

**Lopez v Bautista**

2023 NY Slip Op 34071(U)

August 22, 2023

Supreme Court, Kings County

Docket Number: Index No. 510773/2019

Judge: Delores J. Thomas

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This opinion is uncorrected and not selected for official publication.

At an I.A.S. Part 11 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, located at Civic Center, Borough of Brooklyn, City and State of New York, on the 22nd day of August, 2023.

P R E S E N T :

**HON. DELORES J. THOMAS, J.S.C.**

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ROBERT LOPEZ,

Plaintiff,

Index No.: 510773/2019

- against -

**DECISION/ORDER**

Mot. Seq. # 3 - 4

MIGUEL BAUTISTA,

Defendant.

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Recitation, as required by CPLR § 2219(a), of the papers considered in the review of these motions are as follows:

**Papers:**

**NYSCEF Document Nos.**

Order to Show Cause and Affidavits (Affirmations) Annexed

NYSCEF Doc Nos. 85-100; 102-103

Answering Affidavits (Affirmations)\_\_\_\_\_

NYSCEF Doc Nos. 104-105

Reply Affidavits (Affirmations)\_\_\_\_\_

NYSCEF Doc Nos. 106-108

Upon the foregoing cited papers, in this landlord-tenant proceeding, the decision/order on these motions are as follows:

Plaintiff commenced this action on May 15, 2019. Defendant was served on May 29, 2019. On or about July 11, 2019, plaintiff filed a notice of pendency.

Plaintiff moved, via order to show cause, in motion sequence three, for an order: to consolidate the Supreme Court Action, (Index # 510773/2019) and the two landlord-tenant proceedings LT-306759-21/KI and LT 307088-21/KI pursuant to Section 602 of the CPLR on the grounds the three actions involve common questions of law and fact.

Defendant cross-moved, in motion sequence four, for an order: (1) compelling plaintiff to give an undertaking pursuant to CPLR 6312 in an amount to be fixed by the Court; (2) compelling plaintiff to pay the expenses of the subject premises during the pendency of this action; (3) pursuant to CPLR 6511, 6514 and 6501, cancelling the notice of pendency encumbering the subject property; (4) denying plaintiff's order to show cause in its entirety; and (5) pursuant to 22 NYCRR 130-1.1, an award of attorney's fees for the filing of the instant motion.

On May 15, 2019, plaintiff commenced this action against defendant to enforce a contract dated April 5, 2016, to purchase the premises known as 429 Lots Avenue, Brooklyn, New York. Pursuant to the agreement, plaintiff was given possession of the premises and permission for use and occupancy pending transfer of title. Plaintiff was also given permission to sublease the premises for up to ten years pending the transfer of title. The first and second floors of the premises were subsequently sublet.

In 2021, defendant initiated two holdover proceedings to remove the first floor and basement tenants (LT 307088-21/KI) and the second-floor tenant (306759-21/KI). In support of the instant motion, plaintiff contends each of the three actions share common facts and questions of law, which regard the validity of the contract of sale dated April 5, 2016. In opposition, defendant contends plaintiff's request should be denied outright because he failed to provide any of the pleadings forming the basis of the landlord-tenant actions and failed to seek leave to amend the complaint pursuant to CPLR 3025. Defendant also contends plaintiff's request was adjudicated by this court and is hereby barred on principles of collateral estoppel and res judicata.

#### Consolidation

A motion to consolidate or join for trial is addressed to the sound discretion of the trial court and, absent a showing of substantial prejudice by the party opposing the same, is proper where there are common questions of law and fact (*see Robinson v 47 Thames Realty, LLC*, 158 AD3d 780, 68 NYS 3d

758 [2d Dept 2018]). Further, consolidation or joinder for trial is appropriate to avoid unnecessary duplication of trials, save unnecessary costs and expenses and prevent an injustice which would result from divergent decisions based on the same facts (*see id.*).

Here, plaintiff's cause of action alleging breach of contract involves issues of law and fact in common with those in the holdover proceedings pending in the Civil Court, and most of the parties are the same. "Where common questions of law or fact exist, a motion to consolidate pursuant to CPLR 602(b) should be granted absent a showing of prejudice to a substantial right by the party opposing the motion" (*Wang v Wang*, 96 AD3d 1005, 1009 [2d Dept 2012]). The defendant did not make a showing that removal and consolidation would prejudice a substantial right.

#### Res Judicata

Pursuant to the doctrine of res judicata, or claim preclusion, "a valid final judgment bars future actions between the same parties on the same cause of action" (*Highlands Center, LLC v Home Depot U.S.A., Inc.*, 149 AD3d 919, 53 NYS3d 321 ([2d Dept 2017])). "One linchpin of res judicata is an identity of parties actually litigating successive actions against each other: the doctrine applies only when a claim between the parties has been previously brought to a final conclusion" (*Highlands Center, LLC v Home Depot U.S.A., Inc.*, 149 AD3d 919, 53 NYS3d 321 ([2d Dept 2017])).

Here, res judicata is not applicable since there is no final judgment in this matter. There is not any successive actions. Accordingly, since this matter has not been brought to a conclusion, res judicata does not preclude plaintiff's order to show cause.

#### Collateral Estoppel

Collateral estoppel, or issue preclusion, is "a component of the broader doctrine of res judicata" which provides that, "as to the parties in a litigation and those in privity with them, a judgment on the

merits by a court of competent jurisdiction is conclusive of the issues of fact and questions of law necessarily decided therein in any subsequent action” (*Highlands Center, LLC v Home Depot U.S.A., Inc.*, 149 AD3d 919, 53 NYS3d 321 ([2d Dept 2017])). “ [T]he burden rests upon the proponent of collateral estoppel to demonstrate the identity and decisiveness of the issue, while the burden rests upon the opponent to establish the absence of a full and fair opportunity to litigate the issue in [the] prior action or proceeding’ ” (*Highlands Center, LLC v Home Depot U.S.A., Inc.*, 149 AD3d 919, 53 NYS3d 321 ([2d Dept 2017] quoting *Ryan v New York Tel. Co.*, 62 NY2d 494, 501 [1984])).

Here, the referenced previous decision did not address consolidating the three actions. Contrary to defendant’s assertions, the fact that the previous order recommended that defendant either commence a holdover action in landlord and tenant court or commence a separate action in supreme court to commence an ejectment action does not demonstrate the identity and decisiveness of the issues. The aforementioned motion only requested recovery of the premises and payment of monies owed for its use and occupancy.

#### Notice of Pendency

CPLR 6511 (a) states, in pertinent part, “the complaint shall be filed with the notice of pendency.” Moreover, CPLR 6511 (a) says “the notice of pendency shall be filed in the office of the clerk of any county where property affected is situated, before or after service of summons and at any time prior to judgment.”

“CPLR 6514(a) provides for mandatory cancellation of a notice of pendency if service of a summons has not been completed within the time period set forth in CPLR 6512, which is 30 days after filing of the notice of pendency” (*Deans v Sorid*, 56 AD3d 417 [2d Dept 2008]).

Here, plaintiff filed the notice of pendency after the summons was filed and before any final judgment entered. Therefore, the notice of pendency is valid (*see* CPLR 6511[a]).

Accordingly, it is hereby

ORDERED, that the motion sequence three is granted to the extent that actions #510773/2019, LT-306759-21/KI and LT-307088-21/KI are consolidated for all purposes; and it is further,

ORDERED, that the Clerk of Kings County is directed to consolidate the file of index # LT-306759-21/KI and LT-307088-21/KI into index #510773/2019, and it is further,

ORDERED, that the pleadings in each action shall stand as the pleadings in the consolidated action; and it is further,

ORDERED, that a copy of this order with notice of entry shall be served upon all parties to the consolidated action; and

it is further,

ORDERED, that the caption shall read as follows:

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ROBERT LOPEZ,

Plaintiff,

- against -

MIGUEL BATISTA, MARIA AHMMA, JUAN

TRINIDAD, and IRIS CASILDA,

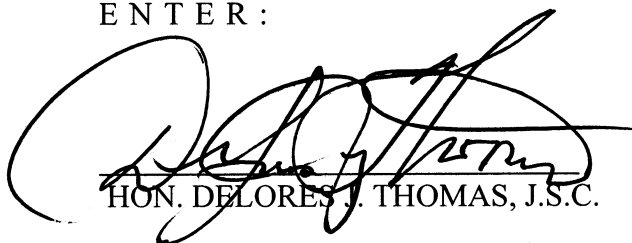
Defendant.

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Any issue raised and not specifically addressed by this decision/order is denied.

This constitutes the decision and order of the Court.

ENTER :



HON. DELORES J. THOMAS, J.S.C.

HON. DELORES J. THOMAS J.S.C

2023 NOV -6 AM 11:17  
KINGS COUNTY CLERK  
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