

**Caputo v Koenig**

2015 NY Slip Op 31046(U)

June 18, 2015

Supreme Court, New York County

Docket Number: 450677/2014

Judge: Manuel J. Mendez

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This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY**

**PRESENT: MANUEL J. MENDEZ**  
*Justice*

**PART 13**

JOSEPHINE CAPUTO, PAUL EDWARDS,  
JEMANDE JAMES, and CHARLENE OWENS,

**INDEX NO. 450677/2014**  
**MOTION DATE 06-10-2015**  
**MOTION SEQ. NO. 001**  
**MOTION CAL. NO. \_\_\_\_\_**

Plaintiffs,

-against-

MICHAEL R. KOENIG, ESQ.  
**Defendant.**

The following papers, numbered 1 to 9 were read on this motion for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

**PAPERS NUMBERED**

1 - 6

Answering Affidavits — Exhibits \_\_\_\_\_

7 - 9

Replying Affidavits \_\_\_\_\_

**Cross-Motion:   X Yes    No**

Upon a reading of the foregoing cited papers, it is Ordered that Defendant’s motion for summary judgment dismissing the Complaint is granted to the extent of dismissing the claims asserted by plaintiff Charlene Owens, the remainder of the motion is denied, Plaintiffs’ cross-motion for partial summary judgment seeking injunctive relief is denied.

Goldfarb Properties is a trade name used to cover over twenty (20) residential, commercial and mixed-use rental properties located within the New York City metropolitan area. Each Goldfarb property is owned by a single-purpose Limited Liability Company (herein “LLC”), and each property is managed by Pelican Management (herein “Pelican”). Michael R. Koenig, Esq., defendant herein, alleges that he has been employed by Pelican since 1995 as General Counsel to Goldfarb Properties.

Plaintiffs are former tenants of Goldfarb Properties. Four actions were commenced in Civil Court, Bronx County by the individual LLCs against plaintiffs in this action (herein “Bronx Actions”). The Bronx Actions allegedly sought damages for unpaid rent after the tenants’ termination of tenancy. The individual LLCs in the Bronx Actions were located in Queens County and New York County. Some of the plaintiffs were represented by counsel in the Bronx Actions. Three of the four actions were settled and one remains pending.

The Bronx Actions commenced by Koenig state that the basis of venue is “Defendant’s Domicile” (see Moving Papers, Mot. Seq. 001, Exhibits A - D). The four defendants in the Bronx Actions resided in buildings owned by Goldfarb Properties located in Queens and New York County; none of the four defendants were domiciled in the Bronx.

Plaintiffs commenced this action by Complaint. On May 13, 2014, plaintiffs amended their Complaint as of right. The Amended Complaint alleges that Koenig files over one hundred debt collection lawsuits each year on behalf of landlords suing former tenants for unpaid rent and other alleged debts. The Amended Complaint further alleges that substantially all of the lawsuits commenced by Koenig for debt collections were commenced in the Civil Court, Bronx County, without regard to the residence of landlord or tenants, and that venue in most of those actions was improper. The Amended Complaint alleges that by commencing debt collection actions in counties where the former tenants did not reside, Koenig violated the Fair Debt Collection Practices Act (15 U.S.C. § 1692i); New York's General Business Law § 349; the Federal Trade Commission Act (15 U.S.C. § 45[a]); §§503 and 513 of New York's CPLR; and §§ 301(a) and 305 of the New York City Civil Court Act. Plaintiffs seek actual, statutory, treble, and punitive damages. Plaintiffs also seek injunctive relief enjoining Koenig from commencing, prosecuting, or enforcing actions commenced in an improper county.

Issue was joined on June 2, 2014. There has been no conference or court-ordered discovery in this action.

Koenig moves under Motion Sequence 001 for summary judgment dismissing the Amended Complaint in its entirety arguing that venue in the Bronx Actions was proper and that the Bronx Action did not violate the statutes stated in the Amended Complaint. In support of his summary judgment motion, Koenig annexes the summonses in the Bronx Actions, stipulations of settlement in some of the Bronx Actions, the deed to the two building-LLCs commencing the Bronx Actions, and the articles of incorporations for the building-LLCs.

Plaintiffs cross-move for partial summary judgment under Motion Sequence 002 as to the injunctive relief sought in the Amended Complaint.

As a preliminary matter, CPLR § 3211(a)(2) allows dismissal of a claim if the court lacks subject matter jurisdiction. A court may, sua sponte, dismiss an action for lack of subject matter jurisdiction (see *Concourse Nursing Home v. Chasin*, 259 A.D.2d 302, 684 N.Y.S.2d 784 [1<sup>st</sup> Dept., 1999]). This Court lacks subject matter jurisdiction over the alleged violations of Federal statutes, specifically, violations of the Fair Debt Collection Practices Act (15 U.S.C. § 1692i) and the the Federal Trade Commission Act (15 U.S.C. § 45[a]). These causes of action are hereby severed and dismissed without prejudice.

