

O'Grady v York 1364 LLC

2009 NY Slip Op 33265(U)

November 30, 2009

Supreme Court, New York County

Docket Number: 116597/2007

Judge: Jane S. Solomon

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

HON. JANE S. SOLOMON

PRESENT: _____

PART 55

Index Number : 116597/2007

O'GRADY, JOHN

INDEX NO. _____

vs
YORK 1364 LLC

MOTION DATE 10/19/09

Sequence Number : 003

MOTION SEQ. NO. _____

DISMISS

MOTION CAL. NO. _____

_____ were read on this motion to/for _____

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

1-3

4-6

7-8

Cross-Motion: Yes No


Upon the foregoing papers, it is ordered ^{and advised} that this motion ~~is decided~~ ^{is decided} by the annexed ~~order~~ ^{memorandum decision} and order dated

Nov 30, 2009

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

FILED
DEC 03 2009
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 12/1/09


JANE S. SOLOMON

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 55

-----X

JOHN O'GRADY,

Index No. 116597/2007

Plaintiff,

-against-

YORK 1364 LLC; SUSAN LIQUORI; and
POWPA CHRISTIAN;

Defendants.

-----X

SOLOMON, J.:

Defendants York 1364 LLC (York), owner of the property located at 1364 York Avenue, New York (the Building), Susan Liquori, York's managing agent, and Powpa Christian (Pompa¹), its principal, made two motions for relief against Plaintiff John O'Grady. In motion sequence 002, Defendants seek to vacate the note of issue on the ground of an improper jury demand. In motion sequence 003, Defendants move for summary judgment for failure to state a claim upon which relief can be granted pursuant to CPLR 3211(a)(7) and 3212(b), and, in the alternative, for failure to state a claim against Liquori and Pompa pursuant to CPLR 3211(a)(7). Finally, defendants move to preclude O'Grady from producing witnesses or offering evidence or testimony regarding his second cause of action, pursuant to CPLR 3126. O'Grady opposes Defendants' motion and cross moves for leave to amend the complaint.

DECISION AND ORDER
FILED
DEC 03 2009
NEW YORK
COUNTY CLERK'S OFFICE

¹ See infra regarding Powpa Christian's proper name.

FACTS

O'Grady is a rent stabilized tenant at the Building. On November 25, 2007, an electrical fire occurred. The fire started in a commercial space on the ground floor and spread throughout the Building. None of the Defendants was responsible for the fire.

O'Grady's third floor apartment was largely untouched. Shortly thereafter, the Department of Housing Preservation & Development (HPD) issued a full vacate order, requiring all occupants to vacate the building. O'Grady then applied for, and was granted, an order from the Department of Housing and Community Renewal (DHCR) reducing his rent from \$1,543.23 per month to \$1.00 per month for the duration of the vacate order, which preserved his rent stabilized status.

O'Grady was not allowed to return to his apartment until November 2008, twelve months after the fire. During this time, O'Grady lived with his mother for seven months, lived in England for two months, lived with his sister and friends for two months, and house sat for one month.

On December 14, 2007, O'Grady brought this action, seeking both a mandatory injunction directing Defendants to restore the building and preventing them from demolishing it or interfering with O'Grady's rent stabilization rights, and money damages for out of pocket expenses, alternate housing and lack of

access to personal property. Defendants answered and filed a counterclaim for attorney's fees on January 17, 2008. The note of issue was filed in March 2009.

DISCUSSION

1. Cross Motion for Leave to Amend

O'Grady seeks leave to amend the complaint to make "minor amendments," which would remedy an error in the caption, remove the first count as moot, and add a new claim for "wrongful failure to restore Plaintiff to his apartment." The new count alleges that Defendants permitted workers, agents and unnamed others to have free access to O'Grady's apartment, and, as a result of this access, some of his property was removed and not returned. O'Grady seeks additional damages for lost, stolen, and damaged property, as well as punitive and exemplary damages.

Initially, it is noted that "Powpa Christian" is incorrectly named in the complaint. His correct name is Christian Pompa. O'Grady requests that the caption be corrected. This relief is granted. Similarly, withdrawal of the injunction claim as moot is well founded, and is granted.

