

Williamson v Genovese
2013 NY Slip Op 30445(U)
March 4, 2013
Supreme Court, Richard County
Docket Number: 101793/12
Judge: Joseph J. Maltese
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**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF RICHMOND DCM PART 3**

**Index No.:101793/12
Motion No.:002, 003**

**SCOTT WILLIAMSON and
THOMAS ZINN,**

Plaintiffs

DECISION & ORDER

HON. JOSEPH J. MALTESE

against

**SEVERINO GENOVESE,
NICOLE VINCIGUERRA, and
ANTHONY SECCAFICO,**

Defendants

The following items were considered in the review of the following motions to dismiss.

<u>Papers</u>	<u>Numbered</u>
Notice of Motion and Affidavits Annexed	1
Notice of Motion and Affidavits Annexed	2
Affirmation in Opposition	3
Affirmation in Reply	4
Affirmation in Reply	5
Exhibits	Attached to Papers

Upon the foregoing cited papers, the Decision and Order on these Motions is as follows:

The defendants move to dismiss the plaintiffs' complaint pursuant to CPLR 3211 and 3017. The motions are granted and the complaint is dismissed.

Facts

The plaintiffs are former tenants of the defendants. On or about June 29, 2011 the plaintiffs previously commenced an administrative action in the New York State Division of Human Rights bearing case number 10149554. The administrative proceeding alleged violation of the New York State Human Rights Law (Executive Law, Article 15), Section 296. The plaintiffs claimed that their landlord defendants discriminated against them because of their marital status and their sexual orientation as a gay couple. On that complaint form the plaintiffs

alleged that the property involved was an owner occupied two-family house located at 127 Prescott Avenue, Staten Island, New York. The complaint listed the alleged acts of discrimination as: “Evicted me/threatened to evict me;” “Denied me equal terms, privileges, or facilities that other tenants were given;” and “Other” which contains elaboration, but is illegible on the court’s copy of the administrative complaint. The administrative complaint then goes on to articulate alleged statements made by the defendants that were discriminatory in nature.

On September 8, 2011 the New York State Division of Human Rights issued a determination and order of dismissal for lack of jurisdiction. The administrative decision reads as follows:

Pursuant to Section 297.2 of the Human Rights Law, the Division finds that it does not have jurisdiction for the following reason:

The New York State Division of Human Rights lacks jurisdiction over this case pursuant to New York State Human Rights Law § 296.5(a) as the unit rented to Complainants is within an owner-occupied two family home owned by Respondent, Mr. Genovese, who also resides at that location.

The complaint is therefore ordered dismissed and the file is closed.

. . . any party to this proceeding may appeal this Determination to the New York State Supreme Court in the County wherein the alleged unlawful discriminatory practice took place by filing directly with such court a Notice of Petition and Petition within sixty (60) days after service of this Determination. . .

The plaintiffs never appealed the determination by the New York State Division of Human Rights. On or about April 9, 2012 the plaintiffs commenced this action by filing a summons and complaint with the Richmond County Clerk.

The complaint alleges sixteen causes of action against the defendants that recite the same facts as those raised in the prior administrative hearing. Additionally, the facts asserted in the first two causes alleging conversion and violations of GOL § 7-103(2-a) based on the retention of

a \$1450.00 rental security deposit were litigated in the Civil Court of the City of New York, Small Claims Part. The remaining causes of action seek to litigate those causes of action that were previously dismissed by the New York State Division of Human Rights with one caveat. Petitioner did not appeal the administrative determination finding that the residence was a two family owner occupied home. The plaintiffs' complaint now asserts that the home was actually a *three family* home with an illegal basement apartment. Furthermore, the plaintiffs' complaint at paragraph 155 states that "Defendant Genovese refused to renew the Lease due to the Plaintiffs' sexual orientation in the Cutrona Demand Letter." However, the demand letter makes no such reference.

On March 29, 2011 Attorney Robert S. Cutrona sent a letter to Messrs. Thomas Zinn and Scott Williamson that stated in pertinent part as follows:

. . . Although I have advised Mr. Genovese of his rights under the lease and the law, he has indicated that he is willing to be flexible and reasonable. He is prepared to accept April rent of \$1450.00, without any of the "added rent", conditioned on your agreement to move out on or before April 30, 2011. In furtherance of this arrangement you must both sign the enclosed document which memorializes your intention of vacating the apartment on that day.

The lease term ends on November 30, 2011 and Mr. Genovese has informed me that he has no intention of renewing it. Bear this in mind when deciding whether the current offer to move out at the end of April is acceptable. . .

The defendants now move to dismiss the plaintiffs complaint.

Discussion

Collateral estoppel gives conclusive effect to an administrative agency's quasi-judicial determination when two basic conditions are met: (1) the issue sought to be precluded is identical to a material issue necessarily decided by the administrative agency in a prior proceeding; and (2) there was a full and fair opportunity to contest this issue in the administrative tribunal. The proponent of collateral estoppel must show identity of issue, while the opponent must

demonstrate the absence of a full and fair opportunity to litigate.¹

Furthermore, the election of remedies doctrine found in Executive Law § 297(9) states in pertinent part that:

Any person claiming to be aggrieved by an unlawful discriminatory practice shall have a cause of action in any court of appropriate jurisdiction for damages . . . and such other remedies as may be appropriate, including any civil fines and penalties provided in subdivision four of this section, **unless such person had filed a complaint hereunder or with any local commission on human rights** . . . provided that, where the division has dismissed such complaint on the grounds of administrative convenience, on the grounds of untimeliness, or on the grounds that the election of remedies is annulled, such person shall maintain all rights to bring suit as if no complaint had been filed with the division. (Emphasis added)

Here, the New York State Division of Human Rights found that it did not have jurisdiction over these claims based on the finding that property in question was a two family owner occupied residence. Consequently, the dismissal was not for administrative convenience.

Both cases cited by the plaintiff, *Low v. Gibbs & Hill and Gondala*² and *Center Moriches Union Free School Dist.*³ stand for the proposition that causes of action based on claimed discrimination that were previously dismissed at an administrative hearing on other grounds than for administrative convenience, cannot be subsequently brought in Supreme Court. Here, the plaintiffs' third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, fifteenth and sixteenth causes of action are all predicated on alleged acts of discrimination based on sexual orientation. The plaintiffs' first, second, eleventh, twelfth, thirteenth and fourteenth causes of action were litigated in the New York City Civil Court, Small Claims Part. Consequently, the plaintiffs' complaint must be dismissed.

¹ *Jeffreys v. Griffin*, 1 NY3d 34 [2003].

² 92 AD2d 467 [1st Dep't 1983].

³ 80 AD2d 600 [2d Dep't 1981].

While the plaintiffs argue that the dwelling is actually a three family unit, and not a two family unit, as was found by the New York State Division of Human Rights such an argument should have taken the form of an Article 78 appeal. Absent such an appeal the law of the case requires a finding that this dwelling is a two family owner occupied residence. Moreover, if there is an illegal third apartment at the premises, that does not make the premises a legally recognized three family dwelling.

The court now must turn its attention to the plaintiffs' complaint at paragraph 155 that states "Defendant Genovese refused to renew the Lease due to the Plaintiffs' sexual orientation in the Cutrona Demand Letter." This court reviewed Attorney Cutrona's demand letter in its entirety and found that it did not contain any reference to the plaintiffs' sexual orientation. It did make it clear that the landlord would not extend the lease term, as was his right, and gave the plaintiffs alternatives to avoid paying "added rent" under the terms of the lease. While this court finds this allegation disturbing, it will not sanction the plaintiffs' attorney for this over zealous advocacy. In the future, plaintiffs' counsel is cautioned to pay closer attention to the accuracy of quotes contained in his pleadings.

Accordingly, it is hereby:

ORDERED, that the defendants' motions to dismiss is granted and the complaint is dismissed; and it is further

ORDERED, that the Clerk is directed to enter judgment accordingly.

ENTER,

DATED: March 4, 2013

Joseph J. Maltese
Justice of the Supreme Court