

Koval v St Nicholas 175 Assoc LLC

2017 NY Slip Op 32825(U)

September 22, 2017

Supreme Court, New York County

Docket Number: 157027/2016

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

ZACHARY KOVAL,
Plaintiff,
-against-

INDEX NO. 157027/2016
MOTION DATE 09/20/2017
MOTION SEQ. NO. 002
MOTION CAL. NO. _____

ST NICHOLAS 175 ASSOC LLC, a/k/a ST NICHOLAS
ONE SEVEN FIVE ASSOCIATES, L.L.C., LAURENCE
GLUCK, SMAJLJE SRDANOVIC, STELLAR MANAGEMENT
CO., and RAMSES CAPELLAN,
Defendants,

The following papers, numbered 1 to 8 were read on this motion to reargue.

	<u>PAPERS NUMBERED</u>
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	<u>1-3</u>
Answering Affidavits — Exhibits _____	<u>4- 6</u>
Replying Affidavits _____	<u>7 - 8</u>
Cross-Motion: <input type="checkbox"/> Yes <input checked="" type="checkbox"/> No	

Upon a reading of the foregoing cited papers, it is Ordered that Defendant St Nicholas 175 Assoc LLC a.k.a St Nicholas One Seven Five Associates, LLC's ("St Nicholas") motion for leave to reargue pursuant to CPLR §2221 and upon reargument, deny Plaintiff's January 23, 2017 cross-motion for summary judgment without prejudice, is granted.

Plaintiff commenced this action on August 19, 2016 against Defendants to recover for: (i) rent overcharge, (ii) breaches of the warranty of habitability, and (iii) legal fees. Plaintiff was a tenant in an Apartment owned by Defendant St Nicholas located at 1306 St. Nicholas Avenue, New York, New York from October 2014 through September 2016. On May 31, 2017 this court granted Plaintiff's cross-motion for summary judgment to the extent of granting judgment on liability on the First Cause of Action for Rent Overcharge against St Nicholas and dismissing St Nicholas' First, Third and Fourth Affirmative Defenses in its Answer (Moving Papers Ex. A).

Defendant St Nicholas now moves for leave to reargue Plaintiff's January 23, 2017 cross-motion pursuant to CPLR §2221[d] and upon reargument, deny Plaintiff's motion for summary judgment. Plaintiff opposes the motion.

CPLR §2221[d] states that a motion for leave to reargue (i) shall be identified specifically as such, (ii) shall be based upon matters of fact or law allegedly overlooked or misapprehended by the court in determining the prior motion, but shall not include any

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

matters of fact not offered on the prior motion, and (iii) shall be made within thirty (30) days after service of a copy of the order determining the prior motion and written notice of its entry.

The Court has discretion to grant a motion to reargue upon a showing that it “overlooked or misapprehended any relevant facts, or misapplied any controlling principle of law” (Kent v 534 East 11th Street, 80 AD3d 106, 912 NYS2d 2 [1st Dept. 2010]). Reargument is not intended to afford an unsuccessful party successive opportunities to reargue issues previously decided, or to present arguments different from those originally asserted (Kent, supra and UI Haque v Daddazio, 84 AD3d 940, 922 NYS2d 548 [2nd Dept. 2011]). The movant cannot merely restate previous arguments (id).

Upon a review of the papers in Plaintiff’s January 23, 2017 cross-motion for summary judgment, the court finds it misapplied controlling principle of law. Pursuant to CPLR §2215, a cross-moving party must serve a “Notice of Cross-Motion” (CPLR §2215). Failure to serve a Notice of Cross-Motion or any other notice is a fatal defect (Myung Chun v N. Am. Mortg. Co., 285 AD2d 42, 729 NYS2d 716 [1st Dept. 2001]). Under these circumstances the court is virtually without jurisdiction to grant the relief afforded (id). While a court may permit a defect to be corrected pursuant to CPLR §2001, the defect must not prejudice a substantial right of a party (CPLR §2001). Although Plaintiff’s affirmation expressly stated that he “was making this affirmation in opposition to the Defendants’ motion and in support of the instant cross-motion,” Defendant St Nicholas was prejudiced in its ability to oppose the cross-motion on its merit since Plaintiff failed to e-file or serve a Notice of Cross-Motion until February 27, 2017, the return date of Defendants summary judgment motion. With New York’s public policy favoring determinations on the merits, upon reargument, Plaintiff’s cross-motion for summary judgment is denied without prejudice (Guzetti v City of NY, 32 AD3d 234, 820 NYS2d 29 [1st Dept. 2006]).

Accordingly, it is ORDERED, that Defendant St Nicholas 175 Assoc LLC a.k.a St Nicholas One Seven Five Associates, LLC’s motion for leave to reargue Plaintiff’s January 23, 2017 cross-motion for summary judgment, pursuant to CPLR §2221 is granted, and it is further,

ORDERED, that on reargument, Plaintiff’s January 23, 2017 cross-motion for summary judgment and to dismiss is denied in its entirety without prejudice, and it is further,

ORDERED, that this court’s Order dated May 31, 2017 granting Plaintiff summary judgment on liability against Defendant St Nicholas 175 Assoc LLC a.k.a St Nicholas One Seven Five Associates, LLC and dismissing the First, Third and Fourth Affirmative Defenses in its Answer is vacated, and it is further,

ORDERED, that Defendant St Nicholas 175 Assoc LLC a.k.a St Nicholas One Seven Five Associates, LLC’s First, Third and Fourth Affirmative Defenses asserted in its Answer to Plaintiff’s Complaint are restored, and it is further,


ORDERED, that within twenty (20) days from the date of entry of this Order Defendant St Nicholas 175 Assoc LLC a.k.a St Nicholas One Seven Five Associates, LLC shall serve a copy of this Order with Notice of Entry on all parties appearing, upon the Trial Support Clerk located in the General Clerk’s Office (Room 119) and the County Clerk (Room 141B) who are directed to amend the court’s records accordingly, and it is further,

ORDERED, that the parties appear for a Compliance Conference on November 22, 2017 at 9:30 a.m. in IAS Part 13 at 71 Thomas Street, New York, NY 10013.

ENTER:

**MANUEL J. MENDEZ
J.S.C.**

Dated: September 22, 2017



**MANUEL J. MENDEZ
J.S.C.**

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE