

Goodman v Terrence Lowenberg

2013 NY Slip Op 30134(U)

January 23, 2013

Supreme Court, New York County

Docket Number: 401899/2009

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: _____
Justice

PART _____

Index Number : 401899/2009
GOODMAN, DALE
vs.
LOWENBERG, TERRENCE
SEQUENCE NUMBER : 003
DECLARATORY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

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

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is decided in accordance with the annexed decision.

UNFILED JUDGMENT

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: 1/23/13

CR, J.S.C.

1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
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: Part 55

-----X
DALE GOODMAN,

Plaintiff,

Index No. 401899/2009

-against-

DECISION/ORDER

UNFILED JUDGMENT

TERRENCE LOWENBERG, 420 East 66 Realty LLC
ICON REALTY MANAGEMENT LLC, THE ICON
GROUP LLC and TODD COHEN

This judgment has not been entered by the County Clerk
and notice of entry cannot be served based hereon. To
obtain entry, counsel or authorized representative must
appear in person at the Judgment Clerk's Desk (Room
141B).

Defendants.
-----X

HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion
for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	<u> </u>
Answering Affidavits to Cross-Motion.....	<u> </u>
Replying Affidavits.....	<u>3</u>
Exhibits.....	<u>4</u>

Plaintiff, who is *pro se*, commenced this action asserting several claims against defendants based upon defendants allegedly improper conduct as former owners of the building where she resides. Plaintiff now moves pursuant to CPLR § 3212 seeking an order granting summary judgment on her first cause of action and issuing a declaratory judgment that plaintiff owes no money to defendants stemming from unpaid rent. For the reasons set forth below, plaintiff's motion is granted in part.

The relevant facts are as follows. Plaintiff resides at 420 East 66th Street, New York, NY (the "Premises"). From approximately May 2007 to September 2011, defendants 420 East 66

Realty LLC, Icon Realty Management LLC and The Icon Group LLC (collectively referred to herein as “defendant business entities”) owned and managed the Premises. Defendant Terrance Lowenberg (“Lowenberg”) is, and at all relevant times was, a managing member of Icon Realty Management LLC. It is unclear what defendant Todd Cohen’s relationship is to plaintiff or to the defendant business entities.

According to the Resident Ledger Report (the “Ledger”) kept by the defendant business entities, defendant business entities “wrote-off” a portion of plaintiff’s alleged unpaid rent on two occasions. An entry on December 10, 2008 remarks “Bad Debt Write Off” and shows a \$30,074.50 credit to plaintiff’s account, leaving a \$9,500.00 balance. Additionally, on November 17, 2011, the Ledger notes “Write Off - Sold Building” and shows a \$ 24,323.20 credit to plaintiff’s account, leaving a \$0.00 balance.

On or about September 7, 2011, defendant business entities sold the Premises to non-party Chase East 66th LLC (“Chase”) and assigned and transferred all their “rights, title and interests in, to and under the Leases [at the Premises]” to Chase.

On a motion for summary judgment, the movant bears the burden of presenting sufficient evidence to demonstrate the absence of any material issues of fact. *See Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324 (1986). Summary judgment should not be granted where there is any doubt as to the existence of a material issue of fact. *See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). Once the movant establishes a *prima facie* right to judgment as a matter of law, the burden shifts to the party opposing the motion to “produce evidentiary proof in admissible form sufficient to require a trial of material questions of fact on which he rests his claim.” *Id.*

Here, plaintiff’s motion for summary judgment is granted to the extent that this court

finds that defendants no longer have any right to collect past-due rents allegedly owed by plaintiff. By defendants' own admission, "the right to collect the plaintiff's debt belongs to non-party Chase 66th Realty LLC, or to another unknown party if Chase 66th Realty LLC has assigned that right to another party." This argument is supported by the "Assignment and Assumption of Leases" attached to defendants' response papers, wherein defendants assigned and transferred all their "rights, title and interests in, to and under the Leases [at the Premises]" to Chase. Accordingly, defendants herein no longer have any right to collect the alleged past-due rents of plaintiff.

However, plaintiff has failed to establish that the alleged debt owed to defendants at the time they sold the premises was forgiven. While plaintiff argues that the notation of "write-off" on the Ledger demonstrates that defendants forgave her debt when they sold the premises, she cites no authority supporting the proposition that a write off on an accounting ledger, by law, equates to debt forgiveness. As argued by defendants, "these are two unrelated concepts. Writing off a bad [sic] debt is simply an accounting entry that is used to reflect an opinion by the creditor that the debt is not collectible. However, the debt still exists and may be collected if it is later learned that the debt can be collected. Debt forgiveness, on the other hand, is a cancellation of the debt so that the debt no longer exists." Accordingly, plaintiff has provided insufficient evidence to establish that she did not owe, nor does she owe, money to defendants.

Additionally, plaintiff's argument, stated for the first time in her reply papers, that it was proven in the lower court that there was debt forgiveness by defendants is without merit. It is well established that "[t]he function of reply papers is to address argument made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion." *Dannasch v. Bifulco*, 184 A.D.2d 415 (1st Dept

1992). However, notwithstanding this principle, this fact was neither proven by the stipulation, nor is the stipulation applicable to this action. The stipulation explicitly states: "This stipulation has absolutely no bearing on and is without prejudice to Respondent Goodman's claims under Index No. 401899-2009 . . . presently being heard and commenced in Supreme Court, New York County. This stipulation relates only to Petitioner Chase East 66th LLC."

Accordingly, plaintiff's motion is granted to the extent that it is found that defendants no longer have a right to collect any past-due rents allegedly owed by plaintiff. Thus, it is hereby ADJUDGED and DECREED that defendants do not have a right to collect the past-due rent at issue herein from plaintiff. This constitutes the decision and order of the court.

Dated: 1/23/13

Enter: OK

J.S.C.

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