

**Cohen v Restuccia**

2022 NY Slip Op 30751(U)

April 1, 2022

Supreme Court, New York County

Docket Number: Index No. 158072/2020

Judge: Dakota D. Ramseur

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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: HON. DAKOTA D. RAMSEUR PART 34M

Justice

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INDEX NO. 158072/2020

ANDREA COHEN, JOSE ANTONIO ROJAS,

MOTION DATE N/A

Plaintiff,

MOTION SEQ. NO. 003

- 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.

DECISION + ORDER ON MOTION

Defendants.

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The following e-filed documents, listed by NYSCEF document number (Motion 003) 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135

were read on this motion to/for REARGUMENT/RECONSIDERATION

This is an action to recover damages for wrongful eviction pursuant RPAPL 853. In a decision and order, dated April 8, 2021, this court (1) granted the motion of defendant Hertz Cherson & Rosenthal P.C (HC&R) for summary judgment dismissing the complaint insofar as asserted against it, (2) granted the cross motion of defendants New York City Department of Housing Preservation and Development (HPD), Louise Carroll, and Tammy Alston for summary judgment dismissing the complaint insofar as asserted against them, and (3) denied plaintiffs' motion for partial summary judgment on the issue of liability against all defendants except for HC&R. Plaintiffs now move pursuant to CPLR 2221 for leave to reargue and renew (1) their opposition to HC&R's motion and (2) their motion for partial summary judgment on the issue of liability. Plaintiff's motion is opposed. For the following reasons, plaintiff's motion is denied.

BACKGROUND

On November 27, 2019, non-party Jose Rojas Sr. (Rojas Sr.) died from a gastrointestinal hemorrhage while in the apartment where he resided, located at 456 West 37th Street in the borough of Manhattan (the Apartment). The nature of Rojas Sr.'s death resulted in an inordinate amount of blood, which caused the New York City Police Department (NYPD) to seal the Apartment for the purpose of investigating his death. The NYPD did not remove the seal until February 27, 2020. Upon removal of the seal, defendant Joseph Restuccia, an employee of the landlord, defendant Clinton Housing Development Company (CHDC), changed the lock on the entrance door of the Apartment.

On March 5, 2020, Rojas Sr.'s disabled son, plaintiff Jose Antonio Rojas (Rojas), and Rojas' mother plaintiff Andrea Cohen (together plaintiffs) commenced a proceeding against Restuccia and CHDC in the Civil Court of the City of New York under L&T Index No. 54643/2020 (the underlying Civil Court proceeding). In that proceeding, plaintiffs alleged that they were in possession of the Apartment in excess of thirty days prior to Rojas Sr.'s death and were entitled to be restored to possession pursuant to New York City Administrative Code § 26-521 (a) (3).<sup>1</sup> Plaintiffs also sought the imposition of civil penalties against Restuccia and CHDC pursuant to RPAPL 768.<sup>2</sup>

After a hearing, the Civil Court (Evon M. Asforis, J.) issued a decision and order, dated September 28, 2020, finding that plaintiffs were unlawfully evicted from the Apartment in violation of NYC Administrative Code § 26-521 (a) (3) and were entitled to be restored to possession (NYSCEF Doc. No. 33). The court declined to award civil penalties under RPAPL 768.

### *The Instant Action*

On September 30, 2020, plaintiffs commenced the instant action to recover damages for wrongful eviction pursuant to RPAPL 853, which provides:

“If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.”

The complaint names Restuccia, CHDC, and CHDC employee, Nancy Paz, as defendants. In addition, the complaint names HPD and two of its employees, Louise Carroll and Tammy Alston (collectively, the City defendants), as defendants, alleging that HPD owns the building in which the Apartment is located. Finally, the complaint names HC&R, the law firm that represented Restuccia and CHDC in the underlying Civil Court proceeding, as a defendant, alleging it made false representations to the court in that proceeding for the purpose of prolonging plaintiffs' unlawful lockout from the Apartment.

The City defendants submitted an answer denying the material allegations of the complaint and asserting cross claims against CHDC for indemnification and contribution (NYSCEF Doc. No. 5). CHDC, Restuccia, and Paz filed a separate answer denying the material

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<sup>1</sup> NYC Administrative Code § 26-521 (a) (3) states that is unlawful.

