

Nachmias v 210 Atl. Ave. Corp.

2008 NY Slip Op 32372(U)

August 21, 2008

Supreme Court, Nassau County

Docket Number: 2919-07/a

Judge: Anthony L. Parga

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**AMENDED
SHORT FORM ORDER**

SUPREME COURT - STATE OF NEW YORK - NASSAU COUNTY

Present:

HON. ANTHONY L. PARGA

Justice

-----X PART 11

ANDREW NACHMIAS, an infant by RICHARD NACHMIAS, and JODI NACHMIAS, his father and mother; RICHARD NACHMIAS, individually, and JODI NACHMIAS, individually,

INDEX NO. 22919/07

Plaintiff,

-against-

MOTION DATE: 6/5/08
SEQUENCE NO. 01, 02, 03

210 ATLANTIC AVENUE CORP., EDWARD KURTZ, MADELINE DE FLORES-AZIZ, MIGLIO PROPERTIES-GREENVALE LLC d/b/a MIGLIO REAL ESTATE, JUNE DIAMANT, ESQ.,

Defendants.

-----X

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Upon the advice of counsel that there was an inconsistency in the order dated August 12, 2008, the court vacates said order and substitutes the following in its place and stead:

Upon the foregoing papers, it is ordered that the motion to dismiss pursuant to CPLR 3211 (a)(1) and (7) by defendants 210 Atlantic Avenue Corp. and Edward Kurtz and June Diamant, Esq. denied as to defendants 210 Atlantic and is granted as to defendants Diamant and Kurtz. The motion by defendants Madeline De Florez-Aziz, Miglio Properties-Greenvale LLC d/b/a Miglio Real Estate dismissing the action pursuant to CPLR 3211(a) (1) and (7) is denied.

The cross-motion by plaintiff for an order disqualifying June Diamant, Esq. from representing defendants 210 Atlantic Avenue Corp. and Edward Kurtz is denied.

In this action plaintiffs seek a monetary recovery from defendants for damages allegedly sustained by plaintiff, infant Andrew Nachmias pursuant to HRL §296 and the Nassau County Administrative Code Title C Chapter 21. Specifically, plaintiffs Richard and Jodi Nachmias signed an apartment rental agreement on October 6, 2007 with landlord, defendant Edward Kurtz, the sole shareholder of defendant 210 Atlantic Avenue Corp. in Valley Stream, N.Y. Defendant Madeline De Florez-Aziz, is a sales agent employed by defendant Miglio Real Estate, the broker for Kurtz/210 Atlantic in this transaction. Plaintiffs (2 parents, 2 children) needed an apartment with a one year lease while renovations were made to their home nearby.

Plaintiffs allege to have told defendant DeFlorez-Aziz about their son's disability requiring a wheelchair and the landlord signed the lease and accepted the first month's rent, one month security and parking fee (\$3,481.00) check along with lease documents listing the names of plaintiffs' family. The Complaint further alleges that the landlord refused to deliver the keys to plaintiffs after learning of Andrew Nachmias' disability unless plaintiffs signed a "waiver" absolving the landlord from any injuries incurred from the steps at the apartment entrance/exit and

steps within the apartment. Plaintiffs found another apartment at a higher rent with less accessibility for their disabled son.

The First cause of action seeks a declaration of plaintiffs' rights pursuant to NCAC Title C, Chap. 21 and Executive Law §296 (5)(c)(1) (Unlawful discriminatory practices for a real estate broker to refuse to rent because of disability). The Second cause of action alleges defendant June Diamant, Esq. to have aided and abetted in the discriminatory acts by correspondence with plaintiffs as attorney for defendant 210 Atlantic regarding the waiver and cancellation of the lease. This Second cause of action also alleges that defendants 210 Atlantic and Kurtz discriminated against plaintiffs by cancelling the lease. The Third cause of action seeks attorneys' fees.

