Drasser v STP Assoc., LLC

2010 NY Slip Op 33484(U)

December 10, 2010

Sup Ct, Nassau County

Docket Number: 15465/09

Judge: Thomas P. Phelan

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SCAN

SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present:

HON. THOMAS P. PHELAN,

Justice

TRIAL/IAS PART 3
NASSAU COUNTY

NANCY DRASSER, ROBERT DYKMAN, ROGER DUPRE, DALE EBERSBERGER, ANDREW FROMIA, DARLENE FUNK, NELSON HESS, DIANE JOHNSON, EDWARD KESSLER, ALEXANDRA KOSTOS, CATHERINE LAKE, ROSEANN McCANN, JEANNETTE JAROSLAWSKI, ELIZABETH McCAULEY, JACQUELINE NARGI, ROSE-RENATE KARSCH, BARBARA PEDOTE, JOSEPHINE POEMMERL, RANDI PORTNOY, PHILIP SCHMIDT, CONNIE SESSA, ANNA SESSA, CATHERINE SNYDER, DEBBIE ST. CLAIR, WILLIAM STONESTREET, SUSAN STONESTREET, and THERESA WALCH,

ORIGINAL RETURN DATES:04/22/10 (#1)
05/13/10 (#2)
SUBMISSION DATE: 11/03/10
INDEX No.: 15465/09

Plaintiff(s),

-against-

STP ASSOCIATES, LLC,

MOTION SEQUENCE #1,2

Defendant(s).

The following papers read on this motion:

Order to Show Cause...	1
Cross-Motion..	2
Affidavits of Plaintiffs..	3,4
Affidavit of Nelson Hess.......................................	5
Affidavit of Larry Rush...	6
Affidavit of Kevin Tynan..	7
Supplemental Affidavit of Jeffrey A. Miller..................	8
Plaintiffs' Memorandum of Law................................	9,10
Defendant's Memorandum of Law.............................	11,12

Defendant, STP Associates, LLC ("STP"), purchased the Syosset Trailer Park located at 80 West Jericho Turnpike, Syosset, New York, in 2007. Plaintiffs are the remaining tenants at the trailer park. Real Property Law § 233(e) requires each manufactured home park owner to offer each tenant the opportunity to enter into a lease with a term of not less than one year. On

June 1, 2007, STP sent each tenant of the park a written lease in which it offered a one-year rental agreement. None of the plaintiffs executed the lease agreement. Therefore, as of September 1, 2007, they became month-to-month tenants of the park. In September 2007, STP terminated plaintiffs' tenancies.

In November 2007, it commenced eviction proceedings against each of the individual plaintiffs in the Nassau County District Court, First District, Landlord/Tenant Part. In response to those proceedings, plaintiffs commenced a lawsuit in Nassau County Supreme Court, entitled *Amatuzio v STP,* index number 021154/07 (the prior action). The first cause of action sought to void the sale of the park from Hormi Holding to STP based on an alleged violation of RPL §233(b)(6). The second cause of action sought a court order directing STP to provide a six-month notice of change of use pursuant to RPL § 233 prior to commencing eviction proceedings. The third cause of action sought an order directing STP to modify the proposed written lease to include terms and conditions favorable to and desired by plaintiffs. The fourth cause of action alleged that the proposed rent increase by STP violated RPL § 233(g)(3) and sought an order directing compliance with that requirement.

Simultaneously with the filing of the prior action, plaintiffs sought and obtained a temporary restraining order from this court preventing STP from continuing the holdover proceedings and the District Court from considering the proceedings or issuing a judgment of eviction. In denying plaintiffs' request for a preliminary injunction, this court determined that STP offered leases to plaintiffs in accordance with the statute. None were executed, thereby creating a month-to-month tenancy. (Decision of the Hon. Thomas P. Phelan, dated 3/20/08, *Amatuzio, et al.* (2008 NY Slip. Op. 30867(U), Sup. Ct. Nassau County) (p. 4) (the prior decision). On April 29, 2008, plaintiffs filed for, and were granted, a further stay of the summary proceedings by the Appellate Division, Second Department.

