

Binder v Bailey's Bay of N.Y., Inc.

2009 NY Slip Op 33469(U)

January 8, 2009

Supreme Court, New York County

Docket Number: 104411/2009

Judge: Jane S. Solomon

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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 55

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BRYAN BINDER and SUSAN BINDER,

Plaintiffs,

Index No.: 104411/2009

-against-

BAILEY'S BAY OF NEW YORK, INCORPORATED,

DECISION and ORDER

Defendant.

FILED

JAN 11 2009

NEW YORK COUNTY CLERK'S OFFICE

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JANE S. SOLOMON, J.:

On March 31, 2009, Plaintiffs, Bryan Binder and Susan Binder, commenced this lawsuit seeking to control their tenancy in Unit 31-F/G in the building located at 161 West 61st Street, New York, New York (Apartment), which condominium unit is owned by defendant. By April 7, 2009, defendant commenced a holdover proceeding against plaintiffs in the Civil Court entitled *Baileys Bay of New York, Incorporated v. Bryan Binder and Susan Binder*, Index No. 064372/2009 (the Holdover). Before me are a pre-answer motion by the defendant to dismiss only one of the six claims in the complaint and a separate motion by plaintiff's to consolidate the two lawsuits in this court.

The parties' lease dated March 4, 2004 expired on March 31, 2006, but has a renewal provision which provides that:

"Tenant may extend this Lease for an additional term of one year at a reasonable monthly real to be agreed upon, depending on market conditions. Rate increases are to be limited to no more than 5.0% in any one given year. Tenant shall have the option to renew this lease in the same manner, for a total Lease Term of up to 5 years [from] Lease start."

FACTS

Notwithstanding the foregoing text in the lease, the parties entered into three one-year extensions on April 1, 2006, April 1, 2007 and April 1, 2008, with a rent increases of 8% for year one, 6% for year two and 6% for year three. Plaintiffs allege that they agreed to the higher rent increases in exchange for defendant's agreement to permit them to exercise two further one-year options, for 2009 and 2010 at the rate of the lesser of a 5% increase or the fair market value. Defendant denies the existence of such an agreement.

Plaintiffs complaint seeks: First, declaratory judgment that they timely exercised their right to renew the lease for longer than the five year term; second, constructive eviction; third, breach of contract; fourth, negligent repair of the premises; fifth, unjust enrichment; and sixth, fraud, in that plaintiffs relied on Defendant's assertion that they could extend their lease at a lower rate. All but the first could be asserted in the holdover proceeding.

DISCUSSION

A. Motion to Dismiss:

Defendant argues that count two of the complaint fails to state a claim against it. After referring to the lease and the agreed upon and disputed renewals, the second cause of action states:

21. As a result of significant damage to the apartment, plaintiffs were unable to utilize the entire premises during a period of their tenancy, resulting in plaintiff's constructive eviction from a substantial portion of the apartment.

22. By reason of the foregoing, plaintiffs have been damaged . . ."

(Complaint, ¶21, 22).

"To be an eviction, constructive or actual, there must be a wrongful act by the landlord which deprives the tenant of the beneficial enjoyment or actual possession of the demised premises" (*Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 82 [1970]). This claim does not describe the damage or its cause or refer to any conduct of defendant. Furthermore it does not allege that Defendant engaged in any wrongful acts which deprived Plaintiffs of possession. Accordingly, the motion to dismiss it must be granted.

B. Consolidation:

Defendant objects to consolidation because the Holdover is a summary proceeding.

"CPLR 602 (b) authorizes the Supreme Court to remove an action or proceeding pending in another court for consolidation with the Supreme Court action. However, the Civil Court is the preferred forum for landlord-tenant disputes, and a summary proceeding should be removed only where the Civil Court is unable to afford the parties complete relief" (*Spain v. 325 West 83rd*

Owners Corp., 302 AD2d 587 [1st Dept, 2003]).

Because continuation of the Holdover depends on the outcome of the first claim in the complaint, for which the Civil Court lacks jurisdiction, the Holdover should be joined with this lawsuit.

CONCLUSION

For the foregoing reasons, it hereby is

ORDERED that Defendant's motion to dismiss the second cause of action (motion sequence 01) is granted and said claim is dismissed; and it further is

ORDERED that the defendant is directed to serve an answer to the complaint within 20 days after service of a copy of this order with notice of entry; and it further is

ORDERED that the Plaintiffs' motion to consolidate (motion sequence 02) is granted and the above-captioned action is consolidated with *Baileys Bay of New York, Incorporated v. Bryan Binder and Susan Binder*, Civil Court (New York County) Index No. 064372/2009; the actions are consolidated under Index No. 104411/2009 of the New York State Supreme Court, New York County, and the consolidated action shall bear the following caption:

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

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BRYAN BINDER and SUSAN BINDER,

Plaintiffs,

Index No.: 104411/2009

-against-

BAILEY'S BAY OF NEW YORK,
INCORPORATED,

Defendant.

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And it further is

ORDERED that the Clerk of the Civil Court, New York County, shall transfer the papers on file under Index No. 064372/2009 to the Clerk of this Court upon service of a certified copy of this order and payment of the appropriate fee, if any; and it further is

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it further is

ORDERED that the claims of *Baileys Bay of New York, Incorporated* in the Civil Court Action are deemed counterclaims against Plaintiffs unless defendants chose to replead the claim as a counterclaim for ejectment in its answer herein and discontinue the Holdover; and it further is

ORDERED that upon service on the Clerk of this Court of

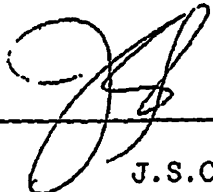
a copy of this order with notice of entry and receipt of the papers from the Civil Court, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the foregoing, and it further is

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it further is

ORDERED that counsel shall appear for a preliminary conference in Part 55, 60 Centre Street, Room 432, New York, NY, on March 8, 2010 at noon.

Dated: January 8, 2009

Enter:



J.S.C.

JAMES S. GOLOBREN