

Thiam v Tuck-It-Away Assoc., L.P.

2009 NY Slip Op 31213(U)

June 4, 2009

Supreme Court, New York County

Docket Number: 110338/08

Judge: Jane S. Solomon

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SCANNED ON 6/5/2009
SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PART 55

JANE R. SOLOMON
Justice

Index Number : 110338/2008

SIAM, MASSAMBA

WICK-IT-AWAY ASSOCIATES

SEQUENCE NUMBER : # 001

DISMISS

INDEX NO. 110338-08

MOTION DATE 5/28/09

MOTION SEQ. NO. #001

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

PAPERS NUMBERED

1-4
5-7
8

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

is decided in accordance with the enclosed memorandum decision and order.

See also separate 325(a) order,

FILED

JUN 05 2009

COUNTY CLERK'S OFFICE
NEW YORK

Dated: 6/4/09

JANE R. SOLOMON

J.S.C.

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

DO NOT POST

REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 55

-----X

MASSAMBA THIAM and MASSAMBA THIAM d/b/a
CAYOR SPORTSWEAR, MASSAMBA THIAM d/b/a
CLAWANE FASHION,

Plaintiffs,

-against-

TUCK-IT-AWAY ASSOCIATES, L.P.,

Defendant.

-----X

Jane S. Solomon, J.:

In this action alleging, among other things, wrongful
eviction and property damage, defendant Tuck-It-Away Associates,
L.P. moved to dismiss the complaint pursuant to either CPLR 3211
(a) (4), for a prior action pending, or CPLR 3211 (a) (7), for
failure to state a cause of action. Plaintiffs Massamba Thiam
and Massamba Thiam d/b/a Cayor Sportswear, Massamba Thiam d/b/a
Clawane Fashion (together, Thiam) cross-move for a default
judgment. Both parties also apply to sanction the other for
frivolous behavior.

I. Background

For many years, Tuck-It-Away operated a self-storage
facilities in a property it owned located at 1901 Park Avenue in
Manhattan. Thiam rented "Studio 31" of the storage facility,
pursuant to a one year lease (Lease) (Notice of Motion, Ex. A)

DECISION AND ORDER

Index No. 110338/08

FILED
JUN 05 2009
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NEW YORK

that expired in June 1994, after which Thiam remained as a month-to-month tenant. Paragraph 10 of the Lease provides that if the premises are acquired by eminent domain for any public or quasi-public purpose, the Lease shall terminate as of the date of title vesting. This action arises from the removal of plaintiffs' property after the property was condemned.

According to the verified complaint, Thiam operated a sewing factory for the assembly of precut garments in room 31 for more than 15 years. Thiam alleges that, between March 17 and March 29, 2006, while he was out of the country, Tuck-It-Away illegally evicted his business from the premises, and destroyed personal property belonging to the business.

Tuck-It-Away submits evidence that in 2005 the building was subject to condemnation by Consolidated Edison Corporation of New York (Con Ed), and that Thiam, and the other tenants of the building, had been notified of the pending condemnation and demolition and given many opportunities to remove themselves and their property. In December 2005, Tuck it Away was notified by Con Ed that it wished to condemn, and then demolish, the building. In response to this turn of events, defendant and Con Ed entered into a contract of sale (Contract) (Notice of Motion, Ex. B.), whereby Con Ed purchased the property pursuant to New York Transportation Corporations Law § 11 (3-a). This statutory provision allows for the purchase of property by Con Edison in

lieu of condemnation of the property. Pursuant to the Contract, the building was to be delivered to Con Ed vacant.

Thereafter followed a succession of notices to defendant's tenants informing them of the sale and impending closure of the building (see Notice of Motion, Exs. C, D, E). Each notice informed the tenants that storage units had been set aside for them elsewhere in one of defendant's other facilities, and that defendant would relocate the customer's property to the new location, if it so desired, with free use of defendant's labor and trucks, and other moving supplies. Defendant maintains that these notices were sent to Thiam.¹

The first notice indicated that tenancies would terminate on December 31, 2005. Ex. C. The date was extended to January 31, 2006 (Ex. D), and then to March 16, 2006 (Ex. E). On or about March 8, 2006, defendant posted a sign on the building which, in bold letters, announced that the building would close down as of March 17, 2006 (Notice of Motion, Ex. F). The building was duly closed. At that time, defendant's contractors entered the building to prepare it for demolition, which included making holes in the floors. This activity allegedly rendered the building unsafe.

Defendant's general manager, Hanna Hanna (Hanna), in

¹ Only one of the notices, Ex. C, bears a notation that it was sent to Thiam, along with a certified mail receipt. The notice was sent to Thiam at the storage facility.

his affidavit, alleges that he had many conversations with Thiam from November 2005 until March 2006 about the closure of the building. Hanna claims that Thiam actually surveyed alternative storage space. Hanna maintains that Thiam was offered the new space, as well as all of the other offers of assistance which had been extended to the other tenants.

Regardless, Thiam and his employees failed to remove all of Thiam's possessions from the building before it became unsafe for them to remain. Consequently, Tuck it Away removed the remaining property and stored it at another of its facilities, in the Bronx.² The entire saga was communicated to Thiam's counsel in a letter dated March 23, 2006 (Notice of Motion, Ex. G).

By order to show cause dated March 15, 2006, Thiam commenced a Civil Court action entitled *Massamba Thiam d/b/a Cayor Sportswear v Tuck It Away, L.P.*, Index No. 62701/07 (Civil Court action)³ (*id.*, Ex. H). The action sought (1) an order restoring Thiam to possession; (2) a warrant of eviction against defendant; (3) a money judgment for losses incurred by Thiam, including attorney's fees, for wrongful ejection; and (4) a judgment against defendant pursuant to Real Property Actions and

² Defendant claims that Thiam's employees appear to have moved out much of Thiam's property prior to March 16, 2006.

³ The copy of this document provided to this court is all but unreadable.

Proceedings Law § 853, for treble damages. In light of the March 23 letter and Hanna's affidavit, these claims seem far-fetched.

Thiam failed to appear in court on March 29, 2006, the adjourned return date of the order to show cause, and the motion was denied, and the proceeding dismissed (*id.*, Ex. I). Later on March 29, Thiam moved, again by order to show cause, to restore the case to the calendar (*id.*, Ex. J). After this order to show cause was adjourned numerous times, an order dated May 15, 2007 was made at Thiam's request, in which, while still apparently dismissed, the case was marked "off calendar."

Thiam brought the present action in June 2008, asserting asserts four causes of action: (1) breach of contract; (2) conversion; (3) negligent or intentional damage to property; and (4) prima facie tort.

Defendant asserts that the present action cannot stand because it is barred by CPLR 3211 (a) (4), under which an action may be dismissed because there exists a prior pending action. Defendant also seeks dismissal under CPLR 3211 (a) (7), on the ground that Thiam has failed to plead any valid cause of action. Defendant also would have this court find Thiam's action in bringing this suit sanctionable.

Thiam claims that he is entitled to a default judgment. Thiam purports to have commenced this action by means of substitute service upon a person of suitable age and discretion

on August 1, 2008, by handing the pleadings to Hanna at defendant's place of business, followed by mailing a copy to an attorney at the firm representing defendant in this action (Aff. of Substitute Service, Thiam Cross Motion, Ex. B). He argues that defendant's present motion was not served until November 26, 2008, which would render it untimely, unless service was not properly made. In the alternative, Thiam cross-moves for consolidation of the two actions should the Civil Court action be deemed a prior pending action. He also seeks sanctions against defendant.

II. Discussion

A. Cross Motion for Default Judgment

Thiam has not established his entitlement to a default judgment. As defendant points out, Thiam served defendant as if defendant were a "natural" person under CPLR 308 (2), upon whom one could make substitute service, by service on a person of suitable age and discretion. However, defendant is a corporation, requiring service pursuant to CPLR 311 (a) (1), by service upon an "officer, director, managing or general agent, or cashier or assistant cashier or to any other agent authorized by appointment or by law to receive service," or, service under section 306 of the Business Corporations Law, upon the Secretary of State. While Hanna is a property manager at a Tuck-It-Away facility, Thiam's process server made no effort to ascertain

Hanna's status as an agent authorized to accept service on defendant corporation, and his service upon Hanna as a substitute person of suitable age and discretion on defendant was not proper. Mailing the pleading to an attorney who apparently represented defendant in the Civil Court action is of no consequence. Therefore, while defendant does not dispute receiving the summons, default judgment against it is not appropriate because Thiam has not shown that he made proper service.

B. Motion for Dismissal

i. Failure to State a Cause of Action

Plaintiff's claims for breach of contract and conversion appear unsustainable in light of the month-to-month tenancy, the adequacy of the notice to move, and the efforts to store that which Thiam's employees did not move from the space. Mr. Hanna's affidavit is not specifically rebutted, and if believed, would put an end to this action. However, on a motion to dismiss under CPLR 3211(a)(7), the court is obligated to accept as true the facts alleged in the complaint and to give plaintiff the benefit of every possible favorable inference (*Leon v Martinez*, 84 NY2d 83 [1994]). Since the complaint makes out the elements of these two claims, dismissal may not be granted.

