

Saccheri v Cathedral Props. Corp.

2008 NY Slip Op 30951(U)

March 26, 2008

Supreme Court, Nassau County

Docket Number: 0017-07/

Judge: Antonio I. Brandveen

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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: ANTONIO I. BRANDVEEN
J. S. C.

LEONARD SACCHERI, JR.,
Plaintiff,

TRIAL / IAS PART 32
NASSAU COUNTY

- against -

Index No. 20017/07

CATHEDRAL PROPERTIES CORP.,
CATHEDRAL COURT ASSOCIATES, L.P.,
OLD COURT REALTY CORP., and JACQUES
BLINBAUM,
Defendants.

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits	<u>1</u>
Answering Affidavits	<u>2</u>
Replying Affidavits	<u>3, 4</u>
Briefs: Plaintiff's / Petitioner's	_____
Defendant's / Respondent's	_____

The plaintiff moves for an order adding Michael J. Muzik as a party defendant in the action on the ground he is a party to be joined if complete relief is to be accorded, amending the title of the action and the pleadings, permitting the plaintiff's service of a second amended summons and second amended verified complaint upon Michael J. Muzik to satisfy the requirement for serving a supplemental summons and verified complaint, for service of the second amended summons and second amended verified complaint upon the defendant Jacques Blinbaum be deemed sufficient service, for service of the second amended summons and second amended verified complaint upon the

defendants Cathedral Properties Corp., Cathedral Court Associates, and Old Court Realty be deemed sufficient service, and granting their time to respond to the second amended summons and second amended verified complaint to run from the date of the Court's order. The motion is opposed.

The plaintiff's attorney states, in supporting affirmations dated December 11, 2007, and January 10, 2008, the underlying action was commenced to award ownership of a certain cooperative apartment, and to obtain damages from the defendants, so Muzik must be added as a party defendant to afford complete relief to the plaintiff by determining ownership of the cooperative apartment. The plaintiff's attorney asserts the plaintiff brought a prior wrongful eviction against the defendant Cathedral Properties Corp. on or about January 8, 1999, after the plaintiff was locked out of his cooperative apartment, and his cooperative apartment shares were sold in foreclosure, without the plaintiff's knowledge, in violation of the proprietary lease. The plaintiff's attorney states, in detail, the history of the litigation among the parties. The plaintiff's attorney avers the plaintiff brought the underlying action on November 8, 2007, to obtain damages for his unlawful eviction, and the plaintiff now wants to add the issue of ownership of the shares allocated to the apartment because the Nassau County District Court could grant the plaintiff possession, which it did, but could not grant ownership of the shares. The plaintiff's attorney alleges the plaintiff seeks to amend the complaint to add Muzik, and to seek a judicial order granting the 275 shares indicating ownership and possession of the

subject apartment 2F since Muzik is the present shareholder, a necessary party to this action, and there is no prejudice to the defendants.

The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum states, in an opposing affirmation dated January 4, 2008, the motion should be denied as it is without merit, or dismissed as unauthorized. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum points to the accompanying opposing affidavits dated January 4, 2008, by the defendant Jacques Blinbaum, and Melissa Sheeran, Vice President of the defendant Old Court Realty which establish some background facts, and describe service. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum points out several causes in a 1988 Nassau County District Court L&T summary proceeding arose from the subject transaction were dismissed by the Appellate Term of the Supreme Court, 10th & 11th Judicial Districts, on June 18, 2007 for lack of subject matter jurisdiction. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum notes the plaintiff needs to avail himself of CPLR 205 (a) tacking to extend the Statute of Limitations because the plaintiff's 1998 claims are otherwise time barred since the plaintiff had not effected proper service within six months as required by law. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum maintains the plaintiff is moving for summary judgment on a key issue before an answer has been served, and there is no showing the plaintiff had difficulty effecting

service or the defendants avoided service. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum observes the motion papers seek to amend the complaint, yet there is no annexed copy of the proposed pleading which is an additional reason to dismiss the motion. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum further reports the plaintiff has another action for the same relief pending in the Nassau County District Court against the respondents, Cathedral Court Associates, Cathedral Properties Corp., and Michael J. Muzik, to wit Index No. SP 127/99 on a supplemental summons/notice of petition dated November 27, 2007. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum contends these defendants have duly raised the defense of lack of personal jurisdiction by pleading it in their answers, and until this issue is disposed pursuant to a procedure authorized by the CPLR, the Court, in its discretion, should not entertain other motions affecting their rights.

The attorney for the defendant Cathedral Properties Corp. responds, in an affirmation dated January 11, 2008, to the plaintiff's motion, and the papers submitted in opposition to the motion by the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum, but asks that this affirmation not be construed as a response to the amended complaint nor the second amended complaints including any defenses based on any procedural defects other than those waived in the stipulation extending the time to answer. The attorney for the defendant Cathedral Properties Corp. claims all of the files

delivered to the defendant Cathedral Properties Corp. were incomplete or untimely, for example the file with respect to the litigation leading to this action was not delivered to the attorney for the defendant Cathedral Properties Corp. until November 2007, well after the appeal deadline. The attorney for the defendant Cathedral Properties Corp. also reports no files concerning the litigation commenced in 1999 have been delivered to the defendant Cathedral Properties Corp. attached to the papers submitted in opposition to the motion by the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum. The attorney for the defendant Cathedral Properties Corp. contends, in detail, the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum engaged in wrongful acts of misconduct, and provides, in detail, background information about the litigation and various communications. The attorney for the defendant Cathedral Properties Corp. states this defendant has no opposition to adding Muzik as a party defendant to afford full relief. The attorney for the defendant Cathedral Properties Corp., however agree with counsel for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum that the plaintiff's requests to have service of the second amended complaint approved by this Court are outside the scope of the CPLR, and the plaintiff's failure to include the second amended complaint as an exhibit is technically improper, and the this defendant would object to the Court waiving compliance with the CPLR only to the extent Cathedral Gardens would be prejudiced by such waiver. The attorney for the defendant Cathedral Properties Corp. states the plaintiff

has established his right to amend the summons and complaint without leave of the Court or stipulation pursuant to CPLR §§ 1003 and 3025. The attorney for the defendant Cathedral Properties Corp. maintains Cathedral Gardens is the only one with the right to object to the propriety of the first amendment, and it has no objection to this amendment, and the plaintiff including the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum as parties defendants. The attorney for the defendant Cathedral Properties Corp. argues the remaining objections of the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum are irrelevant to a determination of this motion, will be presented in a motion to dismiss, as counsel for those defendants acknowledges here, and any affirmative relief sought by the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum should be denied because they failed to cross move for it.

The plaintiff's attorney replies to the affirmation of counsel for the defendant Cathedral Properties Corp., in an affirmation dated January 14, 2008, the plaintiff largely agrees with the defendant Cathedral Properties Corp., its attorney's affirmation, except to the extent the defendant Cathedral Properties Corp. states having not fully waived any defense based on personal jurisdiction. The plaintiff's attorney points to a stipulation dated December 20, 2007, prepared by defense counsel, and annexed to plaintiff counsel's affirmation dated January 14, 2008, which states the defendant Cathedral Properties Corp. waives defenses based on personal jurisdiction.

The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum states, in an affirmation dated January 17, 2008, in response to the affirmation of the attorney for the defendant Cathedral Properties Corp., and in further opposition to the plaintiff's motion, the attorney for the defendant Cathedral Properties Corp. misstates the record, and that defense affirmation is inadmissible hearsay and speculation. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum points to the reply affidavit dated January 15, 2008, of the defendant Jacques Blinbaum which is supported by documentary evidence. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum asserts the defendant Jacques Blinbaum shows the attorney for the defendant Cathedral Properties Corp. played a negative role in the cooperative's affairs as transaction counsel with more than an attorney's interest. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum avers counsel for the defendant Cathedral Properties Corp.'s assertion that only the defendant Cathedral Properties Corp. has standing to oppose the plaintiff's motion is unsupported and erroneous. The attorney for the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum notes the plaintiff delivered a summons and complaint to Old Court, and served it with a notice of motion, but the defendants Cathedral Court Associates, Old Court Realty, and Jacques Blinbaum are not yet parties because the summons was not properly served as provided by law.

