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| <b>Platovsky v Bernstein</b>   |
| 2018 NY Slip Op 34454(U)   |
| July 10, 2018  |
| Supreme Court, Bronx County  |
| Docket Number: Index No. 25292/2017E   |
| Judge: Wilma Guzman  |
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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF THE BRONX

Index No. 25292/2017E  
Motion Calendar No.24  
Motion Date: 3/5/18

-----X  
DANIEL PLATOVSKY and 2235 BASSFORD, AVE.  
CORP.,

Plaintiff,

-against-

ARI BERNSTEIN, STEPHEN FRIEDMAN, ESQ.,  
2235 BASSFORD PARTNERS, LLC, "John Doe"  
BERNSTEIN, and John Does 1-10, the latter parties  
being purported members, officers or managers of  
2235 BASSFORD PARTNERS, LLC other  
Than Plaintiff Daniel Platovsky, Defendant Ari  
Bernstein or Stephen Friedman, Esq.,

**Decision/ Order**

**Present:**

**Hon. Wilma Guzman**  
Justice Supreme Court

Defendants.

-----X  
ARI BERNSTEIN, MICHAEL BERNSTEIN,  
2235 BASSFORD PARTNERS, LLC

Counterclaim-Plaintiffs,

-against-

DANIEL PLATOVSKY, 2235 BASSFORD AVE.  
CORP., and NBR NYC REALTY CORP.,

Counterclaim-Defendants.

-----X  
Recitation as required by CPLR 2219(a), of the papers considered in the review of this motion to dismiss the  
plaintiff's complaint:

| <u>Papers</u>  | <u>Numbered</u> |
|--|-----------------|
| <b>Notice of Motion, Affirmation in Support,<br/>Exhibits Thereto .....</b>      | <b>1</b>        |
| <b>Notice of Cross-Motion, Affirmation in Support,<br/>Exhibits Thereto.....</b> | <b>2</b>        |
| <b>Reply Memorandum.....</b>   | <b>3</b>        |

Motions decided as follows: Upon deliberation of the application duly made by  
defendant/counterclaim-plaintiff, ARI BERNSTEIN, **NOTICE OF MOTION**, and all the  
papers in connection therewith, for an Order, pursuant to CPLR §§3011 and 3211(a)(8), striking  
or dismissing the counterclaim set forth in the reply filed by plaintiffs/counterclaim-defendants  
on September 7, 2017, is heretofore granted. Upon deliberation of the application duly made by

**NOTICE OF CROSS-MOTION**, and all the papers in connection therewith, for an Order: (1) Denying ARI BERNSTEIN'S motion striking or dismissing the cross-claim set forth by DANIEL PLATOVSKY; or alternatively (2) pursuant to CPLR §3025(b) granting DANIEL PLATOVSKY leave to amend the Complaint to set forth said cross-claim against ARI BERNSTEIN, based upon the claims contained in the Answer and Counterclaims filed August 18, 2017; and (3) striking or dismissing, the in effect, third party action not properly commenced against non-party NBR NYC REALTY CORP. and plaintiffs DANIEL PLATOVSKY and 2235 BASSFORD AVE. CORP., is heretofore denied.

This action concerns the ownership and management of an apartment building located at 2235 Bassford Ave., Bronx, New York (hereinafter "Subject Premises"). The subject premises are owned by defendant 2235 BASSFORD PARTNERS, LLC (hereinafter "Bassford LLC"). On June 16, 2017 PLATOVSKY attempted to stop Bassford LLC's sale of the subject property to prospective buyer and commenced this action by filing a *lis pendens* and a Summons and Complaint claiming that he had ownership interest in Bassford LLC and that Bassford LLC could not sell the property without his consent. On August 18, 2017, BERNSTEIN, his father MICHAEL BERNSTEIN, and Bassford LLC (together "Counterclaim-Plaintiffs") filed their Answer and asserted counterclaims against PLATOVSKY, 2235 BASSFORD AVE. CORP. (hereinafter "Bassford Corp.") and NBR NYC REALTY CORP. (hereinafter "NBR"). It is alleged that NBR is a company wholly owned by PLATOVSKY, that was previously responsible for managing the Subject Property.

It appears that on May 25, 2012, Michael Bernstein and Ari Bernstein entered into an Operating Agreement forming a Limited Liability Company known as 2235 Bassford Partners, LLC (hereinafter "LLC"). According to this Operating Agreement, Ari Bernstein and Michael Bernstein were the only members of the LLC and each possessed a 50% interest/equity. As per the agreement, Ari Bernstein was exclusively authorized to be the Manager of the LLC.

In 2015, The Company purchased the Subject Property from PLATOVSKY's corporation, 2235 Bassford Corp. PLATOVSKY's management company, NBR NYC Realty Corp. (hereinafter "NBR") acted as the Property Manager until the sale. Subsequent to the sale, PLATOVSKY and NBR continued to manage the Subject Property. According to the movant, PLATOVSKY was allowed to continue to manage the Subject Property so as to ensure PLATOVSKY could have a source of income. The movant claims that PLATOVSKY and NBR function at the Subject Property was entirely at the will of the LLC and that neither PLATOVSKY, 2235 Bassford Corp. or NBR had a management contract.

It appears that the LLC relieved plaintiffs as the Property Manager of the Subject Property on June 15, 2017 and hired HSC Management Corp. (hereinafter "HSC") to serve as Property Manager of the Subject Premises. Thereafter, PLATOVSKY and allegedly NBR and an agent named Eppie allegedly began to actively interfere with the LLC and HSC operations at the Subject Premises by installing new locks that denied HSC access to buildings and instructing tenants not to remit their rent to HSC and to remit all rent payment and arrears to PLATOVSKY, NBR and/or Eppie.

It appears that the Operating Agreement forming the LLC does not list PLATOVSKY, NBR or 2235 Bassford Corp. as members of LLC. Furthermore, it does not appear that the Operating Agreement was ever amended or updated.

ARI BERNSTEIN's application for an Order, pursuant to CPLR §§3011 and 3211(a)(8), striking or dismissing the counterclaim set forth in the reply filed by plaintiffs/counterclaim-defendants on September 7, 2017, is heretofore granted. The September 7, 2017 response to the counterclaims by plaintiffs entitled "Answer of Counterclaim Defendants to Complaint of Counterclaim Plaintiffs," is in fact tantamount to a reply to the allegations asserted in Defendants' counterclaims. Contained within that reply is a counterclaim against BERNSTEIN, asserting that he should be held personally liable for refusing to treat PLATOVSKY as a member of the Bassford LLC. It is well established that a counterclaim cannot be interposed in a reply. See Habiby v. Habiby, 23 A.D.3d 558 (1<sup>st</sup> Dept. 1965). As it appears that the "Answer of Counterclaim Defendants to Complaint of Counterclaim Plaintiffs" is tantamount to a reply with further counterclaims, such counterclaims are heretofore stricken.

However, plaintiff's application, pursuant to CPLR §3025(b) granting plaintiffs leave to amend the Complaint to set forth cross-claims against BERNSTEIN, based upon the claims contained in the Answer and Counterclaims filed August 18, 2017, is heretofore granted.

CPLR 3025(b) provides:

"A party may amend his pleading, or supplement it by setting forth additional or subsequent transactions or occurrences, at any time by leave of court or by stipulation of all parties. Leave shall be freely given upon such terms as may be just including the granting of costs and continuances. Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading."

Here, no prejudice can result as a result of this Court allowing plaintiffs to amend the Complaint. Moreover, the issues of fact exist as to the proposed 8<sup>th</sup> and 15<sup>th</sup> causes of action which make them sufficiently dissimilar so that they appear to be considered distinct causes of action.

With respect to the striking or dismissing, the in effect, third party action not properly commenced against non-party NBR and plaintiffs DANIEL PLATOVSKY and 2235 BASSFORD AVE. CORP., is heretofore denied, with leave to renew. Although it is claimed that pursuant to CPRL 3211(e), NBR may have waived its objection to service by answering the Counterclaim without including a lack of personal jurisdiction defense, this Court cannot determine same as such an answer was not attached to any moving papers. Normally, if the defense of lack of jurisdiction was not interposed, such an application would be denied as the objection would be deemed waived. Nevertheless, this Court cannot make such a determination at this time as the answer was not attached.

Accordingly, it is:

ORDERED that the application ARI BERNSTEIN for an Order, pursuant to CPLR §§3011 and 3211(a)(8), striking or dismissing the counterclaim set forth in the reply filed by plaintiffs/counterclaim-defendants on September 7, 2017, is heretofore granted. It is further

ORDERED that plaintiff's application, pursuant to CPLR §3025(b) granting plaintiffs leave to amend the Complaint to set forth cross-claims against BERNSTEIN, based upon the claims contained in the Answer and Counterclaims filed August 18, 2017, is heretofore granted. The Amended Complaint must be served within (20) days of the entry of this Order. It is further

ORDERED that the application to strike or dismiss the action against non-party NBR and plaintiffs DANIEL PLATOVSKY and 2235 BASSFORD AVE. CORP., is heretofore denied, with leave to renew. It is further

ORDERED that ARI BERNSTEIN shall serve a copy of this Order with Notice of Entry within thirty (30) days of entry of this Order.

The forgoing constitutes the Decision and Order of the Court.

Dated:

7/10/18



HON. WILMA GUZMAN

J.S.C.