“to evict or attempt to evict an occupant of a dwelling unit who has lawfully occupied the dwelling unit for thirty consecutive days or longer or who has entered into a lease with respect to such dwelling unit or has made a request for a lease for such dwelling unit pursuant to the hotel stabilization provisions of the rent stabilization law . . . by . . . engaging or threatening to engage in any other conduct which prevents or is intended to prevent such occupant from the 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.”

<sup>2</sup> RPAPL 768 includes substantially the same language quoted above from NYC Administrative Code § 26-521 (a) (3), but also contains a provision providing that any person who violates or assists in the violation of the statute is subject to criminal and civil penalties.

allegations of the complaint and asserting a cross claim against HPD for indemnification (NYSCEF Doc. No. 6).

In lieu of answering, HC&R moved to dismiss the complaint insofar as asserted against it pursuant to CPLR 3211 (a) (1) and (7) (motion sequence no 001). Plaintiffs opposed the motion and moved for partial summary judgment on the issue of liability against all defendants except HC&R (motion sequence no 002). The City defendants opposed plaintiffs' motion and cross-moved to dismiss the complaint insofar as asserted against them (motion sequence no 002). In a decision and order, dated April 8, 2021, this court: (1) granted HC&R's motion to dismiss; (2) denied plaintiffs' motion for partial summary judgment; (3) granted the City defendants' cross motion to dismiss on the ground that plaintiffs failed to comply with General Municipal Law 50-e and 50-i, and (4) ordered that the matter be transferred to a non-City part, as the City defendants were no longer parties to this action (the prior order) (*Cohen v Restuccia*, 2021 NY Slip Op 31215[U] [Sup Ct, NY County 2021] [NYSCEF Doc. No. 108]).

Plaintiffs now move pursuant to CPLR 2221 for leave to reargue and renew (1) their opposition to HC&R's motion to dismiss and (2) their motion for partial summary judgment on the issue of liability. For the purposes of the present motion, the court will assume familiarity with the prior order.

## DISCUSSION

Pursuant to CPLR 2221 (d), a motion for leave to reargue must "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 matters of fact not offered on the prior motion" (CPLR 2221 [d][2]). Reargument is not available to argue a new question or theory of law not advanced on the prior motion (*see People v D'Alessandro*, 13 NY3d 216, 219 [2009]; *Litton Loan Servicing, L.P. v Wasserman*, 202 AD3d1074 [2d Dept 2022]; *DeSoignies v Cornasesk House Tenants' Corp.*, 21 AD3d 715, 718 [1st Dept 2005]) and "is never a vehicle for seeking new forms of relief" (*Fox v Abe Schrader Corp.*, 36 AD2d 591, 591 [1st Dept 1971]).

Pursuant to CPLR 2221 (c), a motion for leave to renew must "be based upon new facts not offered on the prior motion that would change the prior determination or shall demonstrate that there has been a change in the law that would change the prior determination." (CPLR 2221 [e] [2]). Where the movant offers new evidence in support of his or her motion to renew, the motion is properly denied without a reasonable explanation for failing to submit the new evidence in connection with the original motion (*see Hernandez v St. Stephen of Hungary School*, 72 AD3d 595, 595 [1st Dept 2010]; *Kasem v Price-Rite Off. & Home Furniture*, 21 AD3d 799, 801 [1st Dept 2005]).

### ***Reargument and Renewal of Plaintiffs' Opposition to HC&R's Motion***

In seeking reargument of their opposition to HC&R's motion, plaintiffs assert that this court misapplied the Appellate Division, First Department's decision in *Mayer v UVI Holdings* (280 AD2d 153 [1st Dept 2001]) when it determined that under the circumstances, HC&R is not liable to plaintiffs for treble damages pursuant to RPAPL 853. In this regard, plaintiffs contend

that the court failed to consider that *Mayer* sets forth multiple criteria for determining when a direct cause of action against a law firm is available to a non-client.

