TOLUB, J.:

By this motion, defendants move for an order (I) dismissing the complaint pursuant to CPLR 3211(a)(1), (a)(4), (a)(5) and (a)(7) and 3016(b); (II) imposing sanctions against plaintiff pursuant to NYCRR Part 130 and, (III) directing defendants to serve their answer to plaintiff's verified complaint.

Plaintiff *pro se*,[1] cross-moves for an order: (I) granting a continuance pursuant to CPLR 2215, 3211(d) and 4402 for plaintiff to respond to defendants' motion; (II) compelling defendants to serve their answer to plaintiff's verified complaint pursuant to CPLR 3012[c].

This action stems from a non-payment proceeding in the Housing

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[1]Plaintiff is an attorney suspended from the practice of law.

Part of the Civil Court[2] brought by Lincoln Building Associates, LLC (defendant "LBA") against plaintiff's former law firm, Wisehart & Koch. The complaint herein states two causes of action. Plaintiff alleges, *inter alia*, that with respect to the first cause of action that on October 5, 2004, LBA "commenced a frivolous eviction and nonpayment proceeding in the Civil Court" in order to evict plaintiff unless he paid excessive charges that were unilaterally imposed upon him by the management of the Lincoln Building (Complaint, defendants' Exhibit A, ¶3). Plaintiff also asserts that the lease for the suite occupied by Wisehart & Koch in the building was a nullity because it was not signed by LBA but by Helmsley-Spear, Inc., and that Helmsley-Spear was an "imposter" [sic] that had been repudiated by the owners of the building, before the lease was signed, for "mismanagement, incompetence, corruption, fraudulent misrepresentations, and breaches of fiduciary duty concerning the misuse of funds that the tenants of the building had been forced to pay" out of ignorance or fear of the expense involved in relocating (¶¶ 5, 11). Plaintiff additionally asserts in the same cause of action, that they were fraudulently induced to become a tenant in the building because defendants falsely represented that it was a 'Class A space', well managed by Helmsley-Spear and owned by LBA (¶¶ 7-10); that

[2] References to the Civil Court herein shall, in most cases, be deemed to be references to the Housing Court, since the parties appear to use the two interchangeably.

defendants failed to disclose that extensive renovation and repairs costing over $60,000,000 were required as a result of their mismanagement, corruption and gross neglect following the time when Harry Helmsley became *non compos mentis* (¶¶ 12-13); and, that defendants failed to disclose that Helmsley-Spear was an "impostor" that was virtually insolvent because Leona Helmsley improperly diverted millions of dollars paid by the tenants for the maintenance of the building (¶¶ 14-16). The complaint goes on to allege that one or more of the defendants was guilty of malfeasance, misfeasance, nonfeasance, mismanagement, misconduct, misrepresentation, misappropriation, fraud in the inducement, deception, non-disclosure, negligence, theft, lacking to bring the Civil Court proceeding, lacking standing to sign the lease, forming a limited liability company to relieve the partner of LBA of joint and several liabilities for their misconduct in connection with the building, improper escalations of various charges including increases for electricity and cost of living expenses, "conspiracy to gouge the helpless tenants" for sums that should have been collected elsewhere, willful withholding of building services, refusal to make needed repairs and improvements, breach of the warranty of fitness, willful rent overcharges, monopoly over the availability of space in the building and conspiracy to fix prices in an unreasonable restraint of trade in violation of section 340 of the General Business Law, retaliatory eviction, wrongful

collusion to obtain the retaliatory eviction of plaintiff, "fraudulent fiction", usurpation and infringement of the function, trade name and goodwill of the former Helmsley-Spear firm created by Harry Helmsley, false and fraudulent representations concerning the authority of the purported agent with whom plaintiff dealt in violation of section 349 of the General Business Law, tortious interference, and extortion (¶¶17-69). The relief requested under the first cause of action is a judgment and order: (I) declaring that the Civil Court has no jurisdiction over the claims asserted in the summary proceeding (p.14); (II) enjoining further proceedings in that Court; (III) transferring the Civil Court proceeding to this court; (IV) granting discovery herein; and (V) awarding plaintiff $1,500,000 in compensatory damages as well as punitive damages to be determined at trial (see, Complaint, defendants' Exhibit A, p. 14).