As to the causes of action for alleged violations of New York's General Business Law § 349, §§503 and 513 of New York's CPLR, and §§ 301(a) and 305 of the New York City Civil Court Act, Koenig's motion for summary judgment dismissing the Amended Complaint is denied as to plaintiffs Josephine Caputo, Paul Edwards, and Jemande James, but granted as to Charlene Owens.

In order to prevail on a motion for summary judgment, the proponent must make a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence, eliminating all material issues of fact (*Klein v. City of New York*, 81 N.Y. 2d 833, 652 N.Y.S. 2d 723 [1996]). Once the moving party has satisfied these standards, the burden shifts to the opponent to rebut that prima facie showing, by producing contrary evidence, in admissible form, sufficient to require a trial of material factual issues (*Amatulli v. Delhi Constr. Corp.*, 77 N.Y. 2d 525, 569 N.Y.S. 2d 337 [1999]).

Koenig annexes a Civil Court Bronx County so-ordered stipulation of settlement (see Moving Papers, Mot. Seq. 001, Exhibit F) whereby Charlene Owens, who was represented by counsel, stipulated to pay \$100.00 per month, beginning September 2014, and ending once she had paid off the entire sum of \$7,241.85. Res judicata bars Owens from now attempting to assert causes of action for violations of New York's General Business Law § 349, §§503 and 513 of New York's CPLR, and §§ 301(a) and 305 of the New York City Civil Court Act, when she could have raised them in the Bronx Civil Court action (*In re Hunter*, 4 N.Y.3d 260, 269, 794 N.Y.S.2d 286, 291, 827 N.E.2d 269 [2005]).

Koenig also annexes a stipulation of settlement between him and Jamande James. However, the stipulation of settlement is unexecuted by James, and is not so-ordered (see Moving Papers, Mot. Seq. 001, Exhibit E).

The evidence submitted by Koenig in support of summary judgment does not eliminate all material issues of fact or establish entitlement to judgment as a matter of law as to the remaining plaintiffs. Koenig does not establish, as a matter of law, that Pelican has offices in Bronx County, that he is an employee of Pelican, that he is not a debt collector, and that the Bronx Actions were not debt-collection actions.

Plaintiffs' cross-motion for partial summary judgment as to the injunctive relief sought in the Amended Complaint is denied. CPLR § 6301 grants this court the power to issue an order directing the defendant to perform an act for the benefit of plaintiff, or to refrain from performing an act which would be injurious to the plaintiff. A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates (1) a likelihood of success on the merits; (2) the prospect of irreparable injury and (3) a balance of equities tipping in the moving party's favor (*Doe v. Axelrod*, 73 N.Y. 2d 748, 532 N.E.2d 1272, 536 N.Y.S.2d 44 [1988]).

Plaintiffs fail to submit sufficient proof establishing a likelihood of success as to the alleged violations of New York's General Business Law § 349, §§503 and 513 of New York's CPLR, and §§ 301(a) and 305 of the New York City Civil Court Act. Plaintiffs annex self-serving affidavits, the pleadings in this action, only the summonses from the Bronx Actions, and various documents exchanged between the parties. None of these documents establish plaintiffs' likelihood of success. These documents also fail to show the prospect of irreparable injury that would be suffered by plaintiffs. In addition, the damages claimed in this action are solely monetary precluding the granting of an injunction.

Accordingly, it is hereby ORDERED, that the causes of action asserted in the Amended Complaint alleging violations of the Fair Debt Collection Practices Act (15 U.S.C. § 1692i) and the Federal Trade Commission Act (15 U.S.C. § 45(a)) are hereby severed and dismissed without prejudice to recommence in a proper forum, and it is further,

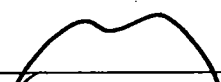
ORDERED, that defendant's motion for summary judgment made under Mot. Seq. 001 dismissing the Amended Complaint is granted to the extent of dismissing the claims alleged by plaintiff Charlene Owens, the remainder of the motion is denied, and it is further,

ORDERED, that plaintiffs' cross-motion for partial summary judgment made under Mot. Seq. 002 seeking injunctive relief is denied,

ORDERED, that the parties appear for a Preliminary Conference in IAS Part 13, located at 71 Thomas Street, Room 210, N.Y., N.Y. on July 22, 2015 at 9:30am.

ENTER:

Dated: June 18, 2015

  
\_\_\_\_\_  
MANUEL J. MENDEZ  
J.S.C.

Check one:  FINAL DISPOSITION    X NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST                       REFERENCE