

Zipper v Haroldon Court Condominium

2006 NY Slip Op 30299(U)

April 27, 2006

Supreme Court, New York County

Docket Number: 0110986/2003

Judge: Rolando T. Acosta

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

PRESENT: HON. ROLANDO T. ACOSTA

PART 61

Justice

Sherrill Ziegler

INDEX NO. 1109/01/06

MOTION DATE _____

MOTION SEQ. NO. 57.6

MOTION CAL. NO. _____

- v -

Harrison Lewis

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 _____

See attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

FILED

MAY 04 2006

NEW YORK COUNTY CLERK'S OFFICE

MOTION IS DECIDED IN ACCORDANCE WITH THE ATTACHED MEMORANDUM DECISION.

SO ORDERED

Dated: 4/28/06

[Signature]

J.S.C.

ROLANDO T. ACOSTA

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 PART 61**

Sheila Zipper and Gerald Zipper,
Plaintiffs

– against –

Haroldon Court Condominium, et al.,

Defendants.

DECISION/JUDGMENT

Index No. 110986/03

Seq. 8

Present:

Hon. Rolando T. Acosta

Supreme Court Justice

FILED

MAY 04 2006

NEW YORK

COUNTY CLERK'S OFFICE

The following documents were considered in reviewing Defendant Rebecca Rosenbaum's motion for attorneys fees and other Defendants – except Penmark Realty Corp. and Rosenbaum – (“Condominium”)’s cross-motion for an order pursuant to CPLR 2221, modifying or, alternatively, granting leave to reargue, and upon reargument, modifying the Court’s decision dated November 21, 2005, to the extent of awarding Read Ventures Co. (the landlord) rent arrears from Rosenbaum and unpaid use and occupancy for the period August 2005 through December 2005; staying so much of the Decision as directed the landlord to offer Rosenbaum a lease renewal pending the appeal of the decision by the Condominium; denying Rosenbaum’s motion for attorneys fees; ordering plaintiffs to indemnify the Condominium against and/or contribute to any award of attorneys fees and, in any event, directing plaintiffs to indemnify the Condominium for their attorneys fees; and,

dismissing the amended complaint on the grounds of collateral estoppel.

Papers	Numbered
Order to Show Cause and Affirmation	1 (Exhibit A)
Notice of Cross-Motion and Affirmation	2 (Exhibits A-F)
Rosenbaum's Affirmation in Opposition	3
Plaintiff's Opposition to Cross-Motion and	
Memorandum of Law	4-5 (Exhibits A-E)
Reply in Support of Cross-Motion	6

Background

In their amended complaint, plaintiffs asserted four causes of action against the Condominium. The first cause of action sought an order directing the Condominium to abate permanently the noxious odor nuisance, which they attributed to Rosenbaum; the second cause of action sought compensatory damages for, *inter alia*, the decrease in market value of their apartment as a result of the odors; the third cause of action sought an abatement of the monthly service charges; and the fourth cause of action sought legal fees. In their answer, the Condominium asserted six cross-claims against Rosenbaum. The first sought a judgment of possession plus use and occupancy; the second sought a judgment of possession based on objectionable conduct (odor emanating from her door) plus use and occupancy; the third sought an order of

[*4]
ejectment based on the objectionable conduct; the fourth sought an order enjoining and restraining Rosenbaum from committing a nuisance; the fifth sought indemnification in the event plaintiffs recover judgment; and the sixth sought contribution in the event the plaintiff's recover judgment.

Following extensive negotiations with the Court and with the general agreement that a determination of whether Rosenbaum was creating a nuisance or not would go a long way towards resolving the matter, the parties agreed to a bench trial on the cross-claim for ejectment only. Following trial, the Court issued a decision dated November 21, 2006, wherein it found for Rosenbaum:

The burden . . . is on the Condominium to establish that the clutter and odor emanating from the apartment was not only continuous but of such a degree as to interfere with the other tenants' interest in the use of their apartments. In the Court's opinion, the Condominium failed in its burden. Indeed, Swift testified that although a foul odor emanated from the apartment when the door was opened, as soon as it was closed, the odor dissipated "in about 20 seconds" (295).

* * *

There is also no record support for the claim that whatever roach and vermin problem may exist in apartment 14A is actually interfering with the other tenants. Indeed, Gerald Zipper testified that there have been roaches in his apartment "only on several occasions (86-87), and Sheilah Zipper added that they have had "very little problem in [the] apartment with roaches" (171). As far as mice and rats, Gerald stated that they have had no rodents for at least 15 years (86-87) and Sergio DeLeon, the handy man, added that there are no mice in the building and he has seen rats only once or twice (426-27). Moreover, the clutter has been isolated to two rooms, the living room and the dining room, which the Rosenbaums use as storage rooms. Although the

stacked boxes may cause a fire hazard,¹ that condition can be easily remedied. It should also be noted that the bulk of the photographs introduced into evidence by the Condominium (Plaintiff's Exhibits 11 and 12) indicating the extent of the clutter in the apartment predate the July 27, 2001 inspection by Judge Wendt.

