

Owen v Low

2009 NY Slip Op 33375(U)

July 16, 2009

Supreme Court, New York County

Docket Number: 113310/06

Judge: Joan A. Madden

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

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THEODORE B. OWEN,

Plaintiff,

INDEX NO. 113310/06

-against-

CHARLES LOW, DUNDEE EQUITY CORP.,
PINE TREE MOUNTAIN, LTD, SANDCASTLE
AT BEACH L.P. and DOES 1 through 100,

Defendants.

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

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JOAN A. MADDEN, J.:

In this action between a residential tenant of a loft apartment and his landlord, defendants Charles Low, Dundee Equity Corp. and Pine Tree Mountain, Ltd (the "Dundee defendants") move for an order pursuant to CPLR 3211 and CPLR 3212 granting summary judgment dismissing the second, third, fifth, sixth and seventh causes of action in the complaint (motion sequence no. 004). Defendants also move to strike plaintiff's jury demand (motion sequence no. 003).¹ Defendant Sandcastle at Beach L.P. ("Sandcastle") joins in support of the co-defendants' motions, and plaintiff opposes the motions.

The following facts are undisputed unless otherwise noted. Since 1994, plaintiff has occupied "Loft 4D" in the building located at 60 Beach Street in Manhattan, which is registered as an Interim Multiple Dwelling and is covered under the New York City Loft Law, Article 7-C

¹Motions 003 and 004 are consolidated for determination. At oral argument, defendants were permitted to withdraw the portion of their motion (003) to strike the note of issue based on outstanding discovery. Defendants' request to strike plaintiff's jury demand is the only issue for determination with respect to motion 003.

of the Multiple Dwelling Law. The original lease between plaintiff as tenant and defendant Dundee Equity Corp. ("Dundee") as owner, is a "Standard Form of Loft Lease," dated May 6, 1994, and provides for a one-year term at the monthly rent of \$3100.

On May 18, 2001, plaintiff and Dundee executed a one-page agreement to "extend the lease . . . one year from June 1, 2001 to May 31, 2002 under the same terms and conditions as in the original lease of May 6, 1994 and the amendments thereafter with the rent at \$4100 per month." The agreement also states that

Dundee, by purchasing the fixtures, improvements and rights of the Loft will forgive half of the debt of the rent arrears ($\frac{1}{2}$ of \$131,200) = \$65,600. Dundee will credit Owen a total of \$65,500 ($\frac{1}{2}$ owed past debt) plus \$1000 now, (receipt is hereby acknowledged) for the purchase of the above. The remaining \$65,500 will be due on June 1, 2010. Dundee and Owen mutually release each other for all and any claims each may have against each other up to the date of this agreement.

Defendants assert that on or about March 19, 2005, plaintiff and Dundee executed four separate documents. One document is entitled "Confidential Agreement," and states that

Landlord will cancel the existing lease with Theodore B. Owen at 4D, 60 Beach Street, New York, New York 10013 and give a new lease for one year. There will be a debt of honor on rent past due from Ted Owen to Dundee Equity Corp. to be paid back at some time in the future. Hopefully soon. The new lease to take effect immediately.

Plaintiff and Dundee also executed a one-year "Apartment Lease" dated March 19, 2005, with monthly rent of \$2,200 for the first nine months, and \$3,500 for the last three months. The third document, entitled "Agreement," states in its entirety as follows:

Tenant [Ted B. Owen] agrees to sell and Owner [Dundee Equity Corp.] agrees to buy pursuant to Multiple Dwelling Law 286(12) and 286(6) any and all of Tenant's rights and improvements in and to loft 4D in the building known as and located at 48-60 Beach Street, New York, New York. In consideration therefore, Owner agrees to pay tenant one thousand (\$1,000) dollars and waives all rent due to date together with other good and valuable consideration receipt of which is

hereby acknowledged. Dundee and Owen mutually release each other for all and any claims each may have against each other up to date of this agreement.

The fourth document is entitled, "Sale of Improvements and Rights, MDL Section 286(12) Sales Record – Form A," and is date stamped as filed with the Loft Board on May 3, 2005.

Defendants assert that on December 8, 2005, Dundee sold the building to defendant Sandcastle, the current owner. On or about June 20, 2006, Sandcastle commenced a Civil Court holdover proceeding against plaintiff. On or about September 15, 2006, plaintiff commenced the instant action and filed an order to show cause to remove the holdover proceeding to this court and consolidate it with the instant action. By order dated December 22, 2006, this court granted plaintiff's motion for removal and consolidation.

In the instant action, plaintiff alleges, *inter alia*, that defendant landlord made fraudulent representations to him and filed fraudulent documents with the Loft Board in connection with the purported sale and transfer of his rights to the apartment under the Loft Law. Seeking damages and equitable relief, the complaint asserts eleven causes of action: 1) fraud and misrepresentation; 2) intentional infliction of emotional distress; 3) punitive damages; 4) rescission; 5) rent overcharges; 6) deceptive business practices in violation of General Business Law §349; 7) conversion; 8) attorney's fees; 9) an injunction staying and consolidating the Civil Court holdover proceeding with the instant action; 10) removal and consolidation of the holdover proceeding with instant action; and 11) breach of the warranty of habitability.

Defendants appeared and answered asserting affirmative defenses and counterclaims, including counterclaims for rent arrears in the amount of \$241,900, use and occupancy and attorney's fees. The parties conducted discovery and on June 18, 2008, plaintiff filed a note of

issue which included a demand for a jury trial. Defendants are now moving to strike the jury demand and by separate motion, for summary judgment dismissing the second, third, fifth, sixth and seventh causes of action in the complaint. For the reasons stated below, the motions are both granted.

