

Stoner v Atlantic Realty Apts., LLC
2015 NY Slip Op 32052(U)
August 25, 2015
Supreme Court, New York County
Docket Number: 101399/14
Judge: Donna M. Mills
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.
This opinion is uncorrected and not selected for official publication.

BA
9/23/15
E

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

PRESENT: DONNA M. MILLS

FILED

PART 58

Justice
SEP 23 2015

Stoner, MARTIN

COUNTY CLERK'S OFFICE
NEW YORK

INDEX No. 101399/14

Plaintiff,

MOTION DATE ~~10/29/14~~

-v-

MOTION SEQ. No. 178

Defendant,

MOTION CAL No. _____

Atlantic REALTY APTS.

The following papers, numbered 1 to _____ were read on this motion to _____

PAPERS NUMBERED

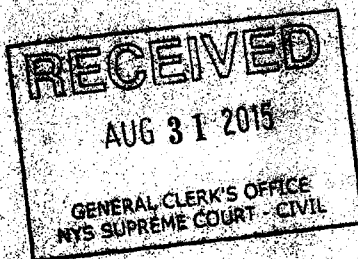
Notice of Motion/Order to Show Cause-Affidavits- Exhibits.... _____

Answering Affidavits- Exhibits _____

Replying Affidavits _____

CROSS-MOTION: _____ YES _____ NO

Upon the foregoing papers submitted it is, decided as per attached order,



Dated: 8/25/15

[Signature]
J.S.C.

Check one: _____ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

FILED

SEP 23 2015

COUNTY CLERK'S OFFICE
NEW YORK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 58

-----X

Martin Stoner,

Plaintiff,

Index
Number:

-against-

101399/2014

Atlantic Realty Apts., LLC,
and New York State Division
of Housing and Community
Renewal,

FILED

Defendants.

-----X SEP 23 2015

Donna M. Mills, J.:

COUNTY CLERK'S OFFICE
NEW YORK

Plaintiff moves for an injunction staying all current proceedings (the Administrative Proceedings) between himself and Atlantic Realty Apts., LLC (Atlantic), to enjoin Atlantic from commencing actions against him in the Civil Court of the City of New York, to permit him to deposit rent into this court and other relief. The Administrative Proceedings are currently pending before the New York State Division of Housing and Community Renewal (DHCR). Plaintiff also moves to impose sanctions against defendants. He also moves for leave to serve a second amended complaint, adding Woody Pascal (Pascal), DHCR's Deputy Commissioner as an additional defendant.

DHCR cross-moves, pursuant to CPLR 3211 (a) (7), to sever and dismiss plaintiff's complaint against it for failure to state a claim. Atlantic also cross-moves, pursuant to CPLR 3211 (a)

(1) and (7), to dismiss plaintiff's complaint against it and for sanctions against plaintiff. The motions and cross motions are consolidated for disposition and decided as noted below.

Underlying Allegations

Plaintiff states that he is a rent-stabilized tenant residing in a building (the Building) located at 900 West End Avenue, Apt 7F (the Apartment), New York, New York. Atlantic owns the Building.

Plaintiff asserts that Atlantic has harassed him, since October 2013, in order to force him out of the Apartment by failing to make repairs, failing to credit some of his rent payments and by "lying" in its response to plaintiff's applications to DHCR. Plaintiff has filed eleven separate complaints to DHCR, commencing in November 2013, raising these claims of Atlantic's purported misconduct. The Administrative Proceedings are still ongoing. DHCR's failure to issue determinations forms the basis of plaintiff's motion to amend to add Pascal as a party defendant and to assert claims against DHCR under 42 USC § 1983.

