

Thomas v Rockaway One Co.-Michael Koenig

2015 NY Slip Op 31326(U)

May 18, 2015

Supreme Court, Queens County

Docket Number: 17716/2014

Judge: Robert J. McDonald

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT : QUEENS COUNTY

P R E S E N T : HON. ROBERT J. McDONALD
Justice

IAS PART 34

- - - - - x

KEVIN THOMAS (ZEPHANIAH)

Index No.: 17716/2014

Plaintiff,

Motion Date: 4/21/15

- against -

Motion No.: 182

ROCKAWAY ONE COMPANY-MICHAEL KOENIG
THE CITY OF NEW YORK (CIVIL/HOUSING
COURT) MARSHAL ALEJANDRO R. FINARDO -
BADGE #55,

Motion Seq.: 1

Defendants.

- - - - - x

The following papers numbered 1 to 10 on this motion by defendants Rockaway One Company - Michael Koenig for an order pursuant to CPLR 3211(a) (7) dismissing the plaintiff's complaint for lack of jurisdiction and failure to state a cause of action.

Papers
Numbered

Rockaway One Company-Michael Koenig's	
Notice of Motion-Affirmation-Affidavit(s)-	
Service-Exhibit(s)	1-4
Plaintiff's Affirmation in Opposition-	
Affidavit(s)-Exhibit(s)	5-8
Defendants' Reply Affirmation-Exhibit(s)	9-10

Defendants Rockaway One Company - Michael Koenig, by notice of motion, seek and order of the Court, pursuant to CPLR 3211, for an order dismissing the complaint for lack of jurisdiction and for failure to state a cause of action for which relief can be obtained and upon documentary evidence which establishes a defense as a matter of law.

Plaintiff submits an affidavit in opposition and defendants submit a reply.

This is an action in which plaintiff seeks monetary damages for an illegal eviction for non-payment of rent from Apartment 4D located at Wavecrest Gardens, located at 20-23 Seagirt Boulevard, Rockaway, NY, Apartment 4D. In addition, the plaintiff seeks monetary damages maintaining that the lease was breached by defendants' failure to keep the premises habitable and failure to repair damage done to the premises caused by water leaking through the bedroom ceiling from the apartment above.

Defendant Rockaway One Company is the owner and landlord of Wavecrest Gardens and Michael Koenig is General Counsel for Rockaway One Company. Jenny Thomas, the wife of the plaintiff was a tenant under the terms and conditions of a written lease dated May 21, 2013.

Defendant Rockaway One Company began an action for eviction against Jenny Thomas in the Civil Court of the City of New York, Housing Part, Queens County on August 6, 2014 based upon rental arrears in the amount of \$2,134.00. On September 15, 2014 a judgment of possession was awarded to Rockaway One Company by the Civil Court of the City of New York, Queens County, Housing Part in favor of Rockaway One Company and against Jenny Thomas for the non-payment of rent.

On October 6, 2014, the City Marshal sent respondent an eviction notice. On October 15, 2014, Jenny Thomas filed an Order to Show Cause to vacate the judgment. On October 23, 2014, the Order to Show Cause was heard and Housing Court Judge Gilbert Badillo stayed the execution of the warrant through November 12, 2014 to permit payment of \$4,480.00 representing rent arrears through October 31, 2014 and for the landlord to repair the leak in the bedroom.

On November 19, 2014, a second eviction notice was sent to respondent and on November 28, 2014, Jenny Thomas filed another Order to Show cause to vacate the judgment. Housing Court Judge John S. Lansden declined to sign the Order to Show Cause as no proof of ability to pay the back rent was provided.

Subsequently, a warrant was executed and Jenny Thomas was evicted from the apartment on December 5, 2014.

On December 9, 2014, Jenny Thomas filed an Order to Show Cause in Civil Court to restore possession. Pursuant to the order of Housing Court Judge Gilbert Badillo signed on December 11, 2014, the reletting of the apartment was stayed through December 16, 2014 for the respondent to pay \$7,722.00 in back rent plus legal and marshal's fees through December 31, 2014.

Upon payment the respondent would be "...restored to possession immediately. Upon default in payment all stays are vacated. Petitioner is released from all claims regarding the legality of the eviction."

Defendants in this action now move to dismiss the complaint for lack of jurisdiction on the ground that they were not served with the summons with notice; that a judicial determination had been made by order of the Civil Court/Housing Part on December 16, 2014 and that the eviction was lawful and that petitioner was released from all claims regarding the legality of the eviction. Defendants maintain that determination is res judicata and has collateral estoppel effect.

In this action the Court record reflects that plaintiff filed a summons with notice on December 9, 2014 and an RJI on January 30, 2015. Pursuant to the affidavit of Lindsay Fernhoff, employee of Pelican Management Inc., exclusive Managing Agent for Rockaway One Company, on December 10, 2014, she was handed a document labeled complaint (Exhibit A) however, no summons was attached to the complaint.

Plaintiff submits an affidavit in opposition where he maintains that after he filed the summons with notice he requested that the defendants receive a copy of it. That same day the summons was filed, plaintiff maintains that a Melissa McBride "submitted a copy of the complaint with index number to Lindsey Fernhoff and stated that the company was going to be served." No affidavit of service of the summons with notice or affidavit of service of the complaint is submitted. The Queens County Clerk's minutes reflect that the complaint was never filed.

Defendants maintain that although they did receive the complaint they never received the summons with notice. However no affidavits of service are submitted by plaintiff and none are filed in the Queens County Clerk's minutes.

Pursuant to CPLR 308(2), service of process may be made, inter alia, by delivery of the summons within the state to a person of suitable age and discretion "at the [defendant's] actual place of business, dwelling place or usual place of abode," and by mailing the summons to the defendant at either his or her last known residence or actual place of business. "Jurisdiction is not acquired pursuant to CPLR 308(2) unless both the delivery and mailing requirements have been strictly complied with" (Munoz v. Reyes, 40 AD3d 1059 [2d Dept. 2007] quoting Ludmer v Hasan, 33 AD3d 594 [2d Dept. 2006]). The plaintiff failed to

proffer proof of service to show that the defendants were personally served and that service of the summons with notice had been properly effected in compliance with the statute.

Moreover, the defendants maintain pursuant to the order of the Housing Court Judge Gilbert Badillo signed on December 11, 2014, the respondent, the petitioner was released from all claims regarding the legality of the eviction. Defendants maintain that determination is res judicata and has collateral estoppel effect.

Therefore, the defendants assert that the issues raised in the instant complaint have already been litigated and determined in a prior action and therefore the plaintiff's complaint should be dismissed for failure to state a cause of action and that the plaintiff's complaint should be dismissed on the grounds of res judicata.

"The doctrine of collateral estoppel precludes a party from relitigating an issue which was previously decided against that party, or those in privity, in a proceeding in which there was a fair opportunity to fully litigate the matter" (Strough v Incorporated Vil. of W. Hampton Dunsee, 78 AD3d 1037 [2d Dept. 2010]; Ryan v New York Tel. Co., 62 NY2d 494 [1984]). In order to invoke the doctrine, two requirements must be met: (1) the identical issue must have been necessarily decided in the prior action and must be decisive in the present action, and (2) the party who is precluded from relitigating the issue must have had a full and fair opportunity to contest the matter in the prior action (see Schwartz v Public Adm'r of County of Bronx, 24 NY2d 65 [1969]). "The proponent of collateral estoppel has the burden of demonstrating that the issue was identical and necessarily decided in the first action, whereas the opposing party has the burden of establishing that there was no full and fair opportunity to litigate the matter in the prior action" (see Strough v Incorporated Vil. of W. Hampton Dunes, supra., Kaufman v Eli Lilly & Co., 65 NY2d 449[1985]).

Here, this Court finds that the Court did not obtain jurisdiction as it is clear from the record that the plaintiff failed to serve a summons with the complaint. Moreover, the issue as to the legality of the eviction was previously litigated in Civil Court and pursuant to Judge Badillo's order of December 11, 2014, the petitioner was released from all claims regarding the legality of the eviction.

Accordingly, in light of the fact that the summons with notice was never served and pursuant to Judge Badillo's order of December 11, 2014, defendants' motion is granted and the action

is dismissed.

Dated Long Island City, NY
May 18, 2015

ROBERT J. McDONALD
J.S.C.