

Militana v Militana

2023 NY Slip Op 30657(U)

March 6, 2023

Supreme Court, New York County

Docket Number: Index No. 150808/2019

Judge: Arlene P. Bluth

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(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
 COUNTY OF NEW YORK: PART 14

-----X

MARK D. MILITANA,	INDEX NO.	<u>150808/2019</u>
Plaintiff,	MOTION DATE	<u>02/08/2023</u>
- v -	MOTION SEQ. NO.	<u>004</u>
FRED A. MILITANA, HEATHER MILITANA		
Defendant.		

**DECISION + ORDER ON
MOTION**

-----X

HON. ARLENE P. BLUTH:

The following e-filed documents, listed by NYSCEF document number (Motion 004) 55, 56, 57, 58, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 81 were read on this motion to/for DISCOVERY.

Plaintiff's motion to compel is denied and defendants' cross-motion for summary judgment is granted. This case is dismissed.

Background

Here, plaintiff is suing his brother and sister-in-law for rent allegedly due from 2011 to 2017. Plaintiff claims that he co-owned the building with his mother and that his mother, as landlord, entered into a lease with defendants in 2011. In 2012, the mother's ownership interest was transferred to 24 W 89 St, LLC ("LLC"), of which she was the sole member. Plaintiff's complaint alleges that defendants never paid the LLC any rent and he sues here for the rent. The defendants vacated in 2017, before the mother died.

Plaintiff alleges that defendants entered a lease with their mother without plaintiff's knowledge or consent, the mother/her LLC never collected rent from defendants and plaintiff now seeks to recover unpaid rent.

This matter was previously dismissed on October 6, 2021 because the parties ignored three consecutive discovery conference deadlines. Plaintiff moved to restore in November 2021, a motion which the Court granted, and the parties stipulated to a discovery schedule in April 2022. No discovery was exchanged, and plaintiff submitted a demand for production on July 19, 2022. Plaintiff alleges defendants failed to respond to his demand and so he filed this motion to compel.

Defendants cross-move for summary judgment or, in the alternative, for a stay while a related proceeding (for partition of the property) continues in Surrogate's Court. Defendants claim that plaintiff is seeking to recover unpaid rent dating back to 2011, in violation of the statute of limitations. Additionally, defendants contend they surrendered possession of the apartment unit and provided a release. Defendants also point out that plaintiff lacks standing and that he failed to join the LLC, a necessary party. Finally, if summary judgment is not granted, defendants request a stay until the partition action in Surrogate's Court is resolved, arguing that the two actions are related and would save on unnecessary costs and expenses.

In opposition to the cross-motion and in reply to defendants' opposition to the motion to compel, plaintiff argues that he joined all necessary parties and has sufficiently stated a cause of action, pointing to the specific factual circumstances in his complaint. He asserts that a stay in this case pending resolution of the partition action is inappropriate and prejudicial; he claims that the partition action has no relevance to this matter. Plaintiff also emphasizes that defendants have had over five months to respond to plaintiff's demands and refuse to do so, and plaintiff claims an extension of time to respond is improper.

In reply to plaintiff, defendants contend the LLC that co-owns the building was not named or served and thus all necessary parties were not joined. According to defendants, because that LLC brought a partition action against plaintiff, the LLC is a necessary party. The defendants also allege that plaintiff does not have standing because the lease was entered into by the parties' now-deceased mother. Finally, defendants claim a stay is within the Court's discretion and is warranted in this circumstance given that it is undisputed the LLC owns a one-half interest in the premises.

Discussion

To be entitled to the remedy of summary judgment, the moving party "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact from the case" (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853, 487 NYS2d 316 [1985]). The failure to make such a prima facie showing requires denial of the motion, regardless of the sufficiency of any opposing papers (*id.*). When deciding a summary judgment motion, the court views the alleged facts in the light most favorable to the non-moving party (*Sosa v 46th St. Dev. LLC*, 101 AD3d 490, 492 [1st Dept 2012]).

Once a movant meets its initial burden, the burden shifts to the opponent, who must then produce sufficient evidence to establish the existence of a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d 557, 560, 427 NYS2d 595 [1980]). The court's task in deciding a summary judgment motion is to determine whether there are bonafide issues of fact and not to delve into or resolve issues of credibility (*Vega v Restani Constr. Corp.*, 18 NY3d 499, 505, 942 NYS2d 13 [2012]). If the court is unsure whether a triable issue of fact exists, or can reasonably conclude that fact is arguable, the motion must be denied (*Tronlone v Lac d'Amiante Du Quebec*,

Ltee, 297 AD2d 528, 528-29, 747 NYS2d 79 [1st Dept 2002], *affd* 99 NY2d 647, 760 NYS2d 96 [2003]).

The Court addresses defendants' motion for summary judgment first. The essential facts relevant to this claim for rent are undisputed. Plaintiff claims, and defendants do not dispute, that the mother, as landlord, entered into a lease with defendants and never collected rent. After the LLC took over the mother's interest and became defendants' landlord, the LLC allowed defendants to continue to remain in possession of the premises without paying rent. It is also undisputed that during the time period where defendants occupied the premises pursuant to that lease with the mother/her LLC, plaintiff co-owned the building with his mother/her LLC.

Based on these undisputed facts, plaintiff has not shown how he has standing to sue these defendants for rent. Quite simply, he was not a party to the lease. He has not alleged or shown that he was a third-party beneficiary to the lease (*see Fourth Ocean Putnam Corp. v Interstate Wrecking Co.*, 66 NY2d 38, 495 NYS2d 1 [1985] [dismissing a breach of contract claim where a party was not a third-party beneficiary of a contract]).

If plaintiff claims his mother/her LLC should have collected rent, or that she/her LLC should have turned the value (or half the value) over to him as co-owner, then plaintiff's dispute is with his mother's estate or with the LLC. But plaintiff has no standing to sue for rent under a contract to which he was not a party.

In dismissing this case, the Court does not leave plaintiff without a forum. There is currently a partition case in Surrogate's Court. Of course, a partition action is the perfect forum for all co-owners to "settle up" with each other. If plaintiff feels the LLC owes him money for the value of the rent that the LLC chose not to collect, then that claim can be addressed in the partition action. In other words, if plaintiff's co-owner let people stay for free, then plaintiff's

remedy is against his co-owner, it is not against the tenants, who never entered into a lease with plaintiff.

Accordingly, it is hereby

ORDERED that defendants' cross-motion to dismiss is granted; and it is further

ORDERED that plaintiff's motion to compel is denied as moot.



3/6/2023

DATE

ARLENE P. BLUTH, 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