The second cause of action alleges that defendant Peter L. Malkin (defendant "Malkin") colluded with others, including defendant Newmark & Company Real Estate Inc. and attorney David I. Lu, to perpetrate a deception upon the Civil Court by causing the Civil Court proceeding to be commenced and prosecuted in violation of § 487 of the Judiciary Law (¶¶ 68, 74-77). With respect to this cause of action, plaintiff seeks a judgment pursuant to Judiciary Law § 487 against Malkin awarding plaintiff treble damages, together with interest, costs and expenses including the reasonable

value of the time expended by plaintiff in prosecuting this action (id.).

Defendants contend that the first cause of action should be dismissed for several reasons. First, plaintiff's request for declaratory , injunctive, and related relief with respect to the Housing Court proceeding is procedurally improper, inappropriate, and barred by the doctrine of collateral estoppel. Second, plaintiff's claims under §§ 340 and 349 of the General Business Law fail because the elements necessary to sustain such claims are inadequately pleaded and factually unsupported. Third, although the complaint is rife with allegations of fraud and deceit, plaintiff has failed to plead the elements of a fraud claim and has failed to comply with the specificity requirement of CPLR 2016(b). Next, defendants argue that plaintiff's second cause of action alleging that Malkin violated § 487 of the Judiciary Law should be dismissed because: Malkin was not a party to the Housing Court proceeding and is not the attorney of record in this action; the claims should have been raised in the Housing Court proceeding; the complaint fails to allege the elements required to invoke the statute; and, plaintiff has failed to comply with the specificity requirement of CPLR 3016(b). Defendants then argue that plaintiff lacks standing to bring this action because Wisehart & Koch, not plaintiff individually, was the lessee in the building. In their memorandum of law, defendants conclude that plaintiff should be

sanctioned because, *inter alia*, "[e]lementary legal research by Mr. Wisehart, who was a member of the bar of this Court for many years, would have revealed that his claims against defendants were utterly meritless" (see defendants' memorandum of law, p. 17).

In opposition and in support of his cross-motion, plaintiff contends that the factual allegations in the moving affirmation of defendants' attorney are "false and misleading, irrelevant to the instant action and constitute an improper attempt by an attorney to inject matters outside the pleadings into a motion to dismiss" (see, Wisehart December 21, 2005 affidavit, ¶ 3). Plaintiff then argues that the summary proceeding in the Civil Court to recover possession of real property and to recover judgement for rent due is irrelevant to the allegations in the instant complaint. Plaintiff also argues that section 340 of the General Business law is applicable herein because defendants exercised monopoly powers over space in the building to extort excessive payments from the tenants. Plaintiff concludes that essential facts involving defendants' activities are within their exclusive possession and requests court-ordered disclosure and leave to replead, if warranted by such disclosure. In his reply affidavit plaintiff states that the "complaint also contains an additional antitrust claim based upon the sham litigation proceeding commenced by the defendants in the Civil Court, a court without jurisdiction, in order to retaliate against [him] because of his objection [sic]

defendants' exorbitant charges that resulted in a restraint of trade as alleged in paragraphs 31-33, 37-41, 46-69 of the Verified Complaint" (id.,¶7). Plaintiff also states that section 487 of the Judiciary Law is not limited to attorneys who appear in a case but also to attorneys who act in collusion with them or consent to any deceit or collusion with the intent to deceive the court or any other party (id., ¶ 15).

In their reply memorandum of law, defendants argue "that the complaint suffers from basic and fundamental pleading defects that cannot be remedied by discovery" (p. 3) and that plaintiff's request for leave to replead should be denied because he has not proffered a proposed amended complaint supported by evidence as required in order for an application for leave to replead to be granted and because amending would be futile since no cognizable claim can possibly be stated.

