

Obispo v 423 Madison Ave. L.L.C.

2009 NY Slip Op 30575(U)

March 16, 2009

Supreme Court, New York County

Docket Number: 1007861/08

Judge: Jane S. Solomon

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

PRESENT: Jane S. Solomon
Justice

PART 55

Index Number : 100761/2008
OBISPO, FABIAN
v.
423 MADISON AVENUE L.L.C.
SEQUENCE NUMBER : # 001
STRIKE ANSWER

INDEX NO. 100761-08
MOTION DATE _____
MOTION SEQ. NO. #001
MOTION CAL. NO. _____

here read on this motion to/for strike answer.

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

PAPERS NUMBERED
1-3
4-6
7-10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in
accordance with the annexed Decision and Order.

FILED
MAR 18 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 3/16/09

Jane S. Solomon
JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

[* 2]
SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

-----X
FABIAN OBISPO,

Plaintiff,

INDEX NO. 1007861/08

-against-

DECISION AND ORDER

423 MADISON AVENUE L.L.C.,
SOLIL MANAGEMENT, CORP. and
SOLIL MANAGEMENT, LLC,

Defendants.
-----X

JANE S. SOLOMON, J.:

INTRODUCTION

In an action to enforce a fair market rent appeal order, plaintiff moves to strike defendants' answer and, in the alternative, for an order of preclusion. Defendants cross-move for summary judgment on their statute of limitations defense.

FACTS

On January 17, 2008, plaintiff commenced this action to enforce a New York State Division of Housing and Community Renewal ("DHCR") fair market rent appeal ("FMRA") order. On January 19, 1990, a DHCR Administrator issued an order finding that the initial fair rent for the premises was \$136.75 and awarded plaintiff \$40,633.36 in overcharges. At the time of this determination, defendant Solil Management Corp. was plaintiff's landlord. On May 9, 1997, a Deputy Commissioner of the DHCR

[*3]

affirmed the prior finding that plaintiff was overcharged, but reduced the amount owed to \$40,131.24 in overcharges. Plaintiff received a copy of this determination. It contained a statement, which read: "This Order may, upon expiration of the period for seeking review of this Order and Opinion pursuant to Article Seventy-eight of the [CPLR], be filed and enforced as a judgment." (DHCR Order and Opinion, attached as Exh. 7 to Affirmation of Blair Hofherr.) The landlord filed an Article 78 petition in this Court to challenge the Deputy Commissioner's determination, and on March 11, 1998, I denied the petition and dismissed the proceeding. Thereafter, the building was transferred to defendant 423 Madison Avenue L.L.C.

In his Amended Complaint, plaintiff seeks a judgment against defendants in the amount of \$40,131.24 pursuant to the DHCR decisions, plus reasonable attorney's fees. Defendants answered with a general denial of the allegations and asserted the following affirmative defenses: (1) failure to state a cause of action; (2) laches; (3) the amount claimed is not due to plaintiff; (4) a portion of the amount due was paid; (5) statute of limitations; and (6) waiver. On or about April 24, 2008, plaintiff served defendants with a demand for a bill of particulars seeking information about the basis for defendants' affirmative defenses. In a letter, dated July 31, 2008, plaintiff's attorney advised counsel for the defendants that

plaintiff would make a discovery motion because of defendants' failure to respond.

DISCUSSION

Plaintiff contends that the Court should strike defendants' Verified Answer because their failure to respond was willful. In the alternative, plaintiff seeks an order precluding defendants from offering any evidence on their affirmative defenses. Defendants respond by arguing that the delay in responding was not willful. Defendants attribute their delay, in part, to the long time it took them to obtain a copy of the files on the FMRA, which dates back to 1984. Defendants submit their Bill of Particulars as an exhibit to their papers on the motion.

Defendants correctly argue that plaintiff's motion should be denied. The striking of a pleading and the issuance of an order of preclusion are drastic sanctions, which are not warranted under these circumstances.

Defendants' cross-motion for summary judgment based on the six year statute of limitations in CPLR § 213(1) should be granted. In *Sciarra v. 531 East 83rd Street Owners Corp.*, 8 A.D.3d 159 (1st Dept. 2004), the Appellate Division, First Department squarely held that "a plenary action to enforce an FMRA order is governed by the six-year limitations period in CPLR 213(1)." The statute of limitations began to run, at the latest,

upon entry of my March 11, 1998 order dismissing the Article 78 proceeding. Plaintiff did not commence this action until January 17, 2008, almost ten years later.

Plaintiff argues that his claim should not be dismissed as untimely because defendants deceived and misled plaintiff by not naming him in the Article 78 proceeding. Plaintiff attributes the approximately ten year gap between my denial of the petition and the instant action to the fact that he was not served with notice of entry of my determination.

However, there was no obligation to make plaintiff a party to the Article 78 proceeding against DHCR; nor has plaintiff shown that defendants affirmatively deceived or misled him in any way. Significantly, plaintiff was advised that the landlord had a right to bring an Article 78 proceeding to challenge the Deputy Commissioner's determination before a judgment could be entered, and a simple inquiry with the County Clerk or DHCR would have revealed that the landlord had instituted such a proceeding. Plaintiff's failure to follow the status of his EMRA does not relieve him from the effect of the applicable statute of limitations. Further, his argument is premised on the contention that he was not aware of the resolution of the Article 78 proceeding. This is belied by his very own affidavit, in which he states: "I may have called DHCR to check on what was happening with my EMRA . . . they might have

then sent me a copy of the Court's order, but I do not have a specific recollection of when I called, or whether or not they ever sent me the decision." (Affidavit of Fabian Obispo, ¶ 5.)

CONCLUSION

Accordingly, it hereby is

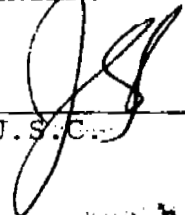
ORDERED that plaintiff's motion is denied; and it further is

ORDERED that defendants' cross-motion for summary judgment is granted and plaintiff's Amended Complaint is dismissed; and it further is

ORDERED that the Clerk shall enter judgment accordingly with costs and disbursements as taxed.

March 16, 2009

ENTER:



J.S. Clerk

CLERK'S OFFICE

FILED
MAR 18 2009
CLERK'S OFFICE
NEW YORK