The condominium also presented testimony that Rosenbaum had caused several leaks which affected apartment 12A. The Court, however, finds that the Condominium did not establish by a preponderance of the evidence that Rosenbaum actually caused these leaks. Indeed, it should be noted that Lieutenant Mechan entered Rosenbaum's apartment expressly to look for the source of a water leak trickling into apartment 12A and did not find the source of the leak (437). Moreover, Michael Alejandro, the property manager, testified that there are approximately 100 water leaks a year in the 100-year-old building and most are caused by old pipes (531).

Decision at 5-7. Rosenbaum, however, was ordered to remove the clutter from the two rooms being used as storage rooms within 30 days of this order and to stop using the two rooms as storage rooms to avoid creating a potential fire hazard.

Rosenbaum's Motion for Attorneys Fees

The only issue before the Court at the bench trial was whether Rosenbaum could be evicted from her rent stabilized apartment for causing a nuisance. Inasmuch as the Court found that the Condominium failed in its burden of proof on this issue, Rosenbaum was the prevailing party, and pursuant to Real Property Law § 234, is entitled to reasonable attorneys fees. That the Court ordered Rosenbaum to remove

1. The Court noted in the Decision at footnote 1, that no memoranda or verbal warnings were given to the firefighters at the firehouse regarding safety precautions in the event that they had to return to Rosenbaum's apartment.

the clutter from the two rooms being used as storage rooms does not change the result. Indeed, the Court ordered her to clean up solely to avoid creating a potential fire hazard in the future.

Condominium Defendants' Cross-Motion

Rent Arrears and Use and Occupancy

The Condominium's motion for reargument pursuant to CPLR 2221 is denied without prejudice to commencing an appropriate action in Housing Court. Contrary to the Condominium's claims, although there was some evidence introduced at trial with respect to Rosenbaum's rent arrears, the issue of rent arrears or use and occupancy was not litigated at the bench trial. Inasmuch as there may be potential warranty of habitability defenses to the rent arrears claims, this Court will not rule on those issues.

Stay Pending Appeal.

The Condominium's motion for an order granting a stay pending the appeal to the Appellate Division, First Department, of that portion of the Decision that directed the landlord to offer Rosenbaum a lease, is granted on Rosenbaum's consent.

Dismissing the Amended Complaint Pursuant to CPLR §§3211(a)(5) & 3212.

The Condominium moved to dismiss the amended complaint on collateral estoppel grounds. Essentially, it argues that the amended complaint is premised on

a nuisance caused by the odor emanating from Rosebaum's apartment. Since the Court found that Rosenbaum was not causing a nuisance, plaintiff's causes of actions are collaterally estopped. The doctrine of collateral estoppel was summarized by the Court of Appeals in Kaufman v. Eli Lilly and Company, 65 N.Y.2d 449, 455-56 (1985):

The doctrine of collateral estoppel precludes a party from relitigating "an issue which has previously been decided against him in a proceeding in which he had a fair opportunity to fully litigate the point" (Gilberg v Barbieri, 53 NY2d 285, 291; see, Schwartz v Public Administrator, 24 NY2d 65, 69). It is a doctrine intended to reduce litigation and conserve the resources of the court and litigants and it is based upon the general notion that it is not fair to permit a party to relitigate an issue that has already been decided against it. There are now but two requirements which must be satisfied before the doctrine is invoked. First, the identical issue necessarily must have been decided in the prior action and be decisive of the present action, and second, the party to be precluded from relitigating the issue must have had a full and fair opportunity to contest the prior determination (Gilberg v Barbieri, *supra*, at p 291; Schwartz v Public Administrator, *supra*, at p 71; see, Koch v Consolidated Edison Co., 62 NY2d 548, 554- 555, cert denied -- US --, 105 S Ct 1177; Ryan v New York Tel. Co., 62 NY2d 494, 500-501). The party seeking the benefit of collateral estoppel has the burden of demonstrating the identity of the issues in the present litigation and the prior determination, whereas the party attempting to defeat its application has the burden of establishing the absence of a full and fair opportunity to litigate the issue in the prior action (see, Ryan v New York Tel. Co., *supra*, at p 501; Schwartz v Public Administrator, *supra*, at p 73).

Here, the first and second causes of action of the amended complaint are clearly premised on nuisance based solely on the odor emanating from Rosenbaum's apartment. Moreover, the issue as to whether the odor emanating from the apartment

constituted a nuisance is identical to one of the issues decided at the bench trial and plaintiffs fully participated in that litigation (the other two were whether Rosenbaum caused the vermin infestation and water leaks) and had a full and fair opportunity to litigate the issue. Thus, plaintiff is collaterally estopped from relitigating (in their first and second causes of action) the issue as to whether the odor emanating from Rosenbaum's apartment constitutes a nuisance.