O'Grady contends that the new count should not be a surprise to Defendants, because they conducted discovery on all issues. Defendants counter that they would be prejudiced because leave to amend is sought so late, the new claim seeks damages that were not revealed prior to or during deposition, and,

because laches should be a bar as O'Grady was in possession of the apartment and the facts related to his newly alleged damages for over eight months before moving to amend.

Normally, leave to amend the complaint shall be freely given by the court (CPLR 3025[b]), absent prejudice or surprise resulting directly from the delay (*Seda v. New York City Housing Authority*, 181 AD2d 469 [1st Dept 1992]). Furthermore, an application for leave to amend is properly denied due to unnecessarily long delays (*B.B.C.F.D., S.A. v. Bank Julius Baer & Co. Ltd.*, 62 AD3d 425 [1st Dept 2009]). Finally, where the amendment is sought after a long delay, and a statement of readiness has been filed, judicial discretion in allowing the amendment should be "discreet, circumspect, prudent and cautious" (*Cseh v. New York City Transit Authority*, 240 AD2d 270 [1st Dept 1997]).

Here, O'Grady's request to add a new claim came eight months after he was returned to his property, four months after he filed a note of issue, and over two months after Defendants moved for summary judgment. O'Grady provides no reasonable excuse for not acting sooner (*Jennings v. 1704 Realty LLC*, 39 AD3d 392, 393 [1st dept 2007]).

Accordingly, the cross motion for leave to amend the complaint is denied as to the new claim.

2. Summary Judgment on the Complaint:

As an initial matter, only the second cause of action remains. Defendants make several arguments about the infirmity of the claim. They first argue that the complaint does not allege that Defendants actions caused the fire, and it is only through such actions that Defendants might be liable to pay a tenant. Second, they contend that the complaint does not allege that they owed O'Grady a duty beyond the warranty of habitability (Real Property Law § 235-b), which does not entail a duty to relocate a tenant or cover out of pocket expenses, and that O'Grady did not suffer any damages because his rent was reduced to \$1.00 during his dispossession. Third, Defendants argue that O'Grady has not sufficiently enumerated his damages, nor supplied sufficient evidence of the same.

In his papers, O'Grady does not directly counter the arguments addressing the prima facie elements of his claim, instead he focuses on establishing that Liquori and Pompa would be liable for damages as "owners" of the property. At oral argument, O'Grady expressed that he was not suing in negligence, but rather in contract, and does not need to establish a duty, but merely the existence of a contract, a breach, and damages.

Regardless of the underlying theory, O'Grady has not established damages. At his deposition, in response to a question asking him how much money he was seeking, O'Grady stated

"[a]s much as I can get" (*O'Grady Deposition*, pg 13-14). When asked to further enumerate and substantiate his damages, O'Grady was unable to provide any evidence, nor has any evidence been submitted since.

Accordingly, O'Grady has not established his damages, and summary judgment is granted in favor of the Defendants as to the second cause of action.

3. Vacating the note of issue (Motion Sequence 002)

As summary judgment was granted in favor of Defendants, there is no need to address arguments regarding the note of issue. Accordingly, in light of the foregoing, the motion to vacate the note of issue is denied as moot.

4. Counterclaim for Attorneys Fees

As the Defendants have not argued in support of their counterclaim, it is denied.

For the foregoing reasons it is

ORDERED that Defendants' motion to vacate (Motion Sequence 002) is denied as moot; and it further is

ORDERED that Defendants' motion for summary judgment (Motion Sequence 003) is granted and the complaint is dismissed; and it further is

ORDERED that Plaintiff's cross motion for leave to amend the complaint is granted to the extent that the caption is amended and the first cause of action is removed, and otherwise


is denied; and it further is

ORDERED that Defendants' counterclaim is dismissed; and
it further is

ORDERED that the Clerk is directed to enter judgment
accordingly.

Dated: November 30, 2009

ENTER:



J.S.C

JANE S. SOLOMON

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