

Goodman v Leschins
2022 NY Slip Op 31308(U)
April 20, 2022
Supreme Court, New York County
Docket Number: Index No. 157204/2021
Judge: Douglas E. Hoffman
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**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. DOUGLAS HOFFMAN PART **44**

Justice

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LAWRENCE GOODMAN,

Plaintiff,

- v -

BENJAMIN LESCHINS, SAMUEL LESCHINS, JOHN DOE, JANE
DOE,

Defendant.

INDEX NO. 157204/2021

MOTION DATE 10/27/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON
MOTION**

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The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 32

were read on this motion to/for DISMISSAL

Upon the foregoing documents, and for the reasons set forth below, the court denies the instant motion filed by defendant Samuel Leschins pursuant to CPLR §§ 3211(a)(1) and (a)(3) for an order dismissing the second, third and fourth causes of action against him and his brother, defendant Benjamin Leschins, in this ejectment action commenced by the court-appointed receiver, Lawrence Goodman.

First, movant did not file a request for judicial intervention in violation of court rules ["Except as provided in subdivision (b) [not applicable here], in an action not yet assigned to a judge, the court shall not accept for filing a notice of motion, order to show cause, application for ex parte order, notice of Motion, note of issue, notice of medical, dental or podiatric malpractice action, statement of net worth pursuant to section 236 of the Domestic Relations Law or request for a preliminary conference pursuant to section 202.12(a) of this Part, unless such notice or application is accompanied by a request for judicial intervention. Where an application for poor person relief is made, payment of the fee for filing the request for judicial intervention

accompanying the application shall be required only upon denial of the application. A request for judicial intervention must be submitted, in duplicate, on a form authorized by the Chief of the Courts, with proof of service on the other parties to the action (but proof of service is not required where the application is *ex parte*)." 22 NYCRR § 202.6 .

Second, movant, a non-attorney, cannot represent his brother, defendant Benjamin Leschins. *Judiciary Law sec. 478; Lanzuter Benevolent Assn. v Altman*, 160 AD3d 575, 576 [1st Dept 2018]. This is a non-waivable defect. *Id.*, citing *Salt Aire Trading LLC v Sidley Austin Brown & Wood*, 93 AD3d 452, 453 [1st Dept 2012]. That branch of the motion that seeks relief on behalf of any defendant other than movant is stricken. *Id.*

Third, the underlying order appointing the receiver permits the receiver to commence the instant ejectment action with all four causes of action. The ancillary relief the receiver seeks herein is permissible as part of an ejectment action and is intertwined with the fundamental purpose of the instant ejectment action. This plenary action arises from a matrimonial action, pending in this Court, Index 304677/2013, captioned *Eileen Leschins v Preston Leschins*, in which plaintiff therein Eileen Leschins sought to sell the subject condominium unit. Ms. Leschins' efforts to sell the condominium came after numerous years and numerous motions, wherein Mr. Preston Leschins (who is an attorney), attempted to delay discovery in the matrimonial action and to cause the condominium unit to fall into default despite multiple orders for him to contribute to carrying charges for the condominium unit.

In the matrimonial action, upon a lengthy and detailed record, this court appointed Lawrence B. Goodman, Esq. as receiver to sell the condominium unit. After it became known that, apparently, Preston Leschins installed his adult son Benjamin Leschins, and now his 18-year-old son Samuel Leschins, in the condominium unit, effectively preventing its sale, this court

issued a March 22, 2021 supplemental order authorizing the Receiver to “undertake any and all efforts, including but not limited to the commencement of an action or proceeding (including, but not limited to, an ejectment action) to remove any and all occupants from the condo”.

The receiver retained counsel to commence the instant ejectment action. Plaintiff commenced the instant action by filing the summons and complaint on August 3, 2021. Service was effectuated on August 12, 2021. At the time of the filing of the instant motion, no defendant had filed an answer. In addition to the cause of action for ejectment, the complaint asserts causes of action for injunctive relief to prevent defendants from encumbering the premises, use and occupancy and slander of title.

“When . . . a defendant moves for dismissal of a cause of action under CPLR 3211 (a) (1), their documentary evidence must utterly refute[] the plaintiff’s factual allegations, conclusively establishing a defense as a matter of law” *Himmelstein, McConnell, Gribben, Donoghue & Joseph, LLP v Matthew Bender & Co.*, 37 NY3d 169, 175] [2021][internal quotation marks and citations omitted].

See also Consol. Rest. Operations, Inc. v. Westport Ins. Corp., 2022 N.Y. Slip Op. 02336, --- N.Y.S.3d ----, 2022 WL 1040367, at *2 [1st Dept Apr. 7, 2022].

The third cause of action seeks use and occupancy, relief that can be sought in an action for ejectment. RPAPL § 601 provides in pertinent part: “In an action to recover the possession of real property, the plaintiff may recover damages for withholding the property, including the rents and profits or the value of the use and occupation of the property for a term not exceeding six years...”

The second and fourth causes of action seek injunctive and other relief designed to prevent the receiver from encountering certain obstacles to the sale of the condominium unit should defendants or others acting in concert with or on behalf of defendants seek to encumber or otherwise hinder the sale of the unit. The unencumbered sale of the condominium unit, the primary purpose of the underlying order appointing the receiver, may require the injunctive relief

sought and payment of use and occupancy to prevent de-valuation of the condominium unit as a result of foreclosure, the filing of liens or other encumbrances. Thus, all four causes of action are inextricably intertwined with the appointment order and supplemental order. Movant has presented no documentary evidence that would refute conclusively the four causes of action pleaded in the complaint and dismissal pursuant to CPLR § 3211(a)(1) is unwarranted.

Furthermore, plaintiff has the capacity to prosecute all four causes of action as discussed above, and dismissal pursuant to CPLR § 3211(a)(3) is similarly unwarranted. To remove any possible question as to the receiver's authority to prosecute all four causes of action, this court's January 19, 2021 and March 22, 2021 orders in this action are hereby amended nunc pro tunc to their issuance dates to permit the receiver to prosecute all four causes of action set forth in the complaint. Accordingly, the motion is denied.

ORDERED that any relief not granted is denied. This constitutes the Decision and Order of the Court.

APR 20 2022

4/20/2022

DATE

[Signature]
APR 20 2022

DOUGLAS E. HOFFMAN, J.S.C.

CHECK ONE:

CASE DISPOSED
GRANTED DENIED
SETTLE ORDER
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION
GRANTED IN PART
SUBMIT ORDER
FIDUCIARY APPOINTMENT

OTHER
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

**HON. DOUGLAS E. HOFFMAN
J.S.C.**