

Helm v Marchisotto
2022 NY Slip Op 32149(U)
July 7, 2022
Supreme Court, New York County
Docket Number: Index No. 151994/2021
Judge: James d'Auguste
Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.
This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. JAMES D'AUGUSTE PART 55

Justice

-----X

MARTIN HELM, INNA HELM,	INDEX NO.	<u>151994/2021</u>
Plaintiff,	MOTION DATE	<u>11/18/2021, 11/18/2021</u>
- v -	MOTION SEQ. NO.	<u>001 002</u>

CHARLES MARCHISOTTO, BENNETT MOVERS, DONALD JONES, THOMAS TRASKA, ALL-READY MOVING & STORAGE INC. D/B/A BENNETT MOVERS

DECISION + ORDER ON MOTION

Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 55, 56, 62, 63, 64, 71, 72, 73

were read on this motion to/for DISMISSAL.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 61, 65, 66, 67, 70, 74, 75

were read on this motion to/for DISMISS.

Motion Sequences 001 and 002 are consolidated for disposition.

Motion Sequence 001:

In Motion Sequence 001, defendant Charles Marchisotto (“Marchisotto”) moves to dismiss the amended complaint pursuant to CPLR 3211(a)(5); 215[1]; 3211(a)[1]. Actions against the City Marshal are subject to a one-year statute of limitations, and therefore, this action is time-barred against him. CPLR 215(1); *see Jemison v Crichlow*, 139 AD2d 332 (2d Dept 1988) (holding that the one-year statute of limitations under CPLR 215[1] applies to acts by the City Marshal under color of his office, rather than whether the alleged misconduct is deliberate). Since the eviction occurred on July 7, 2017, and the action was commenced on February 26,

2021, the action is time-barred, and the Court does not need to proceed with an analysis of the documentary evidence claim.¹

Motion Sequence 002:

In Motion Sequence 002, defendants Donald Jones and Thomas Traska (“moving defendants”) move pursuant to CPLR 3211(a)(1), (a)(5) and (a)(7) dismissing the plaintiff’s Amended Complaint in its entirety, with prejudice, and any cross-claims as against the moving defendants. Although not raised in the Notice of Motion, moving defendants argue for the imposition of sanctions against the plaintiff – stating that plaintiffs have engaged in frivolous and harassing conduct. As a preliminary matter, plaintiffs failed to file this action within the three-year statute of limitations period for the first through fifth causes of action. *See Brash v Richards*, 195 AD3d 582 (2d Dept 2021) (discussing how to calculate the toll instituted through Executive Order 202.8 [March 20, 2020]); *see* Defs Aff in Reply, NYSECF Doc. No. 74, at pp. 2-4 (calculating statute of limitations period in this action and calculating that the plaintiff missed the statute of limitations period by four days). Moreover, plaintiffs do not oppose dismissal of the second, fourth, fifth, sixth, and seventh causes of action, so the Court will dismiss these causes of action. *Aff. in Opp*, NYSCEF Doc. No. 65; *see Norex Petroleum Ltd. v Blavatnik*, 48 Misc3d 1226(A) (Sup Ct, NY Cty, 2015); *see also Costello v Standard Metals*, 99 AD2d 227 (1st Dept. 1984). Assuming, *arguendo*, that the Court were to proceed to the merits of the first and third causes of action – conversion of plaintiffs’ property and negligence in handling plaintiffs’ property – the Court would find that plaintiffs voluntarily abandoned the property left in the apartment. Pursuant to the sublease, as well as the series of so-ordered

¹ The plaintiffs raise former Governor Cuomo’s Executive Order 202.8 (signed March 20, 2020), the executive order addressing essential services during the COVID-19 pandemic, as a toll to the statute of limitations in this action. However, this executive order does not apply, as the statute of limitation expired in 2018.

stipulations filed with the Housing Court, any property left in the apartment would be deemed abandoned and able to be disposed at the discretion of moving defendants. NYSCEF Doc. No. 49, at Para. 9(B) (sublease provision stating that “If your property remains in the Apartment after the Sublease ends Owner may... consider that You have given up ... any property remaining In the Apartment. In this event, Owner may either discard the property or store it at your expense”); NYSCEF Doc. No. 34, at p. 5 (January 26, 2017 so-ordered stipulation in Housing Court action stating “Respondents all agree to vacate and remove from the subject premises no later than by 4pm on May 31, 2017 ... and to surrender the Subject Premises to Petitioners or their agent(s) in vacant, broom-swept clean condition, free of debris”). The parties do not dispute that the plaintiffs were aware of the upcoming eviction, despite the final so-ordered stipulation agreeing to vacate the premises months before their ultimate eviction. Plaintiffs’ arguments that the property left in the apartment was not actually abandoned were analyzed and deemed to be without merit.² Therefore, Plaintiffs cannot sustain a cause of action for conversion or negligence in handling plaintiffs’ property when they abandoned same. *8902 Corp. v Helmsley-Spear, Inc.*, 23 AD3d 316, (1st Dept. 2005).

The Court is exercising its discretion to deny the movant’s application for sanctions in Motion Sequence 002.

Accordingly, it is,

ORDERED that Motion Sequence 001, dismissing the action against Charles Marchisotto, is granted, and it is further,

² Although plaintiffs state that they were unable to vacate the apartment prior to their eviction for unspecified reasons, the Court does not address this issue as the validity of the eviction was fully litigated in the prior Housing Court action. The Court only considered whether plaintiffs’ property was abandoned on the date of eviction, considering facts and circumstances that would support plaintiffs’ contentions that they did not intend to abandon the property remaining in the apartment.

ORDERED that Motion Sequence 002 is granted insofar as granting defendants Donald Jones's and Thomas Traska's motion to dismiss is granted, and it is further,

ORDERED that the branch of Motion Sequence 002 seeking sanctions against plaintiffs is denied.

This constitutes the decision and order of the Court.

<u>7/7/2022</u>			<u>JAMES D'AUGUSTE, J.S.C.</u>	
DATE				
CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART
			<input type="checkbox"/>	DENIED
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT
			<input checked="" type="checkbox"/>	OTHER
			<input type="checkbox"/>	REFERENCE