Defendants 210 Atlantic, Kurtz and Diamant contend that the documentary evidence of the lease was not signed by plaintiff Jodi Nachmias thus not fully executed is insufficient as a predicate to this action. Defendant 210 Atlantic also argues that there is no basis in the pleadings for finding defendant Kurtz personally liable for the acts of 210 Atlantic Corp. in this lease matter. Defendant Diamant argues that the Complaint's allegations of aiding and abetting the other defendants to have no basis in law or fact.

June Diamant's affirmation in support of defendants 210 Atlantic, Kurtz and Diamant's motion notes that plaintiffs' lease application used by the brokers did not mention that two children would also be living with them in the one bedroom apartment. Additionally, Diamant notes that the ramp which plaintiffs intended to use for their son's wheelchair was a narrow portable ramp used for trash removal without handrails or any safety features requisite for a handicap ramp. Finally, defendants note that the additional document plaintiffs were asked to execute in

addition to the lease was an acknowledgment by the plaintiffs of the non-handicap accessible conditions of the building and apartment.

In opposition, plaintiffs challenge the documentary evidence by arguing that the lease signed only by Mr. Nachmias does not conclusively resolve all the issues in contention. Plaintiffs also argue that the sequence of events demonstrates that the refusal to allow access to the apartment occurred after they had notice of plaintiffs' handicapped son. Plaintiffs contend that this act by defendants 210 Atlantic, Kurtz and Diamant is a prima facie demonstration that the Complaint articulates a viable cause of action against defendants.

In support of their motion to dismiss, defendants DeFlores-Aziz and Miglio Properties (Miglio) recite the facts and time line of the aforementioned events. The time line differs in that they allege the rejection of plaintiffs' application was initially rejected due to "number of people that would be residing in the one bedroom apartment". These movants then contend that Mr. Nachmias spoke to the management and his son's disability then became known to defendants. Defendants Aziz and Miglio do admit to trying then support plaintiffs' as tenants in that he "reminded Mr. Kurtz that the Nachmias' were responsible potential tenants, financially stable and that in any event of damage to the unit, the Nachmias' had already provided a security deposit". Movants Aziz and Miglio argue that there are no facts in dispute with respect to their "limited" role as brokers.

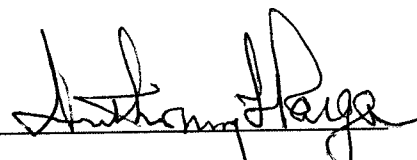
Plaintiffs' cross-motion to disqualify June Diamant from representing defendants 210 Atlantic Avenue Corp. and Edward Kurtz is premised on counsel's discussion with plaintiffs' counsel and preparation of the document which is characterized by plaintiffs as a "waiver" and by defendants as an "acknowledgment" regarding the building's lack of handicap accessibility.

To prevail on a motion for dismissal founded on documentary evidence defendant must show that the lease and annexed documents resolve all factual issues as a matter of law and definitely disposes of plaintiff's claim. Here, there is no documentation that the circumstances leading to the lease execution and revocation have occurred in an unambiguous manner. There are factual allegations by plaintiff that still remain unresolved thus defeating dismissal of the Complaint pursuant to CPLR 3211(a)(1) (*Rubinstein v. Salomon*, 2007 N.Y. Slip Op 9573 (2nd Dept., 2007)).

Likewise, the Court has examined the Complaint in a manner consistent with uncontested law. "To determine whether a pleading is sufficient to withstand a challenge under CPLR 3211[a][7], the court must consider whether the pleading, taken as a whole, fails to state a cause of action. Looseness, verbosity and excursiveness, must be overlooked on such motion if any cause of action can be spelled out from the four corners of the pleading" (*Foley v. D'Agostino*, 21 AD2d 60 (1st Dept., 1964)). Accordingly, defendant's motion pursuant to CPLR 3211(a)(7) is denied (*Town of Riverhead v. County of Suffolk*, 2007 N.Y. Slip Op 2933 (2nd Dept., 2007)).

Defendants June Diamant, Esq. and Edward Kurtz have demonstrated that the Complaint does not state a cause of action against them.

Dated: August 21, 2008.



Anthony L. Parga, J. S. C.

ENTERED

AUG 25 2008

NASSAU COUNTY
COUNTY CLERK'S OFFICE