

Matter of El v Halprin
2010 NY Slip Op 30040(U)
January 3, 2010
Supreme Court, New York County
Docket Number: 114147/2007
Judge: Paul G. Feinman
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY
HON. PAUL G. FEINMAN

PRESENT: _____
Justice

PART 12

Index Number : 114147/2007

KAHIR, EL

VS.

573W 192ND ST. LLC.,

SEQUENCE NUMBER : 004

OTHER RELIEFS

INDEX NO. 114147/07

MOTION DATE 10-1-09

MOTION SEQ. NO. 804

MOTION CAL. NO. 79

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

attached

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion:

**PEITION IS DECIDED IN ACCORDANCE WITH
THE ANNEXED DECISION, ORDER AND JUDGMENT.**

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

UNFILED JUDGMENT

This judgment has been filed and will
and will
obtain as
appear in
1912.

New York County

Dated: 1/3/2010 12:32 PM Paul G. Feinman J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 12

-----X
In the Matter of Kahir El, Martiza Cardenas, and
Juan Moronta,

Petitioners,

Index Number 114147/2007

against

Mot. Seq. Nos. 004 & 005

Judge Halprin, Judge Lao, Judge Badillo, Judge
McCooe, 573 W. 192 ST. LLC, Novick,
Edelstein, Lubell, Reusnab, Wassnerman
& Leventhal, P.C.,

**DECISION, ORDER and
JUDGMENT**

Respondents.

-----X
For the Petitioners:

Kahir El, *pro se*
573 W 192nd St., Apt 1C
New York, NY 10040-3351

For Judicial Respondents:

Andrew M. Cuomo, Esq.
NYS Attorney General
By: Charles F. Sanders, Esq.
120 Broadway, 24th Floor
New York, NY 10271

For 573 W 192 St. LLC:

Novick, Edelstein, Lubell, Reisman, Wasserman &
Leventhal, P.C.
By: Paul Finkelstein, Esq.
733 Yonkers Ave.
Yonkers, NY 10704

Papers considered in review of this petition for replevin and motion to reargue:

	Papers	Numbered
Mot. Seq. 004	Notice of Re-amended Verified Petition	1
	Answer and Affirmation in Opposition	2
	Affidavit of Service	3

Mot. Seq. 005 Notice of Relief Demanded

UNFILED JUDGMENT
This judgment has not been filed with the County Clerk
of New York County
2007-08-21 10:00 AM

PAUL G. FEINMAN, J.:

The motions denominated sequence numbers 004 and 005 are combined for purposes of decision.

In Motion Sequence number 004, petitioner Kahir El, who is self-represented, submits a "Re-amended Verified Petition" (*sic*) setting forth nine "causes of action" against the various respondents. Respondents Housing Court Judges Sheldon Halprin, Laurie Lau, and Gilbert Badillo and now-retired Supreme Court Justice William McCooe, collectively, the "respondent judges", answer and oppose the Re-amended Verified Petition, seeking its dismissal with

prejudice, and to bar petitioner from filing any new petitions or complaints against them without leave from this court. Respondents Novick, *et. al.*, and 573 W. 192 Street LLC, have not answered.

In Motion Sequence number 005, petitioner Kahir El seeks in essence to renew and reargue the court's Interim Decision and Order of December 12, 2007, and the Decision and Order of May 6, 2008.

For the reasons stated below, the "re-amended" (sic) petition as against the respondent judges is denied with prejudice, the motion to renew and reargue is denied, and the petition although unopposed by the other respondents, is dismissed in its entirety with prejudice.

Background

Petitioners initially commenced this proceeding pursuant to CPLR 78, seeking an order restoring them to possession of the premises at issue, 573 West 192nd Street, Apt. 1C, New York, New York 10040, following an eviction proceeding, which movant claimed was fraudulently commenced and for a return of the family furniture and possessions removed by the landlord. The respondent judges answered and opposed the petition on several grounds, including absolute judicial immunity, lack of jurisdiction, and that petitioners had an adequate remedy at law by appeal. The landlord also answered and opposed.

At oral argument on December 12, 2007, this court issued an oral interim decision on the record, and by written Interim Decision and Order of the same date, denied and dismissed the petition as to the respondent judges, and directed the landlord to re-serve its answer. Thereafter, by Decision and Order dated May 6, 2008, the court dismissed the claims of fraudulent misrepresentation, abuse of process, and intentional infliction of emotional distress as against the landlord. One of the problems in the original pleadings was whether that it was unclear as to

* 4]

whether petitioners sought monetary damages for property wrongfully converted, which would be a plenary action, or a writ of replevin for return of the family's possessions, which be a special proceeding pursuant to Article 78. The Court therefore directed the petitioners to determine which form of relief they sought, and to then file and serve either an amended complaint alleging conversion, or an amended petition seeking replevin and setting forth the property to be returned, naming only the landlord as a defendant or respondent. Petitioners were to serve their second amended petition or complaint within 45 days of the court's decision.

Analysis

The Motion to Renew and Reargue (Motion Sequence 005)

Petitioners seek leave to renew and/or reargue the Court's previous Decisions dated December 12, 2007, and May 8, 2008. In general, a motion for leave to renew under CPLR 2221(e) is based on new facts not offered in the prior motion and should include reason for the failure to include such facts (*Castillo v Zimmerly*, 260 AD2d 243 [1st Dept 1999]). In contrast, a motion to reargue under CPLR 2221(d) is allowed where the party believes the court has misapplied the facts or law in rendering a decision (see *Pro Brokerage, Inc. v Home Ins. Co.*, 99 AD2d 971 [1st Dept 1984], *app dismissed* 64 NY2d 646 [1984]). The motion is denied in its entirety as the Court is aware of no new facts, nor made aware of any misapplication of the facts or law in rendering its earlier decisions.

The "Re-amended Verified Petition" (sic) (Motion Sequence 004)

The Notice of Re-amended Verified Petition was filed with the court on August 7, 2009, according to the court's stamped copy.¹ Based on the court's earlier directive, by filing an

¹ An Amended Notice of Re-amended Verified Petition, dated August 12, 2009, corrects a portion of the earlier notice that had been whited-out and corrected by hand.

amended petition, it is understood that petitioners seek a writ of replevin. However, contrary to the Court's previous directives, the amended petition names the same Housing Court judges as well as a newly added now-retired Supreme Court justice,² names the law firm representing the respondent landlord as well as the landlord, and instead of setting forth a list of the possessions at issue, rehashes the very claims previously dismissed by the court.³

In opposition, the judges ask the court to enforce its previous orders by dismissing petitioners' Re-amended Verified Petition with prejudice, and to bar petitioners from filing any new petitions or complaints against them without leave of this court.

All nine of the "causes of action" stated in the Re-amended Verified Petition were previously dismissed by this court. It is established that, "when no appeal has been taken from a previous dismissal . . . a second action is barred on the ground of *res judicata*; and a second complaint should be dismissed." (*Flynn v Sinclair Oil Corp.*, 20 AD2d 636 [1st Dept 1964]). In *Flynn*, the plaintiff served on the defendants a complaint that, "except for an added irrelevant allegation [was] virtually identical to one previously dismissed" by the trial court, and although the trial court admitted the second complaint, the Appellate Division reversed the trial court's decision, holding that the second action was "barred on the ground of *res judicata*, and the [second] complaint should have been dismissed" (20 AD2d at 637, citing *Linton v Perry Knitting Co.*, 295 NY 14 [1945] [holding that "[a]part from any question of *res adjudicata*, an action is

² Petitioner's Affidavit in Reply to Answer and Affirmation in Opposition (Motion Seq. 5, Document 3) asserts that, among other things, that "newly discovered evidence of a conflict of interest" justifies the reassertion of the claims against the respondent judges.

³ The nine "causes of action" which petitioner asserts in the present Reamended Verified Petition are: intentional infliction of emotional distress; promissory estoppel; abuse of process; misrepresentation and fraudulent inducement; trespass to chattel; negligent infliction of emotional distress; deprivation and violation of rights under the New York Constitution Article I, § 11; civil conspiracy; and breach of fiduciary duty.

properly dismissed when it is based upon a complaint similar in all respects to that in an earlier action between the same parties which had been finally dismissed, even though the earlier judgment was not on the merits.”)). Laying aside the question of petitioners’ timeliness,⁴ their Reamended Verified Petition, like the plaintiff’s second complaint in *Flynn, supra*, merely restates causes of action which were previously dismissed, and merits dismissal on those grounds alone.

Furthermore, while the court’s prior orders did not recite that certain claims were dismissed “with prejudice” or “on the merits,” the Court of Appeals has held that, “CPLR 5013 does not require that the prior decision of the court contain the precise words ‘on the merits’ in order to be given *res judicata* effect; it suffices that it appears from the judgment that the dismissal was on the merits.” (*Strange v Montefiore Hosp. & Med. Ctr.*, 59 NY2d 737, 738 [1983] [quotation and citation omitted]). By its orders of December 12, 2007, and May 6, 2008, this Court dismissed all the causes of action against the respondent judges which are again contained, some with additional or slightly different allegations, in the Reamended Verified Petition. Petitioners' claims against them in the Reamended Verified Complaint are precluded by the doctrine of *res judicata*, and are accordingly dismissed.

The respondent judges also request that the Court bar petitioners from filing any new petitions or complaints against them without leave from the Court. When the claims against a defendant to an action have been dismissed, the court no longer has jurisdiction over that

⁴ Although the amended petition was filed more than 45 days after the May 6, 2009, decision, petitioners allege they did not receive notice of the order. Petitioner Kahir El calls attention to the transcript of proceedings dated January 16, 2008, where the court states, “you’ll get a decision in the mail,” after which the 45 days would begin to run. (Pet. Notice of Relief Demanded, Ex. 3, Transcript at 4: 7).

defendant (*Felice v St. Agnes Hosp.*, 65 AD2d 388 [2d Dept 1978]). It is proper for the court to then issue an order to amend the caption of the action so as to delete the name as a party defendant pursuant to CPLR 305(c) (*Felice v St. Agnes Hosp.*, at 390). Pursuant to this Court's Order of December 12, 2007, the petition against the Honorables Halprin, Lau, and Badillo was dismissed in its entirety, and petitioners were ordered in the Court's Decision and Order of May 6, 2008, to remove their names from the caption in future papers, if any. Petitioners have not done so. Rather, they seek to add the name the Honorable William McCooe as a respondent, although an examination of the Reamended Petition finds no specific allegations concerning that now-retired justice in the third, sixth, seventh, or ninth causes of action, and does not address the fact that a judge, who was actively sitting at the time of the claimed acts, is cloaked with absolute immunity when conducting judicial business (*see Rosenstein v State of N.Y.*, 37 AD3d 208 [1st Dept 2007]). .

A court has the power, on the facts and in the exercise of discretion, to impose various sanctions on a plaintiff, including the power to dismiss a pleading on the ground of *res judicata*, as well as the power to enjoin self-represented litigants from bringing further suits against a particular defendant without prior judicial approval. (*Novel v Salzberg*, 253 AD2d 684 [1st Dept 1998]). Here, the court previously ordered the removal of the Honorables Halprin, Lau, and Badillo from the caption, and directed petitioners to tailor the pleadings to claims of either conversion or for a writ of replevin. In light of petitioners' failure to amend the caption and limit the claims as instructed, and recognizing that the respondent judges were and are not now proper parties to this litigation, the court hereby directs that the Clerk of Court is not to accept any new or amended petition or complaint from the petitioners naming these judicial respondents arising out of this factual scenario without prior leave of the Court.

Furthermore, the Reamended Verified Petition fails to comply with the Court's prior directive to set forth the property which was allegedly removed and held by respondent landlord, so as to properly seek a writ of replevin. In addition, the document does not make out a claim of conversion, even were the Court to overlook the failure in form by petitioners to file an amended plenary complaint if they sought monetary damages. To the extent that either cause of action survived this Court's previous Orders of December 12, 2007, and May 6, 2008, those surviving claims are now also dismissed, with prejudice, as against both the landlord and the newly added law firm representing the landlord.

It is

ORDERED and ADJUDGED that the Reamended Verified Petition (Mot. Seq. 004) is denied and the proceeding is dismissed with prejudice as against all parties; and it is further

ORDERED that the motion to renew or reargue is denied (Mot. Seq. 005); and it is further

ORDERED that, absent leave of this Court or the Administrative Judge of this Court, the Clerk of Court is enjoined from accepting from petitioners Kahir El, Maritza Cardenas, and Juan Moronta for filing any motions or new or amended petitions and complaints against the Honorable Sheldon Halprin, Judge Laurie Lao, Judge Gilbert Badillo, and retired Justice WilliamMcCoee, which arise out of the facts which resulted in this petition.

The foregoing shall constitute the decision, order, and judgment of this court.

Dated: January 3, 2010
New York, New York

1230 PM

Paul J. Ginn

J.S.C.

Courtesy copies mailed.

FILED
JAN 03 2010
CLERK OF THE COUNTY CLERK
COUNTY OF NEW YORK
7
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