

Lewis v Fischer

2012 NY Slip Op 31258(U)

May 15, 2012

Sup Ct, Albany County

Docket Number: 7681-11

Judge: Joseph C. Teresi

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SUPREME COURT
STATE OF NEW YORK

COUNTY OF ALBANY

MELVIN C. LEWIS,

Plaintiff,

-against-

DECISION and ORDER
INDEX NO. 7681-11
RJI NO. 01-12-105740

BRIAN FISCHER, COMMISSIONER OF
THE DEPARTMENT OF CORRECTIONAL
SERVICES; AND HIS SUBORDINATES
MARVEEN E. BOLL; KENNETH S. PERLMAN;
KAREN BELLAMY; WILLIAM R. LAPE;
CAPTAIN JAMES RAYMOND; CAPTAIN SHANLEY;
SERGEANT S. LAQUAY; SERGEANT SLAVEN;
SERGEANT STALEY; ERIC GUTWEIN; NORMAN
BEZIO; DAVID ROCK; DON UHLER; R. LECLERC;
SHERRIE KING; J. OROPALLO; M. LIRA;
T. QUINN; A. LASHWAY,¹

Defendants.

Supreme Court Albany County All Purpose Term, March 26, 2012
Assigned to Justice Joseph C. Teresi

APPEARANCES:

Melvin C. Lewis, # 00B1401
Pro Se Plaintiff
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PO Box 2000
Malone, New York 12953

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Attorneys for Defendants
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¹ To the extent that the caption of this Court's Decision and Order, dated March 15, 2012, did not mirror the Complaint's caption, such Decision and Order is amended nunc pro tunc.

TERESI, J.:

Plaintiff commenced this action by filing his Summons and Complaint on February 1, 2012.² Prior to answering, Defendants move to dismiss the complaint pursuant to CPLR §3211(a)(7), while also arguing for dismissal under the doctrines of collateral estoppel and res judicata. In addition, Defendants seek revocation of Plaintiff's poor person status and attorney's fees. Plaintiff opposes the motion, makes four motions and has served an amended complaint as of right. (CPLR §3025[a]; Johnson v Spence, 286 AD2d 481 [2d Dept 2001]). At the Defendants' specific request, this Court will apply their motion to dismiss to the superceding amended complaint. (Sage Realty Corp. v Proskauer Rose LLP, 251 AD2d 35 [1st Dept 1998]; Fownes Bros. & Co., Inc. v JPMorgan Chase & Co., 92 AD3d 582 [1st Dept 2012]). On this record, while Plaintiff's motions are all procedurally defective, Defendants established their entitlement to dismissal.

Considering Plaintiff's motions first, CPLR §2214(b) states that "[a] notice of motion and supporting affidavits shall be served at least eight days before the time at which the motion is noticed to be heard." "The failure to give requisite notice of motion deprives the court of jurisdiction to entertain the motion." (Burstin v Public Service Mut. Ins. Co., 98 AD2d 928, 928 [3d Dept 1983]; Zaidi v New York Bldg. Contractors, Ltd., 61 AD3d 747 [2d Dept 2009]). Here, Plaintiff failed to specify when any of his motions were "noticed to be heard." As such, Plaintiff failed to give requisite notice of his motions, depriving this Court of jurisdiction over them and requiring they be denied. As such, each of Plaintiff's motions will be considered as opposition to

² Plaintiff also filed a copy of his Summons and Complaint on December 13, 2011.

Defendants' motion.

Turning to Defendants' res judicata motion to dismiss, "the doctrine of res judicata bars all other claims arising out of the same transaction... even if based upon different theories or if seeking a different remedy." (Graziano v Evans, 90 AD3d 1367, 1370 [3d Dept 2011] lv to appeal denied, __ NY3d __ [2012], quoting O'Brien v City of Syracuse, 54 NY2d 353 [1981]; See Why Gerard, LLC v Gramro Entertainment Corp., 941 NYS2d 350 [3d Dept 2012]).

Here, the transactions alleged in Plaintiff's amended complaint arise from his unauthorized possession and use of Uniform Commercial Code (hereinafter "UCC") materials. Specifically, he alleges that he wrongly received three misbehavior reports because of his UCC materials. He alleges multiple rights violations due to his being found guilty at the related tier III hearings, and his placement in the Special Housing Unit. Plaintiff additionally alleged that his rights were violated when his grievance challenging Respondent's UCC regulations was denied.

Plaintiff previously litigated these exact same transactions in an Article 78 proceeding. (Lewis v Lape, 90 AD3d 1259 [3d Dept 2011] lv to appeal denied, __ NY3d __ [2012][stating that this Plaintiff, "a prison inmate, was charged in three misbehavior reports with violating various prison disciplinary rules, several of which relate to the unauthorized possession of Uniform Commercial Code (hereinafter UCC) materials. Following three tier III disciplinary hearings, petitioner was found guilty of all charges, and those determinations were thereafter upheld upon administrative review. Petitioner also filed a grievance challenging the departmental regulations pertaining to UCC materials, which was ultimately denied by the Central Office Review Committee. He then commenced this CPLR article 78 proceeding challenging all four determinations."]). Because the Appellate Division - Third Department has already considered

and rejected the Plaintiff's UCC challenge, his disciplinary hearing dispositions and his grievance, the doctrine of res judicata bars the amended complaint's claims. (Id.; Graziano v Evans, supra).

Accordingly, Defendants' motion is granted and this matter is dismissed. In light of the foregoing, Defendants' motion to revoke Plaintiff's poor person status is denied as moot and, in an exercise of discretion, Defendants' motion for attorney's fees is denied.

This Decision and Order is being returned to the attorneys for the Defendants. A copy of this Decision and Order and all other original papers submitted on this motion are being delivered to the Albany County Clerk for filing. The signing of this Decision and Order shall not constitute entry or filing under CPLR §2220. Counsel is not relieved from the applicable provision of that section respecting filing, entry and notice of entry.

So Ordered.

Dated: Albany, New York
May 15, 2012


Joseph C. Teresi, J.S.C.

PAPERS CONSIDERED:

1. Notice of Motion, dated April 4, 2012; Affirmation of Douglas Goglia, dated April 4, 2012, with attached Exhibits A-C and unattached unnumbered exhibits;
2. Letter of Douglas Goglia, dated April 10, 2012, with attached Exhibits A-D;
3. Reply Affirmation of Douglas Goglia, dated April 12, 2012, with attached Exhibits A-E;
4. "Motion Seeking Permission to Amend Complaint" of Melvin Lewis, dated February 27, 2012.
5. "Motion Seeking Clarification of Decision and Order" of Melvin Lewis, dated March 21, 2012.
6. "Notice of Motion of Rebuttal Defendant's Affirmation and Memorandum of Law Notice of Motion," undated; Affidavit of Melvin Lewis, dated April 8, 2012, with attached Exhibit A;
7. "Second Notice of Motion of Rebuttal and Objection to Defendant's Memorandum of Law," undated; Affidavit of Melvin Lewis, dated April 20, 2012.