

**Department of Hous. Preserv. & Dev. of the City of
N.Y. v Feldman**

2021 NY Slip Op 32403(U)

November 15, 2021

Civil Court of the City of New York, New York County

Docket Number: L&T 303173/2021

Judge: Frances A. Ortiz

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This opinion is uncorrected and not selected for official publication.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK, HOUSING PART B

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DEPARTMENT OF HOUSING PRESERVATION
AND DEVELOPMENT OF THE CITY OF NEW
YORK

Petitioners,

**Index No. L&T
303173/2021**

-against-

DECISION AND ORDER

MICHAEL FELDMAN
DAN SHALOM
HIGHPOINT ASSOCIATES XII, LLC

Respondents,

-----X

FRANCES A. ORTIZ, JUDGE

Recitation as required by CPLR 2219(a), of the papers considered in the review of the respondents' motions to dismiss.

Papers	Numbered
Respondent Dan Shalom/Highpoint Associates' Notice of Motion & Affirmation.....	1/NYSCEF 12
Affirmation in Opposition to Dan Shalom's Motion.....	2/NYSCEF 36
Reply Affirmation.....	3/NYSCEF 49
Respondent/Michael Feldman's Notice of Motion &Affirmation.....	4/NYSCEF 29
Affirmation in Opposition to Michael Feldman's Motion.....	5/NYSCEF 45

Upon the foregoing cited papers, the Decision/Order of this Court on respondents' motions to dismiss.

This is an HP Action brought by Department of Housing Preservation and Development ("HPD") against respondents, Michael Feldman, Dan Shalom and Highpoint Associates XII, LLC who are the owners of the subject building, 412 West 46 Street, New York, NY 10036. The

petition seeks an order to correct, civil penalties for failure to correct twelve (12) class “C” violations at the subject premises, order to comply with HPD’s Vacate Order and Administrative Order to Correct, after having placed the subject building in the Alternative Enforcement Program (“AEP”).¹.

Facts

According to paragraph fourteen (14) of the petition, HPD issued a full Vacate Order dated October 7, 2016 and effective October 11, 2016 for the subject building which includes all fifteen (15) apartments. The conditions in the Vacate Order describe the building as follows: building in total disrepair, entire roof missing and exposed to the elements, unkeyed plasters at wall and ceiling at stories 3, 4, 5, and no gas service supply to apartments 3B, 3C, 3A, meter locked at basement. Therefore, all persons in any of the fifteen (15) apartments of the subject building were ordered to vacate by October 11, 2016, and the owner was ordered to repair the conditions by October 11, 2016.

Respondents, Dan Shalom/Highpoint Associates XII, LLC, indicate that the City of New York commenced a Supreme Court action by Summons and Complaint dated August 13, 2019 against many defendants including them - Daniel Shalom and Highpoint Associates XII, LLC. The title of the action is *The City of New York v Keystone Management Inc. et. al.*, New York County, Supreme Court, Index No. 451285/2019, the “Supreme Court action.” (*NYSCEF 16*).

¹ HPD on or about January 31st of each year designates severely distressed multiple dwellings for participation in the Alternative Enforcement Program (“AEP”). Buildings are selected based on the number of class B and C violations and the dollar value of emergency repair charges incurred as a result of the work HPD performed. Building owners selected for AEP are notified and informed on how to be discharged from the program. If the owner does not correct the conditions in the first four months, HPD will issue an AEP Order to Correct. (*NYSCEF 16, Complaint ¶s 200 & 201*).

According to the complaint, the City of New York brought the action for shut down of illegal transient (less than 30-day) rentals, to hold the defendants responsible for years of neglect by failing to keep their buildings located at 410 West 46th Street, NY, NY, 412 West 46th Street, NY, NY, and 452 West 36th Street, NY, NY in a safe and code complaint manner and for persistent participation and acquiescence to harassment conduct against permanent residents. The Complaint claims that defendants have created and/or permitted public nuisances in the form of illegal transient rentals and that the action is mainly brought pursuant to the common law of public nuisance. According to paragraph 23 of the Complaint, it seeks preliminary and permanent injunctive relief, imposition of civil statutory penalties, compensatory, punitive damages against the owners, managers, lessees, licensees, operators and agents of the subject buildings for violations under the Multiple Dwelling Law (“MDL”), the New York City Building Code (“the Building Code”), and the New York City Housing Maintenance Code (“Housing Maintenance Code”) for creating nuisances as defined in Section 7-701 et seq., of the Administrative Code (the “Nuisance Law”) (*NYSCEF 16*).