One of the major contentions of plaintiffs in the prior action was that they were entitled to a six-month change-of-use notice before the commencement of a holdover proceeding against residents of a manufactured home park. In the context of the prior action, on May 30, 2008, the parties agreed in a written stipulation to the following: 1) Defendant STP retroactively withdrew all previous Notices to Terminate served on plaintiffs as if the same had never been served and retroactively restored the tenancies. The pending Holdover Summary Proceedings were withdrawn. 2) In accordance with Real Property Law § 233(b)(6), STP agreed to serve six (6) months Change of Use notices on each plaintiff herein prior to commencing a Summary Holdover Proceeding based on a month-to-month termination. 3) The second cause of action in plaintiff's Amended Complaint was withdrawn. 4) Plaintiffs withdrew their appeal to the Appellate Division Second Department.

In June 2008, plaintiff served a Six Month Change of Use Notice, pursuant to Real Property Law § 233(b)(6) advising defendants that the owner proposed a change in the use of the park and that their month-to-month tenancies were terminated as of December 31, 2008. Pending the expiration of the notices of termination, defendant filed Non-Payment Summary

Proceedings, which were concluded by stipulation. Plaintiffs settled the non-payment proceedings by paying approximately 19 months rent of the 23 claimed due.

On August 6, 2008, the prior action was discontinued with prejudice by stipulation. Three homeowners residing at the park (Giner Bonner, Marcy Rappaport and Lisa Caramico) were not provided with the Notice of Termination when the other plaintiffs were served. Defendant was prohibited by federal bankruptcy law from giving notice to those three homeowners (United States Bankruptcy Code, 11 U.S.C. § 362). The bankruptcy stay relative to these three residents was lifted by the United States Bankruptcy Court, Eastern District of New York, on March 9, 2010 (Orders of the Hon. Robert E. Grossman, dated March 9, 2010). These homeowners were served Notices of Change In Use on March 17, 2010, with a termination date of September 30, 2010. The court notes that on January 26, 2010, defendant also served Notices of Termination on each plaintiff advising that each of their tenancies would terminate on March 31, 2010.

In the action now before the court, plaintiffs again seek a preliminary injunction pursuant to CPLR 6311 enjoining STP from commencing any eviction proceedings against plaintiffs in reliance on its service on plaintiffs of the Notice to Quit dated September 15, 2009, that stated "Six Month Notice of Proposed Change in Use of the Land Comprising Syosset Trailer's Park." Plaintiffs also seek an order directing summary judgment pursuant to CPLR 3212 on the first cause of action, declaring and setting forth the rights of the parties, specifying that plaintiffs are in good standing and were entitled to a written lease for a team of at least twelve months on or before October 1, 2009, containing terms and conditions, including provisions for rent and other charges, consistent with all rules and regulations promulgated by the manufactured home park owner/operator prior to the date of the offer, with rent charges identical to the rents currently paid by plaintiff; on the second and third causes of action, declaring and setting forth the rights of the parties, specifying that the Notices to Quit are null and void and of no effect; on the fourth cause of action, permanently enjoining STP from serving any further notices pursuant to RPL § 233, without leave of the court, on any of plaintiffs or until such time as the court may determine that STP is in compliance with the requirements of RPL § 233(b)(6)(i); and declaring that pursuant to RPL § 233(b)(6), STP may only move forward to evictions based on an actual change in use, not a proposed change in use.

Defendant STP cross-moves for an order referring this action to the Hon. Thomas P. Phelan, who presided over the related prior action, between the parties; granting summary judgment pursuant to CPLR 3212 relative to plaintiffs' Amended Complaint on the first cause of action that the tenants are not entitled to a further lease offering and that STP has complied in all respects with Real Property Law § 233; on the second cause of action that defendant's September 15, 2009 Change of Use Notice is valid and complies with Real Property Law § 233; on the third cause of action that the stipulation of discontinuance entered into between counsel for the parties on August 4, 2008, discontinuing the prior action is valid and enforceable; on the fourth cause of action that plaintiffs are not entitled to a permanent

injunction enjoining defendant from serving any further notices without leave of court; and dismissing the fifth and sixth causes of action on the grounds that defendant has not breached the warranty of quiet enjoyment nor harassed plaintiffs by service of notices and pleadings it was required to serve in order to protect its rights, pursuant to statute, including RPL § 233 and RPAPL Article 7.

By short form order dated October 14, 2010, Justice F. Dana Winslow transferred the within action to Justice Thomas P. Phelan who made several decisions in the prior action involving many of the same parties' issues and applications for relief.

The court reiterates its prior determination in the prior action involving the same parties and issues that STP offered leases to plaintiffs in accordance with RPL § 233. None were executed, thereby creating a month-to-month tenancy. When the parties' counsel stipulated in District Court that the tenant would be "in good standing" upon paying the rent arrears, it meant that as "holdover tenants" they were current in their rent payment and could not be evicted for non-payment. The stipulation in District Court in no way changed or modified this court's prior determination that plaintiffs, by refusing to accept the lease offer, continue to remain holdover tenants.

The salient issue now before the court and one of first impression is whether the Notice of Termination in the within action that states "Please take notice that STP Associates, LLC is proposing to change the use of the land comprising the Syosset Trailer Park to a use other than as manufactured home park," without further factual elaboration, is sufficient predicate notice under Real Property Law § 233(b)(6)(i) and Real Property Law § 233(d).

Real Property Law § 233(b)(6)(I) states:

> The manufactured home park owner or operator proposes a change in the use of the land comprising the manufactured home park, or a portion thereof, on which the manufactured home is located, from manufactured home lot rentals to some other use, provided the manufactured homeowner is given written notice of the proposed change of use and the manufactured home- owner's need to secure other accommodations. Whenever a manufactured home park owner or operator gives a notice of proposed change of use to any manufactured homeowner, the manufactured home park owner or operator shall, at the same time, give notice of the proposed change of use to all other manufactured home owners in the manufactured home park who will be required to secure other accommodations as a result of such proposed change of use. Eviction proceedings based on a change in use shall not be commenced prior to six months from the service of notice of proposed change in use or the end of the lease term, whichever is

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> later. Such notice shall be served in the manner prescribed in section seven hundred thirty-five of the real property actions and proceedings law or by certified mail, return receipt requested.

A court in interpreting a statute should attempt to effectuate the intent of the legislature. The starting point is always to look to the language itself and where the language of a statute is clear and unambiguous, courts must give effect to its plain meaning. *State of New York v Patricia II*, 6 NY3d 160. New language cannot be imported into a statute to give it a meaning not otherwise found therein. A court in contemplating the meaning of statutory language must avoid objectionable, unreasonable or absurd consequences. *Roberts v Tishman Speyer*, 62 AD3d 71, 81 citing *Matter of Raritan Development Corp. v Silva*, 91 NY2d 98; *Long v State of New York*, 7 NY3d 269 and McKinney's Consolidated Laws of New York Book 1, Statutes § 94, Comment at 190. See also the Memorandum of Division of Housing and Community Renewal relative to the 1994 Laws of New York.

Chapter 502 of the Session Laws (p. 2750) states:

> Section 1 of the bill amends subdivision of b of § 233 of the Real Property Law by adding a new paragraph 6, which provides that a mobile home park owner may terminate a tenancy based on a change in the use of the park or a portion thereof, provided the affected tenant is given at least six months notice of the proposed change in use.
>
> At page 2751
>
> In addition of the park owner's right to evict tenants based on a change in land use would insure that renewal leases would not institute a perpetual tenancy which would block desirable development of the land.

There is nothing in the statute that requires the Notice to Quit to set forth both legal and factual specifications for the anticipated new use of the land as argued by plaintiffs. Nor has the court found any case in this jurisdiction to support plaintiffs' position. The cases cited by plaintiff can all be distinguished from the facts in the action now before this court. For example, in *Kaycee W. 113 St. Corp. v Diakoff*, 160 AD2d 573, cited by plaintiff, the court interpreted the Notice to Quit in the context of the requirement of 9 NYCRR 2204.3 of the Rent Control Regulations that states a 30-day Notice to Quit must set forth "the ground under Section 2204.2 of this Part which the landlord relies for removal or eviction of the tenant, [and] the facts necessary to establish the existence of such ground." (9 NYCRR 2204.3[b]). There is nothing in RPL § 233 or the Memorandum in Support or any legal precedent to construe RPL § 233 in the context of or in conjunction with the Administrative Code of the

City of New York § 26-511(c)(9)(b) and the Rent Stabilization Code [see NYCRR 2524.4(a)(1)(3)] governing owner-occupied apartments sought to be withdrawn from the housing market in New York City. The Rent Stabilization Law and Rent Stabilization Code relied upon by plaintiffs require the owner to establish to the satisfaction of the Department of Housing Community Renewal (DHCR) after a hearing that he or she seeks in good faith to withdraw any housing accommodations from both the housing and non-housing rental market without any intent to rent or sell part of the building.

Moreover, "[i]n evaluating the facial sufficiency of a predicate notice in a summary eviction proceeding, the appropriate test is one of reasonableness in view of the attendant circumstances." *Oxford Towers Co., LLC v Leites*, 837 N.Y.S.2d 131 (upholding denial of tenant's motion to dismiss the holdover proceeding, finding that the notice used fairly stated the nature of the landlord's claim and the facts necessary to establish the grounds for eviction); *see also 3657 Realty Co. LLC v Jones*, 859 N.Y.S.2d 434, 435 (1st Dept. 2008) (affirming order awarding possession to landlord, finding that the notice sufficiently apprised respondent of the grounds on which she would have to defend the proceeding). The subject Notice to Quit advised the homeowners of the grounds upon which STP seeks to evict them; that STP intends to end its use of the property as a manufactured home park, and that in six months time, the homeowners would have to find other accommodations.

Plaintiffs' argument that § 233-a of the Real Property Law prevents STP from ceasing to use the property as a manufactured home park is misplaced. RPL § 233-a only applies to the sale of an operating manufactured home park. Nothing in Section § 233-a prohibits a manufactured home park owner from deciding that it no longer wants to operate a manufactured home park and invoking its right under § RPL 233(b)(6)(I).

By giving the six-month notice that it no longer desires to operate the property as a mobile home park and will clear its property for some future use other than a manufactured home park and advising the homeowners to make other accommodations, the Notice to Quit served on plaintiffs complies with the legislative intent.

In sending the termination notice and effectuating the actual eviction, defendant must act in good faith. In *Pultz v Economakis*, 10 NY3d 542 [2008], cited by the attorney for plaintiffs, a couple sought to evict the tenants in 15 rent-stabilized apartments from an East Village tenement in order to convert the 60-room tenement into their own single-family home containing a gym, a playroom, a library, five bedrooms and six bathrooms. Alistair and Catherine Economakis acquired title to the six-story tenement building on the Lower Eastside. They sent out notices that they were expecting their first child and that there was insufficient residential living space for the couple and their child in their present apartment.
The trial court enjoined the Economakises from converting their tenement into a single family house (*Pultz v Economakis*, 891 Misc3d 1022, 803 NYS 2, 20, 2005 Misc Lexis 1624). In *Pultz,* there was a concern that once the tenement was emptied of the tenants, the couple would subdivide the building into renovated apartments no longer subject to rent control rather than

use the tenement as their residence. The Court of Appeals reversed stating that:

> "Based on the foregoing, the Appellate Division correctly granted summary judgment to, and vacated the permanent injunction against, defendants [Economakis]. In so ruling, we underscore that defendants may not recover the stabilized apartment units unless and until they establish in Civil Court (at holdover proceedings against plaintiffs) their good faith intention to recover possession of the subject apartments for the husband owner's personal use as the primary residence." (*Pultz v Economakis*, 10 NY3d 542, 548.)

