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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: LUCY BILLINGS J.S.C. Justice PART 46

Index Number : 600739/2010
BURTON, ROBERT
vs.
LUPU, EMANUELA, ESQ.
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

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

The following papers, numbered 1 to 4, were read on this motion to/for reargument

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). 1
Answering Affidavits — Exhibits _____ | No(s). 2-3
Replying Affidavits _____ | No(s). 4

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

The court denies plaintiff's motion for reargument pursuant to the accompanying decision. C.P.L.R. § 2221(d).

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

Dated: 9/4/13

Lucy Billings, J.S.C.
LUCY BILLINGS
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

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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ROBERT BURTON, Index No. 600739/2010

Plaintiff

- against - DECISION AND ORDER

EMANUELA LUPU, ESQ., DOMINICK TAMMARO, SMITH, BUSS & JACOBS, 70 PARK TERRACE EAST OWNERS CORP., and PRIME LOCATIONS, INC.,

Defendants

----------x

LUCY BILLINGS, J.S.C.:

I. BACKGROUND

Plaintiff sues to recover damages for harassment and fraud arising from a landlord-tenant proceeding that defendant 70 Park Terrace East Owners Corp., represented by defendants Lupu and Smith, Buss & Jacobs, maintained against non-party Equity Preservation Corp. to recover possession of apartment 5G, 70 Park Terrace East, in New York County. Plaintiff also seeks a declaration that he, Equity Preservation, or both own the apartment. He moves to reargue, C.P.L.R. § 2221(d), the motions by 70 Park Terrace East and its managing agent, defendant Prime Locations, Inc., and by Lupu, defendant Tammaro, a partner in Smith, Buss & Jacobs, and the firm to dismiss the complaint and his cross-motion for a declaration that 70 Park Terrace East does not own the apartment. In a decision dated August 8, 2012, the court granted defendants' motions on the grounds of lack of standing, res judicata and collateral estoppel, and failure to

state a claim, C.P.L.R. § 3211(a)(3), (5), and (7), and denied plaintiff's cross-motion. C.P.L.R. §§ 3001, 3212(b) and (e). For the reasons explained below, the court now denies plaintiff's motion for reargument and, even treating his motion as one for renewal, denies that relief as well. C.P.L.R. § 2221(d) and (e).

II. THE GROUNDS FOR DISMISSAL

A. LACK OF STANDING

The court determined that plaintiff lacked standing to maintain his claims because, even as Equity Preservation Corp.'s sole shareholder, director, and officer, he is not entitled to recover for injury to the corporation, which would constitute its claims, not his. New Castle Siding Co. v. Wolfson, 63 N.Y.2d 782, 784 (1984); MatlinPatterson ATA Holdings LLC v. Federal Express Corp., 87 A.D.3d 836, 839 (1st Dep't 2011); Rogers v. Ciprian, 26 A.D.3d 1, 6 (1st Dep't 2005); Evangelista v. Slatt, 20 A.D.3d 349, 350 (1st Dep't 2005). See Spear, Leeds & Kellogg v. Bullseye Sec., 291 A.D.2d 255, 256 (1st Dep't 2002); Uribe v. Merchants Bank of N.Y., 239 A.D.2d 128 (1st Dep't 1997). Plaintiff failed and still fails to show that he, rather than Equity Preservation, owned apartment 5G in the cooperative apartment building, was a shareholder of the cooperative, or was a party to the proprietary lease and signed it in his own capacity rather than as the president of Equity Preservation. See Rogers v. Ciprian, 26 A.D.3d at 3-4; Behrens v. Metropolitan Opera Assn., Inc., 18 A.D.3d 47, 49 (1st Dep't 2005).

To sustain a claim based on Equity Preservation's assignment

of its rights in the cooperative apartment to him, according to ¶ 16(a) of the apartment's proprietary lease as well as New York General Obligations Law § 5-703(1), he was required to show a written assignment. Panetta v. Kelly, 17 A.D.3d 163, 165 (1st Dep't 2005); Lowinger v. Lowinger, 287 A.D.2d 39, 44 (1st Dep't 2001). Nowhere, however, did he even allege such a writing in either his complaint or his affidavits, let alone demonstrate a written assignment through documentary evidence. Nor does he make such a showing in support of reargument or renewal.

B. RES JUDICATA AND COLLATERAL ESTOPPEL

Plaintiff claimed that the shares allocated to the apartment qualified as unsold shares under ¶ 38(a) of the proprietary lease, entitling Equity Preservation to transfer the shares to him without the consent of 70 Park Terrace East, its shareholders or directors, or Prime Locations, albeit not negating the statutory and lease requirements for a written assignment. The court determined that two prior court decisions resolved his claim for a declaration that the apartment shares were unsold shares, to which Equity Preservation and then he was entitled: a decision in a proceeding by 70 Park Terrace East against Equity Preservation in New York City Civil Court and another in a prior action by plaintiff against defendants in this court.

The Civil Court's decision dated May 7, 2009, awarding 70 Park Terrace East a final judgment of possession of the apartment against Equity Preservation based on its breach of the lease, necessarily decided that Equity Preservation maintained no claim

to the apartment that the corporation then might assign to plaintiff. Although plaintiff insists that Equity Preservation assigned its rights to the apartment to him before the Civil Court eliminated them, his persistent failure to show a valid assignment is fatal to this proposition as well.

Plaintiff also points out that he was not a party to the Civil Court proceeding. Nevertheless, if Equity Preservation maintained no claim, the corporation possessed no rights to assign to him. New York & Presbyt. Hosp. v. Country-Wide Ins. Co., 17 N.Y.3d 586, 592 (2011); Madison Liquidity Invs. 119, LLC v. Griffith, 57 A.D.3d 438, 440 (1st Dep't 2008); Condren, Walker & Co., Inc. v. Portnoy, 48 A.D.3d 331 (1st Dep't 2008); Trisingh Enters. v. Kessler, 249 A.D.2d 45, 46 (1st Dep't 1998). Even if he possessed every right the corporation originally maintained, he does not factually challenge the conclusion that, since Equity Preservation and he, as its sole shareholder, director, and officer, were in privity, collateral estoppel barred his claims here. Casa de Meadows Inc. (Cayman Is.) v. Zaman, 76 A.D.3d 917, 922 (1st Dep't 2010); Ginzera Assoc. LLC v. Ifantopoulos, 70 A.D.3d 427, 429 (2010). See UBS Sec. LLC v. Highland Capital Mgt., L.P., 93 A.D.3d 489, 490 (1st Dep't 2012); Simmons v. New York City Health & Hosps. Corp., 71 A.D.3d 410, 411 (2010). The legal authority plaintiff cites holds no differently. Taylor v. Sturgell, 553 U.S. 889, 894-95 (2008).

In plaintiff's own prior action in this court based on the same claims as here against 70 Park Terrace East, Lupu, and

Smith, Buss & Jacobs, Justice Madden's decision dated September 15, 2009, dismissing the complaint, albeit upon plaintiff's default, is equally preclusive under res judicata and collateral estoppel. CIBC Mellon Trust Co. v. HSBC Guyerzeller Bank AG, 56 A.D.3d 307, 308 (1st Dep't 2008); Brown v. Suggs, 39 A.D.3d 395 (1st Dep't 2007); Academic Health Professionals Ins. Assn. v. Lester, 30 A.D.3d 328, 329 (1st Dep't 2006); Trisingh Enters. v. Kessler, 249 A.D.2d at 46. As plaintiff indirectly points out, had Justice Madden granted the defendants' motion to dismiss that prior action based on his lack of standing or failure to allege a claim, C.P.L.R. § 3211(a)(3) and (7), such a dismissal might be without prejudice, allowing him to commence a new action alleging additional facts sufficient to establish a claim and his standing. E.g., 175 East 74th Corp. v. Hartford Acc. & Ind. Co., 51 N.Y.2d 585, 590 n.1 (1980); Tico, Inc. v. Borrok, 57 A.D.3d 302 (1st Dep't 2008); Adelaide Prods., Inc. v. BKN Intl. AG, 15 A.D.3d 316 (1st Dep't 2005); Pullman Group v. Prudential Ins. Co. of Am., 297 A.D.2d 578 (1st Dep't 2002). Not only does plaintiff's complaint in this action fail to cure the deficiencies or supply the omissions on which defendants' motions in his prior action were based, e.g., Algomod Tech. Corp. v. Price, 65 A.D.3d 974, 975 (1st Dep't 2009); Lampert v. Ambassador Factors Corp., 266 A.D.2d 124, 125 (1st Dep't 1999); Aetna Cas. & Sur. Co. v. City of New York, 160 A.D.2d 561, 563 (1st Dep't 1990); Albert G. Ruben & Co. v. Fritzen, 101 A.D.2d 795, 796 (1st Dep't 1984), but those motions also were based on the preclusive

effect of the Civil Court decision, a premise that plaintiff might overcome only by a vacatur of that decision or an appeal and reversal: steps he never took.

Finally, plaintiff does not challenge the further conclusion that he alleged claims against Prime Locations as 70 Park Terrace East's agent that were indistinct from the claims against its principal and claims against Tammaro as a partner in Smith, Buss & Jacobs that were indistinct from the claims against his firm. Therefore these parties, too, were in privity, barring plaintiff's current claims against them as well.

C. FAILURE TO STATE A CLAIM

In an attempt to resurrect his claim for intentional infliction of severe emotional distress, plaintiff characterizes the totality of defendants' alleged conduct as amounting to a "vendetta" against him. Aff. of Robert J. Burton ¶¶ 14, 26, 28 (Oct. 9, 2012). This label, however, is too unspecific to establish the requisite extreme and outrageous conduct, "beyond all possible bounds of decency" and "utterly intolerable in a civilized community." Marmelstein v. Kehillat New Hempstead: The Rav Aron Jofen Community Synagogue, 11 N.Y.3d 15, 22-23 (2008); Howell v. New York Post Co., 81 N.Y.2d 115, 122 (1993); Murphy v. American Home Prods. Corp., 58 N.Y.2d 293, 303 (1983); Suarez v. Bakalchuk, 66 A.D.3d 419 (1st Dep't 2009).

Plaintiff faults the dismissal of his fraud claim based on its failure to allege any false representations or concealment by defendants that he actually and justifiably relied on to his

damage, claiming defendants did not raise this ground for dismissal. See C.P.L.R. § 3016(b); Mandarin Trading Ltd. v. Wildenstein, 16 N.Y.3d 173, 178 (2011); Gosmile, Inc. v. Levine, 81 A.D.3d 77, 81 (1st Dep't 2011); Nicosia v. Board of Mgrs. of the Weber House Condominium, 77 A.D.3d 455, 456 (1st Dep't 2010). Plaintiff's own Exhibit B supporting his current motion (the Affirmation of Michael F. Daly ¶¶ 37-39), as well as Exhibit D to the current Affirmation of John J. Malley in opposition (the Affirmation of John J. Malley II ¶ 3), both supporting defendants' prior motions to dismiss the complaint, belie this claim.

As this court's August 2012 decision as well as defendants' underlying motions to dismiss also demonstrate, the claim that the attorney defendants deceived a party in violation of New York Judiciary Law § 487(1) was before the Civil Court, and hence both Justice Madden's decision and this court's more recent decision dismissed that claim based on collateral estoppel. Plaintiff himself was not entitled to claim damages under Judiciary Law § 487(1) in the Civil Court proceeding, because he was not a "party" there, as required to sustain such a claim, unless the deceit was part of "a larger fraudulent scheme," which he did not and does not allege. Specialized Indus. Servs. Corp. v. Carter, 68 A.D.3d 750, 752 (2d Dep't 2009). See Melnitsky v. Owen, 19 A.D.3d 201 (1st Dep't 2005); Yalkowsky v. Century Apts. Assocs., 215 A.D.2d 214, 215 (1st Dep't 1995); Cramer v. Sabo, 31 A.D.3d 998, 999 (3d Dep't 2006). His allegations are limited to the

Civil Court proceeding and his prior Supreme Court action, are unconnected, and nowhere suggest that defendants deceived the court or a party in defending this action.

Equity Preservation, the party with standing to raise the Judiciary Law § 487(1) claim concerning the attorney defendants' conduct in the Civil Court proceeding, raised just such a claim in that proceeding, where the Civil Court rejected the claim. Insofar as plaintiff alleges that defendants deceived him in defending his prior Supreme Court action, again the exclusive forum for that claim was in that action, where the Supreme Court dismissed all his claims. Plaintiff did not and does not deny either of these preclusive decisions. He simply disagrees with them, yet never vacated or appealed them. Nor does he allege that defendants' deceit in the latter action was more than their attorneys' delay in appearing, with malicious intent to prevent him from obtaining a judgment, a basis for this court's decision that the allegations fell short of showing the requisite deceit or pattern of delinquency to state a claim under Judiciary Law § 487(1). Finally, plaintiff equally fails to supplement his allegations to draw a causal connection between defendants' alleged deceit and the adverse consequences to Equity Preservation or him in the prior litigation, Mars v. Grant, 36 A.D.3d 561, 562 (1st Dep't 2007), a deficiency that is fatal to any such claim. Maksimiak v. Schwartzapfel Novick Truhowsky Marcus, P.C., 82 A.D.3d 652 (1st Dep't 2011); Kaminsky v. Herrick, Feinstein LLP, 59 A.D.3d 1, 13 (2008); Nason v. Fisher,

36 A.D.3d 486, 487 (1st Dep't 2007); Jaroslawicz v. Cohen, 12 A.D.3d 160, 161 (1st Dep't 2004).

III. THE GROUNDS FOR DENYING PLAINTIFF DECLARATORY RELIEF

Plaintiff's prior cross-motion specifically sought a declaration that 70 Park Terrace East waived its successful bid at the foreclosure sale for apartment 5G by continuing to treat Equity Preservation as the owner. Plaintiff makes no further attempt to establish his standing to seek this relief on Equity Preservation's behalf or to show why the prior Civil Court and Supreme Court decisions do not bar any claim that Equity Preservation or plaintiff as its successor owns the apartment. Citidress II Corp. v. Hinshaw & Culbertson LLP, 59 A.D.3d 210, 211 (1st Dep't 2009); Active Media Servs., Inc. v. Grant Prideco, Inc., 35 A.D.3d 165, 166 (1st Dep't 2006); Noto v. Bedford Apts. Co., 21 A.D.3d 762, 765 (1st Dep't 2005); Jenkins v. State of N.Y. Div. of Hous. & Community Renewal, 264 A.D.2d 681, 682 (1st Dep't 1999).

Nor does he successfully resurrect his claim that, after 70 Park Terrace East's winning bid, its delay in closing title on the apartment until after the deadline set by the terms of the sale nullified its ownership of the apartment, let alone re-conferred ownership rights on Equity Preservation or, through it, on plaintiff. See Plotch v. 375 Riverside Dr. Owners, Inc., 92 A.D.3d 478 (1st Dep't 2012). As neither was a party to the terms of the sale established by that winning bid, neither was entitled to claim a breach of those terms.

Finally, plaintiff makes no further attempt to establish 70 Park Terrace East's waiver of its right to possession of the apartment. He previously relied on invoices for maintenance charges transmitted to Equity Preservation after 70 Park Terrace East's successful bid for the apartment at the foreclosure sale, from which waiver of a right is not inferable absent those circumstances manifesting 70 Park Terrace East's voluntary, intentional abandonment or relinquishment of that right. Fundamental Portfolio Advisors, Inc. v. Tocqueville Asset Mgt., Ltd., 7 N.Y.3d 96, 104 (2006); Gilbert Frank Corp. v. Federal Ins. Co., 70 N.Y.2d 966, 968 (1988); Jefpaul Garage Corp. v. Presbyterian Hosp., 61 N.Y.2d 442, 446, 448 (1984); Jumax Assoc. v. 350 Cabrini Owners Corp., 46 A.D.3d 407, 408 (1st Dep't 2007). While waiver may constitute a factual question, plaintiff must allege facts to raise such a question. The very facts he alleges, that Prime Locations, not 70 Park Terrace East, transmitted the invoices to Equity Preservation, the apartment's former lessee, did not amount to a waiver by 70 Park Terrace East of its rights to foreclose on the premises due to the former lessee's default under the lease. Bercy Invs. v. Sun, 239 A.D.2d 161, 162 (1st Dep't 1997).

IV. THE SINGLE "FACT" THAT THE COURT MISAPPREHENDED

The only fact that plaintiff claims the court misapprehended is that no motion to dismiss the complaint by the attorney defendants was pending when the court dismissed his claims against these defendants. The record belies this claim, too.

A stipulation dated February 9, 2011, among all parties provided: "Defendants to file further motion to dismiss Plaintiff's proposed complaint." Aff. of John J. Malley Ex. C (Dec. 6, 2012). Whether "Defendants" referred to all defendants or just to 70 Park Terrace East and Prime Locations, since the stipulation refers to only one "motion" to dismiss the complaint, the stipulation did not require the attorney defendants to file a further motion to dismiss and did not withdraw these defendants' pending motion to dismiss the complaint.

In response to the further motion to dismiss the complaint by 70 Park Terrace East and Prime Locations, the Affirmation of John J. Malley II ¶ 3, dated March 18, 2011, both reinforced the attorney defendants' pending motion and adopted their co-defendants' further motion:

> the arguments set forth in the motion of 70 Park Terrace East Owners Corp. (the "Co-op") and Prime . . . by order to show cause, dated March 3, 2011, . . . apply to, and fully support, the SBJ Defendants' pending motion to dismiss under CPLR 3211(a)(3), (5) and (7), dated September 24, 2010 . . . .

Malley Aff. Ex. D (Dec. 6, 2012). When the parties argued this further motion May 2, 2011, the court recognized the status of defendants' respective motions by ordering, specifically and only regarding 70 Park Terrace East and Prime Locations, that:

> Pursuant to the accompanying 2/9/11 stipulation, the motion by defendants 70 Park Terrace East Owners Corp. and Prime Locations, Inc., to dismiss this action against them is resolved and superseded by their motion by an order to show cause dated and signed by the court 3/3/11.

Id. Ex. E.

Significantly, at no point, February 9, 2011, May 2, 2011,

in response to defendants or the court, or at any other juncture before plaintiff's current motion, did he ever suggest that no motion to dismiss the complaint by the attorney defendants was pending. Therefore he not only has misapprehended the true status of defendants' respective motions, but also has raised this claim regarding their status without even attempting to explain why, particularly in the face of the attorney defendants' March 2011 affirmation, he failed to present this claim earlier. C.P.L.R. § 2221(e)(3); Citizens Ins. Co. of Am. v. Hatzigeorgiou, 94 A.D.3d 586, 587 (1st Dep't 2012); Prime Income Asset Mgt., Inc. v. American Real Estate Holdings L.P., 82 A.D.3d 550, 551-52 (1st Dep't 2011); Henry v. Peguero, 72 A.D.3d 600, 602-603 (1st Dep't 2010); Gasab v. R.T.R.L.L.C., 69 A.D.3d 511, 512 (1st Dep't 2010). Insofar as plaintiff advances his misapprehension of the pending motions as a new legal theory, it is equally impermissible. C.P.L.R. § 2221(d); Onglingswan v. Chase Home Fin., LLC, 104 A.D.3d 543, 544 (1st Dep't 2013); DeSoignies v. Cornasesk House Tenants' Corp., 21 A.D.3d 715, 718 (1st Dep't 2005); Frisenda v. X Large Enters., 280 A.D.2d 514, 515 (2d Dep't 2001).

V. CONCLUSION

In sum, plaintiff has not pointed out a basis for defendants' motions to dismiss the complaint and his cross-motion for a declaratory judgment that the court overlooked or misapprehended. C.P.L.R. § 2221(d)(2); Social Serv. Empls. Union, Local 371 v. New York City Bd. of Correction, 93 A.D.3d

454 (1st Dep't 2012); Hernandez . St. Stephen of Hungary School, 72 A.D.3d 595 (1st Dep't 2010); Tounkara v. Fernicola, 63 A.D.3d 648, 649 (1st Dep't 2009); DeSoignies v. Cornasesk House Tenants' Corp., 21 A.D.3d at 718. See Harris v. Seward Park Hous. Corp, 79 A.D.3d 425, 426 (1st Dep't 2010); Garcia v. Jesuits of Fordham, 6 A.D.3d 163, 165 (1st Dep't 2004). For the abundant independent reasons outlined above and discussed further in the prior decision of those motions, even after a second look at plaintiff's allegations and legal theories, the court adheres to its original disposition of those motions and denies his motion for reargument and, insofar as his motion relies on any new fact, denies renewal as well. C.P.L.R. § 2221(d) and (e); Social Serv. Empls. Union, Local 371 v. New York City Bd. of Correction, 93 A.D.3d 454; Rivera v. Benaroti, 29 A.D.3d 340, 341 (1st Dep't 2006).

DATED: September 4, 2013

LUCY BILLINGS, J.S.C.