Giacobbe v 115 Mulberry, LLC
2020 NY Slip Op 30753(U)
March 11, 2020
Supreme Court, New York County
Docket Number: 155436/2016
Judge: Carol R. Edmead

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART IAS MOTION 35EFM

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JON GIACOBBE,

Plaintiff,

- v -

115 MULBERRY, LLC,STEVEN CROMAN, ANTHONY FALCONITE, ELIZABETH RODRIGUEZ

Defendant.

INDEX NO. 155436/2016

MOTION DATE 01/31/2020

MOTION SEQ. NO. 005

DECISION + ORDER ON MOTION

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HON. CAROL R. EDMEAD, J.S.C.:

In this residential landlord/tenant action, defendants 115 Mulberry, LLC (115 Mulberry) and Steven Croman (Croman; together, defendants) move, pursuant to CPLR 3212, for summary judgment to dismiss the complaint (motion sequence number 005). For the following reasons, the motion is granted, and the balance of Giacobbe's complaint against defendants is dismissed.

BACKGROUND

Plaintiff Jon Giacobbe (Giacobbe) is the tenant of apartment 5R, a rent-stabilized unit in a building (the building) located at 115 Mulberry Street in the County, City and State of New York. *See* notice of motion, exhibit A (verified complaint), ¶¶ 1, 7, 11, 13, 22. Co-defendant 115 Mulberry is the building's corporate owner/landlord and Croman is 115 Mulberry's principal officer. *Id.*, ¶¶ 2-3, 6-9. This action arose from Giacobbe's allegations that defendants harassed him and otherwise interfered with his tenancy in order to drive him out of apartment 5R.

Plaintiff originally commenced this action on June 6, 2016. *See* notice of motion, exhibit A (verified complaint). Defendants filed an answer on September 2, 2016, and discovery commenced thereafter. *Id.*, exhibit B. On March 12, 2018, the court entered an order that

disposed of defendants' prior dismissal motion (motion sequence number 002) by, *inter alia*, dismissing Giacobbe's complaint as against two former defendants, and dismissing the second and seventh causes of action in the complaint as against 115 Mulberry and Croman. As a result of the March 12, 2018 order, the remaining causes of action in Giacobbe's complaint against 115 Mulberry and Croman allege: 1) harassment; 2) breach of the warranty of habitability; 3) breach of the covenant of quiet enjoyment; 4) nuisance; and 5) attorney's fees. *Id.*, exhibit A.

On October 30, 2018, Giacobbe executed a "release of claims" (the release) which provided as follows:

> "In consideration for my receipt of a disbursement from the Tenant Restitution Fund from the New York State Office of the Attorney General, paid to me pursuant to a consent decree dated December 20, 2017 between the Attorney General, Steve Croman, . . . and the special-purpose limited liability real estate entities that own the properties which Steven Croman exercises control over as described in the Corrected Verified Petition [i.e., 115 Mulberry][1] . . . I release any right I may have to recover money damages against respondents for claims occurring on or before December 29, 2017, solely based upon claims in the Corrected Verified Petition, including but not limited to (1) tenant harassment . . . [in violation of 9 NYCRR § 2525.5]; (2) tenant harassment . . . [in violation of NYC Admin Code § 27-2005]; (3) failure to obtain work permits, violation of stop-work orders and concealment of illegal construction . . . ; (4) failure to use lead-safe work practices, remediate lead-based paint hazards, provide lead-based paint notices and disclosure to tenants, conduct dust clearance tests and conduct annual inspections for lead-based paint hazards . . .; (5) acting as an unlicensed tenant relocator or failing to supervise persons who act as tenant relocators . . .; (6) engaging in deceptive practices in the conduct of business by filing baseless lawsuits, serving tenants with deceptive rent demands, charging unauthorized legal fees and using false pretenses and deception to gain access to tenants' apartments . . .; and (7) commingling tenants' security deposits, failing to provide tenants with the name and address of the financial institution in which their security deposits are held and failing to place security deposits in interest-bearing accounts when required . . ..
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> "This Release shall only apply to the above-listed violations of law and warranty of habitability claims for the specified period above. The Release shall not

[1] 115 Mulberry is listed as a defendant on the caption of the action that resulted in the consent decree as a "special-purpose limited liability real estate entity." *Id.*, exhibit J.

> include any defenses that I . . . may assert in an eviction proceeding other than warranty of habitability. The Release shall also not apply to any other personal injury claims, including but not limited to, exposure to lead-based paint or lead-contaminated dust.
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> * * *
>
> "I also agree that I have carefully read and understand all of the provisions of this Release, I knowingly and voluntarily agree to and intend to be legally bound to all of its terms, and I have been advised in writing to consult with an attorney of my choosing regarding the terms of this Release."

See notice of motion, exhibit D. The release was signed in connection with a separate proceeding commenced in this court under Index No. 450545/16 (*People of the State of New York v Steven Croman, et al.,* Hagler, J), which was settled pursuant to the terms of the so-ordered consent decree mentioned therein on July 24, 2018. *Id.*, exhibit J. Defendants filed this summary judgment motion on October 15, 2019, arguing that the terms of the release also apply to his Giacobbe's remaining claims in this action (motion sequence number 005). *See* notice of motion. Giacobbe filed opposition on January 16, 2020 and defendants filed a reply on January 23, 2020. *See* Zekaria affirmation in opposition; Vasilatos reply affirmation.

DISCUSSION

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist. *See e.g. Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985); *Sokolow, Dunaud, Mercadier & Carreras v Lacher*, 299 AD2d 64, 70 (1st Dept 2002). Once this showing has been made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial of the action. *See e.g. Zuckerman v City of New York*, 49 NY2d 557, 562 (1980); *Pemberton v New York City*

Tr. Auth., 304 AD2d 340, 342 (1st Dept 2003). Further, it is well settled that "'on a motion for summary judgment, the construction of an unambiguous contract is a question of law for the court to pass on, and . . . circumstances extrinsic to the agreement or varying interpretations of the contract provisions will not be considered, where ... the intention of the parties can be gathered from the instrument itself.'" *Maysek & Moran v S.G. Warburg & Co.*, 284 AD2d 203, 204 (1st Dept 2001), quoting *Lake Constr. & Dev. Corp. v City of New York*, 211 AD2d 514, 515 (1st Dept 1995). Here, defendants request summary judgment to dismiss Giacobbe's five remaining causes of action against them on the grounds that he is barred from pursuing those claims by the terms of the release. *See* notice of motion, Vasilatos affirmation, ¶¶ 15-35. The court will consider each cause of action *seriation*.

As an initial matter, however, the court notes that the complaint is dated June 28, 2016 and the release applies to "claims occurring on or before December 29, 2017." *Id.*, exhibits A, D, J. Therefore, it is clear that the claims in the complaint fall within the time frame of the release. Next, the Court of Appeals' holding in *Centro Empresarial Cempresa S.A. v América Móvil, S.A.B. de C.V.* (17 NY3d 269 [2011]) provides that:

> "Generally, 'a valid release constitutes a complete bar to an action on a claim which is the subject of the release.' If 'the language of a release is clear and unambiguous, the signing of a release is a 'jural act' binding on the parties.' A release 'should never be converted into a starting point for . . . litigation except under circumstances and under rules which would render any other result a grave injustice.' A release may be invalidated, however, for any of 'the traditional bases for setting aside written agreements, namely, duress, illegality, fraud, or mutual mistake.'"

17 NY3d at 276 (internal citations omitted). The Appellate Division, First Department's, holding in *Long v O'Neill* (126 AD3d 404 [1st Dept 2015]) is also germane, since it noted that "[t]he language in the release contains several phrases indicating its exceptional breadth - for example, the language stated that the agreement was made in full settlement 'of all matters arising out of or in connection with the facts, matters, claims, actions and allegations' made in the lawsuits," and that "[t]his language is not "reasonably susceptible of more than one interpretation." 126 AD3d at 407. The First Department then held that "[t]his Court has actually construed similar broad language to bar fraud claims relating to the subject matter where the signatories to the agreement did not specifically refer to, or even know about, those fraud claims before executing their release." 126 AD3d at 408. As will be discussed, the instant release contains similar "broad language.."

Here, Giacobbe's first cause of action alleges "harassment in violation of NYC Admin Code § 27-2005 (d)." *See* notice of motion, exhibit A (verified complaint), ¶ 34. The release bars claims from before December 29, 2017 for "(2) tenant harassment in violation of NYC Admin Code § 27-2005." *Id.*, exhibit D. Because both documents describe exactly the same activity - i.e., tenant harassment in violation of NYC Admin Code § 27-2005 from the appropriate time frame - the court finds that they describe identical claims. As a result, the plain language of the release bars plaintiff's first cause of action, and the court grants so much of defendants' motion as seeks summary judgment to dismiss that cause of action.

Giacobbe's third cause of action alleges breach of the warranty of habitability of apartment 5R by allowing "conditions that are dangerous, hazardous or detrimental to the life, health or safety of plaintiff." *See* notice of motion, exhibit A (verified complaint), ¶ 48. The second paragraph of the release provides that it "shall only apply to the above-listed violations of

law and *warranty of habitability claims* for the specified period . . .." *Id.*, exhibit D (emphasis added). The language of both documents again makes it clear that these are identical claims. As a result, it is clear that the release bars plaintiff's third cause of action, and the court grants so much of defendants' motion as seeks summary judgment to dismiss that cause of action.

Giacobbe's fourth cause of action alleges breach of the covenant of quiet enjoyment of apartment 5R, and his fifth cause of action alleges nuisance. *See* notice of motion, exhibit A (verified complaint), ¶¶ 54-62. Both of these claims refer to "constant construction and unfixed conditions." *Id.* The relevant portion of the release states that it applies to "claims occurring before December 27, 2017, solely based upon claims in the Corrected Verified Petition." *Id.*, exhibit D. The third cause of action in the corrected verified petition alleged violations of "Building Safety - NY Exec Law § 63 (12) [and] Violation of NYC Construction Codes § 28-101.1 et seq." *Id.*, exhibit A-A (corrected verified petition), ¶¶ 269-279. It specifically alleged that defendants "together directly instructed construction workers and contractors to engage in unpermitted construction and/or in violation of stop work orders." *Id.*, ¶ 278. This broadly descriptive language sufficiently alleges the same activity that was alleged in Giacobbe's fourth and fifth causes of action. As a result, it is clear that the release bars those causes of action, and the court grants so much of defendants' motion as seeks summary judgment to dismiss them.

Giacobbe's sixth cause of action seeks an award of attorney's fees. *See* notice of motion, exhibit A (verified complaint), ¶¶ 63-66. Counsel for Giacobbe argues that it is "not impacted by the release in any manner whatsoever." *See* Zekaria affirmation in opposition, ¶ 25. Counsel is incorrect. "Under the general rule, attorney's fees are incidents of litigation and a prevailing party may not collect them from the loser unless an award is authorized by agreement between the parties, statute or court rule." *Hooper Assoc. v AGS Computers*, 74 NY2d 487, 491 (1989);

see also Sykes v RFD Third Ave. I Assoc., LLC, 39 AD3d 279 (1st Dept 2007). Here, the court need not even consider the provisions of any "agreement between the parties, statute or court rule," Since the release bars Giacobbe from pursuing his remaining claims against defendants, and Giacobbe is therefore not the "prevailing party." As a result, the court grants so much of defendants' motion as seeks summary judgment to dismiss Giacobbe's sixth cause of action.

Accordingly, having found that all of Giacobbe's remaining claims against defendants are barred by the October 30, 2018 release, the court grants defendants' dismissal motion in full.

CONCLUSION

ACCORDINGLY, for the foregoing reasons, it is hereby

ORDERED that the motion, pursuant to CPLR 3212, of defendants 115 Mulberry, LLC and Steven Croman (motion sequence number 005) is granted and the first, third, fourth, fifth and sixth causes of action in the complaint are dismissed with costs and disbursements to said defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly.

Dated: New York, New York
March 11, 2020

ENTER:

Hon. Carol R. Edmead, J.S.C.

HON. CAROL R. EDMEAD
J.S.C.