Atlantic asserts that, in the Administrative Proceedings, plaintiff has sought rent reductions, based upon his claims of reduction in services in the Building, as well as in the Apartment. It contends that it has maintained essential services, that it sought to gain access to the Apartment when

necessary to make repairs and that its responses in the Administrative Proceedings were accurate. It further contends that plaintiff's complaint should be dismissed for failure to exhaust his administrative remedies, and that plaintiff retains the right to challenge any adverse DHCR determination in an article 78 proceeding. For the same reasons, Atlantic states that plaintiff's motion for an injunction and sanctions should be denied.

DHCR contends that plaintiff's underlying dispute is with his landlord, Atlantic, rather than the administrative agency adjudicating the Administrative Proceedings. It asserts that the amended complaint does not seek any relief against it and that the proposed second amended complaint lacks merit since neither DHCR nor Pascal are subject to suit under 42 USC § 1983 and that there are no factual assertions of deprivation of federal constitutional or statutory rights under color of state law. It, therefore, contends that plaintiff's complaint against it should be dismissed and that plaintiff's motion to amend his complaint should be denied.

Dismissal Standard

In determining a motion to dismiss pursuant to CPLR 3211, "the court must accept the facts as alleged in the complaint as true, accord [them] every possible favorable inference, and determine . . . whether the facts as alleged fit within any

cognizable legal theory" (*Goldman v Metropolitan Life Ins. Co.*, 5 NY3d 561, 570-571 [2005] [internquotation marks and citation omitted]; *Goshen v Mutual Life Ins. Co. of N.Y.*, 98 NY2d 314, 326 [2002]). Dismissal based upon documentary evidence is appropriate only where the "documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law" (*Leon v Martinez*, 84 NY2d 83, 88 [1994]). However, allegations that are bare legal conclusions or are inherently incredible or that are flatly contradicted by the documentary evidence are not accorded such favorable inferences and need not be accepted as true (*Biondi v Beekman Hill House Apt. Corp.*, 257 AD2d 76, 81 [1st Dept 1999], *affd* 94 NY2d 659 [2000]). Also, "[w]hether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I, Inc. v Goldman, Sachs & Co.*, 5 NY3d 11, 19 [2005]).

Injunction Standard

"A preliminary injunction may be granted under CPLR article 63 when the party seeking such relief demonstrates: (1) a likelihood of ultimate success on the merits; (2) the prospect of irreparable injury if the provisional relief is withheld; and (3) a balance of the equities tipping in the moving party's favor" (*Doe v Axelrod*, 73 NY2d 748, 750 [1988]; *see also Nobu Next Door, LLC v Fine Arts Hous., Inc.*, 4 NY3d 839, 840 [2005]).

Exhaustion of Administrative Remedies

"It is hornbook law that one who objects to the act of an administrative agency must exhaust available administrative remedies before being permitted to litigate in a court of law" (*Matter of Welch v New York State Div. of Hous. & Community Renewal*, 287 AD2d 725, 726 [2d Dept 2001] quoting *Watergate II Apts. v Buffalo Sewer Auth.*, 46 NY2d 52, 57 [1978]; see also *Town of Oyster Bay v Kirkland*, 19 NY3d 1035, 1038 [2012])). While Supreme Court has the authority to adjudicate such disputes "by virtue of its constitutional role as a court of general original jurisdiction . . . [this] does not prohibit the Legislature from conferring exclusive original jurisdiction upon an agency in connection with the administration of a statutory regulatory program" (*Sohn v Calderon*, 78 NY2d 755, 766-767 [1991]; see also *Uniformed Firefighters Assn. of Greater N. Y. v City of New York*, 79 NY2d 236, 241-242 [1992])). "In situations where the Legislature has made that choice, the Supreme Court's power is limited to article 78 review, except where the applicability or constitutionality of the regulatory statute, or other like questions are in issue" (*Sohn*, 78 NY2d at 767; see also *Katz 737 Corp. v Cohen*, 104 AD3d 144, 149 [1st Dept 2012], *lv denied* 21 NY3d 864 [2013])). Where the "issues to be decided in this action involve factual evaluations which must be made based almost entirely upon the interpretation of DHCR orders pertaining

to the premises, [a plenary action in Supreme Court is inappropriate, but the proper forum is rather] a determination by DHCR" (*Wilcox v Pinewood Apt. Assoc., Inc.*, 100 AD3d 873, 874-875 [2d Dept 2012]; see also *Wong v Gouveneur Garden Hous. Corp.*, 308 AD2d 301, 303-304 [1st Dept 2003]).

Sanctions

"Sanctions are retributive . . . [to] punish past conduct [and] . . . goal oriented . . . in deterring future frivolous conduct" (*Levy v Carol Mgt. Corp.*, 260 AD2d 27, 34 [1st Dept 1999]; see also *Yenom Corp. v 155 Wooster St. Inc.*, 33 AD3d 67, 70 [1st Dept 2006]). "[F]rivolous conduct can be defined [as follows]: the conduct is without legal merit; or is undertaken primarily to delay or prolong the litigation or to harass or maliciously injure another; or asserts material factual statements that are false" (*Levy*, 260 AD2d at 34; see also *Matter of Grayson v New York City Dept. of Parks & Recreation*, 99 AD3d 418, 419 [1st Dept 2012]). "[A] somewhat colorable argument" is not not sanctionable since it is not completely without merit and can be supported by a reasonable argument for extension, modification or reversal of existing law (*Kremen v Benedict P. Morelli & Assoc., P.C.*, 80 AD3d 521, 522 [1st Dept 2011]).

Leave to Amend

"Motions for leave to amend pleadings should be freely granted (CPLR 3025 [b]), absent prejudice or surprise" (*MBIA Ins.*

Corp. v Greystone & Co., Inc. 74 AD3d 499, 499 [1st Dept 2010]; see also *Loomis v Civetta Corinno Constr. Corp.*, 54 NY2d 18, 23 [1981]). However, amendment is not proper if "the proposed amendment is palpably insufficient or patently devoid of merit" (*MBIA Ins.*, 74 AD3d at 499; see also *Megarix Furs v Gimbel Bros.*, 172 AD2d 209, 209 [1st Dept 1991]).

42 USC § 1983 Claim Against a State Agency

"To state a claim for relief in an action brought under § 1983, [a party] must establish that [he] was deprived of a right secured by the Constitution or laws of the United States, and that the alleged deprivation was committed under color of state law [and] the under-color-of-state-law element of § 1983 excludes from its reach 'merely private conduct, no matter how discriminatory or wrongful'" (*American Mfrs. Mut. Ins. Co. v Sullivan*, 526 US 40, 49-50 [1999], quoting *Blum v Yaretsky*, 457 US 991, 1002 [1982]; see also *Tancredi v Metropolitan Life Ins. Co.*, 316 F3d 308, 312-313 [2d Cir], cert denied 539 US 942 [2003]).

"States are protected [from lawsuits under 42 USC § 1983] by the Eleventh Amendment . . . [,b]ut a suit against a state official in his or her official capacity . . . is a suit against the official's office . . . [and], it is no different from a suit against the State itself" (*Will v Michigan Dept. of State Police*, 491 US 58, 70-71 [1989]). Put another way, "an entity with

Eleventh Amendment immunity [such as a state agency] is not a 'person' within the meaning of § 1983" (*Howlett By and Through Howlett v Rose*, 496 US 356, 365 [1990])).

Moreover, "the language of § 1983 . . . compels the conclusion that Congress did not intend municipalities to be held liable unless action pursuant to official municipal policy of some nature caused a constitutional tort" (*Monell v Dept. of Social Servs. of City of New York*, 436 US 658, 691 [1978])).

"Official municipal policy includes the decisions of a government's lawmakers, the acts of its policymaking officials, and practices so persistent and widespread as to practically have the force of law" (*Connick v Thompson*, 563 US 51, 131 S Ct 1350, 1359 [2011])).

Discussion

Plaintiff has sought an injunction to stay the Administrative Proceedings. He has not established a likelihood of success on the merits, irreparable harm or a favorable balance of the equities (see *Nobu Next Door*, 4 NY3d at 840; *Doe*, 73 NY2d at 750). There is a sharp factual dispute as to whether Atlantic has harrassed plaintiff or whether it has acted properly. The administrative process before DHCR will determine what occurred and staying the Administrative Proceedings would delay resolution of the matter. Plaintiff has also not shown irreparable harm, since the determinations of the Administrative Proceedings is

reviewable in an article 78 proceeding.

Plaintiff has not shown that Atlantic engaged in "frivolous conduct . . . [or] abuse of the judicial process" (*Levy*, 260 AD2d at 34). Plaintiff asserts that Atlantic's statements were false, but his mere assertion does not establish that Atlantic's statements were false. Rather, there is a dispute on the underlying facts and not the type of wrongful conduct that would warrant sanctions. Accordingly, plaintiff's motion for sanctions is denied. For similar reasons, the court denies the portion of Atlantic's cross motion that seeks to impose sanctions on plaintiff.

Plaintiff's proposed second amended complaint seeks to add Pascal as an additional defendant. However, "a suit against a state official in his or her official capacity . . . is no different from a suit against the State itself [and is barred by the Eleventh Amendment]" (*Will*, 491 US at 71). Moreover, plaintiff has not presented factual allegations of an "official [governmental] policy" (*Monell*, 436 US at 691). Consequently, plaintiff's motion for leave to serve and file a second amended complaint is denied since "the proposed amendment is . . . patently devoid of merit" (*MBIA*, 74 AD3d at 499).

DHCR is "a state agency protected from suit . . . by the Eleventh Amendment" (*Howlett*, 496 US at 365). Moreover, the claims in plaintiff's amended complaint do not seek relief

against it and, consequently, its cross motion to dismiss plaintiff's complaint against it must be granted.

Atlantic seeks dismissal of plaintiff's complaint, based upon his failure to exhaust administrative remedies, and that the proper remedy is through DHCR's administrative process. While Supreme Court has jurisdiction over plaintiff's claims, this "does not prohibit the Legislature from conferring exclusive original jurisdiction upon an agency in connection with the administration of a statutory regulatory program" (*Sohn*, 78 NY2d at 767). Also, "'while concurrent jurisdiction does exist, where there is an administrative agency which has the necessary expertise to dispose of an issue, in the exercise of discretion, resort to a judicial tribunal should be withheld pending resolution of the administrative proceeding'" (*Wong*, 308 AD2d at 303 [internal citation omitted]). The portion of Atlantic's cross motion that seeks dismissal of plaintiff's complaint must be granted.

Order

It is, therefore,

ORDERED that plaintiff's motion for an injunction is denied; and it is further

ORDERED that plaintiff's motion to impose sanctions on defendants is denied; and it is further

ORDERED that plaintiff's motion for leave to serve and file a second amended complaint is denied; and it is further

ORDERED that New York State Division of Housing and Community Renewal's cross motion to sever and dismiss plaintiff's complaint against it is granted and the Clerk of the Court is directed to enter judgment in favor of said defendant, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

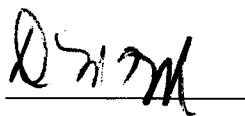
ORDERED that the portion of Atlantic Realty Apts., LLC's cross motion that seeks dismissal of plaintiff's complaint is granted; and the Clerk is directed to enter judgment accordingly in favor of said defendant, together with costs and disbursements as taxed by the Clerk upon submission of an appropriate bill of costs; and it is further

ORDERED that the portion of Atlantic Realty Apts., LLC's cross motion that seeks impose sanctions on plaintiff is denied.

Dated:

8/25/ 2015

ENTER:



J.S.C.

DONNA M. MILLS, J.S.C.

FILED

SEP 23 2015

COUNTY CLERK'S OFFICE
NEW YORK