The defendant Jacques Blinbaum gives an account, in detail, in a reply affidavit dated January 15, 2008, regarding the relationship between the cooperative board of directors and Old Court Realty, and the background of the underlying circumstances of this litigation. The defendant Jacques Blinbaum states, as counsel to the cooperative board of directors, counsel for the defendant Cathedral Properties Corp. was the main instigator of the adversity for the purpose of generating revenue for counsel's law firm. The defendant Jacques Blinbaum points out, in late 2006, counsel for the defendant Cathedral Properties Corp. advised the cooperative board of directors to usurp the sponsor's right to refinance the wrap mortgage, as shown in *Cathedral Properties Corp. V. Blinbaum* (44 AD3d 852) where counsel was unsuccessful. The defendant Jacques Blinbaum avers the bias and interest of counsel for the defendant Cathedral Properties Corp. is evident in the inaccurate description of the plaintiff's litigation handled by Old Court Realty which was the 28th foreclosure handled for Cathedral by Old Court Realty. The defendant Jacques Blinbaum notes all prior foreclosures were routine, handled by outside counsel after the issues were terminated, and status information posted on the public bulletin board at Cathedral Gardens. The defendant Jacques Blinbaum states Old Court retained Richard J. Vande Stouwe, Esq., Garden City, to represent Cathedral after the plaintiff sued in the Nassau County District Court, and in 2001 when the plaintiff prevailed in the Nassau County District Court, the defendant Jacques Blinbaum informed the cooperative board of directors that counsel was taking an appeal. The defendant

Jacques Blinbaum alleges he heard nothing from Vande Stouwe from the termination of Old Court's contract on December 31, 2006, until approximately June 18, 2007, when the appellate Court affirmed the decision of the Nassau County District Court. The defendant Jacques Blinbaum states he informed Vande Stouwe Old Court was no longer the managing agent for Cathedral, and sent a copy of the order on appeal to the new agent, Richland Management.

The Court has carefully reviewed and considered all of the parties' papers on this motion. The burden of proving in personam jurisdiction is on the party asserting it (see, **Bernardo v. Barrett**, 87 A.D.2d 832; **Lamarr v. Klein**, 35 A.D.2d 248, *aff'd*, 30 N.Y.2d757; **Ziperman v. Frontier Hotel of Las Vegas**, 50 A.D.2d 581). It is well established that "it is the plaintiff who bears the ultimate burden of proving by preponderating evidence that jurisdiction over [a] defendant was obtained." It is also well-settled that where "there is a sworn denial of service by [a] defendant, the affidavit of service is rebutted and the plaintiff must establish jurisdiction by a preponderance of the evidence at a hearing [citations omitted]") **Wern v. D'Alesandro**, 219 AD2d 646, 647; *see also*, **Skyline Agency, Inc. V. Ambrose Copputelli, Inc.**, 117 AD2d 135). Any issues regarding mailing and filing the summons, complaint and proof of service require a review of the office procedure, followed in the regular course of business of the process server (*see*, **Spangenberg v. Chaloupka**, 229 A.D.2d 482; *see also* Prince, Richardson on Evidence Section 3-128, at 77 [Farrell 11th ed]). The Court finds, as a matter of law, the


affidavit of service has been rebutted by the defendants, and the plaintiff must establish jurisdiction by a preponderance of the evidence at a traverse. The defendant's motion is granted only to the extent this action is set down for a traverse. The plaintiff is ordered to file a note of issue to place this matter on the trial calendar for a traverse within 30 days of service of a copy of this order with notice of entry by the defendant. If the defendant or the defense attorney fails to serve a copy of this order with notice of entry upon the plaintiff's attorney, this motion is denied.

The parties are ordered to appear, with any witnesses they wish to call, in the Calendar Control Part for a traverse, subject to the right of the Presiding Justice of the Calendar Control Part to refer this matter to a Justice, Judicial Hearing Officer, or a Court Attorney Referee as the Presiding Justice deems appropriate.

Accordingly, the motion by the defendant is granted only to the extent this action is set down for a traverse. So ordered.

Dated: **March 26, 2008**

ENTER:



J. S. C.
HON. ANTONIO I. BRANDVEEM

FINAL DISPOSITION

NON FINAL DISPOSITION XXX

ENTERED

APR 01 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**