

**Pereira v Cooper Sq. Mut. Hous. Assn. II, HDFC**

2012 NY Slip Op 32355(U)

September 6, 2012

Supreme Court, New York County

Docket Number: 106020/11

Judge: Paul Wooten

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

PRESENT: HON. PAUL WOOTEN  
*Justice*

PART 7

ROBERT PEREIRA,  
Plaintiff,

INDEX NO. 106020/11

- v -

MOTION SEQ. NO. 002

COOPER SQUARE MUTUAL HOUSING  
ASSOCIATION II, HDFC, "JOHN DOE"  
and/or "JANE DOE,"  
Defendants.

The following papers, numbered 1 to 4, were read on this motion by defendant for summary judgment.

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits (Memo)  
Replying Affidavits (Reply Memo)

PAPERS NUMBERED	
<u>1, 2</u>	
<u>3</u>	
<u>4</u>	

Cross-Motion:  Yes  No

**FILED**

Robert Pereira (plaintiff) brings <sup>SEP 11 2012</sup> this action for breach of contract against Cooper Square Housing Association II HDFC (Cooper Square), seeking specific performance of the Temporary Relocation Agreement to restore him to the possession and tenancy of Apartment B at 89 East 3<sup>rd</sup> Street, New York, New York. Before the Court is Cooper Square's motion for summary judgment, pursuant to CPLR 3212, seeking dismissal of plaintiff's complaint. Plaintiff has submitted opposition to the motion and Cooper Square has filed a reply.

BACKGROUND

Cooper Square is the owner of the premises located at 89 East 3<sup>rd</sup> Street ("89") and 60 East 4<sup>th</sup> Street ("60"), New York, New York. Plaintiff was a tenant who resided in apartment B, a one bedroom apartment, in the building located at 89 East 3<sup>rd</sup> Street. Under the auspices of the Department of Housing Preservation and Development the premises at 89 was rehabilitated, and plaintiff was relocated to apartment 18 located at 60 (Orselli Affidavit, ¶ 3). On December 1, 2003, plaintiff and Cooper Square entered into a stipulation. Pursuant to the

stipulation, the parties agreed that Cooper Square would abide by the terms of the temporary relocation agreement, and upon the conclusion of the renovations at 89 plaintiff would be given notice that he may relocate back to 89 (Affirmation in Support, ¶ 10). On December 3, 2003, Cooper Square executed the temporary relocation agreement, which states in pertinent part:

"Upon the completion of the work in my permanent building, I am entitled to move back and agree to do so. If I fail to vacate the temporary apartment and move back into my permanent apartment within ten days of receiving notice that it is ready for occupancy, I understand that I will forfeit my right to the permanent apartment. I understand that failure to comply shall be deemed to be a violation of the substantial obligation of my tenancy in the permanent agreement, and upon 30 day written notice, the Cooper Square MHA may terminate this agreement and the lease, and commence a summary eviction proceeding to recover possession of the permanent apartment. I further understand that I may be evicted from the temporary apartment" (Temporary Relocation Agreement, exhibit B).

Once renovation of the premises at 89 was complete Cooper Square offered plaintiff a studio apartment located on the third floor of 89<sup>1</sup> (Affirmation in Support, ¶ 12). However, plaintiff refused to move into the apartment alleging that he was entitled to a one bedroom apartment, having previously occupied a one bedroom apartment, and as a result the studio was unacceptable<sup>2</sup> (Affidavit in Opposition, ¶ 12). Plaintiff was then given the option of remaining at the relocation apartment at 60, but to do so a lease agreement had to be signed (Affirmation in Support, ¶ 13). Plaintiff failed to sign a permanent lease for the apartment at 60 alleging that signing a lease would preclude his right to return to his permanent apartment at 89 (Affidavit in Opposition, ¶ 23).

Cooper Square commenced summary holdover proceedings to recover possession of the apartments at 60 and 89, however the proceeding involving 89 was discontinued (Affirmation in Support, ¶ 14). On January 13 and 14, 2011, a trial was conducted before the

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<sup>1</sup> Defendants allege that plaintiff did not qualify for a low-level one bedroom apartment at 89 because they were reserved for senior citizens and disabled tenants.