On the other hand, Plaintiff's claim for prima facie tort is totally without merit, and will be dismissed. The

elements of a cause of action for prima facie tort are (1) the intentional infliction of harm; (2) special damages; (3) without excuse or justification; and (4) by an act or series of acts that are otherwise lawful (*Burns Jackson Miller Summit & Spitzer v Lindner*, 59 NY2d 314, 332 [1983]). There must be a showing that "disinterested malevolence was the sole motivation for the conduct of which [plaintiff] complain[s]" (*R.I. Island House, LLC v North Town Phase II Houses, Inc.*, 51 AD3d 890, 896 [2d Dept 2008]). Of course, Thiam has not pleaded, and cannot, plead, these elements. The third cause of action, to recover for property damage, duplicates an element of the breach of contract claim, and therefore it too is dismissed.

Plaintiff also demands punitive damages, which claim also is dismissed. Punitive damages will only be awarded if there plaintiff can show "intentional or deliberate wrongdoing, aggravating or outrageous circumstances, fraudulent or evil motive, or conscious act in willful and wanton disregard of another's rights" (*Ulico Casualty Company Co. v Wilson, Elser, Moskowitz, Edelman & Dicker*, 56 AD3d 1, 13 [1st Dept 2008][internal quotation marks and citation omitted]). Again, Thiam has not, and cannot, plead these elements.

ii. Prior Pending Action

Pursuant to CPLR 3211 (a) (4), an action may be dismissed if there is "another action pending between the same

parties for the same cause of action" in another court. The court "need not dismiss upon this ground but may make such order as justice requires[.]"

The contention by both parties here that the Civil Court action is still pending, such that one wants this case dismissed and the other wants them consolidated, is wrong. The record on this motion shows that Thiam never obtained a vacatur of the dismissal in the Civil Court. If he had, and it then was marked off, restoration by this court is not available to him. Moreover, if the Civil court action is alive, consolidation of redundant claims seems unwise. Clarification of the status of the Civil Court matter may be had there as, pursuant to a separate order, the claims which remain are transferred to it under CPLR 325 (d).

If, in the end, the action is dismissed on the merits, the defendant then may seek sanctions. On these motions, both requests for sanctions are denied. Accordingly, it is

ORDERED that the motion of defendant Tuck-It-Away Associates for an order dismissing the complaint is granted to the extent that the causes of action for property damage and prima facie tort are dismissed, and the claim for punitive damages is struck, and the Clerk is directed to enter judgment accordingly; and it further is

ORDERED that defendant shall serve an answer within

twenty days of service of notice of entry hereof; and it further is

ORDERED that the cross motion by plaintiffs Massamba Thiam, Massamba Thiam d/b/a Cayor Sportswear and Massamba Thiam d/b/a/ Clawane Fashion for a default judgment, or, alternatively, for consolidation of the two actions is denied; and it further is

ORDERED that the remainder of the action is transferred to the Civil Court under CPLR 325(d) pursuant to a separate order.

Dated: June 4, 2009

ENTER:



J.S.C.

JUNE 4 2009

FILED

JUN 05 2009

COUNTY CLERK'S OFFICE
NEW YORK

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At an Individual Assignment Part SS of
the Supreme Court of the State of New York, held in
and for the County of New York, at the courthouse
thereof in the County of New York, City, and State of
New York, on the 4th of June, 2009

SENT: **JANE S. SOLOMON**
N: _____
JUSTICE.

PRE-NOTE OF ISSUE

ORDER OF TRANSFER-325(d)

Thyam, Massamba
vs.
Tuck-IT-AWAY Associates

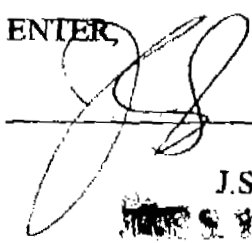
County Clerk's
Index No. 110338 ~~10~~ 20 08

It appearing that the Civil Court of the City of New York has jurisdiction of the parties to this action and
pursuant to Rule 202.13(a) of the Uniform Civil Rules for the Supreme Court and the County Court, it is

ORDERED, that this cause bearing Index Number 110338-08 be, and it hereby is, removed
from this court and transferred to the Civil Court of the City of New York, County of New York, and it is
further

ORDERED, that the clerk of New York County shall transfer to the clerk of the Civil Court of the City
of New York, County of New York, all papers in this action now in his possession, upon payment of his proper
fees, if any, and the clerk of the Civil Court of the City of New York, County of New York, upon service of a
certified copy of this order upon him and upon delivery of the papers of this action to him by the clerk of the
County of New York, shall issue to this action a Civil Court Index Number without the payment of any
additional fees, and it is further

ORDERED, that the above-entitled cause be, and it is hereby, transferred to said Court, to be heard, tried
and determined as if originally brought therein but subject to the provisions of CPLR 325(d).

ENTER,


J.S.C.
