

<b>Cohen v Restuccia</b>
2021 NY Slip Op 31215(U)
April 8, 2021
Supreme Court, New York County
Docket Number: 158072/2020
Judge: Dakota D. Ramseur
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. DAKOTA D. RAMSEUR PART IAS MOTION 5**

*Justice*

-----X

ANDREA COHEN, JOSE ROJAS,

Plaintiff,

- v -

JOSEPH RESTUCCIA, NANCY PAZ, LOUISE CARROLL,  
TAMMY ALSTON, CLINTON HOUSING DEVELOPMENT  
COMPANY, NEW YORK CITY DEPARTMENT OF  
HOUSING PRESERVATION AND DEVELOPMENT, HERTZ  
CHERSON & ROSENTHAL P.C.

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 49, 50, 51, 52, 53, 54, 55, 56, 57, 92

were read on this motion to/for

DISMISSAL

The following e-filed documents, listed by NYSCEF document number (Motion 002) 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91

were read on this motion to/for

SUMMARY JUDGMENT(AFTER JOINDER)

Plaintiffs Andrea Cohen (Cohen) and Jose Antonio Rojas (Rojas) commenced this action seeking damages from defendants, Joseph Restuccia (Restuccia), Nancy Paz (Paz), Louise Carroll (Carroll), Tammy Alston (Alston), Clinton Housing Development Company (CHDC), New York City Department of Housing Preservation and Development (HPD), Hertz Cherson & Rosenthal P.C (HRC) pursuant to Section 853 of New York Real Property and Procedures Law (RPAPL) stemming from an alleged wrongful eviction from the premises located at 456 West 37th Street, Apartment 3F, New York, New York (the premises).

In motion sequence 001, HRC now moves pursuant to CPLR 3211(a)(1), (7) to dismiss the complaint as against it. In motion sequence 002, plaintiffs move for partial summary judgment on liability against all defendants except HCR, and defendants HPD, Carroll, and Alston (collectively the City defendants) cross-motion to dismiss the complaint. Plaintiffs oppose HCR's motion. CHDC, Restuccia, Paz and the City oppose plaintiffs' motion. Plaintiffs oppose the City's cross-motion. For the foregoing reasons, HRC's motion and the City defendant's cross-motion are granted, and plaintiffs' motion is denied.

**BACKGROUND**

On March 5, 2020, in the Civil Court of the City of New York, New York County, under

Landlord and Tenant Index Number (L&T Index #) 54643/2020, plaintiffs herein commenced a proceeding by order to show cause, in lieu of petition against Restuccia and CHDC, seeking to be restored to possession of the premises pursuant to New York City Administrative Code § 26-521 and RPAPL § 768 and also seeking the imposition of civil penalties.

On September 28, 2020, the Housing Court issued a Decision/Order After Hearing (the Housing Court Decision) granting petitioners' order to show cause in lieu of petition, finding, among other things, that the petitioners were unlawfully evicted and are entitled to be restored to possession of the subject premises forthwith, and awarding a final judgment of possession for the subject premises to petitioners and against respondents. As set forth in the Housing Court Decision, the proceedings were delayed by the COVID-19 pandemic, motion practice by both sides and the appointment of a Guardian Ad Litem (GAL) for Rojas, an adult incapable of adequately protecting his rights, and a hearing was held over the dates of August 18, 2020, September 10, 11, 14 and 15, 2020.

According to the Housing Court Decision, the subject premises was sealed by the New York City Police Department from November 27, 2020 (the date of the death of Jose Rojas, Sr., father of plaintiff Rojas) until February 27, 2020 and upon removal of the NYPD seal, respondents (Restuccia and CHDC) changed the locks to the premises.

As set forth in the Housing Court Decision, the court finds, among other things, that "both petitioners [plaintiffs] have shown that they were in actual and constructive possession of the subject premises when the respondents [defendants Restuccia and CHDC] changed the lock to the entrance door of the apartment;" that respondents were unable to conclusively show that petitioners do not reside in the apartment or have possessory rights to the apartment and therefore failed to refute petitioners' testimonial and documentary evidence; that Cohen never did surrender possession; that had Cohen surrendered possession, her son Jose Rojas, Jr., would still have possessory rights to the premises; that petitioners have sufficiently proven their case for unlawful eviction; and that petitioners are entitled to be restored to possession of the premises.