The second cause of action for intentional infliction of emotional distress is dismissed as plaintiff neither alleges nor establishes the degree of conduct necessary to support such a claim, i.e. conduct “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” Howell v. New York Post Co, Inc., 81 NY2d 115, 122 (1993); accord Murphy v. American Home Products Corp., 58 NY2d 293, 303 (1983); Graupner v. Roth, 293 AD2d 408 (1st Dept 2002); Seltzer v. Bayer, 272 AD2d 263 (1st Dept 2000); Walentas v. Johnes, 257 AD2d 352, 353 (1st Dept), lv app disp 93 NY2d 958 (1999).

The third cause of action is dismissed, as a claim for punitive damages is not properly pleaded as a separate cause of action. See Supreme Automotive Mfg v. Continental, 126 AD2d 153 (1st Dept), app disp 69 NY2d 1038 (1987). While plaintiff contends that he is seeking punitive damages in connection with his claims for fraud and breach of the warranty of habitability, he fails to demonstrate conduct evincing the level of high moral culpability necessary to support an award of punitive damages based on either of those claims. See e.g. Ross v. Louise Wise Services, Inc., 8 NY3d 478, 489 (2007) (punitive damages may be sought when defendant’s wrongdoing is not simply intentional but evinces a high degree of moral turpitude and demonstrates such a wanton dishonesty as to imply a criminal indifference to civil obligations); Gruber v. Craig, 208 AD2d 900 (1st Dept 1994) (imposition of punitive damages

not unreasonable where landlord's conduct so flagrant as to transcend mere carelessness, since landlord had notice of the hazardous condition for a significant period of time, and the risk to tenant was great); Minjak v. Randolph, 140 AD2d 245 (1st Dept 1988) (record supported jury award of punitive damages based on tenant's breach of warranty of habitability claim, given dangerous and offensive manner in which landlord permitted construction work to be performed, the landlord's indifference to the health and safety of others in failing to respond to the tenants' repeated complaints of dust, sand and water leak problems, and the landlord's disregard for the rights of others, so as to imply a criminal indifference to civil obligations, rising to the level of "high moral culpability"). Plaintiff's claim for punitive damages, therefore, must be dismissed.

The fifth cause of action for rent overcharges is dismissed in its entirety as time-barred. A tenant's claim for rent overcharges accrues and the four-year statute of limitations set forth in CPLR 213-a begins to run when the first overcharge is alleged. See Direnna v. Christensen, 57 AD3d 408 (1st Dept 2008); Mozes v. Shanaman, 21 AD3d 854 (1st Dept 2005), lv app den 6 NY3d 715 (2006). A plaintiff cannot avoid the four-year limitations period by amending his complaint to withdraw his claim for earlier months of rent overcharge. See Direnna v. Christensen, supra. Here, plaintiff commenced the instant action in 2006 and the complaint alleges rent overcharges for the "past 13 years." Since this action was not commenced until 13 years after the first alleged overcharge, plaintiff's claim for rent overcharges is barred entirely by the four-year statute of limitations. See id; Mozes v. Shanaman, supra.

The sixth cause of action for deceptive business practices in violation of General Business Law §349 is dismissed as without merit. Contrary to plaintiff's assertion, the instant action is not based upon "consumer oriented" conduct affecting the public at large, but involves a

landlord/tenant dispute concerning a single loft apartment, which is unique to the parties. See New York University v. Continental Insurance Co., 87 NY2d 308, 320-321 (1995); Oswego Laborers' Local 214 Pension Fund v. Marine Midland Bank, N.A., 85 NY2d 20, 24-27 (1995); Biacone v. Bossi, 24 AD3d 582 (2nd Dept 2005).

In support of his seventh cause of action for conversion, plaintiff asserts that defendants' alleged illegal rent overcharges have resulted in a "conversion of funds that are owing to me." To establish a claim for conversion, plaintiff must demonstrate that he has legal ownership or an immediate right of possession to specifically identifiable funds, and that defendants exercised unauthorized dominion over such funds to the exclusion of his rights. See Bankers Trust Co. v. Cerrato, Sweeney, Cohn, Stahl & Vaccaro, 187 AD2d 384 (1st Dept 1992). Plaintiff's alleged rent overcharges are not the proper subject of a conversion claim. At best, plaintiff asserts an arguable statutory or contractual right to refund of monies voluntarily paid, which does not constitute an immediate right to possession of the claimed funds. Thus, the seventh cause of action must be dismissed.

Finally, defendant's motion to strike plaintiff's jury demand is granted. In view of the jury waiver provisions in the 1994 and 2005 leases, and plaintiff's assertion of equitable claims for rescission and injunctive relief, he has waived his right to a jury trial. See Mercantile & General Reinsurance Co., PLC v. Colonial Assurance Co., 82 NY2d 248 (1993); Hudson View II Assocs v. Gooden, 222 AD2d 163 (1st Dept 1996).

Accordingly, it is hereby

ORDERED that defendants' motion for summary judgment is granted and the second, third, fifth, sixth and seventh causes of action in the complaint are severed and dismissed, and the

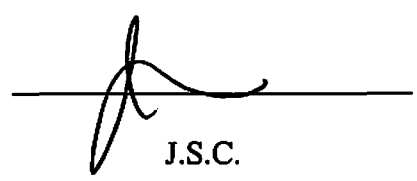
action shall continue as to the remaining causes of action; it is further

ORDERED that defendants' motion to strike the jury demand is granted; and it is further

ORDERED that the parties are directed to appear for a pretrial conference on July 30, 2009 at 4:00 p.m. in Part 11, Room 359, 60 Centre Street.

DATED: July 16, 2009

ENTER:


J.S.C.

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JUL 24 2009
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