There is nothing in the statute that requires defendant to provide plaintiffs with "factual information" to prepare a defense to a subsequent holdover proceeding if they do not believe defendant is acting in good faith. Evidentiary matters testing defendant's good faith can be explored in discovery or at trial in a holdover proceeding. CPLR 408; *McQueen v Grinker*, 158 AD2d 355; *Cox v J.D. Realty Associates*, 217 AD2d 179; *see also, McGoldrick v DeCruz*, 195 Misc2d 414. The September 15, 2009, notice satisfied all the notice requirements of RPL § 233(b)(6)(i), as did the notices served on the tenants previously in bankruptcy.

Plaintiff's third cause of action seeks to vacate the written stipulation of discontinuance entered into between counsel for the parties on August 4, 2008, which discontinued, with prejudice, plaintiffs' prior action. As with the current action, the prior action was litigated between the same parties and contained a cause of action which sought to compel defendant to offer a one-year lease. It is well settled that "[a] stipulation [of discontinuance] with prejudice does carry *res judicata* authority" with respect to the same cause. (*Dolitsky's Dry Cleaners, Inc. v Y L Jericho Dry Cleaners, Inc.*, 203 AD2d 322, 323 citing *Rossi v Twinbogo Co.*, 193 AD2d 481, 483; 7A Carmody-Wait 2d NY Prac § 47:46, at 48). Where an action is discontinued with prejudice, *res judicata* applies. Plaintiffs cite no legal authority or factual basis as to why their claim for a lease should be revived by the passage of time or the payment of rent. When a claim is brought, and then settled with prejudice by mutual agreement, the same issues may not be re-litigated. Having interposed the claim previously, and having discontinued the claim with prejudice, plaintiffs may not re-litigate their claim for another lease offering pursuant to RPL § 233.

Plaintiffs allege that defendant's "service of Notices of Termination, commencing Holdover Proceedings, terminating Holdover Proceedings, serving so-called Six Month Notices of Change of Use, serving Notices of Non-Payment, commencing Non-Payment Proceedings, serving a second so-called Six Month Notices of Change of Use, and refusing to issue leases, is in derogation of the requirements of RPL § 233 to the extent that same is intended to protect 'manufactured homeowner' and constitute a breach of the warranty of quiet enjoyment (fifth

cause of action) and harassment" (sixth cause of action). Defendant served these notices and documents, not in derogation of statute, but rather, to protect defendant's rights pursuant to RPL Section 233 and RPAPL Article 7. Serving pleadings and notices in accordance with statutory law does not rise to the level of a breach of warranty of quiet enjoyment (fifth cause of action) or constitute harassment (sixth cause of action). *See McRedmond v Sutton Place Restaurant and Bar*, 48 AD3d 258. "In actions for damages for breach of the covenant of quiet enjoyment, a tenant likewise must show an ouster, or if the eviction is constructive, an abandonment of the premises. Here, the complaint does not contain such an allegation and, therefore, this cause of action should have been dismissed." *Genovese Drug Stores, Inc. v William Floyd Plaza, LLC*, 63 AD3d 1102. There cannot be constructive eviction if the tenants are still in possession of the premises.

To sustain its sixth cause of action alleging "harassment," plaintiffs rely on *Green v Fischbein Oliveri Rozenholc & Badillo*, 119 AD2d 345. In *Green*, plaintiff pled a cause of action for "intentional infliction of emotional harm." A cause of action for the intentional infliction of emotional distress is pleaded where it is alleged that severe mental pain or anguish is inflicted through a deliberate and malicious campaign of harassment or intimidation. The conduct must be 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. The plaintiff in *Green* alleged baseless eviction proceedings and other actions brought against plaintiff over a period of several years, severe interruptions or discontinuance of services, the drastic deterioration of plaintiff's living conditions, the interference with his mail and the verbal abuse of plaintiff and his guests.

