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| <b>Matter of EI v Halprin</b>  |
| 2008 NY Slip Op 31328(U)   |
| May 6, 2008  |
| Supreme Court, New York County   |
| Docket Number: 0114147/2007  |
| Judge: Paul G. Feinman   |
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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: FEINMAN  
Justice

PART 52

ELI, KAHR, ET AL.

INDEX NO.

114147/07

MOTION DATE

2/20/08

MOTION SEQ. NO.

02

MOTION CAL. NO.

- v -  
JUDGE HALPAIN,  
ET AL.

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

MOTION IS TO BE FILED IN ACCORDANCE WITH  
THE ANNEXED DECISION AND ORDER.

**FILED**

MAY 09 2008

COUNTY CLERK  
NEW YORK

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

Dated: 5/16/08

[Signature]

J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: CIVIL TERM: PART 52

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In the Matter of KAHIR EL, MARTIZA CARDENAS,  
JUAN MORONTA,

Petitioners,  
  
against

Index Number 114147/2007  
Submission Date Feb. 20, 2008  
Mot. Seq. Nos. 001, 002

JUDGE HALPRIN, JUDGE LAO, JUDGE  
BADILLO, and 573 W. 192 ST. LLC,  
Respondents.

**DECISION & ORDER**

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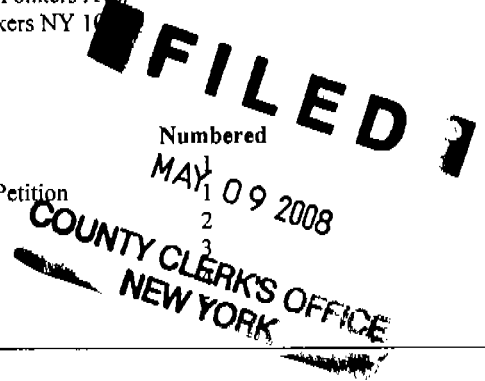
**For the Petitioners:**  
Kahir El, *pro se*  
573 W 192<sup>nd</sup> St., Apt. 1C  
New York NY 10040-3351

**For Judicial Respondents:**  
Andrew M. Cuomo, Esq.  
NYS Attorney General  
By: Charles F. Sanders, Esq.  
120 Broadway, 24<sup>th</sup> Floor  
New York NY 10271

**For 573 W 192 St. LLC:**  
Novick, Edelstein, Lubell, Reisman, Wasserman &  
Leventhal, P.C.  
By: Paul Finkelstein, Esq.  
733 Yonkers Ave.  
Yonkers NY 10

Papers considered in review of this petition to compel:

|          | <b>Papers</b>   |
|----------|---|
| Seq. 001 | Order to Show Cause (unsigned)  |
| Seq. 002 | Order to Show Cause, Amended Notice of Petition & Petition<br>Judicial Answer & Affirmation in Opposition<br>573 W. 192 <sup>nd</sup> St LLC Affirmation in Opposition<br>Petitioner's Notice of Order and Removal of Causes<br>573 W 192 <sup>nd</sup> St. LLC Affirmation in Opposition |



**PAUL G. FEINMAN, J.:**

In this Article 78 proceeding commenced by order to show cause, the self-represented petitioner seeks to compel the respondents to restore his family and himself to possession of the apartment from which they have been evicted, and to return the family furniture and possessions removed by the landlord. Separately, petitioner also seeks to transfer this proceeding to the Appellate Division. By interim decision and order dated December 12, 2007, the petition was denied and dismissed as against the judicial respondents. For the reasons which follow, the remainder of the petition is converted into a plenary action, and upon conversion, certain of the

claims are dismissed and the remainder severed and continued.

The gravamen of petitioner's remaining claim is that his landlord, 573 W. 192<sup>nd</sup> St. LLC, wrongly brought a non-payment eviction proceeding using fraudulent means, in particular filing false affidavits as to the non-military status of Maritza Cardenas and Juan Moronta (Am. Pet. ¶¶ 5, 11). He alleges fraudulent misrepresentation, abuse of process, and intentional infliction of emotional distress. This claim concerning the use of falsified non-military status affidavits, was previously included in petitioner's motion for summary judgment that was heard and denied in the Housing Part of Civil Court in August 2007 (Respondent-Judges' Answer, Ex. 5 [Mot. for Summ. Judg., *573 W 192<sup>nd</sup> St. LLC v Maritza Cardenas and Juan Moronta*, L&T Index No. 068280/2007]; Ex 6 [*573 W 192<sup>nd</sup> St. LLC v Maritza Cardenas and Juan Moronta*, Civ Ct, New York County, L&T Index No. 068280/2007 Dec./Ord. of Aug. 15, 2007, Halpern J.]).

Petitioner and his family were evicted on September 6, 2007 (Am. Pet. ¶ 3). According to petitioner's affidavit in support of his application to proceed as a poor person, one of the documents included in the papers submitted as part of his order to show cause, "[p]roperty was confiscated partially by [the landlord] and placed into storage partially at Midtown Moving Storage." Petitioner does not further address this claim of wrongly confiscated goods in his petition or amended petition.

In general, CPLR Article 78 proceedings seeking judicial review may be brought only to challenge an action or inaction by agencies and officers of state and local governments (Alexander, Practice Commentaries, McKinney's Cons. Laws of NY, Book 7B, CPLR 7801:1, at 25). Here, where the sole remaining respondent is a limited liability company, and petitioner claims intentional torts and wrongful retention of property, the proper proceeding is a plenary

action seeking damages and the recovery of chattel. Rather than dismiss the proceeding because of incorrect form, under the liberal pleading rules of New York, the court may convert the form of an action or proceeding to the proper one (CPLR 103 [c]). Accordingly, this special proceeding is deemed converted into a plenary action. Petitioner is hereinafter the plaintiff, and the respondent-landlord is the defendant and the petition and amended petition deemed to be a complaint and amended complaint.

The pleadings allege, as against the landlord, fraudulent misrepresentation, abuse of process, and intentional infliction of emotional distress. Plaintiff alleges that “[t]he landlord’s attorney caused to be issued a void and illegal warrant of eviction which caused irreparable harm, and injury to the petitioner and his family. . . making the landlord and his attorneys liable for damage and injury for this wrongful eviction, (RPAPL 853), intentional infliction of emotional distress, conversion, and negligent infliction of emotional distress.” (*see* Ver. Pet. ¶; Ver. Am. Pet. ¶ 3). He seeks “damages for violation of the law,” with the amended complaint setting forth the three intentional torts noted above.

None of the three intentional tort claims are viable as against the landlord. They concern actions taken by the landlord during its attempts to evict plaintiff and his family. With the exception of the intentional infliction of emotional distress claim, they were argued in plaintiff’s motion for summary judgment in Housing Court, and dismissed.<sup>1</sup> The issues having been raised by plaintiff with the same party and adjudicated against him in another court, the plaintiff is not

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<sup>1</sup>Plaintiff’s notice of motion seeking to appeal the denial by Housing Court of his motion for summary judgment, was declined by the Appellate Term on September 5, 2007, and filed in the Clerk’s Office on September 7, 2007 (Judges’ Answer Ex. 13).

free to attempt to re-litigate them again in this court. Rather, this court is bound by principles of collateral estoppel and *res judicata* to hold that there is no viable claim of fraudulent misrepresentation or abuse of process. Moreover, the claim of intentional infliction of emotional distress is not viable, given the previous determination by Housing Court granting eviction on the legal ground of nonpayment of rent.

The only possible claim remaining to plaintiff is that mentioned in his affidavit concerning his poor person status, namely that some of his family's household goods were taken by the landlord and placed into storage. This claim that his personal property was improperly seized by the landlord, is alluded to only by the term "conversion" in both the petition and the amended petition, as quoted above. Notably, however, the landlord provides an affidavit from the building superintendent who avers that after plaintiff and his two brothers were twice allowed "limited and supervised access" to the apartment to remove "belongings," movers hired by the landlord removed plaintiff's remaining belongings on September 21, 2007 (573 West Aff. in Opp., Rodriguez Aff. ¶ 9). Thus, defendant has conceded that it removed the "remaining" items belonging to plaintiff and his family. It is therefore apparent that plaintiff has a likely claim sounding in replevin (CPLR Article 71). The test is "whether the proponent of the pleading has a cause, not whether he has stated one." (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, plaintiff is directed to serve and file a seconded amended complaint to set forth his claim as concerns his property, and defendant shall serve an amended answer. He should clarify whether he is seeking monetary damages for property wrongfully converted (i.e., a plenary action) or whether he seeks a writ of replevin for return of chattel, in which case the proper form is, indeed, a special proceeding.

The landlord's argument that the proceeding should be dismissed because the index number has been "recycled," is unpersuasive. Although the original petition named only the landlord, who answered in November 2007, set forth allegations concerning the Housing Court proceeding, and sought mandamus to compel the return of petitioner to his apartment, as noted above both it and the amended petition allege wrongdoing by the landlord, although without seeking explicit relief. Defendant is little prejudiced by any procedural error here made by the self-represented petitioner, who served his amended petition within three months of the original petition.

Plaintiff's request to transfer this matter to the Appellate Division, is denied as procedurally improper.<sup>2</sup> To the extent that the motion seeks to reargue the court's interim decision of December 12, 2007, that motion is denied as well. It is

ORDERED that this special proceeding filed as a petition pursuant to Article 78 is deemed converted to a plenary proceeding as to the claims of fraudulent misrepresentation, abuse of process, and intentional infliction of emotional distress and such claims are dismissed; and it is further

ORDERED that to the extent plaintiff is seeking monetary damages for wrongful conversion of property, then the action is deemed converted to a plenary action and plaintiff is directed to serve and file a second amended complaint setting forth his claim of conversion; and it is further

ORDERED that to the extent plaintiff seeks a writ of replevin for return of chattel, the

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<sup>2</sup>If what plaintiff seeks is to appeal the court's interim decision, he must follow the rules set forth in Article 15 of the CPLR 5515.

action shall continue as a special proceeding and the petitioner shall serve and file a second amended petition detailing what property he seeks to have returned; and it is further

ORDERED that the plaintiff shall serve the aforementioned second amended complaint within forty-five days of entry of this decision, and reflecting the amended caption naming only the landlord as defendant and the landlord shall answer in accordance with the CPLR ; and it is further

ORDERED that plaintiff's motion seeking either to reargue the interim decision of December 12, 2007, or to transfer this matter to the Appellate Division, is denied; and it is further

ORDERED that the parties are to appear for a preliminary conference in Supreme Court, 80 Centre Street, room 103, on June 18, 2008 at 2:00 p.m.

The foregoing shall constitute the decision and order of this court.

Dated: May 6, 2008  
New York, New York

  
\_\_\_\_\_  
J.S.C.

Courtesy copies mailed.

**FILED**  
MAY 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK