

Lander v 525 W. End Corp.

2013 NY Slip Op 32269(U)

September 18, 2013

Sup Ct, NY County

Docket Number: 155720/12

Judge: Joan A. Madden

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JOAN A. MADDEN
J.S.C.
Justice

PART //

Index Number : 155720/2012
LANDER, NATHAN
vs.
525 WEST END CORP.
SEQUENCE NUMBER : 001
DISM ACTION/INCONVENIENT FORUM

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

The following papers, numbered 1 to _____, were read on this motion tofor _____
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 *determined in accordance with the annexed decision and order.*

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

Dated: September 18, 2013

HON. JOAN A. MADDEN J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED
- 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

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
NATHAN LANDER,

Plaintiff,

INDEX NO. 155720/12

-against-

525 WEST END CORP., SIREN MANAGEMENT
CORP., JOHN DOES 1-20, ABC CORPORATIONS
1-20,

Defendants.

-----X
JOAN A. MADDEN, J.:

Defendants West End Corp. and Siren Management Corp. move for an order pursuant to CPLR 3211(a)(1), (5) and (7) dismissing the complaint, on the grounds of a defense founded on documentary evidence, res judicata and failure to state a cause of action. Plaintiff opposes the motion.

Plaintiff was the rent stabilized tenant of apartment 5D in the building located at 525 West End Avenue, which is owned and managed by defendants 525 West End Corp. and Siren Management Corp., respectively. In April 2009, the owner commenced a holdover proceeding against plaintiff in Housing Court, based on his failure to sign and return a renewal lease. Plaintiff did not appear, and in July 2009, after an inquest, the owner was awarded a judgment of possession and eviction. In or about August 2009, defendants evicted plaintiff and recovered possession of the apartment; the City Marshall removed plaintiff's personal possessions from the apartment and placed them in storage.¹

¹According to plaintiff's counsel, plaintiff is "currently living permanently in a nursing home."

In August 2012, plaintiff commenced the instant action for damages, asserting claims for negligence, unjust enrichment, unlawful conversion, and breach of the covenant of good faith and fair dealing. The complaint alleges that plaintiff “suffered extraordinary financial and personal loss as the result of defendants’ actions . . . including but not limited to personal effects, valuables, furniture, jewelry, cash, and sentimental items,” which “were sold at auction or otherwise lost,” and that he also “sustained a loss of a valuable property interest” in his rent stabilized apartment. Specifically, the complaint alleges that in 2009, plaintiff became ill and incapacitated, and was not present at the apartment, and that defendants or their employees knew he was ill since they were holding his mail. The complaint also alleges that plaintiff paid rent in 2009, which defendants accepted until April 2009. The complaint further alleges that defendants knew how to contact plaintiff, through his family and “representatives,” but failed to do so. The complaint alleges that defendants were “responsible for the actual physical removal” of his belongings from the apartment, that his property was “held by Pack It Away Storage” in Brooklyn and “then sold at auction.”

In lieu of answering, defendants are moving to dismiss the complaint pursuant to CPLR 3211(a)(1), (5) and (7), on the grounds of a defense founded on documentary evidence, res judicata and failure to state a cause of action. Defendants argue that the Housing Court judgment is res judicata, as the instant complaint is based on the same facts and circumstances. Specifically, defendants assert that the instant causes of action are all based on the lease, and are “reformulated contract claims” that were “subsumed” in the Housing Court judgment. For the same reason, defendants argue the complaint fails to state a causes of action. Defendants also rely on the Housing Court judgment as the “document” supporting their defense founded on

documentary evidence.

In opposition to the motion, plaintiff argues that his claims are not barred by *res judicata*, since they are based on events that occurred after the conclusion of Housing Court proceeding, i.e. defendants' conduct in evicting him, removing his belongings from the apartment and placing them in storage, where they were sold to satisfy a warehouseman's lien. Plaintiff states that he is not seeking to relitigate his eviction, has no desire to return to his apartment, and is not asserting any claims arising from the lease, but rather, he is asserting a separate and independent tort committed by defendants when they failed to "give him proper notice of the location of his belongings." Plaintiff concedes the lease was terminated, but alleges that defendants acted either intentionally or with utter and total disregard for his belongings "so that they could recover his apartment without interference," and that they "knew that they ran a strong risk of causing plaintiff's property to be lost." Plaintiff argues that once defendants "took the role of bailee" of his property, they had an independent duty to ensure that it was kept safe, and their failure to produce his property "allows for a cause of action sounding in tort, either negligence or conversion," as pleaded in the complaint. Alternatively, plaintiff requests an opportunity to replead and "revise" the complaint to set forth a valid claim.

