

Brenner v Quik Park 61st St. Operating LLC

2023 NY Slip Op 32782(U)

August 10, 2023

Supreme Court, New York County

Docket Number: Index No. 156073/2017

Judge: Paul A. Goetz

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This opinion is uncorrected and not selected for official publication.

plaintiff's car was placed on "hold" due to nonpayment of rent for the month of April 2015 (Burkhoff Affirm, ¶¶ 6-7, NYSCEF Doc No 52). Plaintiff still does not have access to his car and thus, instituted this action for monetary damages (*id.*). As an affirmative defense, defendant asserts that plaintiff is barred from maintaining the action, as he named the incorrect party in the complaint (*id.* at ¶ 10).

Motion to Dismiss (motion seq no 003)

Defendant seeks to dismiss plaintiff's complaint, pursuant to CPLR § 3211 (a) (7), on grounds that the pleading fails to state a cause of action because it does not operate the garage where plaintiff claims his car was placed on hold. Plaintiff responds that the affidavit submitted by Lincoln Llopiz, on behalf of defendant, is not documentary evidence permissible for consideration on a motion to dismiss. Defendant replies that a court may consider evidentiary material upon determining a motion to dismiss if movant shows that plaintiff has no cause of action.

Based on defendant's supporting affidavit, which may be considered upon a motion for summary judgment and may not be considered upon a motion to dismiss (*see Tsimerman v Janoff*, 40 AD3d 242 [1st Dept 2007]), defendant's motion to dismiss will be treated as a motion for summary judgment pursuant to CPLR § 3211 (c) ("[T]he court, after adequate notice to the parties, may treat the motion [to dismiss] as a motion for summary judgment"). Such notice was provided to the parties by decision and order dated April 21, 2023 for the parties to file supplemental papers (NYSCEF Doc Nos 77-79).

Since the Llopiz affidavit makes clear that Quick Park NYC, LLC is not and has never been affiliated with Quik Park 61st St. Operating LLC, and plaintiff does not present evidence

otherwise defendant's motion for summary judgment to dismiss plaintiff's complaint will be granted (Llopiz Aff, ¶ 4, NYSCEF Doc No 56).

Motion to Amend (motion seq no 002)

In response to defendant's allegations that plaintiff did not sue the proper party/(ies), plaintiff moves to amend the complaint, pursuant to CPLR § 3025 (b), to include various other defendant entities, arguing he is permitted to do so under the relation-back doctrine even if the statute of limitations has run. Defendant responds that plaintiff has known for years that defendant Quik Park FG LLC is the proper defendant and therefore, is precluded from applying the relation-back doctrine.

“As codified in New York's Civil Practice Law and Rules, what is commonly referred to as the relation back doctrine allows a claim asserted against a defendant in an amended filing to relate back to claims previously asserted against a codefendant for Statute of Limitations purposes where the two defendants are ‘united in interest’” (*Buran v Coupal*, 87 NY2d 173, 177 [1995]). Yet, this doctrine does not apply when defendant has demonstrated that plaintiff was aware of the existence of the proper defendant well prior to the statute of limitations expiring (*Mitzmacher v Bay Country Owners*, 211 AD3d 1025, 1026 [2d Dept 2022]). Such is the case here because plaintiff was made aware of the correct defendant entity as early as August 25, 2016, based on plaintiff's invoice submissions (*see* Discovery Responses, p 204, NYSCEF Doc No 29), and at the latest, by August 11, 2017, when defendant answered plaintiff's complaint that plaintiff named an improper defendant (Answer, NYSCEF Doc No 54). Both instances of notice to plaintiff are well before the three-year statute of limitations expired on April 5, 2018 (*see Swain v Brown*, 135 AD3d 629, 631 [1st Dept 2016] [“the statutory period of limitations for

conversion and replevin claims is three years from the date of accrual”). Accordingly, plaintiff’s motion to amend the complaint will be denied.

Motion to Vacate (motion seq no 004)

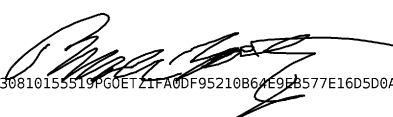
Because summary judgment will be granted to defendant, its motion to vacate the note of issue will be denied as moot. Accordingly, it is hereby

ORDERED that defendant’s motion to dismiss plaintiff’s complaint, pursuant to CPLR § 3211 (a) (7) (motion seq no 003), is treated as a motion for summary judgment, and as such, is granted; and it is further

ORDERED that plaintiff’s claims are dismissed and the Clerk is directed to enter judgment accordingly with costs and disbursements to defendant; and it is further

ORDERED that plaintiff’s motion to amend the complaint, pursuant to CPLR § 3025 (b) (motion seq no 002), is denied; and it is further

ORDERED that defendant’s motion to vacate the note of issue, pursuant to Uniform Rules for Trial Courts § 202.21 (e), (motion seq no 004) is denied.


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<u>8/10/2023</u> DATE					<u>PAUL A. GOETZ, J.S.C.</u>
CHECK ONE:	<input checked="" type="checkbox"/>	CASE DISPOSED		<input type="checkbox"/>	NON-FINAL DISPOSITION
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/> DENIED	<input checked="" type="checkbox"/>	GRANTED IN PART
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER		<input type="checkbox"/>	OTHER
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN		<input type="checkbox"/>	REFERENCE