

Pesochinsky v DeRosa
2007 NY Slip Op 32196(U)
July 18, 2007
Supreme Court, New York County
Docket Number: 0105932/2006
Judge: Jane S. Solomon
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: JANE S. SOLOMON J.S.C.

PART 55

Index Number : 105932/2006

PESPOCHINSKY, SEMYON

vs

DEROSA, ANTHONY

Sequence Number : 006

SUMMARY JUDGMENT

INDEX NO. _____

MOTION DATE 5/29/07

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

1-4
5
6-7

Cross-Motion: Yes No

Upon the foregoing papers, It is ordered that this motion is decided in accordance with the enclosed memorandum decision and order & judgment.

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

UNFILED JUDGMENT
This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 418).

Dated: 7/18/07

JANE S. SOLOMON 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: PART 55

- - - - - X

SEMYON PESOCHINSKY,

Index No. 105932/06

Plaintiff,

DECISION, ORDER
AND JUDGMENT

- against -

ANTHONY DEROSA,

Defendant.

UNFILED JUDGMENT
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appear in person at the County Clerk's Desk (Room
113) - 2 X

JANE S. SOLOMON, J.:

Plaintiff Semyon Pesochinsky moves, pursuant to CPLR 3212, for summary judgment for an order of ejection against defendant Anthony DeRosa, and damages in the amount of maintenance and fees that plaintiff has paid to the Savannah Owners Corp. (Cooperative) for the period of December 2002 until defendant vacates Apartment 5J at 250 West 89th Street, New York, New York (Apartment).

The facts and allegations underlying the parties' dispute are set forth in several prior decisions in this action, as well as in related litigation. Briefly summarized, defendant purchased the Apartment in 1998, financed by a mortgage loan by Chase Manhattan Mortgage Corp., as successor to Chase Home Finance, LLC (together, Chase). In 2000, defendant ceased making his mortgage payments. Chase subsequently foreclosed on the loan, and it sold the Apartment at a public auction to plaintiff, who agreed to pay \$200,000, as well as all of defendant's

maintenance arrears for the foreclosed property.

Plaintiff subsequently commenced this action for ejectment and damages, based upon the April 10, 2006 closing of the purchase of the Apartment, contending that it confirmed him as the owner of the shares and the holder of the lease appurtenant to the Apartment. Defendant interposed three (now dismissed) counterclaims against plaintiff and a third-party complaint (also dismissed) naming as third-party defendants Chase, the Cooperative, and John Doe 1-24.

Plaintiff has demonstrated a prima facie entitlement to summary judgment on the cause of action seeking possession of the Apartment that defendant is occupying, by establishing title to the premises, and that defendant has no legal interest in the premises (see *STED Tenants Owners Corp. v Chumpitaz*, 23 AD3d 373 [2d Dept 2005], *lv denied* 6 NY3d 713 [2006]). It already has been judicially determined that the sale of the Apartment to plaintiff was conducted in a commercially reasonable manner (*DeRosa v Chase Manhattan Mtge. Corp.*, 10 AD3d 317 [1st Dept 2004]). Included with the motion papers are: (1) Certificate of Sale and Fact, dated March 1, 2001, as to the public auction of the Apartment; (2) Stock Power, dated April 10, 2006, whereby Chase assigned the shares allocated to the Apartment to plaintiff; (3) Assignment of Proprietary Lease to plaintiff; (4) Acceptance of Assignment and Assumption of Lease; (5) copy of the

certificate of shares appurtenant to the Apartment issued in plaintiff's favor; and (6) copies of checks showing payment for the Apartment (see Exhibits 21, 22, 7, 8, 10, and 23, respectively, to Affirmation of Audrey A. Roofeh, Esq., dated April 26, 2007 [Roofeh Affirmation]).

Moreover, defendant was served with a 10-day Notice to Quit, dated July 18, 2006, demanding that he surrender possession by July 29, 2006, in compliance with Real Property Actions and Proceedings Law § 713 (5) (see Exhibit 19 to Roofeh Affirmation). Plaintiff's assertion that defendant has not surrendered possession of the Apartment is undisputed.

In opposition, defendant essentially raises the same arguments as he did on prior motions (e.g., plaintiff is an unqualified buyer, the foreclosure sale was invalid, his adversary was involved in undisclosed and improper side deals with Chase and the Cooperative, etc.). Defendant offered no basis for his asserted belief that additional discovery would reveal information material and necessary to his defense. Thus, he failed to raise a triable issue of fact (see *Kronish Lieb Weiner & Hellman LLP v Tahari, Ltd.*, 35 AD3d 317 [1st Dept 2006]).

As for damages, plaintiff seeks to recover an amount representing maintenance and other fees that plaintiff has paid to the Cooperative for the period of December 2002 until

defendant vacates the Apartment. According to plaintiff, he has paid, and continues to pay, the maintenance for the Apartment since July 2000, although defendant continues to remain in possession. Plaintiff is not seeking to recover these charges for the period from July 1, 2000 to December 1, 2002, because he was awarded a judgment for that period in another action, also in Supreme Court, New York County (Index No. 126043/02) (Related Action) (see Exhibit 6 to Roofeh Affirmation).

Plaintiff states that (1) the monthly maintenance for the Apartment is \$1,188.30, and that it has been since prior to December 2002; (2) for those months where he paid an amount greater than \$1,188.30, the amount reflects assessments due the Cooperative; and (3) where the amount paid was less, this reflects a tax abatement for the property applied to his shares (see Affidavit of Semyon Pesochinsky, sworn to April 25, 2007 [plaintiff Affidavit]). Plaintiff contends that, for the period December 2002 until April 2007, he paid a total amount of \$61,162.59. In support, plaintiff submits (1) his affidavit as to the amounts that he paid to the Cooperative, (2) copies of cancelled checks representing payments paid to the Cooperative, and (3) documentation (an attorney's letter regarding the April 2006 closing) (see Exhibits 12-14 to plaintiff Affidavit).

In opposition, defendant argues that (1) the amount owed in maintenance does not match the papers submitted, nor do

they match what was awarded to plaintiff in the Related Action, and (2) assuming plaintiff's ownership of the Apartment, he is not entitled to recovery of maintenance charges prior to closing, because he was not the owner until 2006, and it is Chase that should pursue recovery of these charges in that Chase previously claimed to have been responsible for, and to have paid, these charges.

Notwithstanding these assertions, plaintiff has demonstrated entitlement to damages for defendant's use and occupancy of the Apartment. Pursuant to a declaratory judgment rendered in the Related Action on December 4, 2003, defendant is

"liable to plaintiff for the amount of maintenance fees due on the subject apartment from December 2002 onward, for as long as defendant continues in possession of the subject apartment."

(see Exhibit 6 to Roofeh Affirmation at 9). Thus, the argument that Chase, not plaintiff, is entitled to pursue those charges is without merit.

Defendant states that the amount allegedly owed in maintenance does not match the papers that plaintiff submitted, but he does not opine as to the correct amount. In his reply papers, plaintiff concedes that defendant correctly identified a discrepancy in his original moving papers as to the amount charged by the Cooperative for maintenance and assessments. Plaintiff explains that the photocopies of checks contained in

Exhibit 14 to the Roofeh Affirmation contained three cancelled checks that were inadvertently duplicated. The total amount paid for maintenance and fees for the Apartment is \$57,164.03.

Based on the foregoing (and taking into account defendant's opposition papers which offer only a categorical challenge to the amount of damages claimed due, without offering any specific amount), I find that the record sufficiently supports plaintiff's claim for the amount of damages to which he is entitled for defendant's use and occupancy of the Apartment for the period from December 1, 2002 to March 31, 2007. If so advised, plaintiff may move for additional arrears (i.e., the period from April 1, 2007 until such time as defendant vacates the Apartment).

Accordingly, it is

ORDERED that summary judgment in favor of plaintiff Semyon Pesochinsky is granted; and it further is

ORDERED, ADJUDGED and DECREED, that plaintiff Semyon Pesochinsky shall have a judgment for possession of the premises Apartment 5J at 250 West 89th Street, New York, New York and the clerk of the Court shall enter judgment for that relief; and it further is

ORDERED, ADJUDGED and DECREED, that defendant Anthony DeRosa is directed to vacate Apartment 5J at 250 West 89th Street, New York, New York and deliver possession thereof to

Semyon Pesochinsky within twenty (20) days after service of a copy of this order with notice of entry, failing which the Sheriff of the County of New York shall take possession of the subject premises and deliver possession to plaintiff; and it further is

ORDERED, ADJUDGED and DECREED, that plaintiff Semyon Pesochinsky shall have a judgment against defendant Anthony DeRosa in the amount of \$57,164.03, with costs and disbursements as taxed by the Clerk of the Court upon the submission of an appropriate bill of costs.

Dated: July 18, 2007

ENTER:



J.S.C.

JANE S. SOLOMON
J.S.C.

UNFILED JUDGMENT
his judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Assignment Clerk's Desk (Room 41B)