In reply, defendants argue that the default judgment from Housing Court is conclusive as an adjudication on the merits, and for that reason, the instant action is barred by *res judicata*. Defendants also argue, for the first time in reply, that plaintiff's claims for bailment, conversion, lack of good faith and fair dealing, and unjust enrichment are without merit. Specifically, in the reply memorandum of law, defendants' counsel states that after the judgment of eviction, his clients arranged with the City Marshall to have the contents of plaintiff's apartment "removed to

storage,” and that under the terms of the lease, defendants were authorized to “discard” plaintiff’s property. Defendants’ counsel asserts that a bailment cannot exist since the landlord had no duty to return plaintiff’s property. Defendants’ counsel also argues for the first time in reply, that plaintiff’s property damage claims are time-barred under the three-year statute of limitations, since the Marshall removed his property on August 20, 2009, and this action was not commenced until August 23, 2013.

At the outset the court notes that while defendants base their motion to dismiss on the three separate grounds of documentary evidence, res judicata and failure to state a cause of action, their arguments as presented in their Memorandum of Law focus exclusively on the issue of whether plaintiff is precluded from maintaining this action in view of the Housing Court proceedings and judgment. As noted above, defendants’ “documentary evidence” consists of the Housing Court judgment. With respect to the specific claims for negligence, unlawful conversion, unjust enrichment, and breach of the covenant of good faith and fair dealing, defendants merely argue that such claims are barred by res judicata and fail to state a claim, since they are “nothing more” than “re-formulated contract claims” which could have been litigated in Housing Court.

The doctrine of res judicata or “claim preclusion” provides that “as to parties in a litigation . . . a judgment on the merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action.”

Singleton Management, Inc. v. Compere, 243 AD2d 213, 215 (1st Dept 1998) (quoting Gramatan Home Investors Corp. v. Lopez, 46 NY2d 481[1979]). Under the transactional approach to res judicata adopted by New York courts, “once a claim is brought to a final conclusion, all other

claims arising out of the same transaction or series of transaction are barred, even if based upon different theories or if seeking a different remedy.” Marinelli Associates v. Helmsley-Noyes Co., Inc., 265 AD2d 1, 5 (1st Dept 2000) (quoting O’Brien v. City of Syracuse, 54 NY2d 353, 357 [1981]).

As noted above, plaintiff essentially concedes he is barred from asserting any claims based on the facts underlying the Housing Court proceeding, since he explicitly states he is not seeking to relitigate his eviction, has no desire to return to his apartment, and is not asserting any claims arising from the lease. Thus, to the extent the complaint alleges that plaintiff was illegally evicted and deprived of his property interest in the apartment, such allegations must be dismissed and any portion of the complaint seeking damages based on such allegations is likewise dismissed. Plaintiff, however, is not precluded from asserting claims for damage to or loss of his personal property, since such claims are based on facts and circumstances that arose after the Housing Court proceeding was concluded, when the judgment of eviction was executed and plaintiff’s personal belongings were removed from the apartment and placed in storage. The balance of defendants’ arguments in support of dismissal, including the statute of limitations, cannot be considered, as they were improperly raised for the first time in defendants’ reply papers. See Wal-Mart Stores, Inc v. United States Fidelity & Guaranty Co, 11 AD3d 300 (1st Dept 2004).

Accordingly, it is


ORDERED that defendants’ motion to dismiss is granted only to the extent of dismissing the portion of the complaint seeking damages based on allegations that plaintiff was illegally evicted and deprived of his property interest in the apartment; and it is further

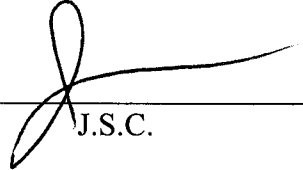
ORDERED that in all other respects defendants' motion to dismiss is denied; and it is further

ORDERED that defendants shall serve and file an answer within 20 days of the date of this decision and order; and it is further

ORDERED that the parties shall appear for a preliminary conference on October 17, 2013 at 9:30 a.m., in Part 11, Room 351, 60 Centre Street.

The court is notifying the parties by mailing copies of this decision and order.

DATED: September , 2013

ENTER:


J.S.C.