The third (abatement of monthly charges) and fourth (attorneys fees) causes of action, however, are not collaterally estopped.² As noted earlier, the only issue before the Court at the Bench trial was whether Rosenbaum's conduct raised to the level of a nuisance as that term has been defined. See Domen v. Aranovich, 1 N.Y.3d 117 (2003). Although this Court found that the odor emanating from Rosenbaum's apartment did not constitute a nuisance, the odor may nevertheless impact on the market value of plaintiffs' apartment and as well as their use and enjoyment. The parties did not litigate, and this Court certainly did not rule on, whether the Condominium breached its duty to plaintiffs in failing to eliminate the odor and thus entitling them to an abatement. See Scherer and Fisher, Residential Landlord - Tenant Law in New York § 12:85 (plaintiffs, as unit owners, may not withhold

2. The Condominium's motion seeking summary judgment dismissing the complaint was based solely on collateral estoppel grounds.

monthly charges on warranty of habitability grounds, Frisch v. Bellmarc Management, Inc., 190 A.D.2d 383 (1st Dept. 1993), but may nevertheless still raise a claim against the Board for breaching its duty to repair). The parties also did not litigate plaintiffs' claim for attorneys fees therefrom.

Accordingly, the first and second causes of action of the amended complaint are dismissed pursuant to CPLR 3212 and the remaining causes of action will be transferred to the Civil Court to determine, either by motion practice or trial, whether the Condominium breached its duty to plaintiffs in failing to eliminate the odor and whether plaintiffs are entitled to attorneys fees.

Contrary to plaintiff's assertion, Justice Abdus-Salaam did not find that Rosenbaum's action constituted a nuisance. Rather, she ordered the Condominium to identify and abate the nuisance. See Decision dated January 29, 2004. The Condominium identified what it thought to be the nuisance, namely noxious odors, vermin infestation and water leaks in Rosenbaum's apartment and attempted to abate what it perceived to be the nuisance by seeking to eject Rosenbaum from the apartment. As noted above, however, this Court found after a lengthy trial that the odor emanating from Rosenbaum's apartment did not constitute a nuisance. Moreover, there was insufficient evidence to establish that Rosenbaum was the cause of any vermin infestation or water leaks.

Indemnification

The Condominium seeks indemnification from plaintiffs for Rosenbaum's attorneys fees as well as the cost of litigating this matter. It bases its demand for indemnification on Article 20, Section 20.3 and Article 29, Sections 20.1 and 29.2 of the Declaration of Condominium, attached to the cross-motion as Exhibit E. The clear import of those sections, however, is that the requesting party (plaintiff) does not have to indemnify the Condominium for actions that the Condominium has to do for free. Specifically, Section 20.3(a) states that the requesting party "pay or reimburse the Condominium Board for the reasonable Costs and Expenses of the Interested Party to perform a request made by the Requesting Party . . . other than those matters expressly stated elsewhere in this Declaration or the By-laws to be performed by the Interested Party without (i.e., free of) fee, charge, Cost or Expense. . . ." The Condominium, however, has a duty to maintain the building nuisance free. See, e.g., Hohenberg v. 77 West 55th Street Associates, 90 A.D.2d 750, appeal after remand, 118 A.D.2d 418 (1st Dept. 1986)(owner responsible for abating nuisance). In commencing the instant action, plaintiffs were merely seeking to enforce a right to which they are entitled free of charge, namely to live without excessive odor. Accordingly, this portion of the cross-motion is denied.

Based on the foregoing, it is hereby

ORDERED that Defendant Rosenbaum's motion for attorneys fees is GRANTED and a hearing to determine reasonable attorneys fees is referred to a Special Referee to hear and report with recommendations (with all the powers conferred by CPLR 4201) to this Court; and it is further

ORDERED that the cross-claims are held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4203; and it is further

ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the cross-motion is GRANTED solely to the extent of staying so much of this Court's Decision dated November 21, 2005 which directed the landlord to offer Rosenbaum a lease renewal pending the appeal to the Appellate Division, First Department, and dismissing the first and second causes of action of the amended complaint; and it is further

ORDERED, that the remaining causes of action be removed from this court and transferred to the Civil Court of the City of New York, County of New York, and it is further


ORDERED, that the clerk of New York County shall transfer to the clerk of the

Civil Court of the City of New York, County of New York, all papers in this action now in his possession, upon payment of his proper fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the County of New York, shall place both actions upon the appropriate calendar of the said Civil Court for jury causes, among the issues filed for the _____ 2006 Term, without Payment of any additional fees, and is further

ORDERED, that the above-entitled case be, and it is hereby, transferred to said court as if originally brought therein but subject to the provisions of CPLR 325(d).

Dated: April 27, 2006

ENTER

SO ORDERED


Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.

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