

Solomons v Douglas Elliman LLC

2011 NY Slip Op 33471(U)

December 23, 2011

Sup Ct, NY County

Docket Number: 110636/2010

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: JUDITH J. GISCHE, J.S.C.
Justice

PART 10

Index Number : 110636/2010
SOLOMONS, PAUL
vs.
PRUDENTIAL REAL ESTATE
SEQUENCE NUMBER : 006
AMEND

INDEX NO. 110636/10
MOTION DATE _____
MOTION SEQ. NO. 006

_____ motion to/for _____
_____ No(s). _____
_____ No(s). _____
_____ No(s). _____

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

**MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION**

FILED

DEC 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/28/11

JUDITH J. GISCHE, J.S.C.
JUDITH J. GISCHE, J.S.C.

1. CHECK ONE: CASE DISPOSED
2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10

-----X
PAUL SOLOMONS,

Plaintiff,

-against-

DOUGLAS ELLIMAN LLC d/b/a PRUDENTIAL
DOUGLAS ELLIMAN, SAN HUNIE KWON,
ELIPARK REALTY CORP., GEORGE
ABI-HASSOUN, CITY CONNECTIONS REALTY
INC., 23 MANHATTAN VALLEY NORTH LLC,
BARUCH SINGER, RANDY BARUH, AIM
REALTY SERVICES INC., TARIQ HAKEEN, OLD
BROWNVILLE RENAISSANCE CORP., STEPHAN
B. GLEICH, ERIK RODRIGUEZ, 650 WEST 189
LIMITED PARTNERSHIP., BRIAN RITTER,
BEST APARTMENTS, INC., BEST
APARTMENTS NORTH, INC., HOWARD
FEINGOLD, JOSEPH BRANCO, CITY SITES
MARKETING INC. d/b/a CITY SITES NEW
YORK, SCOTT HAKIM and BRIAN DUSSEAU,

Defendants.

Decision and Order
Index No. 110636/2010

Seq No.: 006, 008
Present:
Hon. Judith J. Gische, JSC

FILED

DEC 28 2011

NEW YORK
COUNTY CLERK'S OFFICE

-----X

Recitation, as required by CPLR 2219 [a], of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Motion Sequence No. 006	
Solomons' n/m (3025) w/AM affirm, exhs	1
Singer and 23 MVN opp w/DJ affirm, exhs	2
Cross motion (Contempt) w/GAL affirm, exhs	3
OBRC opp w/TT affid, exh	4
Solomons' reply w/ AM affirm, exhs	5
 Motion Sequence No. 008	
Solomons' n/m (3215) w/AM affirm, exhs	6
Transcript 9/22/11 OA	7
Various stips	8

GISCHE, J.:

In this action for housing discrimination based on a disability in violation of the Administrative Code of the City of New York § 8-107 (5), motion sequence numbers 006 and 008 are consolidated for disposition.

In motion sequence number 006, plaintiff Paul Solomons moves for an order, pursuant to CPLR 3025, to amend the complaint.

Defendant Old Brownsville Renaissance Corporation, (OBRC) cross moves for an order holding plaintiff in contempt for his failure to adhere to the stay in this action. OBRC also seeks sanctions pursuant to 22 NYCRR § 130-1.1[c], for plaintiff's continued frivolous conduct, in addition to attorney's fees.

In motion sequence 008, plaintiff moves for an order, pursuant to CPLR 3215, granting a default judgment against defendant Aim Realty Services, Inc (Aim).

BACKGROUND

Plaintiff Paul Solomons is a 44 year-old New York City resident with disabilities who lives on Social Security disability benefits. Plaintiff also receives a "Section 8" voucher to subsidize his housing costs. Plaintiff attempted to find a new apartment among the numerous defendants in this action who owned or rented various residential properties in New York City. Plaintiff commenced this action alleging that he was denied housing at the various residential properties based on his disability and his lawful source of income to pay rent.

OBRC subsequently moved under CPLR 3211 (a) (1) and (7) to dismiss the cause of action against it. This court denied OBRC's motion pursuant to an order dated December 9, 2010 (motion sequence number 002) at which time OBRC filed a Notice of Appeal. On April

11, 2011, OBRC made a motion before the Appellate Division, First Department, to stay the Supreme Court action against it pending a determination of the appeal. On June 14, 2011, the Appellate Division granted OBRC's motion on the condition that the appeal is perfected on or before August 8, 2011. The appeal was perfected prior to or on August 8, 2011 and, to date, there has been no determination regarding the appeal.

On February 7, 2011, a stipulation of settlement and discontinuance was filed with this court to discontinue the claims asserted against defendants City Sites Marketing, Inc., City Sites New York, Scott Hakim, and Brian Dusseau.

On June 27, 2011, a stipulation of settlement and discontinuance was filed with this court to discontinue all claims against defendants Douglas Elliman, LLC, Prudential Douglas Elliman, and Sang Hunie Kwon.

MOTION 006

Plaintiff moves to amend the complaint to remove defendants City Marketing, Inc., City Sites New York, Scott Hakim, Brian Dusseau, Douglas Elliman, LLC, Prudential Douglas Elliman, and Sang Hunie Kwon from the caption and pleadings. Plaintiff also moves to amend the complaint to set forth additional or subsequent transactions or occurrences involving Tessie Travin who is the president and a 50% owner of OBRC, a defendant in this action. Travin also owns real property located at 1227-1229 Bedford Avenue in Brooklyn (the Premises). The proposed amended complaint alleges that Travin used discriminatory criteria to screen and deny plaintiff housing accommodations at the Premises.

In opposition, Tessie Travin, the president argues that plaintiff's motion to amend the complaint should be denied because: (1) it is untimely, (2) an amendment at this juncture of the

litigation creates undue surprise, and significant prejudice, and (3) adding her as a defendant is an attempt on plaintiff's part to bypass the stay imposed by the Appellate Division.

Also in opposition to plaintiff's motion to amend the complaint, defendants Baruch Singer and 23 Manhattan Valley North LLC (23 MVN) argue that plaintiff's motion should be denied because: (1) plaintiff's claims are meritless, (2) plaintiff filed frivolous lawsuits against landlords with whom he has had no contact in order to generate legal fees, and thus he should be prevented from amending the complaint, (2) plaintiff secretly settled with several defendants in 2011 and that is why he seeks to amend the complaint, (3) plaintiff failed to disclose those terms or provide a "set-off" toward plaintiff's damages as espoused under General Obligations Law 15-108, (4) plaintiff failed to obtain Singer's and MVN's signature on the aforementioned stipulation as required under CPLR 3217 (a) (2), and thus plaintiff should be precluded from submitting a third amended complaint that removes or adds any defendants to the caption.

Under CPLR 3025, the decision to allow a plaintiff to amend his or her pleading is within the court's discretion and permission to amend a pleading should be freely granted (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]; *G.K. Alan Assoc., Inc. v Lazzari*, 44 AD3d 95, 99 [2d Dept 2007], *affd* 10 NY3d 941 [2008]). New York courts will freely grant leave to amend a pleading absent a showing of prejudice or surprise resulting directly from the delay. (*Ancrum v St. Barnabas Hosp.*, 301 AD2d 474, 475 [1st Dept 2003]). Plaintiff's motion to amend the complaint is granted.

In the instant case, leave to amend the complaint to add Tavern is proper. The allegations of the proposed amended complaint demonstrate that the additional causes of action against Travin are related to those set forth in the main action.

Although Travin contends that plaintiff's motion is untimely, "[m]ere lateness is not a barrier to the amendment. It must be coupled with significant prejudice to the other side" (*Bishop v Maurer*, 83 AD3d 483, 484 [1st Dept 2011]). Travin argues that an amendment at this juncture of the litigation would create undue surprise, and significant prejudice because motion practice has taken place, both preliminary and compliance conferences have been held, discovery has been exchanged, and depositions have been scheduled in this matter. Although it well may be that Travin's attention to the lawsuit was perfunctory prior to her being named as a defendant in the case, she has not demonstrated exactly how she would be prejudiced.

As to the merits of the amended pleading, the record demonstrates that the proposed amendments to the complaint are not patently meritless. When considering a proposed amendment, "the court should examine, but need not decide, the merits of the proposed new pleading unless it is patently insufficient on its face. Once a prima facie basis for the amendment has been established, that should end the inquiry, even in the face of a rebuttal that might provide the ground for a subsequent motion for summary judgment" (*see Pier 59 Studios, L.P. v Chelsea Piers, L.P.*, 40 AD3d 363, 366 [1st Dept 2007]).

Travin is a principal of OBRC and a landowner. She admittedly was generally aware of the litigation prior to being named a defendant in this matter. It appears that plaintiff's desire to add Travin as a defendant is based entirely on the same set of facts from the housing discrimination claims against OBRC. Plaintiff argues that at Travin's direction, several brokers refused to accept plaintiff as a tenant at the Bedford Avenue property after learning of plaintiff's intent to use a Section 8 voucher. Thus, plaintiff is entitled to amend his complaint to add a claim of aiding and abetting against Travin under Administrative Code § 8-107 (6).

The court has considered defendants Singer and 23 Manhattan Valley North LLC's other arguments and finds them unavailing.

Cross-Motion/Contempt

As for OBRC's cross-motion, "[a] motion to punish a party for civil contempt is addressed to the sound discretion of the motion court (*Schwartz v Schwartz*, 79 AD3d 1006, 1009 [2d Dept 2010]). To sustain a finding of civil contempt based upon the violation of a court order clearly expressing an unequivocal mandate was in effect and the person alleged to have violated the order had actual knowledge of its terms" (*id.*). The moving party bears the burden of proving contempt by clear and convincing evidence (*id.*). Here, the record fails to demonstrate, by clear and convincing evidence, that plaintiff knowingly and willfully disobeyed both the clear and unequivocal provision of the stay in this action and the subsequent stipulation signed by the parties. The relevant order provided:

Defendant-appellant having moved to stay proceedings in the underlying action pending hearing and determination of the appeal taken from the order of the Supreme Court, New York County, entered on or about December 13, 2010 (mot. seq. no. 002), Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon, It is ordered that the motion is granted on condition that the appeal is perfected on or before August 8, 2011 for the October Term.

(Exhibit A to Affirmation of Gabriel A. Leventhal, dated August 5, 2011)

Plaintiff offers explanation why his actions were not in violation of the court's order. OBRC is the only defendant-appellant named in the stay (*id.*). It excuses OBRC from discovery obligations until the appeal is decided. That stay does not apply to any of the other defendants. The amendments to the complaint seek to add Travin, a principal at OBRC, in her individual

capacity to the list of defendants in this action. Thus, it appears that plaintiff has honored the stay, as required by the stipulation, and thus, his actions do not support a finding of civil contempt.

Finally, the record does not support a finding of frivolous conduct. OBRC fails to establish that plaintiff's conduct was completely without merit in law, was undertaken to delay or prolong the resolution of the litigation, or that it involved assertions of factual statements that were false (*Premier Capital v Damon Realty Corp.*, 299 AD2d 158 [1st Dept 2002]).

On the issue of attorney's fees, "Judiciary Law § 773 permits recovery of attorneys' fees from the offending party by a party aggrieved by the contemptuous conduct" (*Schwartz v Schwartz*, 79 AD3d 1006 [2010], *supra*). However, OBRC has not established its entitlement thereto.

MOTION 008

"On a motion for leave to enter a default judgment pursuant to CPLR 3215, the movant is required to submit proof of service of the summons and complaint, proof of the facts constituting its claim, and proof of the defaulting party's default in answering or appearing" (*Atlantic Cas. Ins. Co. v RJNJ Serv., Inc.*, 89 AD3d 649, [2d Dept 2011]; *see* CPLR3215[f]). Consequently, plaintiff established its entitlement to a default judgment against Aim by submitting proof of the summons and complaint, the facts constituting the claim, and Aim's default (*Inegon Natl. Ins. Co. v Norterile*, 88 AD3d 654, 655 [2d Dept 2011]).

To avoid the entry of a default judgment, the defaulting party is required to demonstrate a reasonable excuse for its default and a potentially meritorious defense (*Atlantic Cas. Ins. Co. v RJNJ Serv., Inc.*, 89 AD3d 649, *supra*). Aim has provided no excuse for its default nor a

potentially meritorious defense. In fact, Aim has submitted no opposition or other response to the motion. It appears that as of January 26, 2011, Aim's status with the Department of State is inactive following a dissolution by proclamation/annulment of authority on that date. However, said status does not automatically relieve the corporation of any liability incurred prior to its dissolution. The claims in this action arose on August 26, 201, a date prior to Aim's dissolution.

Pursuant to Business Corporation Law § 1006 (4) (b):

The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008 (Jurisdiction of supreme court to supervise dissolution and liquidation).

Plaintiff attempted service of process on Aim at its business address on September 10, 2010 and September 21, 2010 (Exhibit 3 to Affirmation of Amanda Masters, dated August 23, 2011) (Masters Aff.). On December 7, 2010, plaintiff served the Summons and Complaint on Speigel & Utrera, P.A., P.C., Aim's registered agent (Exhibit 4 to Masters Aff.). More than 30 days elapsed following said service and Aim failed to serve an Answer. Furthermore, the record demonstrates that Aim is continuing to do business as a realtor in New York State, with Mr. Tarik Hakeem as its principal (Exhibit 5 to Master Aff.). Yet, to date, Aim has failed to appear in this action.

Accordingly, it is

ORDERED that in motion sequence 006, plaintiff's motion to amend the complaint is granted, and the amended complaint in the proposed form annexed to the moving papers shall be deemed served on defendants upon service of a copy of this Order with notice of entry thereof;

and it is further

ORDERED that plaintiff shall serve its Supplemental Summons and Amended Complaint upon the proposed additional defendant within 30 days after receipt of a copy of this Order with notice of entry thereof; and it is further

ORDERED that the caption is hereby amended to reflect the caption as contained in the Supplemental Summons and Amended Complaint to the extent of adding Tessie Travin as a defendant in this matter; and it is further

ORDERED that in motion sequence 008, plaintiff's motion for a default judgment against AIM Realty Services, Inc. is granted.

Dated: New York, New York
December 23, 2011

So Ordered:



Hon. Judith J. Gische, JSC

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