

Murphy v 317-319 Second Realty, L.L.C.

2011 NY Slip Op 34145(U)

November 15, 2011

Sup Ct, New York County

Docket Number: 108588/11

Judge: Manuel J. Mendez

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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. MANUEL J. MENDEZ PART 13
Justice

MARTIN MURPHY,
Plaintiff(s),

INDEX NO. 108588/11

MOTION DATE 11-09-2011

- v -

MOTION SEQ. NO. 001

317-319 SECOND REALTY, L.L.C.,
Defendant(s).

The following papers, numbered 1 to 4 were read on this motion to consolidate and cross-motion to for Dismiss:

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

Answering Affidavits — Exhibits — cross-motion

Replying Affidavits

PAPERS NUMBERED

FILED

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Cross-Motion: Yes No

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Upon a reading of the foregoing cited papers, it is ordered that plaintiff's motion by Order to Show Cause to consolidate the Civil Court Residential Landlord and Tenant Summary Holdover Proceeding titled "317-319 Second Realty, LLC v. Martin Murphy," bearing index number, L&T 095947/2010, is granted. Defendant's cross-motion pursuant to CPLR 3211 [a][1], [4] and [7] to dismiss this action, is denied.

Plaintiff brought this declaratory judgment action seeking a judgment declaring that he is a rent stabilized tenant of Apartment B, the basement apartment located at 317-319 Second Avenue, New York, NY and asserting causes of action in the complaint for unjust enrichment, for illegal construction resulting in repair and clean-up following a collapsed ceiling, and breach of the implied warranty of habitability [Mot. Exh. A]. Plaintiff's motion seeks to consolidate this declaratory judgment action with the Civil Court holdover proceeding. Plaintiff states that the purpose of consolidation is to avoid conflicting decisions, to have the totality of the claims heard in one forum and to avoid irreparable harm.

Defendant opposes the motion and cross-moves pursuant to CPLR 3211 [a][1], [4] and [7], to dismiss this action. Defendant claims that the plaintiff's motion should be denied because the declaratory relief sought is the same as that in the Civil Court, which is the preferred forum for this landlord and tenant dispute. Defendant also claims that the Civil Court holdover proceeding is on the trial calendar and the plaintiff commenced this action seven months into the Civil Court proceeding. Defendant's cross-motion seeks to dismiss this action in its entirety claiming that the cause of action involving rent stabilization should be determined by the Civil Court. Defendant claims the remaining causes of action either do not apply to the facts or are not properly stated.

Plaintiff opposes the cross-motion claiming that it is premature because there has not been discovery in this action. Plaintiff also claims the October 13, 2011, Decision/Order

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

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in the Civil Court proceeding (Opp. Cross-Mot. Exh.A), establishes that the causes of action asserted in this case can only be resolved in the Supreme Court.

Consolidation pursuant to CPLR §602, lies within the discretion of the Court, but is generally favored where there are common questions of law and fact, unless the party opposing the motion demonstrates prejudice of a substantial right. The burden is on the party opposing the motion to demonstrate prejudice (*Amcan Holdings, Inc. v. Torys, LLP*, 32 A.D. 3d 337, 821 N.Y.S. 2d 162 [N.Y.A.D. 1st Dept., 2006]).

The Supreme Court, "has unlimited general jurisdiction over all plenary real property actions," including landlord and tenant (*Chelsea 18 Partners, LP v. Shek Yee Mak*, 2011 N.Y. Slip Op. 07740 [N.Y.A.D. 1st Dept. 2011] citing to N.Y. Const. Art. VI, §7[a]). The Supreme Court has unqualified general jurisdiction and the discretion to retain cases seeking rulings in "appropriate and exceptional procedural circumstances" (*Nestor v. McDowell*, 81 N.Y. 2d 410, 615 N.E. 2d 991, 599 N.Y.S. 2d 507 [1993]). The Civil Court has jurisdiction over landlord and tenant disputes and is the preferred forum (*Post v. 120 East End Ave. Corp.*, 62 N.Y. 2d 19, 464 N.E. 2d 125, 475 N.Y.S. 2d 821 [1984]). Relief that cannot be completely obtained in the Civil Court based on its limitations, remains available in the Supreme Court, including declaratory and equitable remedies (*Lex 33 Associates, L.P. v. Grasso*, 283 A.D. 2d 272, 724 N.Y.S. 2d 413 [N.Y.A.D. 1st Dept., 2001], *North Waterside Redevelopment Company, L.P. v. Febbraro*, 256 A.D. 2d 261, 682 N.Y.S. 2d 202 [N.Y.A.D. 1st Dept., 1998] and *Green v. Glenbriar Co.*, 131 A.D. 2d 363, 516 N.Y.S. 2d 670 [N.Y.A.D. 1st Dept., 1987]).

The plaintiff seeks declaratory relief that he is the rent stabilized tenant of the apartment. A trial to determine whether plaintiff is the rent stabilized tenant is also scheduled for November 17, 2011, in a Civil Court, Residential Landlord and Tenant Summary Holdover Proceeding titled "317-319 Second Realty, LLC v. Martin Murphy," bearing index number, L&T 095947/2010. Although the Civil Court is the preferred forum, the October 13, 2011, Decision/Order of Judge John Henry Stanley, granted defendant's motion to dismiss counterclaims based on the provisions of a lease agreement. The causes of action were initially asserted as counterclaims but dismissed in the Civil Court proceeding because, "...Paragraph 33 of that same lease contains a 'no counterclaim' provision." (Mot. Exh. H). The plaintiff is not able to proceed with his second, third and fourth causes of action in the Civil Court proceeding and seeks to consolidate the actions to have the totality of the claims heard in one forum. Defendant has failed to sufficiently establish that it is prejudiced by having the declaratory and equitable relief sought in this action consolidated with the holdover proceeding.

A motion to dismiss pursuant to CPLR §3211[a][1], on the ground that the action is barred by documentary evidence, requires the Court to construe every fact plaintiff has alleged as true. The party making the motion to dismiss must produce documentary evidence that, "utterly refutes plaintiff's factual allegations, conclusively establishing a defense as a matter of law." (*Leon v. Martinez*, 84 N.Y. 2d 83, 638 N.E. 511, 614 N.Y.S. 2d 972 [1994] and *AG Capital Funding Partners, L.P. v. State Street Bank and Trust Co.*, 5 N.Y. 3d 582, 842 N.E. 2d 471, 808 N.Y.S. 2d 573 [2005]).

Defendant has not provided documentary evidence that utterly refutes plaintiff's allegations and the motion to dismiss pursuant to CPLR 3211 [a][1], is denied.

Pursuant to CPLR §3211[a][4], an action may be dismissed on the ground that the action is barred because there is another action pending between the same parties seeking the same relief for the same causes of action in any court of the state. A motion pursuant to CPLR §3211[a][4] requires the relief in both actions be the same or substantially the same (*White Light Productions, Inc. v. On the Scene Productions, Inc.*, 231 A.D. 2d 90, 660 N.Y.S. 2d 568 [N.Y.A.D. 1st Dept., 1997]). Pursuant to CPLR §3211[a][4], "the court need not dismiss upon this ground but may make such order as justice requires" (*McKinney's Cons. Laws of NY, Book 7B, Civil Practice Law and Rules Law §3211*). The characterization of damages in a different manner does not "in and of itself" create a substantial difference between actions (*L-3 Communications Corporation v. Safenet, Inc.*, 45 A.D. 3d 1, 841 N.Y.S. 2d 82 [N.Y.A.D. 1st Dept., 2007]).

Dismissal of the action pursuant to CPLR §3211[a][4], is in the discretion of the Court. Plaintiff's second, third and fourth causes of action were dismissed as counterclaims in the Civil Court because of lack of jurisdiction or a prohibition in the lease, and not because they lacked merit. This Court finds that consolidation will result in eliminating two different pending actions, potentially conflicting determinations and provide a relief that cannot be obtained in the Civil Court. Defendant's motion to dismiss pursuant to CPLR §3211[a][4], is denied.

A motion to dismiss pursuant to CPLR §3211[a][7], requires a reading of the pleadings to determine whether a legally recognizable cause of action can be identified and it is properly pled. A cause of action does not have to be skillfully prepared but it does have to present facts so that it can be identified and establish a potentially meritorious claim. Allegations are generally deemed true (*Leon v. Martinez*, 84 N.Y. 2d 83, supra and *Rovello v. Orofino Realty Co.*, 40 N.Y. 2d 643, 389 N.Y.S. 2d 314, 357 N.E. 2d 17 [1976]). Documentary evidence that contradicts the allegations, or pleadings that consist of bare legal conclusions will not be presumed to be true and are a basis for dismissal (*Morgenthau & Latham v. Bank of New York Company, Inc.*, 305 A.D. 2d 74, 760 N.Y.S. 2d 438 [N.Y.A.D. 1st Dept., 2003]).

Defendant claims that the plaintiff's third and fourth causes of action do not sufficiently stated a claim for illegal construction resulting in repair and clean-up and for breach of warranty of habitability because he is not a tenant, but a licensee. Defendant claims that it is not liable for repair and clean-up because it is not an insurer for any alleged damages. There has been no final determination concerning whether plaintiff is a rent stabilized tenant and no proof submitted that the lease is expired or terminated. There is also insufficient proof provided by the defendant that the plaintiff is solely liable for repair or obtaining insurance for damages to the property caused by its contractors.

A claim of unjust enrichment seeks a determination in equity of whether the defendant can in good conscience be permitted to retain what plaintiff seeks to recover. A determination will be made concerning whether a benefit was conferred that remains with the defendant. Privity of contract is not required for a claim of unjust enrichment (*Paramount Film Distrib. Corp. v. State of New York*, 30 N.Y. 2d 415, 285 N.E. 2d 695, 334 N.Y.S. 2d 388 [1972] and *Sperry v. Crompton Corp.*, 8 N.Y. 3d 204, 863 N.E. 2d 1012, 831 N.Y.S. 2d 760 [2007]).

Defendant seeks to dismiss the second cause of action pursuant to CPLR §3211[a][7], stating that it is not a legally recognizable claim because unjust enrichment

would only apply to the prior owner of the premises. Defendant claims that the plaintiff cannot establish it was unjustly enriched because the benefits were provided at the prior landlord's behest, and there was no reliance or inducement on its behalf. Plaintiff claims the issue of enrichment follows title to the building because the apartment is now substantially more valuable based on the agreement with the prior landlord and the defendant will reap that benefit. This Court finds that there is a potentially meritorious claim asserted and the defendant has not sufficiently established a basis for dismissal of the second cause of action.

Defendant has failed to sufficiently establish the lack of merit to the second, third and fourth causes of action and the motion pursuant to CPLR §3211[a][7], is denied.

Accordingly, it is ORDERED that, it appearing that the Civil Court of the City of New York does not have jurisdiction to grant the full relief to which the parties are entitled in the case of "317-319 Second Realty, LLC v. Martin Murphy," bearing index number, L&T 095947/2010. The motion of plaintiff herein to remove said action to this Court, is granted, and it is further,

ORDERED that movant is directed to serve a certified copy of this Order on the Clerk of the Civil Court, who shall, upon such service and the payment of any fees, transfer to this Court all of the papers heretofore filed in said action; and it is further

ORDERED that, the said Civil Court proceeding shall be consolidated with this action under the index number of this action, and it is further

ORDERED that, the papers heretofore filed in said Civil Court action and in this action shall stand as the papers in the consolidated action, and it is further

ORDERED that, a copy of this Order with Notice of Entry shall be served on the County Clerk (Room 141B) and the Clerk of the Trial Support Office (Room 158), who shall mark their records to reflect this consolidation, and it is further

ORDERED that, the defendant's cross-motion pursuant to CPLR §3211[a][1], [4], [7], to dismiss this action, is denied and it is further

ORDERED that, the defendant shall within twenty days from the date of service of a copy of this Order with Notice of Entry serve and file an Answer on the plaintiff and the Clerk of this Court.

FILED

This constitutes the decision and order of this court.

Dated: November 15, 2011

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MANUEL J. MENDEZ
J.S.C.


MANUEL J. MENDEZ
J.S.C.

NEW YORK
COUNTY CLERKS OFFICE

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