The Housing Court Decision provides that although petitioners seek the imposition of civil penalties pursuant to RPAPL 768 (2) and (2) (b), the court, "is not inclined to award civil penalties at this time. Even though the court finds Mr. Restuccia's testimony was disingenuous and self-serving, awarding civil penalties does not assist petitioners. In this instance, the court believes respondents did not know who resided in the subject premises and rather than conduct a brief investigation, respondents attempted to take advantage of the circumstances surrounding Mr. Rojas, Sr.'s death. There was no need to secure the premises other than for the possibility or opportunity to retain possession of the premises. Nevertheless, the court is unwilling to award civil penalties at this time."

## DISCUSSION

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must "accept the facts as alleged in the complaint as true, accord plaintiff the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory" (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]; see also *Chapman, Spira & Carson, LLC v Helix*

*BioPharma Corp.*, 115 AD3d 526, 527 [1st Dept 2014]). However, "factual allegations . . . that consist of bare legal conclusions, or that are inherently incredible . . . , are not entitled to such consideration" (*Mamoon v Dot Net Inc.*, 135 AD3d 656, 658 [1st Dept 2016], quoting *Leder v Spiegel*, 31 AD3d 266, 267, [1st Dept 2006], *affd* 9 NY3d 836, [2007], *cert denied* 552 US 1257 [2008]). "Whether the plaintiff will ultimately be successful in establishing those allegations is not part of the calculus" (*Landon v Kroll Lab. Specialists, Inc.*, 22 NY3d 1, 6, [2013], *rearg denied* 22 NY3d 1084 [2014] [internal quotation marks and citation omitted]).

Dismissal is warranted pursuant to CPLR 3211 (a) (1) where the documentary evidence "resolves all factual issues as a matter of law, and conclusively disposes of the plaintiff's claim" (*Fortis Fin. Servs. v Fimat Futures USA*, 290 AD2d 383, 383 [1st Dept 2002] [internal quotation marks and citation omitted]).

When presented with a motion for summary judgment, the court's function is issue finding, not issue determination (*Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). If triable issues of fact exist, summary judgment is not warranted (*Alvarez v Prospect Hospital*, 68 NY2d 320, 324 [1986]). Summary judgment will be granted if it is clear that no triable issue of fact exists (*Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986].) The burden is on the moving party to make a *prima facie* showing of entitlement to summary judgment as a matter of law (*Id.*). The burden is a heavy one: the facts must be viewed in the light most favorable to the non-moving party and every available inference must be drawn in the non-moving party's favor (*Sherman v New York State Thruway Authority*, 27 N.Y.3d 1019 [2016] [internal quotation marks omitted]).

If a *prima facie* showing has been made, the burden shifts to the opposing party to produce evidentiary proof sufficient to establish the existence of a triable issue of fact (*Alvarez*, at 324). Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). Because summary judgment deprives a litigant of the party's day in court, it is considered a drastic remedy which should only be employed when there is no doubt as to the absence of triable issues (*Sherman v New York State Thruway Authority*, 27 NY3d 1019 [2016]).

### **1. HCR's Motion to Dismiss**

HCR seeks dismissal of all claims, based upon documentary evidence and for failure to state a claim, pursuant to CLR 3211 (a) (1) and (7). In support of its motion, HCR submits a supporting affidavit, the complaint, pleadings, motions and decisions issued during the Civil Court proceedings. Plaintiffs' opposition includes an attorney affirmation, the affidavit of Cohen and exhibits.

The Housing Court Decision cites Administrative Code § 26-521 (a) (3) when it finds that respondents unlawfully evicted petitioners by "changing the lock on such entrance door without supplying the occupant with a key." The language of Administrative Code 26-521 and RPAPL 768 are similar. Both Administrative Code 26-521 and RPAPL 768 (1) provide in pertinent part, "It shall be unlawful for any person to evict or attempt to evict an occupant of a dwelling unit... by... engaging in a course of conduct which prevents or is intended to prevent

such occupant from lawful occupancy of such dwelling unit or to induce the occupant to vacate the dwelling unit including, but not limited to... changing the lock on such entrance door without supplying the occupant with a key” (Administrative Code 26-521 [a] [3]; RPAPL 768 [1] [a] [iii]). Administrative Code 26-521 and RPAPL 768 (1) also provide that it shall be unlawful for an owner of a dwelling unit to fail to take all reasonable and necessary action to restore an unlawfully evicted tenant who requests to be restored to possession (AC-26-521 [b] and RPAPL 768 [1] [b]).

RPAPL 768 differs from Administrative Code 26-521 because it does not specifically refer to a request for a lease pursuant to the hotel stabilization provisions of the rent stabilization law and because it contains an additional section (RPAPL 768 [2]) which provides for the possible imposition of criminal and civil penalties.

RPAPL 768 (2) (a) provides, in pertinent part, “any person who intentionally violates or assists in the violation of any of the provisions of this section shall be guilty of a class A misdemeanor...” (RPAPL 768 [2] [a]). RPAPL 768 (2) (b) provides, “[s]uch person shall also be subject to a civil penalty of not less than one thousand nor more than ten thousand dollars for each violation,” and that “[i]n the case of a failure to take all reasonable and necessary action to restore an occupant pursuant to paragraph (b) of subdivision one of this section, such person shall be subject to an additional civil penalty of not more than one hundred dollars per day from the date on which restoration to occupancy is requested until the date on which restoration occurs, provided, however, that such period shall not exceed six months” (RPAPL 768 [2] [b]).

The allegations set forth in the complaint – that HCR is a “wrong-doer” within the meaning of RPAPL 853 and/or “directly or indirectly in control” of the subject apartment within the meaning of MDL 4 (44); that HCR, posed irrelevant and non-probative questions during the cross-examination of witnesses who were aged 12 and 18 “to inflict severe pain” on the witnesses and plaintiffs; and that HCR “made many untruthful representations” to the court during the pendency of the Civil Court proceedings “to prolong the illegal lockout” – even if accepted as true, along with the Housing Court Decision that is the basis of the complaint, fail to state a viable cause of action against HCR for damages under RPAPL 853.

Plaintiffs’ allegations that HCR is a “wrong-doer” within the meaning of RPAPL 853 and/or “directly or indirectly in control” of the subject apartment within the meaning of MDL 4 (44) (and therefore the equivalent of an “owner” as set forth in AC 26-521 [b] and RPAPL 768 [1] [b] who is subject to the imposition of civil penalties for violation of AC 26-521 or RPAPL 768), without more are insufficient to establish a cause of action for damages under RPAPL 853. The rule that the facts alleged are presumed to be true and are to be accorded every favorable inference which can be drawn therefrom on a motion addressed to the sufficiency of the pleadings (*see Monroe v Morone*, 50 NY2d 48 [1980]), does not apply to allegations of bare legal conclusions, or factual claims that are inherently incredible or flatly contradicted by documentary evidence (*see Velez v Captain Luna’s Marina*, 74 AD3d 1191 [2008]).

Here, the Housing Court Decision states that the plaintiffs were “unlawfully evicted” when respondents changed the locks to the apartment. Nothing in the complaint’s allegations or the Housing Court Decision establish that HCR was involved in the unlawful eviction by sealing

the apartment or changing the locks or, that afterwards, HCR is a “wrong-doer” that held or kept plaintiffs out of possession through unlawful means. Plaintiffs’ reliance on *Mayes v UVI Holdings* (280 AD2d 153 [1st Dept 2001]), for the proposition that a court may hold a law firm representing a landlord liable under RPAPL is misplaced. *Mayes* is distinguishable. In *Mayes*, the landlord’s law firm was liable for damages under RPAPL because the “unlawful eviction” occurred when the law firm knowingly proceeded upon an invalid warrant for eviction. Here, unlike in *Mayes*, there is no contention that HCR is responsible for the unlawful eviction of plaintiffs that occurred when the locks were changed. There is also no viable contention that HCR acted unlawfully in its representation of respondents (defendant Restuccia and CHDC) during the Civil Court proceedings.

Plaintiffs’ affirmation and affidavit in opposition fail to raise a triable issue of fact with respect to HCR’s liability for damages under RPAPL 853 for unlawful eviction or for the imposition punitive damages upon HCR or for the imposition of civil penalties against HCR pursuant to RPAPL 768. Plaintiffs’ allegations concerning HCR’s representation of respondents in the 2020 Civil Court proceedings and HCR’s representation of the petitioners in the 2005 Civil Court holdover petition against respondents Cohen and Joseph Rojas, Sr. (the deceased father of Rojas) fail to raise a triable issue of fact or establish a viable claim against HCR for liability under RPAPL 853.

Accordingly, HCR’s motion to dismiss the complaint for failure to state a claim (CPLR 3211 [a] [7]) is granted. In view of the foregoing, the court need not address the defendant’s alternative argument, pursuant to CPLR 3211 (a) (1).

## **2. Plaintiffs’ Motion for Partial Summary Judgment on Liability**

Plaintiffs’ motion seeks partial summary judgment on the issue of liability on its claims for treble damages and punitive damages under RPAPL 853 against CHDC and the City defendants. The motion is opposed by the CHDC defendants and the City defendants and the City defendants cross-move for summary judgment dismissing the complaint against the City defendants.

Plaintiffs’ submissions fail to establish a *prima facie* entitlement to summary judgment on liability for treble and punitive damages under RPAPL 853 as a matter of law. The motion relies on a finding of “unlawful eviction” in a Housing Court Decision where only two of the defendants (Restuccia and CHDC) against whom summary judgment on liability is sought are named respondents. Issues of fact exist as to whether plaintiffs were damaged by the alleged “unlawful lockout,” whether the “unlawful lockout” was intentional, and, if so, whether the court’s exercise of its discretion in awarding statutory treble damages under RPAPL 853 is warranted (*see Lyke v Anderson*, 147 AD2d 18 [2d Dept 1989]); *see also Hood v Koziej*, 140 AD3d 563 [1st Dept 2016]; *see also Rental Management Assocs. V Hartford Ins. Co.*, 155 Misc2d 547, 548-549 [Sup Ct New York Co 1992] [noting that treble damages under RPAPL 853 and punitive damages are distinguishable because punitive damages are more difficult to obtain and conduct that forms the basis of an award of treble damages under RPAPL 853 may fall short of that which would be required for an award of punitive damages]).

Accordingly, plaintiffs' motion for summary judgment on liability for treble damages and punitive damages under RPAPL 853 is denied in its entirety.

### ***3. The City Defendants' Cross-Motion for Summary Judgment***

The City defendants' motion seeks summary judgment and dismissal of the complaint and all cross-claims against the City defendants on the grounds that: (1) plaintiffs have failed to comply with applicable Notice of Claim requirements; (2) non-service of the summons and complaint, pursuant to CPL 3211 (a) (8), and lack of personal jurisdiction over the defendants Carroll and Alston; (3) plaintiffs have failed to state a cause of action against defendants Carroll and Alston in their personal, as opposed to official, capacities; (4) the Housing Court Decision is not binding or preclusive as to the City defendants and there is no alleged basis upon which the actions of the respondents in the Housing Court Decision (Restuccia and CHDC) can be imputed to City defendants; and (5) the City defendants are not subject to punitive damages as a matter of law.

The City defendants contend that the claims against them must be dismissed for failure to comply with Notice of Claim requirements of General Municipal Law (GML) 50-e and 50-i. Specifically, the complaint does not include the required averment concerning Notices of Claim as required and the complaint was filed within 30-days after the Notices of Claim were filed, instead of after the required thirty-day period. In opposition, plaintiffs contend that even if the action is dismissed against HPD on these grounds, "GML 50-e is inapplicable to Defendants Carroll and Alston who have been sued on an independent statutory basis [that] they are 'wrong-doers' within the meaning of RPAPL 853."

GML 50-e requires that claims of property damage, negligence and other torts against the City must be served within ninety days from the accrual of the claim. GML 50-i prohibits an action in tort against a municipality unless, (a) a notice of claim shall have been served upon the city in compliance with section fifty-e of this chapter, (b) it shall appear by and as an allegation in the complaint or moving papers that at least thirty days have elapsed since the service of such notice and that adjustment or payment thereof has been neglected or refused.

There is no dispute that the instant action, seeking damages under the statutory tort RPAPL 853, was commenced within a few days of the filing of Notices of Claim, and therefore prior to the expiration of the required thirty-day waiting period for commencing an action, required by GML 50-e and 50-i. Accordingly, the motion to dismiss the action against the City defendants for failure to comply with the Notice of Claim requirements of GML 50-e and 50-i is GRANTED.

Based upon the foregoing the Court need not address the merits of the City defendants remaining contentions.

Accordingly, it is hereby

ORDERED that HCR's motion to dismiss (Motion Sequence 001) is GRANTED; and it is further


ORDERED that plaintiffs’ motion for partial summary judgment (Motion Sequence 002) is DENIED; and it is further

ORDERED that the City defendants’ cross-motion for summary dismissal of the complaint (Motion Sequence 002) is GRANTED; and it is further

ORDERED that this matter be transferred to a non-City part, as the City is no longer a party in this action; and it is further

ORDERED that counsel for the HCR shall serve a copy of this order with notice of entry upon all parties within fourteen (14) days of entry.

This constitutes the decision and order of the Court.

<u>4/8/2021</u>					
DATE			_____ DAKOTA D. RAMSEUR, J.S.C.		
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input checked="" type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/> OTHER
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input checked="" type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE