

Ahmed v C.D. Kobsons, Inc.

2009 NY Slip Op 32061(U)

September 9, 2009

Supreme Court, New York County

Docket Number: 110049/2008

Judge: Jane S. Solomon

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

PRESENT: Solomon
Justice

PART 5

Ahmed, Abdulla

INDEX NO. 110049/08

MOTION DATE 8/3/09

MOTION SEQ. NO. 02

MOTION CAL. NO. _____

- v -

C.D. Kobsons, Inc.

The following papers, numbered 1 to 10 were read on this motion to/for Consolidation

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED	
1-6	1-6
7	7
8-10	8-10

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the annexed memorandum decision and order.

N.B. — preliminary cert. scheduled for Oct. 5, 2009 at noon.

FILED
SEP 11 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: 9/9/09

JANE S. SOLOMON J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST

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

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

-----X

ABDULLA AHMED,

Index No. 110049/2008

Plaintiff,

-against-

C.D. KOBSONS, INC.,

Defendant.

DECISION AND ORDER

FILED

SEP 11 2009

COUNTY CLERK'S OFFICE
 NEW YORK

-----X
 SOLOMON, J.:

Plaintiff Abdulla Ahmed moves for an order pursuant to CPLR 602(b) consolidating this action with one commenced in the Civil Court landlord-tenant part (*C.D. Kobsons, Inc. v Ahmed*, Index No. L&T 72132/09, the "Civil Court Action"). The motion is denied for the reasons below, although plaintiff is granted a partial stay of the Civil Court Action.

Ahmed is the commercial tenant in premises located at 311 Tenth Avenue in Manhattan, where he operates a store. The lease was made in May 2003, and expired on October 31, 2008, with an option to renew for five more years. Defendant C.D. Kobsons, Inc., the landlord, rejected Ahmed's attempt to exercise his renewal option on the grounds that he was delinquent in paying rent and additional rent, and was in material breach of the lease (see the Decision and Order in motion 01 for a more detailed description of the facts). Ahmed commenced this action on July 22, 2008, with three causes of action: First, for declaratory

judgment that he was entitled to renew the lease; second, alleging malicious prosecution arising from earlier litigation initiated by the landlord; and third, alleging prima facie tort arising from notices to cure served upon him by the landlord.

In July 2008, Ahmed sought a preliminary injunction to prevent the lease from expiring during the pendency of this action. A temporary restraining order was issued in Ahmed's favor pending resolution of the motion, which restrained the landlord from recapturing the premises. The TRO remained in effect until I denied the motion by a decision and order dated May 1, 2009, finding that Ahmed had not met his burden to show that he is likely to succeed on the merits, or that the balance of the equities weigh in his favor.

During the interim, the parties sought no discovery through the court, and it appears that little or no discovery was had. The preliminary injunction was sought only in connection with the first cause of action for declaratory judgment, and was irrelevant to the second and third causes of action, which seek monetary damages.

Approximately a month after issuance of the decision denying an injunction, the landlord commenced the Civil Court Action, which is a summary holdover proceeding seeking possession of the premises and a money judgment for rent, use and occupancy, and attorney's fees due under the lease. A trial was scheduled

for July 14, 2009, and adjourned to July 17. Not until the eve of trial did plaintiff seek a stay of the summary proceeding, when an order to show cause was presented on July 15. Ahmed's request for a TRO was denied by another Justice of this Court.

Ahmed seeks to consolidate the Civil Court Action with this Supreme Court action. His rationale is that any judgment entered in the Civil Court Action will be moot if he prevails on the merits of his declaratory judgment claim. Ahmed cites *Morrell & Company the Wine Emporium, Ltd. v Richalan Realty Corp.*, 93 AD2d 736 (1st Dept. 1983), and similar cases, for the proposition that removal and consolidation of a Civil Court action to the Supreme Court is appropriate where (1) the matters involve common questions of law and fact (CPLR 602[a]), (2) and the relief sought in the Supreme Court action is not available in the Civil Court.

In *Morrell*, the tenant rented premises under a lease that expired on October 31, 1982. The lease included a provision granting the tenant a right to first refusal if the landlord received a bonafide offer to purchase the premises. The tenant commenced an action for declaratory judgment and related relief in the Supreme Court in March 1982, alleging that the landlord had failed to communicate offers to purchase the premises, and seeking specific performance of the landlord's contractual obligation to sell the premises to the tenant. Soon after the

lease expired, the landlord commenced a summary holdover proceeding in Civil Court. The Appellate Division found that if the tenant was entitled to purchase the premises, the holdover proceeding would become "academic" (93 AD2d at 737). Moreover, the landlord had failed to show that the declaratory judgment and specific performance issues should be resolved in its favor (*id.*). The Appellate Division held that the Supreme Court should have removed the Civil Court proceeding and consolidated it with the declaratory judgment action to permit resolution of all issues in one forum (*id.*).

Here, as in *Morrell*, Ahmed seeks declaratory judgment, which the Civil Court lacks jurisdiction to issue. Landlord opposes this motion on the grounds that the very matter Ahmed sought to adjudicate in the prior motion was whether the landlord could proceed against Ahmed as a holdover, or whether such litigation should be enjoined pending resolution of this lawsuit. Unlike *Morrell*, the landlord in this case has shown that its position on the declaratory judgment issue is meritorious and likely to prevail. Moreover, the lease provision here did not confer a right on the tenant, as in *Morrell*, but only an option to renew.

It is noteworthy that the landlord-tenant part in Civil Court is better suited to resolve the issues now before it quickly and efficiently. The Civil Court Action was commenced in

early June 2009, and already was ready for trial on July 14. In this action, there has not yet been a preliminary conference, and counsel have not indicated that they are engaged in meaningful discovery.

Also notable is Ahmed's demonstrated intention to sit on his hands in this action. Rather than diligently pursuing a declaration in his favor, he elected to litigate the preliminary injunction and agreed to several adjournments delaying resolution of that motion, he has not sought discovery of the landlord, and he has not sought declaratory judgment in the more than four months since his motion for a preliminary injunction was denied and the TRO on the landlord lifted, and he delayed seeking consolidation of the two lawsuits.

None of the authorities cited by Ahmed address the present circumstances. CPLR 602(a) provides that the court may order that actions with common questions of law and fact be consolidated, and that the court may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay. Ahmed has failed to demonstrate a likelihood of success on the declaratory judgment issue, has not diligently pursued that issue in this action and has instead chosen a litigation strategy apparently calculated to delay resolution of that claim, and has asserted tort claims substantially unrelated to the Civil Court proceeding. Under these circumstances, Ahmed

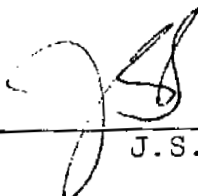
has not shown that granting his motion to remove and consolidate the Civil Court Action would avoid unnecessary costs or delay. Had he pressed the merits of his declaratory claim and sought judgment thereon, his argument might be more persuasive. Nevertheless, lest there be inconsistent outcomes, if defendant prevails in the summary proceeding, no warrant should issue absent further order of this court. Accordingly, it hereby is

ORDERED that the motion to remove and consolidate the Civil Court Action is denied, but issuance of any warrant by that court is stayed pending further court order; and it further is

ORDERED that counsel appear in Part 55 for a preliminary conference on October 5, 2009 at 12 noon to schedule discovery on an expedited basis.

Dated: September 9, 2009

ENTER:



J.S.C

JANE S. SOLOMON

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