In *Mayer*, the lessees and occupants of an apartment commenced an action to recover damages for their eviction, which was previously found to have been wrongful because it was procured upon an invalid warrant. The court in *Mayer* held, among other things, that plaintiffs had a direct cause of action against not only the landlord, but also the landlord's attorney arising from the attorney's failure to obtain a valid warrant. In arguing that this court incorrectly applied *Mayer*, plaintiffs draw the court's attention to the following language from that decision:

"A direct cause of action by a nonclient against a law firm is not generally cognizable, except where injury is 'sustained by a third party as a consequence of the attorney's wrongful or improper exercise of authority, or where the attorney has committed fraud or collusion or a malicious or tortious act' (*Singer v Whitman & Ransom*, 83 AD2d 862, 863 [2d Dept 1981]). The procurement of an eviction upon an invalid warrant is certainly an 'improper exercise of authority,' and may be indicative of collusion between the landlord and its attorneys. Therefore, under the circumstances, a direct action against the law firm is available to plaintiffs"

(*Mayer*, 280 AD2d at 161-162).

Plaintiffs contend that this court interpreted *Mayer* too narrowly by deciding that it only applies when a law firm knowingly proceeds upon an invalid warrant for eviction. They contend that this court overlooked that liability may also be imposed where, as here, a law firm committed fraud or a malicious act. In this regard, plaintiffs assert that HC&R attorney Eliot Cherson knew when he represented Restuccia and CHDC in the underlying Civil Court proceeding that plaintiff Andrea Cohen was a tenant of the Apartment by virtue of Cherson's unsuccessful effort in a 2005 non-primary residence holdover proceeding in which he represented CHDC (L&T Index No. 75778/2005) (the 2005 proceeding). Plaintiffs assert that Cherson committed fraud or a malicious act on behalf of HC&R by arguing in the underlying Civil Court proceeding that Cohen was *not* a tenant of the Apartment, since he, in fact, knew based on the 2005 proceeding, that Cohen *was* a tenant of the Apartment.

Contrary to plaintiffs' contention, this court did not overlook or misapprehend the applicability of *Mayer* and did not hold or imply that it only applies when a law firm knowingly proceeds upon an invalid warrant for eviction. This court considered the argument raised by plaintiffs on this motion in deciding the underlying motion and rejected it by finding not only that HC&R played no role in changing the locks to the Apartment, but also that plaintiffs did not have a viable claim that HC&R "acted unlawfully in its representation of . . . Restuccia and CHDC[] during the [underlying] Civil Court proceedings" (*Cohen v Restuccia*, 2021 NY Slip Op 31215[U], at \*\*5).

HC&R's participation in a 2005 proceeding does not provide a basis upon which to hold HC&R liable for treble damages under RPAPL 853. The result of a holdover proceeding that took place almost 15 years prior is not dispositive of whether plaintiffs were tenants of the Apartment pursuant to a valid lease or whether they occupied the premises for 30 days prior to November 27, 2019.

Upon renewal, plaintiffs also present various documents from the record of the 2005 proceeding to bolster their position that HC&R knew that Cohen was a tenant of the Apartment on November 27, 2019. However, for the reason just discussed, plaintiffs' underlying argument in this regard is without merit, and therefore the newly submitted evidence would not have changed the court's prior determination on this issue.

### ***Reargument and Renewal of Plaintiffs' Motion for Partial Summary Judgment***

In moving for renewal and reargument of their motion for partial summary judgment, plaintiffs argue that the court also misapprehended *Mayes* when it failed to find that Restuccia, Paz, CHDC, and HC&R are barred by the doctrine of collateral estoppel from disputing their liability. Plaintiffs assert that these defendants already had a full and fair opportunity in the underlying Civil Court proceeding to litigate the issues of their wrongdoing.

As an initial matter, to the extent plaintiffs may be understood as arguing they are entitled to summary judgment on the issues of liability against HC&R, this request for relief is inappropriate in the context of the instant motion. Plaintiffs did not move for summary judgment against HC&R in connection with their prior motion and reargument is not a vehicle for seeking new forms of relief.

As to Restuccia, Paz, and CHDC, this court found in the prior order that under the circumstances of this case, issues of fact exist as to whether plaintiffs are entitled to treble damages pursuant to RPAPL 853 including, among other things "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" (*Cohen v Restuccia*, 2021 NY Slip Op 31215[U], at \*\*5). Contrary to plaintiffs' contention, the doctrine of collateral estoppel does not require a different result.

"The doctrine of collateral estoppel precludes a party from relitigating in a subsequent action or proceeding an issue clearly raised in a prior action or proceeding and decided against that party or those in privity, whether or not the tribunals or causes of action are the same. The doctrine applies if the issue in the second action is identical to an issue which was raised, necessarily decided and material in the first action, and the plaintiff had a full and fair opportunity to litigate the issue in an earlier action"

(*Martinez v New York City Tr. Auth.*, 203 AD3d 87, 91 [1st Dept 2022] [internal quotation marks and citation omitted]).

In the underlying Civil Court proceeding, it was established that plaintiffs were wrongfully evicted from the subject apartment and were entitled to be restored to possession of the Apartment. Restuccia and CHDC cannot relitigate that issue because they had a full and fair opportunity to litigate it before the housing court judge. However, the issue raised by plaintiffs' motion for summary judgment in this action — i.e., whether they are entitled to treble damages under RPAPL 853 — was not before the housing court judge in the underlying Civil Court proceeding. As such, collateral estoppel is inapplicable.

Plaintiffs' argument that *Mayes* requires the application of collateral estoppel as to the propriety of the imposition of treble damages under RPAPL 853 is raised for the first time on reargument. A motion for reargument cannot be premised on grounds that were apparent at the time of the prior motion, but not asserted therein (*see Litton Loan Servicing, L.P. v Wasserman*, 202 AD3d 1074). Therefore, the argument is not properly before the court on this motion.

In any event, plaintiffs' reliance on *Mayes* for this proposition is misplaced. The court in *Mayes* did not suggest that a successful "unlawful eviction" claim automatically establishes entitlement to treble damages under RPAPL 853. In fact, the court stated in *Mayes* that "no damages have been assessed, and the propriety of the imposition of treble damages against any defendant remains to be evaluated upon a full record after trial" (*Mayes*, 280 AD2d at 161; *see also Rental & Mgt. Assoc. v Hartford Ins. Co.*, 206 AD2d 288, 288 [1st Dept 1994] [treble damages under RPAPL 853 are "not automatic but discretionary"]; *Lyke v Anderson*, 147 AD2d 18, 28 [2d Dept 1989] ["awarding of treble damages pursuant to RPAPL 853 is discretionary"]).

Plaintiffs further argue that the court "failed to apprehend the compelling public policy preventing and punishing illegal lockout" "especially under the cruel circumstances of the pandemic" (Attorney Affirmation at ¶ 42 [NYSCEF Doc. No. 107]). In so arguing, they rely on a Memorandum issued by the State of New York Office of the Attorney General on May 4, 2020, intending to provide guidance to law enforcement in handling claims for unlawful evictions under RPAPL 768 (Memorandum, NYSCEF Doc. No. 115). However, this document was not submitted in support of plaintiffs' motion for summary judgment and cannot form a basis for renewal in that plaintiffs offer no excuse for not presenting it on the prior motion. Moreover, consideration of this document would not have changed this court's prior determination.

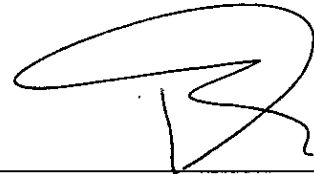
Plaintiff also recounts certain events that occurred after this court issued the prior order on April 8, 2021 and assert that these events prove "[t]hat this Court declining to award judgment on the issue of liability has had the invidious effect of emboldening these horrific wrong-doers" (Attorney Affirmation at ¶ 43 [NYSCEF Doc. No. 107]). These subsequent events cannot form a basis for reargument inasmuch as it is improper for such a motion to "include any matters of fact not offered on the prior motion" (CPLR 2221 [d ] [2]). To the extent plaintiffs are offering these events as a basis for renewal, their reliance is also misplaced. On a motion for leave to renew, it is improper for the moving party to rely on facts that were not in existence at the time of the original motion (*see Farahmand v Dalhousie Univ.*, 96 AD3d 618, 619 [1st Dept 2012]; *Johnson v Marquez*, 2 AD3d 786, 789 [2d Dept 2003]).

Accordingly, it is hereby

ORDERED that plaintiffs' motion for reargument and renewal is denied; and it is further

ORDERED that plaintiffs shall serve a copy of this decision and order on all parties, with notice of entry, within ten (10) days of entry.

This constitutes the decision and order of the Court.



4/1/2022  
DATE

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DAKOTA D. RAMSEUR, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE