

Dis v Bellport Area Community Action Comm.

2010 NY Slip Op 31817(U)

July 15, 2010

Sup Ct, Suffolk County

Docket Number: 11837-2010

Judge: Emily Pines

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SUPREME COURT - STATE OF NEW YORK
COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY

Present: **HON. EMILY PINES**
 J. S. C.

Original Motion Date: 05-27-2010
 Motion Submit Date: 06-22-2010
 Motion Sequence : 001 MOTDCASEDSIP

_____ X

LISA L. DIS AND JEAN-CLAUDE DIS,

Plaintiffs,

-against-

**BELLPORT AREA COMMUNITY ACTION
 COMMITTEE d/b/a BOYS AND GIRLS CLUB
 OF THE BELLPORT AREA,**

Defendant.

_____ X

Attorney for Plaintiff
 Nicole M. Cardiello, PC
 66A Medford Avenue
 Patchogue, New York 11772

Attorney for Defendant
 David Falkner, Esq.
 140 Fell Court
 HAuppauge, New York 11788

ORDERED, that the motion (motion sequence number 001) by plaintiffs for summary judgment is denied, and pursuant to CPLR §3212(e), summary judgment is granted to the defendant and this action is dismissed.¹

Background

The issue in this case concerns whether the existence of an automatic stay acted to prevent plaintiffs from enforcing a warrant of eviction. The instant action arises out of a prior lawsuit between the two parties. The relationship between the plaintiffs, Lis, and the defendant, Bellport Area Community Action Committee (hereinafter "BACAC"),

¹ The Court wishes to acknowledge the valuable aid of Hayley Morgan, legal intern, for her assistance in drafting this Decision.

is one of landlord-tenant, respectively. The parties entered into a lease agreement of a building located at 1685 Montauk Hwy., Bellport, New York 11713, County of Suffolk (hereinafter the “subject premises”) in February 2002. In February 2006 BACAC removed the bulk of their business out of the subject premises and gave notice they would be terminating the lease by May 1, 2006. The plaintiff alleged that the defendant did not remove all of their belongings from the subject premises, and subsequently the plaintiff filed the initial lawsuit in the Sixth District Court in Suffolk County against the defendant seeking rent owed and a warrant of eviction.

On October 2, 2007, the District Court rendered a judgment, in favor of the plaintiffs for possession of the subject premises, as well as \$35,970.00. The Court further ordered that a warrant of eviction be issued. Thereafter, on October 5, 2007 the defendant filed a notice of appeal. Pursuant to CPLR §5519(a)(2), the defendant deposited an undertaking with the Court in the amount of \$35,970.00. Ultimately, the Appellate Term dismissed the appeal on January 13, 2009. Plaintiffs had the Suffolk County Sheriff execute the warrant of eviction on June 13, 2009 and the within action ensued.

Procedural History

Plaintiffs commenced the within action by the filing of a Summons and Verified Complaint on or about April 6, 2010, seeking declaratory, and equitable relief for compensatory and reasonable costs for inter alia, breach of contract, damages to property, and for retention of property owned in whole or in part by plaintiffs. The plaintiffs have alleged four causes of action. The first cause of action is for \$42,230.00,

the amount of money plaintiffs claim to have lost during the time period between the appeal of the first lawsuit (Oct. 2007), and the time at which the Suffolk County Sheriff executed the eviction warrant at the subject premises (June 13, 2009) as a result of its allegation on that it was “out of possession”. The second cause of action seeks \$30,750.00, the amount of money plaintiffs assert is necessary to repair damage done to the property during the aforementioned time period (i.e., during the alleged stay period). The third cause of action is for \$375.00, which is one-half of the increase in real estate taxes, which was pursuant to the lease again during the period of such purported stay. Lastly, the fourth cause of action is for court costs and legal fees, in the amount of \$5,000.

Defendant’s answer, filed on April 26, 2010 contained five affirmative defenses; res judicata, statute of frauds, lack of consideration, failure to state a claim upon which relief can be granted, and failure to mitigate damages.

Plaintiffs now move for summary judgment pursuant to CPLR §3212 and defendant opposes the motion.

Discussion

It is well settled that to obtain summary judgment, the moving party must make a prima facie showing of entitlement to judgment as a matter of law, offering sufficient evidence to demonstrate the absence of any material issues of fact. **Goldberger v. Brick & Ballerstein, Inc.**, 217 A.D.2d 682, 629 N.Y.S.2d 813 (2d Dept. 1995) (internal citations omitted). The burden then shifts to the party opposing the

motion to come forward with proof in admissible form demonstrating there are genuine issues of material fact which preclude the granting of summary judgment. **Zayas v. HalfHollow Hills Cent. School Dist.**, 226 A.D.2d 713, 641 N.Y.S.2d 701 (2d Dept. 1996). Furthermore, pursuant to CPLR §3312(e) the Court, on its own, may award summary judgment “in favor of any one or more parties, to the extent warranted, on such terms as may be just”.

The issue of whether or not the eviction warrant was subject to the automatic stay pending the appeal is provided for under CPLR §5519(a).

CPLR §5519(a) provides in relevant part:

- (a)**Stay without court order.** Service upon the adverse party of a notice of appeal or an affidavit of intention to move for permission to appeal stays all proceedings to enforce the judgment or order appealed from pending the appeal or determination on the motion for permission to appeal where:
2. the judgment or order directs the payment of a sum of money and an undertaking in that sum is given that if the judgment or order is appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the amount directed to be paid by the judgment or order, or the part of it as to which the judgment or order is affirmed; or
 6. the appellant or moving party is in possession or control of real property which the judgment or order directs be conveyed or delivered, and an undertaking is a sum fixed by the court or original instance is given that the appellant or moving party will not commit or suffer to be committed any waste and that if the judgment or order appealed from, or any part of it, is affirmed, or the appeal is dismissed, the appellant or moving party shall pay the value of the use and occupancy of such property, or the part of it as to which the judgment or order is affirmed, from the taking of the appeal until the delivery of possession of the property; if the judgment or order directs the sale of mortgaged property and the payment of any deficiency, the undertaking shall also provide that the appellant or moving party shall pay any such deficiency; or
 7. the judgment or order directs the performance of two or more of the acts specified in subparagraphs two through six and the appellant or moving party complies with each applicable subparagraph.

The plaintiffs have failed to meet their burden of demonstrating that they are entitled to judgment as a matter of law. The District Court litigation between the two parties coupled with CPLR §5519(a) established plaintiffs’ right to possession of the

Specifically, CPLR §5519(a)(2) provides for the undertaking that the defendant filed with the Court in the amount of \$35,970.00 after the judgment was rendered in the first lawsuit. The defendant's appeal and payment of the judgment amount stayed the payment of this sum of money to the plaintiff. However, the Court finds no evidence in the record that a fixed sum was paid to provide for an undertaking in an effort to stay the warrant eviction pursuant to CPLR §5519(a)(6). In other words, plaintiffs were not "out of possession" for the period during which they seek damages from defendant.

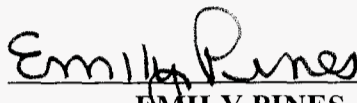
In this case, the facts presented demonstrate that subparagraph (a)(2) was complied with, and therefore the monetary award was the only part of the judgment that was stayed pending the appeal pursuant to CPLR §5519(a)(7). **Essa v. Weiner**, 678 N.Y.S.2d 481 (Supreme Court, Kings County 1998). (Moving party must comply with each applicable subparagraph if he wishes to reap the benefits of an automatic stay.)

Here, since the Court did not fix an undertaking to stay the warrant of eviction, plaintiffs were entitled to execute the warrant of eviction against the defendant pursuant to CPLR §5519(a)(6) and the issuance of the warrant terminated the landlord-tenant relationship. **Centre Great Neck, LLC. v. Rite Aid Corp.**, 739 N.Y.S.2d 420 (2d Dept. 2002). (Dismissing so much of the complaint as sought to recover rent for the period after the issuance of a warrant of eviction.) Therefore, the plaintiffs are not entitled to the rent for the time period following the issuance of the warrant of eviction because they were in a position to enforce the warrant and did not do so. Likewise, since the plaintiff was entitled to possession for this time period, plaintiffs may not recover for the damages that allegedly occurred to the property during the time period of the appeal.

Based on the foregoing, the plaintiffs motion pursuant to CPLR §3212 for summary judgment is denied and in searching the record, pursuant to CPLR §3312(e), this Court grants summary judgment to the defendant and the action is dismissed.

This constitutes the **DECISION** and **ORDER** of the Court.

Dated: July 15, 2010
Riverhead, New York



EMILY PINES
J. S. C.

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