

Astill v Kumquat Prop., LLC

2013 NY Slip Op 32964(U)

November 21, 2013

Sup Ct, New York County

Docket Number: 151650/2013

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C. Justice

PART

Index Number : 151650/2013
ASTILL, JOSEPH
vs
KUMQUAT PROPERTIES, LLC
Sequence Number : 003
PARTIAL SUMMARY 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

is decided in accordance with the annexed decision.

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

Dated: 11/21/13

CYNTHIA S. KERN
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 55

-----X
JOSEPH ASTILL, individually and on behalf of all other
similarly situated Plaintiffs,

Plaintiffs,

-against-

KUMQUAT PROPERTIES, LLC, PARTNERS 66, LLC
and LAWRENCE PROPERTIES, INC.,

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 : _____

Index No. 151650/2013

DECISION/ORDER

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

Plaintiff commenced this action individually and on behalf of all other similarly situated plaintiffs for claims arising out of damages to the residential building located at 66 Pearl Street, New York, New York 10004 (the "Premises"), which were allegedly sustained during Hurricane Sandy on October 29, 2012. Defendant now moves for an order granting partial summary judgment and dismissing the class action claims, with prejudice, on the ground that plaintiff failed to move for class certification pursuant to CPLR § 902 within the requisite time. By separate Notice of Motion, plaintiff moves for an order pursuant to CPLR § 908 approving the discontinuance of the action and to establish a procedure of notice to class members. These motions are consolidated for disposition purposes and for the reasons set forth below, plaintiff's

motion is granted and defendants' motion is denied as moot.

The court first turns to plaintiff's motion for approval of the discontinuance of this action. Pursuant to CPLR § 908, "[a] class action shall not be dismissed, discontinued, or compromised without the approval of the court. Notice of the proposed dismissal, discontinuance, or compromise shall be given to all members of the class in such manner as the court directs." The First Department has made clear that these requirements apply even when class certification has not yet occurred. *Avena v. Ford Motor Co.*, 85 A.D.2d 149 (1st Dept 1982). Generally, "a plaintiff has a right to discontinue a pending action at any time unless substantial rights have accrued or his adversary's rights would be prejudiced thereby." *Louis R. Shapiro, Inc. v. Milspemes Corp.*, 20 A.D.2d 857 (1st Dept 1964). In other words, "in the absence of special circumstances, such as prejudice to a substantial right of the defendant, or other improper consequences, a motion for a voluntary discontinuance should be granted." *Mathias v. Daily News, L.P.*, 301 A.D.2d 503, 504 (1st Dept 2003). However, a motion to discontinue the action without prejudice will be denied when "such relief was plainly sought in order to avoid an adverse decision on the merits." *Baltia Air Lines, Inc. v. CIBC Oppenheimer Corp.*, 273 A.D.2d 55, 55-56 (1st Dept 2000).

In the present case, plaintiff's motion to discontinue this action in its entirety is granted as there is no prejudice to defendants and plaintiff did not seek the discontinuance to evade the consequences of an adverse decision on defendants' pending motion for partial summary judgment. The only argument defendants offer in opposition to plaintiff's motion is that plaintiff is only seeking to discontinue the action as to avoid the effect of his failure to timely move for class certification and the potential adverse result from defendants' motion to dismiss the class

action portion of the complaint. However, defendants fail to identify any adverse consequence that would result from the grant of summary judgment instead of allowing plaintiff to voluntarily dismiss this action. Indeed, if defendants' motion to dismiss the class action claims was granted it would not bar other potential class members from bringing a separate action and seeking class certification as this court never made a determination on the merits of class certification. Instead, plaintiff merely did not move for class certification within the requisite time. Moreover, plaintiff concedes in his reply papers that any discontinuance to Joseph Astill as an individual would be with prejudice. Thus, there is no prejudice to defendants in allowing plaintiff to voluntarily discontinue this action in its entirety.

Accordingly, plaintiff's motion is granted and defendants' motion is denied as moot. It is hereby

ORDERED that the above-entitled action is discontinued against all defendants with prejudice as to Joseph Astill individually and is discontinued against all defendants on behalf of all other similarly situated plaintiffs, without prejudice, and without costs to any party as against the other; and it is further

ORDERED that defendants are directed to produce to plaintiff's counsel the names and current addresses of all individuals who resided at 66 Pearl Street, New York, New York 10004, on October 29, 2012, within 60 days of entry of this order; and it is further

ORDERED that plaintiff's counsel is directed to distribute the notice of discontinuance as annexed to its moving papers to all putative class members by means of first-class mail within 30 days of receiving the necessary contact information from defendants. This constitutes the decision and order of the court.

Dated: 11/21/13

Enter: CR
J.S.C.

CYNTHIA S. KERN
J.S.C.