

Carnegie Mgt. Inc. v Gaiga

2022 NY Slip Op 35001(U)

September 19, 2022

Supreme Court, Kings County

Docket Number: Index No. 516976/2020

Judge: Richard J. Montelione

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This opinion is uncorrected and not selected for official publication.

At IAS Part 99 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse located at 360 Adams Street, Brookfyn, Brooklyn, NY 11201, on the ___ day of _____ 2022.

SEP 19 2022

**DECISION
and
ORDER**

2022 SEP 22 AM 9:45
 KINGS COUNTY CLERK

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 99

-----X
CARNEGIE MANAGEMENT INC.,

Plaintiff,
-against-

JONATHAN F. GAIGE, ALEXANDER LANE and
CIAN O'DAY,

Defendants.
-----X

Index No.: 516976/2020
Motion Date: 9/7/2022
Motion Cal. No.: 12,13
Mot. Seq. 1&2

The following papers were read on this motion pursuant to CPLR 2219(a):

Papers	NYSCEF DOC. #
Plaintiff's notice of motion dated 12/23/2020 : a. Pursuant to Real Property Law ("RPL") §220, directing Defendant Gaige to pay all outstanding rent and use and occupancy through December 2020 totaling \$68,450.00; b. Directing Defendant Gaige to pay use and occupancy pendente lite in the monthly amount of \$9,000.00 plus \$50.00 per month for utilities charges, and c. Pursuant to RPL §220, directing Defendant O'Day to pay all outstanding rent and use and occupancy through December 2020 totaling \$42,450.00; d. Directing Defendant O'Day to pay use and occupancy pendente lite in the monthly amount of \$6,000.00 plus \$50.00 per month for utilities charges, etc.; attorney affirmation of Jonathan Schreier, Esq., affirmed on December 23, 2020;	9-22
Defendants cross-motion dated January 25, 2021: (a) dismissing this proceeding pursuant to CPLR §3211 (a) (4) by virtue of a prior actions pending between the parties, titled 345 Eldert Street, LLC v. Gaige; Kings County L&T Index No.: 300729/2020 and Carnegie Management, Inc. v. Cian O'Day; Kings County L&T Index No.: 303115/2020; (b) dismissing this proceeding as violative of New York State public policy and statutory framework in relation to the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020; (c) dismissing this proceeding as violative of New York State's statutory framework in relation to retaliatory evictions; etc.; attorney affirmation of Jack L. Lester, Esq., affirmed on January 25, 2021; Exhibits A-D; attorney affirmation of Jack L. Lester, Esq., affirmed on February 5, 2021 (NYSCEF#38)	25-30, 38-39
Plaintiff's attorney affirmation of Jonathan B. Schreier, Esq., in opposition to cross-motion affirmed on February 2, 2021; Affidavit of Saul Moskowitz, sworn to on February 2, 2021; Memorandum of Law	31-37

MONTELIONE, RICHARD J., J.

This action was commenced by filing the Summons with Notice on September 10, 2020.

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After a demand for a complaint on November 17, 2020, a complaint was filed on December 7, 2020. This is an action, *inter alia*, for breach of three individual lease agreements whereby the parties agreed that the higher market rate would not be due if the lower rate agreed upon was paid by the individual tenant. In addition to rent, plaintiff-landlord seeks use and occupancy, utilities and legal fees. This matter does *not* seek declaratory relief.

Plaintiff also seeks in its complaint injunctive relief enjoining the defendants from communicating with tenants in the building to encourage them not to pay their rent. Issue was joined by the defendants filing an answer on December 18, 2020 which, *inter alia*, raises affirmative defenses of promissory and equitable estoppel, breach of warranty of habitability, retaliation for forming a tenants' union, prior action, lack of jurisdiction, unclean hands, violation of GBL §349, etc. and counterclaims for retaliatory eviction, breach of warranty of habitability, and abuse of process.

A summary holdover proceeding was brought in New York City Civil Court, County of Kings, against two of the defendants (345 Eldert Street LLC v Gaige, Index No. L&T 300729/2020 and Carnegie Management Inc. v Cian O'Day, Index No. L&T 303816/2020). The proceeding involving Jonathan F. Gaige was settled through a stipulation of settlement filed in Civil Court under Index No. L&T 300729/2020 and resolves the issues pertaining to this defendant in this motion.

Plaintiff's Motion (MS#1)

Plaintiff moves (MS#1) pursuant to Real Property Law ("RPL") §220 directing Defendant O'Day to pay all outstanding rent and use and occupancy through December 2020 totaling \$42,450.00 and use and occupancy *pendente lite* in the monthly amount of \$6,000.00 plus \$50.00 per month for utilities charges, etc. Plaintiff moved for similar relief in a non-payment summary proceeding in Brooklyn Civil Court, *Carnegie Management Inc. v Cian O'Day*, Index No. L&T 303816/2020) and the Notice of Petition seeks "(a) money judgment for \$9,425.00, plus interest from April 2020" and the petition seeks a judgment of possession.

Defendant O'Day's Cross-Motion (MS#2)

Defendant O'Day cross-moves (MS#2) seeking (a) dismissal of this action pursuant to CPLR §3211 (a) (4) by virtue of a prior action pending between the parties, titled *Carnegie Management, Inc. v. Cian O'Day*; Kings County L&T Index No.: 303115/2020, which encompasses the precise issue litigated in this proceeding; (b) dismissal of this proceeding as violative of New York State public policy and statutory framework in relation to the COVID-19 Emergency Eviction and Foreclosure Prevention Act of 2020; (c) dismissing this proceeding as violative of New York State's statutory framework in relation to retaliatory evictions, etc.

Factual and Legal Analysis

There is no issue of fact that the pending landlord-tenant non-payment summary proceeding in Brooklyn Civil Court, *Carnegie Management Inc. v Cian O'Day*, Index No. L&T 303816/2020), involve the same issues as found within the complaint except claims for tortious

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interference with contracts which alleges that defendants interfered by “encouraging, inducing, motivating and/or directing plaintiff’s residential tenants to cease paying the rents and additional rents due to plaintiff” and engaged in a “rent strike,” inducing other tenants to breach their lease agreements, and a request for injunctive relief to prohibit such interference. Regarding all of plaintiff’s causes of action, except for tortious interference of contract and the request for injunctive relief, which will be addressed separately, these causes of action are dismissed. See *JPMorgan Chase Bank, N.A. v Luxama*, 172 AD3d 1341, 1341-42, 102 NYS3d 238, 239, 2019 NY Slip Op 04149, 2019 WL 2275107 (AD 2d Dept 2019):

‘Pursuant to CPLR 3211(a)(4), a court has broad discretion in determining whether an action should be dismissed based upon another pending action where there is a substantial identity of the parties, the two actions are sufficiently similar, and the relief sought is substantially the same. It is not necessary that the precise legal theories presented in the first action also be presented in the second action [so] long as the relief ... is the same or substantially the same’ (*Dec v. BFM Realty, LLC*, 153 A.D.3d 497, 497, 59 N.Y.S.3d 453 [internal quotations marks omitted]; see *Whitney v. Whitney*, 57 N.Y.2d 731, 732, 454 N.Y.S.2d 977, 440 N.E.2d 1324). While a complete identity of parties is not a necessity for dismissal under CPLR 3211(a)(4) (see *Proietto v. Donohue*, 189 A.D.2d 807, 807, 592 N.Y.S.2d 457; *Barringer v. Zgodu*, 91 A.D.2d 811, 811, 458 N.Y.S.2d 42), there must at least be a “substantial” identity of parties, “which generally is present when at least one plaintiff and one defendant is common in each action” (*Morgulas v. Yudell Realty*, 161 A.D.2d 211, 213, 554 N.Y.S.2d 597; see *Cellino & Barnes, P.C. v. Law Off. of Christopher J. Cassar, P.C.*, 140 A.D.3d 1732, 1734, 35 N.Y.S.3d 606; *Cherico, Cherico & Assoc. v. Midollo*, 67 A.D.3d 622, 622, 886 N.Y.S.2d 914; *Proietto v. Donohue*, 189 A.D.2d at 807–808, 592 N.Y.S.2d 457).

Regarding plaintiff’s causes of action for tortious interference with contract, the defendant’s cross-motion to strike this cause of action is denied inasmuch as there is no motion for summary judgment before the court and plaintiff has stated a cause of action by providing all the factual allegations to sustain a motion to dismiss for failure to state a claim. See *S. Nassau Med. Group, P.C. v 105 Rockaway Realty, LLC*, 2022 NY Slip Op 05051, 2022 WL 3640862, at 2 (AD2d Dept Aug. 24, 2022), “(a) claim of tortious interference requires proof of (1) the existence of a valid contract between plaintiff and a third party; (2) the defendant’s knowledge of that contract; (3) the defendant’s intentional procuring of the breach, and (4) damages” (*Foster v. Churchill*, 87 N.Y.2d 744, 749–750, 642 N.Y.S.2d 583, 665 N.E.2d 153).”

Based on the foregoing, it is

ORDERED that plaintiff’s motion for *pendente lite* relief regarding defendant Gaige is DENIED as moot; and it is further

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ORDERED that plaintiff's motion regarding defendant O'Day is DENIED as defendant O'Day is still in possession and plaintiff can seek *pendente lite* relief in the Housing Part of Civil Court in the pending proceeding; and it is further

ORDERED that defendant's motion is GRANTED to the extent that causes of action for *unpaid rent, additional rent and use and occupancy and attorneys' fees* (Third, Fourth, Fifth, Six and Seventh Causes of Action) are DISMISSED against defendants Gaige and O'day, but DENIED regarding causes of action for injunctive relief and damages for tortious interference of contract (First and Second Cause of Action), and it is further

ORDERED that all other requests for relief are DENIED.

This constitutes the decision and order of the Court.


Hon. Richard J. Montelione

KINGS COUNTY CLERK
FILED
2022 SEP 22 AM 9:45

