

Lund v Safran
2017 NY Slip Op 32159(U)
October 10, 2017
Supreme Court, New York County
Docket Number: 652126/2017
Judge: Kathryn E. Freed
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.

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

PRESENT: HON. KATHRYN E. FREED

PART 2

Justice

-----X

NANICE LUND,

INDEX NO. 652126/2017

Plaintiff,

MOTION DATE _____

- v -

LOUISE SAFRAN, KERRIE SAFRAN

MOTION SEQ. NO. 001

Defendant.

DECISION AND ORDER

-----X

The following e-filed documents, listed by NYSCEF document number 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28

were read on this application to/for STAY/CONSOLIDATION

Upon the foregoing documents, it is ordered that the motion is **denied**.

In this action sounding, inter alia, in breach of contract, plaintiff Nanice Lund moves, pursuant to CPLR 602(b), to stay a holdover proceeding pending against her in Housing Court under Civil Court, New York County Index Number L/T 70582/16 and styled *Louise Safran v Nanice Lund*, and to remove the Housing Court proceeding to this Court and consolidate it for trial with the above-captioned action. Defendants Louise Safran and Kerrie Safran oppose the motion. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, the motion is **denied**.

FACTUAL AND PROCEDURAL BACKGROUND:

Defendant Louise Safran (“defendant”), 85, was the holder of 13 shares in RNA House, Inc., a Mitchell-Lama development, which shares were appurtenant to 160 West 96th Street, Apartment 10N, New York, New York (“the unit”). She also held a proprietary lease to the unit. Defendant lived in the unit with her husband, who died in 2012, for more than 50 years. Following the death of defendant’s husband, her family employed plaintiff Nanice Lund (“plaintiff”), 80, to care for her. During that time, plaintiff resided in the unit and did not pay rent.

In or about 2014, after plaintiff was hospitalized due to a stroke, defendant’s family moved defendant out of the unit due to her inability to care for herself. In or about September of 2014, defendant executed a power of attorney allowing her daughter, defendant Kerrie Safran (“Kerrie”), to conduct “real estate transactions”, as well as “all other matters”, on her mother’s behalf. Ex. A to Mot.

When plaintiff was released from the hospital, she moved back into the unit. Although defendant wanted to move back into the unit, she claimed that she could not do so because plaintiff refused to leave. On or about June 28, 2016, defendant served a notice to quit on plaintiff advising that her license to occupy the unit terminated on July 20, 2016. Ex. A to Mot. When plaintiff refused to leave the unit, defendant commenced a summary holdover proceeding against her in Housing Court under Civil Court, New York County Index Number L/T 70582/16, styled *Louise Safran v Nanice Lund* (“the Civil Court proceeding”). Id.

Plaintiff served an answer to the petition in the Civil Court action and defendant moved to dismiss her affirmative defenses and counterclaims. By order dated December 30, 2016, the Civil Court (Stoller, J.) determined that defendant established a prima facie case, dismissed plaintiff’s first through fourth counterclaims, and dismissed all but three of plaintiff’s affirmative defenses.

Ex. F to Aff. In Opp. Plaintiff moved to reargue, which motion was denied. Ex. G to Aff. In Opp. Defendant thereafter moved to strike plaintiff's jury demand on the ground that plaintiff's three remaining affirmative defenses, all relating to the manner in which plaintiff entered into possession of the unit, sounded in equity. The affirmative defenses were that the proceeding was improper because it was not a true licensing proceeding; that plaintiff did not enter into possession of the unit in a capacity as a home health aide employed to assist defendant; and that plaintiff did not owe use and occupancy to defendant since defendant persuaded plaintiff to leave her own apartment to come live with her (defendant). By order dated April 24, 2017, the Civil Court (Schreiber, J.) granted the motion and set a trial date of May 19, 2017. Ex. H to Aff. In Opp. The trial was then rescheduled for August 2, 2017. Aff. In Opp., at par. 21.

Plaintiff did not appeal any of the Civil Court orders referenced above. On April 20, 2017, plaintiff commenced the captioned action asserting a claim for breach of contract as against defendant and a claim for tortious interference with a contract as against Kerrie. Ex. B to Mot. Concomitantly with the filing of the summons and complaint in this action, plaintiff brought the instant order to show cause, pursuant to CPLR 602(b), seeking to stay the Civil Court action, pending in Housing Court under Civil Court, New York County Index Number L/T 70582/16 and styled *Louise Safran v Nanice Lund*, and to remove the Civil Court proceeding to this Court and consolidate it for trial with the above-captioned action. Defendants oppose the motion.

LEGAL CONCLUSIONS:

CPLR 602(b) provides that “[w]here an action is pending in the [S]upreme [C]ourt it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the [S]upreme [C]ourt.” Although there is usually a “strong preference” for

resolving holdover proceedings in Housing Court (*44-46 W. 65th Apt. Corp. v Styan*, 3 AD3d 440, 441 [1st Dept 2004]), where complete relief cannot be provided by the Housing Court and common questions of law and fact exist, judicial economy is served by consolidation of a Housing Court and Supreme Court matter. See *Murphy v 317-319 Second Realty LLC*, 95 AD3d 443 (1st Dept 2012). “Only where [the] Civil Court is without authority to grant the relief sought should the prosecution of a summary proceeding be stayed.” *Scheff v 230 East 73rd Owners Corp.*, 203 AD2d 151 (1st Dept 1994). The decision whether to consolidate is one to be made in the Court’s discretion. *Id.*

This Court finds, in its discretion, that consolidation is not warranted herein since the Civil Court has the authority to grant the relief sought by plaintiff in the Civil Court action. Specifically, since plaintiff raised certain equitable defenses in the Civil Court action which must be tried by that Court (*see 910 West End Avenue, Ltd. v Buckner*, 1995 NY Misc LEXIS 754 (App Term, 1st Dept 1995)), there is no need to try those affirmative defenses in this Supreme Court action.

Additionally, as noted above, the issues relating to the aforementioned affirmative defenses to be tried in Civil Court pertain to the manner in which plaintiff took possession of the unit, whereas the issues raised in the captioned action relate to monetary damages sought by plaintiff arising from an alleged breach of contract and tortious interference with contract. Thus, consolidation is not warranted since the actions do not share common issues of fact and law.

Finally, as defendants assert, the two actions are at significantly different procedural stages. “Even where there are common questions of law or fact, consolidation is properly denied if the actions are at markedly different procedural stages and consolidation would result in undue delay in the resolution of either matter.” *Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 (1st Dept 2003).” *Ahmed v C.D. Kobsons, Inc.*, 73 AD3d 440, 441 (1st Dept 2010). Here, the Civil

Court action, which was commenced on or about August of 2016, was scheduled to proceed to trial on August 2, 2017, whereas the Supreme Court action was commenced on April 20, 2017 and no note of issue has been filed herein. Thus, the motion is denied on this ground as well.

Therefore, in light of the foregoing, it is hereby:

ORDERED that the motion by plaintiff Nanice Lund is denied; and it is hereby

ORDERED that this constitutes the decision and order of the court.

10/10/2017
DATE


KATHRYN E. FREED, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
APPLICATION:	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>		<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>		<input type="checkbox"/>	SUBMIT ORDER	<input type="checkbox"/>	REFERENCE
	<input type="checkbox"/>	DO NOT POST	<input type="checkbox"/>		<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	