

1520 St. Nicholas Ave. Realty, Inc. v Ramirez

2008 NY Slip Op 30475(U)

February 6, 2008

Supreme Court, New York County

Docket Number: 0117882/2004

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 117882/2004
1520 ST. NICHOLAS AVENUE
vs
RAMIREZ, CECILIO
Sequence Number : 005
AMEND SUPPLEMENT PLEADINGS

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____
motion to/for _____

PAPERS NUMBERED	
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

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

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

MOTION IS DECIDED IN ACCORDANCE WITH THE ACCOMPANYING MEMORANDUM DECISION.

FILED
FEB 20 2008
NEW YORK COUNTY CLERK'S OFFICE

Dated: Feb 6, 2008

JUDITH J. GISCHE, J.S.C. J.S.C.

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Check if appropriate DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 10

-----X
1520 ST. NICHOLAS AVENUE REALTY, INC.,

Plaintiff,

-against-

CECILIO RAMIREZ and JOSE CHACON,

Defendant.
-----X

Decision/Order

Index No.: 117882/04

Seq. No. : 005

Present:

Hon. Judith J. Gische

J.S.C.

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers

Numbered

Notice of Motion. RAG affirm., JC affd., exhibits	1
Notice of Cross-motion, FB affd., exhibits	2
RAG affirm. In opp	3
RAG reply affirm	4

FILED
FEB 20 2008
NEW YORK
COUNTY CLERK'S OFFICE

-----X
Upon the foregoing papers, the decision and order of the Court is as follows:

This is an action by plaintiff to, *inter alia*, recover unpaid rent it contends defendant Jose Chacon ("Chacon") converted. Issue has been joined and now Chacon moves for leave amend his answer to assert an additional affirmative defense that the action is barred by the statute of limitations and other grounds. Upon doing so, Chacon also seeks summary judgment based upon the statute of limitations. Plaintiff, 1520 St. Nicholas Avenue Realty, Inc. ("1520 Realty"), cross-moves to amend its complaint to assert a cause of action for fraud. For the reasons that follow, the motion to amend the answer to assert an affirmative defense of the statute of limitations is granted, and upon the deemed interposition of such answer, Chacon is granted summary judgment dismissing the complaint because the claims are time barred. The cross-motion to amend the complaint

to assert a cause of action for fraud is, however, denied.

Certain facts are undisputed. 1520 Realty is a corporation that owns a multi family residential unit located at 1520 St. Nicholas Avenue in Manhattan ("building"). From 1981 until April 2, 2001, Fernando Bertrand ("Bertrand") and Chacon each owned and/or controlled 50% of the shares of 1520 Realty. They jointly operated the building. On April 2, 2001 the Chacon interest in 1520 Realty was sold to Bertrand.

Co-defendant Cecilio Ramirez ("Ramirez") was a superintendent who occupied apartment #1 at the building ("apartment"). Sometime after Bertrand became the sole shareholder of 1520 Realty, Ramirez was fired and a proceeding was brought in Housing Court to recover the apartment based upon a claim that he occupied it as an incident of employment. Ramirez successfully defended the Housing Court action by producing leases issued to him for the apartment by 1520 Realty. The leases were signed by Chacon.

1520 Realty thereafter on December 22, 2004 commenced this proceeding. The complaint claimed that the leases signed by Chacon were forgeries and sought to set them aside. Alternatively the complaint claimed that if the leases were valid, Chacon converted 1520 Realty's property by collecting and personally keeping rent received from Ramirez. Chacon denies 1520 Realty's claims against him.

Pertinent to this motion, Chacon claims and 1520 Realty does not seriously dispute that during the discovery phase of this action he first learned that the rents in dispute were allegedly collected between 1983 and (no later than) 1996. Even if Chacon should have known that the disputes went back so far, his attorney claims that he is an elderly man who reads very little English and only recently retained counsel.

He claims that the subject leases were first produced in July 2007 and that they indisputably terminated no later than April 1, 1996. As a consequence, Chacon claims that he now knows the claims for conversion are completely barred by the applicable statute of limitations.

In connection with this action, 1520 Realty obtained and submitted an affidavit from Chacon in support of his legal position that the lease were forgeries. Chacon now repudiates that affidavit and claims that he signed the disputed leases and that they are legitimate. 1520 Realty claims that as a result of the false affidavit, it had to settle this action against Ramirez and give him a life estate in the apartment at a rent of \$600 per month. As its damages 1520 Realty seeks the difference between the market rate for the apartment and the \$600 it will be collecting from Ramirez.

Discussion

In the absence of prejudice or surprise resulting directly from the delay, leave to amend a pleading is freely given, pursuant to CPLR § 3025(b). Fahey v. County of Ontario, 44 NY2d 934 (1978). In evaluating prejudice, the court may look at any delay and its effect on the parties' positions in the underlying litigation. There should be some explanation for the delay, and prejudice may be found if some special right is lost by the passage of time or if undue expense is implicated. Barbour v. Hospital for Special Surgery, 169 AD2d 385 (1st dept. 1991). In addition the moving party is required to show that the new claims have a colorable basis. NAB Construction Corp. v. Metropolitan Transportation Authority, 167 AD2d 301 (1st dept. 1990). Defenses, like the statute of limitations, which have otherwise been waived under CPLR § 3211(e), can nonetheless be interposed upon application of CPLR § 3025(b). AJ Pegno Construction Corp. v. City of

New York, 95 AD2d 655 (1st dept. 1983).

Applying these principles of law, Chacon's motion to interpose an amended answer which seeks only to add a statute of limitations defense should be granted. The complaint only asserts a cause of action for conversion against Chacon. The conversion is based upon allegations that Chacon collected and kept for himself rents that belonged to 1520 Realty. During discovery it became clear the 1520 Realty's claims covered a period of time that went as far back as 1983 and could not have occurred after April 1, 1996. Shortly after Chacon became aware of the parameters of the claim, he sought to interpose a statute of limitations defense. Conversion is subject to a three year statute of limitations. CPLR § 214(3). It starts to run from the date of the actual conversion.

Vigilant Ins. Co. of America v. Housing Authority of City of El Paso, 87 NY2d 36 (1995).

The action at bar was commenced on December 22, 2004. Assuming that the last date of any converted rents was April 1, 1996, it is clear the passage of the statute of limitations is a viable defense. Chacon has explained the delay and there is no prejudice to permitting the interposition of this defense.

Applying these same principles of law, 1520 Realty's motion to amend its complaint to assert a claim for fraud must be denied. The main reason for the denial is that 1520 Realty has not shown that it has a colorable claim for fraud. The alleged fraudulent statement is the Chacon affidavit that was prepared at 1520 Realty's behest and submitted in this action. The elements of fraud are: a material misrepresentation made that was false and known to be false at the time of its making which was intended to and was actually relied upon by plaintiff and caused damages. JoAnn Homes at Bellmore, Inc. v. Dworetz, 25 NY2d 112 (1969).

Even accepting everything 1520 Realty seeks to allege in its proposed amended complaint, it cannot establish either the elements of reliance or damages. This underlying action against Ramirez was already pending while the affidavit falsely claiming that the leases were forgeries were made. Thus, 1520 Realty could not have relied upon such statement in deciding whether to bring this action against Ramirez. As for plaintiff's decision to settle with Ramirez, certainly it did not rely upon Chacon's statements that the leases were forgeries in withdrawing its claim against Ramirez and giving him what it alleges is a below market lease. The settlement was clearly based upon 1520 Realty's consideration of Ramirez' claim that the leases were valid. If you accept 1520 Realty's current position that Chacon's statement to them that the leases were forgeries was false, then you would have to conclude that the leases were valid. If the leases with Ramirez are valid, then 1520 Realty cannot prove a right to charge market rents for the apartment and the fact that it settled with Ramirez to charge him a lower rent does not support any claim of financial loss or damages.

Chacon also moves for summary judgment on a number of bases. On a motion for summary judgment, the moving party has to prove its *prima facie* case such that it would be entitled to judgment in its favor, without the need for a trial. CPLR § 3212; Winegrad v. NYU Medical Center, 64 NY2d 851 (1985); Zuckerman v. City of New York, 49 NY2d 557, 562 (1980). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact. Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 (1986); Zuckerman v. City of New York, 49 N.Y.2d 557 (1980).

1520 Realty does not specifically address this aspect of the relief sought. Without even reaching Chacon's factual contentions on the merits of the underlying claim, it is

clear that summary judgment must be granted on the basis that 1520 Realty's claims are completely barred by the applicable statute of limitations. The only remaining claim against Chacon in this action is for conversion. It is subject to a three year statute of limitations. Since over five years passed after the last possible date that any conversion could have taken place but, before this action was commenced, no part of the claim survives the application of the statute of limitations.

Conclusion

In accordance herewith, it is hereby :

ORDERED that defendant Jose Chacon's motion to amend it answer is granted and the proposed amended answer annexed as exhibit E to the motion is deemed served, and it is further

ORDERED that defendant Jose Chacon's motion for summary judgment dismissing the complaint against him is hereby granted and the clerk is directed to enter a judgment in favor of Jose Chacon and against plaintiff 1520 St. Nicholas Realty, Inc. dismissing the complaint, and it is further

ORDERED that plaintiff 1520 St. Nicholas Realty, Inc.'s cross-motion to amend the complaint is denied, and it is further

ORDERED that any requested relief not expressly addressed herein is denied and that this constitutes the decision and order of the court.

Since the claims against defendant Ramirez have been previously settled, the disposition of this motion finally resolves the matter.

Dated: New York, New York
February 6, 2008

So Ordered: 
HON. JUDITH J. GISCHE, J.S.C.

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