

Jerulee Co., LLC v Sanchez

2006 NY Slip Op 30396(U)

April 5, 2006

Supreme Court, New York County

Docket Number: 0102888/2002

Judge: Marilyn Shafer

Republished from New York State Unified Court
System's E-Courts Service.

Search E-Courts (<http://www.nycourts.gov/ecourts>) for
any additional information on this case.

This opinion is uncorrected and not selected for official
publication.

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

PRESENT: _____

PART _____

Index Number : 102888/2002

JERULEE CO.

vs

SANCHEZ, RAYMOND

Sequence Number : 003

RENEWAL

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on 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

decided pursuant to attached items

FILED

APR 11 2006

NEW YORK COUNTY CLERK'S OFFICE

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

Dated: 4/5/06

HON. MARLYN SHAFER, JSC

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 — NEW YORK COUNTY

PRESENT: HON. MARILYN SHAFER
Justice

PART 62

JERULEE CO., LLC,

Plaintiff,

-against-

RAYMOND SANCHEZ and NATALYA NIZHNY
Defendants.

INDEX NO. 102888/02

MOTION DATE _____

MOTION SEQ. NO. 003

The following papers, numbered 1 to 3, were read on this motion to reargue:

	<u>PAPERS NUMBERED</u>
Notices of Motion — Affidavits — Exhibits	1
Cross-motion — Affidavits — Exhibits	2
Replying Affidavits	3

FILED

APR 11 2006

NEW YORK

COUNTY CLERK'S OFFICE

Cross-Motion: **Yes** **No**

Upon the foregoing papers, it is ordered that defendant's motion to reargue is denied and plaintiff's cross-motion for summary judgment is granted.

In an Order dated May 20, 2005 ("prior Order"), this Court granted defendant Sanchez's ("defendant") motion for summary judgment dismissing plaintiff's complaint and denied his motion for summary judgment on his first and second counterclaims for sanctions and attorneys' fees. Defendant now moves for leave to reargue the latter portion of the prior Order.

Defendant contends that the Court erred in its prior Order by denying defendant summary judgment on his second counterclaim for attorneys' fees. Defendant claims that there was a

purported breach of a covenant to quit the premises by defendant since defendant Nizhny and his daughter, Alexa, did not vacate Apartment 6F which caused plaintiff to commence this action. Thus, according to defendant, Real Property Law §234 was triggered because defendant had successfully defended an action “commenced by the landlord against the tenant arising out of the lease.” Defendant further contends that since summary judgment was granted and the complaint was dismissed, this Court erred in denying summary judgment on his first counterclaim for sanctions. Defendant asserts that the fact the complaint was found to be without merit is proof enough of plaintiff’s frivolous conduct and sufficient to issue sanctions against plaintiff.

In opposition, plaintiff maintains that defendant’s motion is one to reargue since the written lease for apartment 6F does not constitute new evidence. Further, plaintiff maintains that as a motion to reargue, defendant’s motion is defective and untimely since it does not contain the original motion papers and the instant motion was made more than 90 days after the service of the prior order with notice of entry. Additionally, plaintiff cross-moves for summary judgment to dismiss all of defendant’s four counterclaims. Plaintiff asserts that the defendant’s third counterclaim alleging a breach of defendant’s right to quiet enjoyment of the premises should be dismissed because defendant has failed to demonstrate a cause of action. Specifically, there is no allegation by defendant that he was actually or constructively evicted from the premises or that he was deprived the beneficial use of the premises. Finally, plaintiff argues that defendant’s fourth counterclaim should be dismissed because New York State does not recognize a civil cause of action for harassment.

A motion for leave to reargue, pursuant to CPLR § 2221, is addressed to the sound discretion of the court and may be granted only upon a showing that the court overlooked or misapprehended any relevant facts or misapplied any controlling principles of law (*Foley v*

Roche, 68 AD2d 558 [1st Dept 1979]). The purpose of reargument is not to serve as a vehicle to permit the unsuccessful party to advance arguments different from those tendered on the original application (*Id.*; see also *Mariani v Dyer*, 193 AD2d 456 [1st Dept], *lv denied* 82 NY2d 658 [1993]). A motion to renew under CPLR § 2221, however, is intended to draw the court's attention to new or additional facts which, although in existence at the time of the original motion, were unknown to the party seeking renewal and, therefore, not brought to the court's attention (*Foley v Roche*, 68 AD2d 558 [1st Dept 1979]; see also *Dankner v Szurzan and Dorf, Inc.*, 226 AD2d 669 [2d Dept 1996]).

Here, defendant argues that the written lease for apartment 6F constitutes new or additional evidence and as such, this motion should be construed by the Court as a motion to renew. However, it is undisputed that defendant was aware of the written lease for apartment 6F at the time of his prior motion since he executed said lease. Therefore, this motion must be construed by the Court as a motion to reargue as oppose to one for renewal.

As a preliminary matter, defendant's instant motion for reargument is deemed timely as he timely served and filed his Notice of Appeal. "A motion for reargument may be brought after the time to appeal has expired if a notice of appeal has been timely filed and the motion is brought prior to the submission of the appeal or at the latest before the appeal is determined" (*Luming Café, Inc. v Birman*, 125 AD2d 180 [1st Dept 1986]).

Defendant's first counterclaim for sanctions

Here, defendant argues that since the Court granted summary judgment and dismissed plaintiff's complaint, that fact, in and of itself, was sufficient to warrant the award of sanctions. However, dismissal for legal sufficiency in the pleadings is not the standard for the granting of sanctions. "Frivolous conduct" warranting sanctions is defined pursuant to 22 NYCRR §130-

1.1, and not by whether a cause of action is sufficiently pleaded. Since plaintiff has made a prima facie showing entitlement to judgment as a matter of law, the burden then shifts to defendant to establish the existence of material issues of fact. Defendant has not met his burden. Accordingly, defendant's motion to reargue his first counterclaim is denied and plaintiff's cross-motion for summary judgment is granted and the first counterclaim is dismissed.

Defendant's second counterclaim for attorneys' fees

Defendant's arguments for summary judgment on his second counterclaim are essentially a reiteration of those made in support of his original summary judgment motion. It is well settled that recovery of attorneys' fees pursuant to Real Property Law §234 is permitted for actions arising out of lease disputes, not claims for a tort. Additionally, this Court finds that plaintiff has met its burden in establishing a prima facie case on this counterclaim, thereby shifting to defendant the burden to establish the existence of material issues of fact requiring a trial. Defendant has not met his burden. Accordingly, defendant's motion for reargument on his second counterclaim is denied and plaintiff's cross-motion for summary judgment is granted and defendant's second counterclaim is dismissed.

Defendant's third counterclaim for breach of defendant's right to quiet enjoyment of premises

Here, plaintiff has demonstrated a prima facie showing to entitlement of dismissal of this counterclaim, thus, shifting to defendant the burden to establish the existence of a triable issue of fact. Again, defendant has not met his burden. There are no allegations that defendant was either actually or constructively evicted from the premises. Accordingly, this branch of plaintiff's cross-motion is granted and defendant's third counterclaim is dismissed.

Defendant's fourth counterclaim for harassment

It is well settled that New York does not recognize a civil cause of action for harassment

(*Hartman v 536/540 E. 5th St. Equities, Inc.*, 19 AD3d 240 [1st Dept 2005]). Merely alleging that plaintiff commenced the instant action for the purpose of harassment is insufficient to sustain a claim for a prima facie tort (*Goldstein v Tabb*, 177 AD2d 470 [2d Dept 1991]). Accordingly, this Court finds that plaintiff has not met his burden in raising an issue of fact requiring a trial and therefore, this counterclaim is dismissed.

For all the foregoing reasons, it is ORDERED that defendant's motion to reargue is denied; and it is further

ORDERED that plaintiff's cross-motion for summary judgment dismissing all of defendant's counterclaims is granted.

This reflects the decision and order of this Court.

Dated: 4/5/06

HON. MARTIN SWEET, J.S.C.
J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

FILED
APR 11 2006
NEW YORK
COUNTY CLERK'S OFFICE