The first branch of defendants' motion seeks dismissal of the complaint pursuant to CPLR 3211(a)(1) (defense based on documentary evidence), (a)(4) (another action pending between the same parties for the same cause of action), (a)(5) (collateral estoppel), and (a)(7) failure to state a cause of action. With respect to CPLR 3211(a)(1), defendants' focus appears to be plaintiff's request for relief, rather than the allegations of wrongdoing in the complaint. In order for this defense to succeed, the proffered documentation must definitively dispose of the claim (Demas v. 325 West End

Avenue Corp., 127 AD2d 476, 477 [1st Dept 1987]). That is not the case at bar.

Defendants' reliance on CPLR 3211(a)(4) is also misplaced. In the Housing Court proceeding, the parties are different (with the exception of LBA, which is the petitioner in that proceeding and a defendant in this action), the issues are different, and the relief sought, is different (see, Plaintiff's Exhibit C).

CPLR 3211(a)(5) includes collateral estoppel as a ground for dismissal. The doctrine of collateral estoppel is based on the general notion that a party should not be permitted to relitigate an issue decided against it provided (1) the party seeking the benefit of collateral estoppel proves that the identical issue was necessarily decided in the prior action and is decisive in the present action and (2) the party to be precluded from relitigating an issue must have had a full and fair opportunity to contest the prior determination (see, D'Arata v. New York Central Mutual Fire Insurance Company, 76 NY2d 659, 664 [1990]). Defendants, again focusing on plaintiff's prayer for relief, contend that plaintiff is collaterally estopped from seeking a declaration herein that the Civil Court has no jurisdiction over the claims asserted by LBA in that proceeding because the argument was made and rejected in the Civil Court proceeding as well as in a malpractice action brought in this court by plaintiff against the attorney who represented him in the Civil Court (See Wisehart v. Kiesel, Index No. 101619/2005

[Heitler, J.], defendants' Exhibit E, p. 4). The court agrees with defendants that plaintiff is barred from yet again claiming (incorrectly) that the Housing Court lacked jurisdiction over the proceeding brought by LBA.

Plaintiff's claims under §§ 340 and 349 of the General Business Law, also known as the Donnelly Act (General Business Law § 340 *et seq.*), do not withstand scrutiny under CPLR 3211(a)(7). General Business Law § 340 provides that "[e]very contract, agreement, arrangement or combination whereby ... [a] monopoly ... is or may be established or maintained, or whereby [c]ompetition ... is or may be restrained ... is hereby declared to be against public policy, illegal and void." The complaint does not allege that defendants are seeking to monopolize the commercial rental industry or to restrain trade in that industry. Absent a specific law or regulation to the contrary, an owner of commercial space in an office building is free to charge such rent as the market will bear. General Business Law § 349 is also inapplicable because it is directed at wrongs against the consuming public (see, Oswego Laborers Local 214 Pension Fund v. Marine Midland Bank, 85 NY2d 20, 24 [1995]), and plaintiff's dispute with defendants does not affect the consuming public at large (see, Revlon Consumer Products Corporation v. Arnow, 238 AD2d 223, 224 [1997]). Plaintiff's Donnelly Act claims will therefore be dismissed because they are based on conclusory and fanciful allegations that are manifestly

unsupported by the underlying facts (cf. Caniglia v. Chicago Tribune-New York News Syndicate, Inc., 204 AD2d 233 [1994]).

Defendants contend the complaint is "disjointed [and] largely incomprehensible" and that "the joinder of claims under multiple statutes and theories into two causes of action" makes analysis more difficult (see defendants' memorandum of law, p. 7). This may well be. However, disjointed prolixity is not a ground for dismissal in the context of a motion pursuant to CPLR 3211(a)(7) (cf. Foley v. D'Agostino, 21 AD2d 60, 64-65 [1st Dept. 1964]). The standards applicable to such a motion are well known and well summarized as follows: "[t]he sole criterion is whether the pleading states a cause of action, and if from its four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law a motion for dismissal will fail [citations omitted]" (Guggenheimer v Ginzburg, 43 NY2d 268, 275 [1977]). These standards, liberal as they are, cannot vitalize plaintiff's Donnelly Act claims because those claims are unrelated to this action (see, Caniglia, *supra*).

To plead a *prima facie* case of fraud, the plaintiff must allege misrepresentation of a material existing fact, falsity, scienter, deception and injury (see, Lanzi v. Brooks, 54 AD2d 1057, 1058 [3rd Dept. 1976] *aff'd*, 43 NY2d 778 [1977]). The complaint herein alleges, *inter alia*, that plaintiff was induced to become a tenant in the building as a result of the fraud in the inducement

(¶ 7), defendant's falsely and fraudulently represented that the space in the building was 'Class A space' (¶ 8), defendants falsely and fraudulently represented that the building was 'well managed' by Helmsley-Spear, Inc. (¶ 9), the tenants did not know what was happening (¶ 11), and defendants knew that extensive renovations and repairs were required and that the building was mismanaged (¶¶ 12 and 13). The complaint also alleges that plaintiff sustained damages of $1,500,000(¶ 72). The court concludes that plaintiff's first cause of action, to the extent that fraud is alleged, asserts a viable claim (see, Guggenheimer, *supra*) and satisfies the specificity requirement of CPLR 3016(b) (see, Foley, *supra*).

Plaintiff's second cause of action is based on allegations that "[i]n violation of Section 487 of the Judiciary Law, defendant Peter L. Malkin [an attorney] has colluded with others including defendant Newmark and attorney David I. Lu to perpetrate a deception upon the Civil Court by causing the aforesaid Civil Court proceeding to be commenced and prosecuted" (see, Complaint ¶ 68; see also plaintiff's reply affidavit, p. 4, ¶ 6) and "[a]s set forth above, defendant Peter L. Malkin engaged in a course of conduct to deceive and defraud plaintiff of his rightful monies" in violation of Judiciary Law §487 (see complaint, ¶¶ 75-77). Plaintiff's second cause of action is dismissed. His remedy, if any, lies exclusively in the Housing Court proceeding, not a second plenary action in this court (see, e.g. Melnitzky v Owen, 19 AD3d

201 [1st Dept. 2005]).

The court will not dismiss this action on the ground that plaintiff lacks standing because his law firm, Wisehart & Koch, not plaintiff individually, was the respondent in the Housing Court proceeding. Defendants do not pursue this argument. Furthermore, it appears that plaintiff was the successor in interest to his law firm (Complaint, ¶ 4).

The first two branches of plaintiff's cross-motion are based on the contention that he needs a continuance to conduct discovery as provided in CPLR 3211(d) in order to properly respond to defendant's motion or to replead as provided in CPLR 3212(e)[3] Plaintiff has not submitted an affirmation or affidavit of good faith stating that he attempted to resolve a dispute related to disclosure as required by 22 NYCRR § 202.7(a)(2). Denial of a motion seeking discovery "is mandated when it is made without a proper affirmation of good faith as required by 22 NYCRR 202.7(a) [citations omitted]" (Sixty-Six Crosby Associates v. Berger & Kramer, LLP, 256 AD2d 26 [1st Dept. 1998).

Defendant' request that plaintiff be sanctioned pursuant to 22 NYCRR §130-1.1[c] provides in pertinent part that conduct is frivolous if, *inter alia*, "it is undertaken primarily to delay or prolong the resolution of the litigation" including conduct which

[3] The Court notes that the motion and cross-motion were made prior to January 1, 2006, when the option to replead under CPLR 3211(e) ceased being an option.

was "continued when its lack of legal or factual basis was apparent, should have been apparent or was brought to the attention of counsel or the party." It appears that the Housing Court proceeding brought by LBA against Wisehart & Koch was a run-of-the-mill non-payment proceeding. Plaintiff, a former attorney, utilized that proceeding to bring a malpractice action in this court against the attorney who represented him (see, *supra*, defendant's Exhibit E). In that action plaintiff moved for an order pursuant to CPLR 602(b) removing the Housing Court proceeding to the Supreme Court to be tried in conjunction with the malpractice action on the ground, *inter alia*, that the amount of money sought to be litigated in the Housing Court ($39,985.57) exceeded the monetary jurisdiction of the Civil Court ($25,000) (id. pp. 1-2). The relevance of that action stems from the court's decision and order dated August 24, 2005 and entered on August 26, 2005 (Heitler, J.), in which the plaintiff was advised that not only is the Civil Court the preferred forum for resolving landlord-tenant issues, but that § 204 of the New York City Civil Court Act specifically provides, in relevant part, that the Civil Court 'shall have jurisdiction over summary proceedings to recover possession of real property located within the city of New York, to remove tenants therefrom, and to render judgment for rent due *without regard to amount* ..." (emphasis added; id., p. 4). The court went on to deny plaintiff's motion and grant the defendant's

cross-motion dismissing the complaint (id., p. 7). The complaint herein is dated September 30, 2005 and was served on September 30, 2005, even though plaintiff had been previously advised by the court in the malpractice action that his jurisdictional argument was untenable. Furthermore, plaintiff, who has had a full and fair opportunity to address defendants' charges of misconduct (see, 22 NYCRR § 130-1.1(d); Bruckner v. Jaitor Apartments Co., 147 Misc 2d 796, 798-800 [Civ. Ct. Queens Co. [1990]), does not dispute defendants' contention that he should be sanctioned for frivolous conduct, as defined in 22 NYCRR §130-1/1[c], because he continued to press his meritless jurisdiction argument in this action notwithstanding the fact that it was previously rejected by the Housing Court, the Appellate Term and the Supreme Court in his malpractice action. Even a claim of colorable merit can be deemed frivolous if, as here, it is undertaken primarily to delay or prolong the resolution of the litigation or to harass another (see, Ofman v. Campos, 12 AD3d 581, 582 [2nd Dept. 2004], *lv. den*, 4 NY3d 846 [2005]). Based on the foregoing, the court concludes that plaintiff's conduct warrants the imposition of sanctions pursuant to 22 NYCRR §130.1-1.

CPLR 8303-a provides for the imposition of costs "in actions to recover damages for personal injury, injury to property or wrongful death". This court does not believe that the statute applies to this action notwithstanding defendants' unsupported

footnote that it does.

Accordingly, it is

ORDERED that the branch of defendants' motion requesting an order dismissing the complaint is granted to the extent that plaintiff's claims based on alleged violations of §§ 340 and 349 of the General Business law and § 487 of the Judiciary Law are dismissed; and it is further

ORDERED that the branch of defendants' motion requesting an order pursuant to 22 NYCRR Part 130 and CPLR 8303-a imposing sanctions against the plaintiff *pro se* and awarding defendants their costs and attorneys' fees is granted to the extent that plaintiff is hereby directed to pay the sum of $250.00 to the Lawyers' Fund for Client Protection; and it is further

ORDERED that plaintiff's cross-motion is denied in its entirety; and it is further

ORDERED that plaintiff serve an amended complaint in accordance with the above decision within 20 days of service of a copy of this decision and order with notice of entry. Defendants shall have 20 days from the date of such service to serve an answer to the amended complaint.

Plaintiff *Pro Se* and Counsel for Defendants are directed to appear for a Preliminary Conference in IA Part 15, Room 335, 60 Centre Street, New York, New York at 11:00 a.m. on August 11, 2006.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 6/6/06

HON. WALTER B. TOLUB, J.S.C.