

**Strum v Barone**

2013 NY Slip Op 33033(U)

November 26, 2013

Sup Ct, NY County

Docket Number: 152672/2012

Judge: Debra A. James

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SUPREME COURT OF THE STATE OF NEW YORK – NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

GAIL STRUM, Plaintiff,
- v -
FRANK C. BARONE, Defendant.

Index No.: 152672/2012
Motion Date: 11/26/13
Motion Seq. No.: 001
Motion Cal. No.:

The following papers, numbered 1 to 6 were read on this show cause order for injunctive relief and cross motion for summary judgment on assault claims

Order to Show Cause -Affidavits -Exhibits
Notice of Cross Motion/Answering Affidavits - Exhibits
Replying Affidavits - Exhibits
Sur Replying Affidavits - Exhibits

Table with 2 columns: PAPERS NUMBERED, 1, 2, 3, 4, 5, 6

Cross-Motion: [X] Yes [ ] No

The court consolidates Motion Sequence Number 001 brought by Show Cause Order and cross motion and Motion Sequence Number 002 for disposition.

Upon the foregoing papers, it is

ORDERED that the show cause order of defendant Frank C. Barone is DENIED as defendant may retrieve his mail from 2 Gold Street, New York, New York, in accordance with Section 2, 1001, 1702 and 1708 of Title 18, United States Code; and it is further

ORDERED that with respect to defendant's application for relief from the temporary order of protection dated May 9, 2012, issued by the New York City Criminal Court in the form of seeking an order that plaintiff turn over defendant's personal property to him and that plaintiff and her attorney cease from

Check One: [ ] FINAL DISPOSITION [X] NON-FINAL DISPOSITION
Check if appropriate: [ ] DO NOT POST [ ] REFERENCE

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

contacting defendant's employer is DENIED, and defendant shall seek such relief in NYC Criminal Court, People v Barone, Docket No. 2012 NY 4036407 (NY County)<sup>1</sup>; and it is further

ORDERED that the cross motion of plaintiff for summary judgment on her first and second causes of action for assault is DENIED; and it is further

ORDERED the motion of defendant to amend his answer to interpose a ninth counterclaim for malicious prosecution related to a New York City Criminal Court proceeding; eleventh counterclaim for conversion; twelfth counterclaim for malicious prosecution related to a Family Court proceeding; and thirteenth counterclaim sounding in unjust enrichment for failure to pay use and occupancy, is GRANTED; and it is further

ORDERED that the motion of defendant to the extent that it seeks to amend his answer to interpose a tenth counterclaim for abuse of process and a twelfth counterclaim for wrongful eviction is DENIED; and it is further

ORDERED that defendant shall serve and file an amended answer with the counterclaims set forth as aforesaid, within twenty days of service of this order with notice of entry; and it is further

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<sup>1</sup>See People v Wood, 95 NY2d 509 (2000); In re: Devillano-Smyth v Smyth, 233 AD2d 748 (3d Dept 1996).

ORDERED that plaintiff shall serve and file a reply to such counterclaims in accordance with the Civil Practice Laws & Rules.

Although his Answer, verified by his attorney, qualifies defendant's denials as "upon information and belief", the affidavit of defendant submitted in support of his show cause order, where he "vehemently and vociferously dispute[s] all charges in both criminal and civil complaints" is sufficient to raise an issue of fact. Moreover, the NYC Criminal Court Certificate of Disposition appended to defendant's motion to amend his Answer, stating that the criminal court proceeding was dismissed on motion of the prosecutor, likewise defeats plaintiff's motion for summary disposition. See Uzenski v Fitzsimmons, 10 AD2d 890 (2d Dept 1960) and Fugazy v Corbetta, 34 AD3d 728 (2d Dept 2006).

An action that alleges that a proceeding was maliciously brought in the Family Court states a cause of action for malicious prosecution. See Avildsen v Prystay, 204 AD2d 154, 155 (1<sup>st</sup> Dept 1994); but compare Chappelle v Gross, 26 AD2d 340 (1<sup>st</sup> Dept 1966). However, defendant's proposed counterclaim for abuse of process does not state a cause of action since it refers to the issuance of a temporary order of protection against defendant, which by its very nature constitutes process that was

both issued and used for its intended purpose. See Butler v Ratner, 210 AD2d 691 (3<sup>rd</sup> Dept 1994).

An illegal eviction action on the part of a subtenant at will against a primary tenant or squatter is not cognizable. Plaintiff, as a subtenant or squatter, was without power to divest defendant of his interest in the apartment, since her interest or lack thereof, was, by definition, less than the possessory rights of defendant. Defendant, as primary tenant, may have a cause of action for breach of oral lease with his allegation that plaintiff deprived him of access to the apartment in question (Huron Associates LLC v 210 East 86<sup>th</sup> Street Corp, 18 AD3d 231 [1<sup>st</sup> Dept 2005]). The denial of that part of defendant's motion seeking to add a "wrongful eviction" counterclaim, is without prejudice to interposing a breach of an oral lease or license counterclaim.

Defendant's thirteenth counterclaim for unjust enrichment states a meritorious cause of action. "A quasi or constructive contract rests upon the equitable principle that a person shall not be allowed to enrich [herself] unjustly at the expense of another." Bradkin v Leverton, 26 NY2d 192, at 197 (1970); Kearns v Mino, 83 AD2d 606 (2<sup>nd</sup> Dept 1981).

This is the order and decision of the court.

Dated: November 26, 2013

ENTER:

  
**DEBRA A. JAMES** J.S.C.