Further, the complaint mentions numerous inspections performed by Department of Buildings (DOB) Inspector’s and FDNY Fire Protection Inspectors from the Mayor’s Office of Special Enforcement (“OSE”) at the subject building where multiple violations were issued by DOB. These violations indicate that at least four (4) of the fifteen (15) units in the building had been rented and occupied on a transient basis for less than 30-day stays, in violation of the buildings Certificate of Occupancy (“C of O”), the MDL, the Building Code, and the Fire Code. The OSE Teams issued about 51 Environmental Control Board (“ECB”) Summons to respondent/owners herein and \$159,500 in penalties. (*NYSCEF 16, Complaint ¶ 124*).

In sum, the Complaint in the Supreme Court action, contains nine causes of actions relating to statutory public nuisances for transient residential occupancy, illegal occupancy, criminal nuisance, violation of the MDL on transient occupancy, harassment and common law nuisance.

Dan Shalom/Highpoint Associates - Motion to Dismiss

Respondents/Dan Shalom/Highpoint Associates XII, LLC move to dismiss the petition pursuant to *CPLR § 3211 (a) (4)* and/or *CPLR § 3212*. Alternatively, pursuant to *CPLR § 3211 (a) (4)* seek a stay of this proceeding pending the Supreme Court action.

Under *CPLR § 3211 (a) (4)*, a party may move to dismiss a cause of action if there is another action pending between the same parties for the same cause of action in a court of any state or the United States and the court need not dismiss upon this ground but may make such order as justice requires. Moreover, *CPLR § 3211 (a) (4)* vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action. *Whitney v. Whitney, 57 N.Y.2d 731, 732 (1982)*.

Here, two (2) out of the three (3) respondent/owners are named defendants with other defendants in the Supreme Court action. Specifically, respondents, Dan Shalom and Highpoint Associates XII, LLC are named defendants in the Supreme Court action. Nevertheless, respondent Michael Feldman is not a named defendant in the Supreme Court action. The petitioner in this action is HPD, a City of New York agency, and the plaintiff in the Supreme Court action is the City of New York.

However, in terms of the cause of action, this is an HP Action involving one subject building located at 412 West 46 Street, New York, NY 10036 while the Supreme Court action involves a total of three buildings. These buildings are located at 410 West 46th Street, NY, NY,

412 West 46th Street, NY, NY, and 452 West 36th Street, NY, NY. This HP Action was commenced in the Housing Part of the New York Civil Court pursuant to *N.Y. City Civ. Ct. Act § 110 (a) (9)*,² seeking an Order to Correct, civil penalties for failure to correct twelve (12) class “C” violations at the subject building, order to comply with HPD’s Vacate Order and Administrative Order to Correct, after having placed the subject building in the AEP. The Complaint in the Supreme Court action names nine causes of action involving statutory public nuisances for transient residential occupancy, illegal occupancy, criminal nuisance, violation of the MDL on transient occupancy, harassment and common law nuisance. None of these nine causes of action involve an order to correct HPD violations in Exhibit 1 to the instant petition (NYSCEF 3), nor civil penalties for failure to correct twelve (12) class “C” HPD violations at the subject premises, nor an order to comply with HPD’s Vacate Order and Administrative Order to Correct, after having placed the subject building in the AEP. While it is true that the Complaint in the Supreme Court action mentions HPD violations for the subject building, civil penalties as it relates to public nuisance and that it provides a summary of the AEP with respondents’ involvement in the Program for the subject building, the relief sought in the Complaint does not involve the specific relief sought by HPD herein. The relief sought in the Supreme Court action involves declaratory relief, injunctive relief, civil penalties, as it relates to public nuisance of illegal transient use and occupancy and harassment. As such, respondents/Dan Shalom/Highpoint Associates XII, LLC’s motion to dismiss the petition pursuant to *CPLR §*

² The city department charged with enforcing the multiple dwelling law, housing maintenance code, and other state and local laws applicable to the enforcement of proper housing standards **may commence any action or proceeding described** in paragraphs one, two, three, four, six and seven of this subdivision by an order to show cause, returnable within five days, or within any other time period in the discretion of the court. Upon the signing of such order, the clerk of the housing part shall issue an index number.

3211 (a) (4) and/or CPLR § 3212 is denied. *Sprecher v. Thibodeau*, 148 A.D.3d 654, 656 (1st Dep't 2017). Likewise, any relief sought to stay this HP Action pending the Supreme Court action based on the same argument is also denied for the reasons already discussed above, since they are both unrelated.

Michael Feldman's - Motion to Dismiss

Respondent/Michael Feldman moves to dismiss the petitioner's claim for an Order to Correct and civil penalties pursuant to *CPLR § 3211 (a) (1)* based on documentary evidence, *CPLR § 3211 (a) (4)* based on the pending Supreme Court Action, pursuant to *CPLR § 3211 (a) (5)* based on res judicata and collateral estoppel, pursuant to *CPLR § 3211 (a) (7)* for failure to state a cause of action and pursuant to *CPLR § 3211 (a) (8)* for lack of personal jurisdiction³ over Michael Feldman.

The motion to dismiss is merely supported by an attorney affirmation. The attorney affirmation of Nissan Shapiro indicates that respondent/Michael Feldman was the recorded registered managing agent for the subject building from September 2020 until August 15, 2021. (*Shapiro Affirm ¶ 3 /NYSCEF 30*). In support of this claim, Mr. Shapiro submits an exhibit from the HPD website showing that Michael Feldman is no longer the managing agent (*NYSCEF 33*) and another exhibit from the HPD website showing only one HPD violation for the subject building during Michael Feldman's tenure. (*NYSCEF 32*). However, due to a breakdown in the relationship with the co-respondents, Dan Shalom and Highpoint Associates XII LLC , the relationship was terminated. Therefore, Michael Feldman no longer manages the subject

³ Counsel for Michael Feldman on the record during oral argument of the motion withdrew the *CPLR § 3211 (a) (8)* part of the motion to dismiss based on lack of personal jurisdiction.

building. (*Shapiro Affirm ¶s 4 - 6 /NYSCEF 30*). As such, Michael Feldman asks that the petition against him be dismissed. Additionally, respondent/ Michael Feldman argues that HPD has previously brought comprehensive cases against the co-respondents and referred to the pending Supreme Court action. To support this claim, he submits an exhibit detailing HPD litigation for the subject building from April 12, 2007 through May 20, 2021. (*NYSCEF 34*).

The pleading in a motion to dismiss pursuant to *CPLR §3211* is afforded a liberal construction. *CPLR § 3026*. The facts alleged on the complaint or petition must be accepted as true and afford the plaintiff or petitioner the benefit of every possible inference and determine only whether the facts alleged fit within any cognizable legal theory. *Leon v Martinez, 84 N.Y.2d 83 (1994)*. Under *CPLR § 3211 (a) (1)*, a dismissal is warranted only if the documentary evidence submitted conclusively establishes a defense to the asserted claim as a matter of law. *Heaney v. Purdy, 29 N.Y.2d 157 (1971)*.

Here, the documentary evidence submitted by Michael Feldman as exhibits to the motion do not sufficiently and conclusively establish a defense for him to this HP Action. The fact that Michael Feldman was the managing agent for the subject building for only one HPD violation for the subject building during Michael Feldman’s tenure and only from September 2020 until August 15, 2021 is not a basis for dismissal of the HP Action against him. This HP Action began in May 2021 at a time when Michael Feldman was the registered managing agent of the subject building. Therefore, naming Michael Feldman as a co-respondent to the HP Action is appropriate, since an HP Action is brought against an owner and an owner shall mean an agent, under *City of NY, Adm. Code § 27-2004 (45)* and an HPD violation was issued for the subject building. Accordingly, the motion to dismiss under *CPLR §3211 (a) (1)* based on documentary evidence is denied.

Respondent/Michael Feldman’s motion to dismiss pursuant to *CPLR* § 3211 (a) (4) based on the pending Supreme Court Action is denied for the same reasons already discussed in the denial of respondents/Dan Shalom/Highpoint Associates XII, LLC’s motion to dismiss pursuant to *CPLR* § 3211 (a) (4).

Respondent/Michael Feldman’s motion to dismiss pursuant to *CPLR* § 3211 (a) (5) based on res judicata and collateral estoppel is denied. The doctrine of *res judicata* precludes a party from re-litigating a claim where a judgment on the merits exists from a prior action between the same parties involving the same subject matter. *Matter of Josey v Goord*, 9 N.Y.3d 386 (2007). “The doctrine of *collateral estoppel*, a narrower species of *res judicata*, precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against the party or those in privity, whether or not the tribunals or causes of action are the same.” *Ryan v New York Telephone Company*, 62 N.Y.2d 494 (1984). Here, the affirmation in support of the motion to dismiss does not present any colorable claim or facts to establish res judicata and collateral estoppel as defined above.

Respondent/Michael Feldman’s motion to dismiss pursuant to *CPLR* § 3211 (a) (7) for failure to state a cause of action is denied. A *CPLR* § 3211 (a) (7) motion may be used by a defendant to test the facial sufficiency of a pleading in two different ways. First, the motion may be used to dispose of an action in which the plaintiff has not stated a claim cognizable at law. Second, the motion may be used to dispose of an action in which the plaintiff identified a cognizable cause of action but failed to assert a material allegation necessary to support the cause of action. *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc.*, 115 A.D.3d 128, 134 (1st Dep’t 2014). Moreover, under *City of NY, Adm. Code* § 27-2115, a petitioner in an HP

Action that seeks civil penalties must show that HPD served the owner a notice of violation directing the owner to correct the violation and that the owner failed to correct the violation within the time frame required to correct the violation. Additionally, *City of NY, Adm. Code § 27-2115 (c) (7)* indicates that failure to file with HPD a certification of compliance shall establish a prima facie case that a violation has not been corrected.

Here, the instant petition facially states a cognizable cause of action and material allegation necessary to support a cause of action for an Order to Correct and civil penalties. *Basis Yield Alpha Fund (Master) v. Goldman Sachs Grp., Inc., supra.* For instance, annexed to the petition is the HPD violation summary, notice of violations to the owners, HPD vacate order and Alternative Enforcement Order for the subject building which are supporting documents attached by petitioner as prima facie proof for this HP Action. (*NYSCEF 3-6*). Specifically, these documents show compliance with the requirements of a prima facie claim of civil penalties under City of NY, Adm. Code § 27-2115 and assert a cognizable cause of action for an HP Action against all respondent/owners. Accordingly, the motion to dismiss under *CPLR §3211 (a) (7)* for failure to state a cause of action is denied.

The matter is restored to the calendar to January 11, 2022 at 3:30 p.m. – 4:40 p.m. for all purposes. To join the conference by phone call, please call (833) 262 – 7886, conference ID 466 235 385#. To provide an email address to receive an invitation to appear via Microsoft Teams, please call Part B clerk at (646) 386 – 5529.


ORDERED: Respondent, Dan Shalom/Highpoint Associates XII, LLC's, motion to dismiss or for a stay of the proceeding is denied.

ORDERED: Respondent, Michael Feldman's, motion to dismiss is denied.

ORDERED: The matter is restored to the calendar January 11, 2022 at 3:30 p.m. – 4:30 p.m. for all purposes.

This is the decision and order of the Court, copies of which are being uploaded to NYSCEF.

Date: November 15, 2021


Hon. Frances Ortiz
Judge, Frances A. Ortiz

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