[* 1]

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

PRESENT: STALLMAN Justice

PART 21

Index Number : 116757/2002
BACE, BILL
VS.
TAI MAY REALTY, INC.
SEQUENCE NUMBER : 009
VACATE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. 009

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for vacate (CPLR 5015)

	PAPERS NUMBERED
Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-X	1+2
Answering Affidavits — Exhibits	3
Replying Affidavits	

Order of Reference (High, J.) (11/29/11)

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion Plaintiff's to vacate this court's decision and order dated February 10, 2009, is denied.

Copies to both sides (plaintiff in part 12).

FILED

JAN 25 2012

NEW YORK
COUNTY CLERK'S OFFICE

HON. MICHAEL D. STALLMAN

Dated: 1/23/12

J.S.C.

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

Check one: ☐ FINAL DISPOSITION ☐ NON-FINAL DISPOSITION

Check if appropriate: ☐ DO NOT POST ☐ REFERENCE

☐ SUBMIT ORDER/JUDG. ☐ SETTLE ORDER /JUDG.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 7

----------x

BILL BACE,

Plaintiff,

-against-

TAI MAY REALTY, INC.,

Defendant.

----------x

Index No.: 116757/02

DECISION and ORDER

Hon. MICHAEL D. STALLMAN, J.:

Plaintiff *pro se* moves, pursuant to CPLR 5015 (a) (2), to vacate this Court's prior order, dated February 10, 2009, based on assertions of newly discovered evidence and fraud.

BACKGROUND

Plaintiff is a tenant in a building owned by defendant. The New York State Division of Housing and Community Renewal (DHCR) granted plaintiff a rent reduction, based on plaintiff's complaint of a rent overcharge. Defendant did not challenge the DHCR determination. Based on the DHCR determination, plaintiff entered a judgment (the Judgment) against defendant in Supreme Court, New York County, filed on July 29, 2002.

By decision and order dated February 10, 2009, this Court vacated the Judgment, based on a showing that plaintiff sent notices of both the DHCR determination and the court proceeding to an incorrect address. This Court also concluded that, because plaintiff's rent was paid in whole or in part by the Department

of Social Services (DSS), a question remained as to whether plaintiff or DSS was the party entitled to any refund/restitution for rent overcharge.

Despite this Court's order vacating the Judgment entered against defendant, plaintiff filed a notice of entry of judgment on May 25, 2009, based on the Judgment that had been vacated. On May 16, 2011, Justice Joan M. Kenney granted defendant's motion for inter alia injunctive relief and dismissal; Justice Kenney stated, among other things:

> "Since Justice Stallman's decision and order, it appears that plaintiff has continued to attempt to collect on the Judgment. Plaintiff does not deny this fact. Instead, plaintiff attempts to re-argue/renew Justice Stallman's decision to vacate this Court's judgment against defendant. ... plaintiff has not proffered a good reason as to why he is attempting to collect on a judgment, by way of seeking to levy defendant's assets, based on a judgment that plaintiff was fully aware of [*sic*] had been vacated by a Supreme Court Justice's order."

On May 25, 2011, Justice Kenney signed a long-form order which, inter alia dismissed this action with prejudice,

> "based on plaintiff BILL BACE's frivolous actions committed on the court pursuant to 22 NYCRR Section 130-1.1 (c) and his illegal conduct in violation of 22 NYCRR Section 130-1.- a (b).
> The Office of the Sheriff is prohibited from executing on a vacated judgment and further restrained from levying the assets of Defendant TAI MAY, pursuant to a vacated judgment, indexed by the Court as 116757/2002."
> (Petitioner's Ex. M.)

The evidence that plaintiff asserts is newly discovered consists of four letters:

1. Letter of Keith S. Barnett, Esq. to DHCR, dated October

3, 2000 (Motion, Ex. R);

2. Letter of Keith S. Barnett, Esq. to DHCR, dated October 25, 2000 (Motion, Ex. S);

3. Letter of Ben Wong, Esq., dated August 17, 2001, with attachments (Motion, Ex. T); and

4. Order of DHCR, dated October 5, 2001 (Motion, Ex. U).

These letters indicate that defendant did participate in the DHCR proceeding, but that defendant never received a copy of DHCR's final order because it was mailed to the incorrect address. Consequently, defendant never had the opportunity to challenge DHCR's findings administratively.

In paragraph 73 of plaintiff's affidavit in support of his motion, plaintiff admits to having known about the documents in August of 2009, when he personally handed copies of the Barnett and Wong letters to defendant's attorney. The Court notes that the DHCR order is the one upon which plaintiff instituted this lawsuit.

Plaintiff alleges that defendant participated in the DHCR proceeding and DHCR found against it, as evidenced by these letters; therefore, plaintiff alleges, the DHCR determination was not based on defendant's default. Hence, plaintiff alleges that this Court should not have vacated the earlier judgment.

In opposition, defendant contends that, because this action was dismissed with prejudice, plaintiff's motion should be denied

automatically. In the alternative, defendant maintains that, by plaintiff's own admission, he has been in possession of what he claims is "newly discovered evidence" for over two years, and he has failed to make out any claim of fraud on the part of defendant. Moreover, the letters do not negate defendant's claim that, because it never received notification of the DHCR determination, it did not seek administrative review of the matter, nor does it affect this Court's earlier finding that defendant was never properly served in the initial proceeding in this Court.

DISCUSSION

CPLR 5015 provides, in pertinent part:

> "(a) On motion. The court which rendered a judgment or order may relieve a party from it upon such terms as may be just, on motion of any interested person with such notice as the court may direct, upon the ground of ...
> (2) newly-discovered evidence which, if introduced at trial, would probably have produced a different result and which could not have been discovered in time to move for a new trial ... ."

Plaintiff's motion is denied.

In the first instance, plaintiff admits that he was in possession of the letters for over two years (Plaintiff's Aff., ¶ 73), and, therefore, they do not constitute newly discovered evidence upon which this motion may be founded (*Bongiasca v Bongiasca*, 289 AD2d 121 [1st Dept 2001]); neither does such evidence refute this Court's earlier finding that defendant was

not properly served. *Woori American Bank v Winopa International Ltd.*, 63 AD3d 490 (1st Dept 2009). In addition, the DHCR determination was the basis of plaintiff initiating this action, so that he cannot now assert that it is newly discovered.

Similarly, plaintiff has failed to articulate any fraudulent conduct on the part of defendant that would warrant a different conclusion. The fact that defendant participated in the initial DHCR proceeding does not negate the fact that it never received a copy of DHCR's October 5, 2001 determination, because that document was sent to the incorrect address. Thus, defendant was not afforded the opportunity to challenge DHCR's findings administratively prior to plaintiff seeking to enforce a judgment based on that finding; neither do those letters negate the fact that defendant was never properly served in this action.

Furthermore, this action was already dismissed with prejudice, which alone demands denial of the instant motion.

CONCLUSION

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion is denied.

Dated: January 23, 2012

New York, NY

ENTER:

Michael D. Stallman, J.S.C.