<sup>2</sup> After plaintiff refused to accept the studio apartment offered by Cooper Square, it is alleged that a former resident of that building was placed in the plaintiff's permanent apartment. Plaintiff alleges that Ronald Basterash now resides in apartment B at 89, and could possibly be the John Doe defendant in this action.

Hon. Sheldon Halprin of the Civil Court, New York County. Upon the plaintiff's failure to appear at trial, a Decision and Order was entered in which the Civil Court awarded Cooper Square a final judgment of possession. Specifically, Judge Halprin held that "[I]n view of respondents absence and failure to present a defense to the proceedings, and petitioner having established it's prima facie case; petitioner is awarded a final judgment of possession" (Decision and Order, exhibit F). Plaintiff submitted to the Civil Court several Orders to Show Cause seeking reconsideration or stays, all of which were denied (Affirmation in Support, ¶ 18). Further, Judge Halprin denied plaintiff's motion to vacate the default judgment pursuant to CPLR 5015, stating that "the Court does not accept respondent's claim of an excusable default" (Decision and Order, exhibit I).

Plaintiff commenced the present action seeking a judgment directing Cooper Square to restore plaintiff to the premises at 89 and for a stay of his eviction from 60 while this action proceeds (Affirmation in Support, ¶ 21). In the first cause of action plaintiff seeks judgment directing specific performance of the temporary relocation agreement to restore plaintiff to the possession and tenancy of apartment B at 89. Plaintiff also seeks temporary residential accommodations until such specific performance is effectuated, together with costs. In the second cause of action plaintiff seeks an order preliminary and permanently enjoining Cooper Square from evicting plaintiff from his temporary relocation apartment at 60, until such time as plaintiff is allowed to return to his permanent apartment at 89.

In support of its motion for summary judgment, Cooper Square submits, *inter alia*, an affidavit of Valerio Orselli (Orselli Affidavit), executive director of Cooper Square, the stipulation agreement, the temporary relocation agreement, and the decision and order of the Civil Court of New York, County of New York. Cooper Square claims it is entitled to judgment as a matter of law as there are no issues of fact and plaintiff's first cause of action for specific performance is barred by the doctrine of res judicata. Cooper Square contends that plaintiff had a full and fair opportunity to adjudicate and or contest the issue of his relocation back to apartment B at

89 when he made the issue material to the Civil Court summary holdover proceedings. In the summary proceeding before Judge Halprin, plaintiff filed an answer and asserted as his fourth and fifth affirmative defenses to defendant's claim to possession that he had a right to return to his permanent residence at 89 and as a result he could not be evicted from his temporary residence at 60 until such right was upheld. Cooper Square further contends that plaintiff's second cause of action for a preliminary and permanent injunction is moot, due to the fact that this Court denied plaintiff's request for a temporary restraining order to prevent his eviction from 60 and the consolidation of this case with the summary proceeding in Civil Court (Affirmation in Support, ¶¶ 23-24). Plaintiff was evicted from apartment 18 at 60 on June 13, 2011 (*id.* at ¶ 22).

In opposition to Cooper Square's motion for summary judgment, plaintiff submits, *inter alia*, his affidavit (Pereira Affidavit), and an affirmation from Dr. Donald Baumstein. Plaintiff maintains that Cooper Square's motion for summary judgment should be denied as there are factual issues in dispute. Further, plaintiff contends that the principle of *res judicata* is not applicable in this action because plaintiff's claim regarding his permanent residence in apartment B at 89 has not been determined in any prior proceeding. Plaintiff asserts that defendant Cooper Square commenced two separate holdover proceedings in Civil Court, one for plaintiff's permanent apartment at 89 and another for his relocation apartment at 60. However, under the directive of the Civil Court Cooper Square withdrew the holdover proceeding for apartment B at 89, because plaintiff could not have simultaneously resided in both 89 and 60. Therefore, plaintiff maintains that the final decision rendered by Judge Halprin concerned plaintiff's relocation apartment exclusively, and plaintiff is not asserting in this action any permanent claim against the relocation apartment at 60. Further, since the subject matter of the proceeding in Civil Court was in regard to apartment 18 at 60 and the subject matter of this action is apartment B at 89, the subject matter is not the same and *res judicata* cannot be applied.

Additionally, plaintiff argues that the issue before this Court and as asserted in the

Complaint, is specific performance of the temporary relocation agreement. Plaintiff maintains that specific performance could not have been raised or litigated in a summary proceeding in the Housing Court, as it is beyond the jurisdiction of the Civil Court in a summary proceeding. As a result, plaintiff asserts that his first cause of action is not barred by res judicata, and although this Court has denied a preliminary injunction against his eviction from the relocation apartment at 60, the ability to seek a permanent injunction is not moot.

#### STANDARD

Summary judgment is a drastic remedy that should be granted only if no triable issues of fact exist and the movant is entitled to judgment as a matter of law (see *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The party moving for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence in admissible form demonstrating the absence of material issues of fact (see *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; CPLR 3212 [b]). A failure to make such a showing requires denial of the motion, regardless of the sufficiency of the opposing papers (see *Smalls v AJI Indus., Inc.*, 10 NY3d 733, 735 [2008]). Once a prima facie showing has been made, however, "the burden shifts to the nonmoving party to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact that require a trial for resolution" (*Giuffrida v Citibank Corp.*, 100 NY2d 72, 81 [2003]; see also *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]; CPLR 3212 [b]).

When deciding a summary judgment motion, the Court's role is solely to determine if any triable issues exist, not to determine the merits of any such issues (see *Sillman v Twentieth Century-Fox Film Corp.*, 3 NY2d 395, 404 [1957]). The court views the evidence in the light most favorable to the nonmoving party, and gives the nonmoving party the benefit of all reasonable inferences that can be drawn from the evidence (see *Rotunda Extruders, Inc. v Ceppos*, 46 NY2d 223, 231 [1978]).

## DISCUSSION

Cooper Square argues that under the doctrine of res judicata a valid final judgment bars future actions between the same parties on the same cause of action, and res judicata even extends to a claim not actually litigated but which could have been raised in the prior action. Consequently, because plaintiff asserted his first cause of action as a defense in the summary holdover proceeding, and had a full and fair opportunity to establish his defense at trial but failed to do so, plaintiff should not be afforded a second opportunity to try his case.

The Court is not persuaded by Cooper Square's claim that plaintiff's first cause of action for specific performance of the temporary relocation agreement to restore him to apartment B located at 89, is barred by the doctrine of res judicata because that claim was raised as an affirmative defense during the summary holdover proceedings. Section 2244 of the Code of Civil Procedure provides that the answer to a petition in a summary proceeding may set forth a statement of any new matter constituting a legal or equitable defense or counterclaim (see *Armstrong v Shapiro*, 207 App Div 304, 309 [1st Dept 1923]), and as a general rule once a claim is brought to a final conclusion, all other claims arising out of the same transaction or series of transactions are barred, even if based upon different theories or if seeking a different remedy (see *O'Brien v City of Syracuse*, 54 NY2d 353, 357 [1981]; *Matter of Reilly v Reid* 45 NY2d 24, 30 [1974]). However, the Court of Appeals has held that "res judicata is inapplicable where the plaintiff was unable to seek a certain remedy or form of relief in the first action because of limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain" (*Parker v Blauvelt Volunteer Fire Co.*, 93 NY2d 343, 349 [1991] [internal citation and quotation marks omitted]).

Although plaintiff may have alleged as an affirmative defense his entitlement to specific performance of the temporary relocation agreement and was afforded opportunity to litigate that defense, the Civil Court had no jurisdiction to grant affirmative relief based on the equitable defense interposed in the summary holdover proceeding (see *Schlaich v Blum*, 42 Misc 225,

229 [1903]). A Civil Court has the right to entertain an equitable defense but is without authority to grant equitable remedies such as specific performance of a contract, and such a remedy is only available in the Supreme Court (see *Morrell & Co. Wine Emporium v Richalan Realty Corp.*, 93 AD2d 736, 737 [1st Dept 1983]; *Wilén v Harridge House Assoc.*, 94 AD2d 123, 125 [1st Dept 1983]; *Schlaich*, 42 Misc at 229; *Armstrong*, 207 App Div at 310). Plaintiff could not have received the remedy sought in this action in the summary holdover proceeding, as the Civil Court lacked subject matter jurisdiction. Moreover, whether plaintiff has a right to specific performance of the temporary relocation agreement to restore him to the possession and tenancy of apartment B at 89 is a triable issue of fact that this Court has the authority to determine.

In addition, to invoke the principles of res judicata it must be established that "the issue in the prior action is identical [to], and thus decisive, of [the] issue [to be determined] in the current action" (*Kossover v Trattler*, 82 AD2d 610, 611 [2d Dept 1981], quoting *Gramatan Home Invs. Corp. v Lopez*, 46 NY2d 481, 485 [1979]). "Where two causes of action have such measure of identity that a different judgment in a later action would destroy rights or interests established by the earlier action, the judgment in the earlier action is conclusive in a later one as to matters which actually were or might have been litigated in the earlier action" (*Erbe v Lincoln Rochester Trust Co.*, 3 NY2d 321, 327 [1957]). This Court, in adjudicating plaintiff's first cause of action, would not impair or destroy any right of Cooper Square that was determined in the proceedings before Judge Halprin, in which Cooper Square was granted a judgment of possession of apartment 18 at 60. A decision rendered in this Court regarding plaintiff's first cause of action pertaining to apartment B at 89, would not revoke Cooper Square's right to possession of the relocation apartment at 60. Accordingly, plaintiff's first cause of action is not barred by the doctrine of res judicata and there are triable issues of fact in dispute.

However, the Court finds that Cooper Square is correct in asserting that plaintiff's second cause of action for preliminary and permanent injunction enjoining Cooper Square from



evicting him from apartment 18 at 60 is moot. This Court denied plaintiff's application for a temporary restraining order. Plaintiff was evicted from the relocation apartment at 60, and Cooper Square reclaimed possession of the premises. Since plaintiff has already been evicted from the premises at 60 and fails to make submissions showing the danger of irreparable injury if the preliminary injunction is withheld (see *Nobu Next Door, LLC v Fine Arts Housing, Inc.*, 4 NY3d 839 [2005]), plaintiff's second cause of action is moot and dismissed accordingly.

CONCLUSION

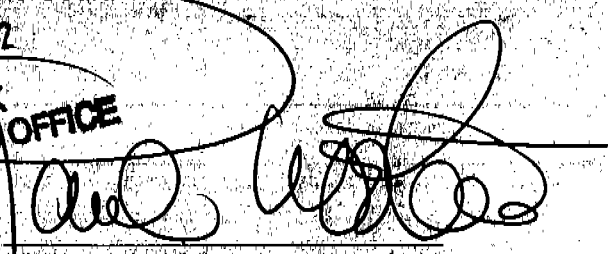
For these reasons and upon the foregoing papers, it is,

ORDERED that defendant Cooper Square Mutual Housing Association II, HDFC's motion for summary judgment dismissing the complaint is granted to the extent that plaintiff's second cause of action for an injunction is hereby dismissed, but is otherwise denied; and it is further,

ORDERED that Cooper Square Mutual Housing Association II, HDFC is directed to serve a copy of this Order, with Notice of Entry, upon all parties and the Clerk of the Court who is directed to enter judgment accordingly, within 30 days; and it is further,

ORDERED that the parties are directed to appear for a compliance conference on October 31, 2012 at 11:00 A.M. in Part 7, 60 Centre Street, Room 341.

This constitutes the Decision and Order of the Court

**FILED**  
SEP 11 2012  
NEW YORK COUNTY CLERK'S OFFICE  
  
PAUL WOOTEN J.S.C.

Dated: 9-6-12

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION

Check If appropriate:  DO NOT POST  REFERENCE