In the within action plaintiffs allege that they were harassed by the service of notices and commencement of proceedings. The only allegation to support a claim for harassment is the service by plaintiffs with Notices to Terminate and the Commencement of Summary Proceedings which plaintiffs had the legal right to do to protect its primary interest. A cause of action for intentional infliction of emotional distress must be supported by allegations of 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." Such extreme and outrageous conduct must be clearly alleged in order for the complaint to survive a motion to dismiss" *McRedmond v Sutton Place Restaurant and Bar, Inc.*, 48 AD3d 258, 259. The allegations in the sixth cause of action fail to set forth a cause of action sounding in harassment or the intentional infliction of emotional distress and is dismissed as to a matter of law. Plaintiffs fail to set forth a cause of action sounding in harassment.

On a motion for summary judgment, the Court's function is to decide whether there is a material factual issue to be tried, not to resolve it. *Sillman v Twentieth Century Fox Films Corp.*, 3 NY2d 395, 404. A *prima facie* showing of a right to judgment is required before summary judgment can be granted to a movant. *Alvarez v Prospect Hosp.*, 68 NY2d 320; *Winegrad v New York University Med. Ctr.*, 64 NY2d 851; *Fox v Wyeth Laboratories, Inc.*,

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129 AD2d 611; *Royal v Brooklyn Union Gas Co.*, 122 AD2d 133. Defendant has made an adequate *prima facie* show of entitlement to summary judgment.

Once a movant has shown a *prima facie* right to summary judgment, the burden shifts to the opposing party to show that a factual dispute exists requiring a trial, and such facts presented by the opposing party must be presented by evidentiary proof in admissible form. *Friends of Animals, Inc. v Associated Fur Mfgrs., Inc.*, 46 NY2d 1065. Conclusory statements are insufficient. *Sofsky v Rosenberg*, 163 AD2d 240, *aff'd* 76 NY2d 927; *Zuckerman v City of New York*, 49 NY2d 557; *see Indig v Finkelstein*, 23 NY2d 728; *Werner v Nelkin*, 206 AD2d 422; *Fink, Weinberger, Fredman, Berman & Lowell, P.C. v Petrides*, 80 AD2d 781, *app dism.* 53 NY2d 1028; *Jim-Mar Corp. v Aquatic Construction, Ltd.*, 195 AD2d 868, *lv app den.* 82 NY2d 660. Plaintiffs have failed to present evidentiary facts sufficient to preclude the granting of summary judgment in favor of defendant and against plaintiffs.

It is the determination of this court that plaintiffs are not entitled to a further lease offering; defendant's Change of Use Notices comply with Real Property Law § 233 as a predicate to commencing a holdover proceeding; the stipulation of discontinuance entered into between counsel for the parties on August 4, 2008, discontinuing the prior action is valid and enforceable; plaintiffs are not entitled to a permanent injunction enjoining defendant from serving any further notices without leave of court; defendant has not breached the warranty of quiet enjoyment nor harassed plaintiffs by service of notices and pleadings it was required to serve in order to protect its rights, pursuant to statute, including RPL § 233 and RPAPL Article 7.

Plaintiffs' complaint is dismissed in its entirety. The application for a preliminary injunction is denied. The temporary restraining order in the order to show cause dated March 25, 2010 is vacated. Plaintiffs shall be permitted to interpose an answer and any affirmative defenses they may have in District Court, Nassau County. The court has considered plaintiffs' remaining arguments and finds them to be without merit.

This decision constitutes the order of the court.

HON THOMAS P. PHELAN

Dated: 12-10-10

J.S.C.
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<u>Attorneys of Record</u>

Frederick C. Kelly, Esq.
Attorney for Plaintiffs
28 Roe Circle
Monroe, NY 10950

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Samuel E. Kramer, Esq.
Of Counsel to Fred C. Kelly
Attorney for Plaintiffs
225 Broadway, Suite 3300
New York, NY 10007

Mason & Mason, P.C.
Attn: Michael V. Mason, Esq.
Attorneys for Defendant
394 Old Country Road
Garden City, NY 11530

Westerman Ball Ederer Miller & Sharfstein, LLP
Attorneys for Defendant
1201 RXR Plaza
Uniondale, NY 11556