[* 1]

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

PRESENT: HON. JOAN A. MADDEN J.S.C. PART 11

Justice

Index Number : 108229/2010
BURTON, ROBERT
vs.
1580 EAST 13TH STREET
SEQUENCE NUMBER : 004
REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is determined in accordance with the annexed decision and order.

FILED
OCT 25 2012
NEW YORK
COUNTY CLERK'S OFFICE

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

Dated: October 22, 2012

_____, J.S.C.

1. CHECK ONE: ..... ☒ CASE DISPOSED ☐ NON-FINAL DISPOSITION

2. CHECK AS APPROPRIATE: .....MOTION IS: ☐ GRANTED ☒ DENIED ☐ GRANTED IN PART ☐ OTHER

3. CHECK IF APPROPRIATE: ..... ☐ SETTLE ORDER ☐ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPOINTMENT ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

----------X

ROBERT BURTON,

Plaintiff,

-against-

1580 EAST 13TH STREET OWNERS CORP.,

Defendant.

INDEX NO. 108229/10



----------X

JOAN A. MADDEN, J.:

Plaintiff *pro se* moves for leave to reargue and renew the decision and order of this court dated October 18, 2011, which granted defendant's motion to dismiss the complaint in its entirety. Plaintiff also seeks to "enlarge the record" to include a letter dated December 13, 2002 from "defendant's former managing agent Lawrence Bernstein."

"A motion for reargument, addressed to the discretion of the court, is designed to afford a party an opportunity to establish that the court overlooked or misapprehended the relevant facts, or misapplied any controlling principle of law." Foley v. Roche, 68 AD2d 558, 567 (1st Dept 1979). Reargument, however, is not intended "to serve as a vehicle to permit the unsuccessful party to argue once again the very questions previously decided . . . [or] to provide a party an opportunity to advance arguments different from those tendered on the original application." Id at 567-568. On the other hand, "[a]n application for leave to renew must be based on additional material facts which existed at the time the prior motion was made, but were not then known to the party seeking leave to renew, and, therefore not made known to the court." Id; accord Byrne

v. Ryder Truck Rental, Inc., 292 AD2d326 (1st Dept 2002); Elson v. Defren, 283 AD2d 109, 113 (1st Dept 2001).

Applying these standards, the court finds that reargument is not warranted, as plaintiff has not established that the court overlooked or misapprehended relevant facts or misapplied governing law, and renewal is not warranted, as plaintiff submits no additional material facts that were not offered in connection with the prior motion and would change the court's prior determination. See Foley v. Roche, supra at 567.

Even assuming without deciding that Bernstein's December 13, 2002 letter was not included in the record on the prior motion, the court did not rely on that letter in determining that plaintiff's first cause of action was time-barred. Rather, as explained in the underlying decision, the court relied solely on "plaintiff's informal judicial admissions in the verified complaint in the prior action, which contains sworn statements by plaintiff that in December 2002 he 'formally requested' that defendant issue him stock certificates and proprietary leases for the apartments and acknowledge that both apartments constitute unsold shares, and that '[o]n December 13, 2002, then managing agent Larry Bernstein of Jonas Equities rejected Mr. Burton's Unsold Share and stock/lease requests.'" While plaintiff's foregoing statement presumably referenced Bernstein's December 13, 2002 letter, the court made no determination as to the content of that letter, but simply found that the sworn statements in the verified complaint constituted informal judicial admissions by which plaintiff was bound as a matter of law, citing Liquidation of Union Indemnity Insurance Co v. American Centennial Insurance Co, 89 NY2d 94, 103 and Ocampo v. Pagan, 68 AD3d 1077, 1078-1079 (2nd Dept 2009). In any event, a review of the content of Bernstein's letter shows that it is consistent with plaintiff's own characterization of the letter as a

"rejection" of his claim that he was a holder of unsold shares.

At oral argument on the motion, plaintiff cited a October 12, 2006 letter from defendant's attorney J. Joseph Kornfeld, which plaintiff conceded was not included in his motion papers. Plaintiff argued that Kornfeld's letter shows that in 2006, defendant had agreed to issue proprietary leases and stock certificates to him as the holder of unsold shares. Plaintiff's argument is not persuasive in light of his sworn statement in the complaint in the prior action, that defendant denied his request for unsold shares status in December 2002.[1]

To the extent plaintiff argues that the first cause of action "contains three separate claims," each with a "different statute of limitation date," plaintiff is improperly attempting to "advance arguments different from those tendered on the original application." Foley v. Roche, supra at 567-568. In any event, plaintiff's argument is unavailing. The court previously determined that the first cause of action "*primarily* seeks declaratory relief" regarding plaintiff's status and rights as the holder of unsold shares. While plaintiff correctly states that the first cause of action also seeks monetary damages based on disparagement of title, breach of fiduciary duty and intentional infliction of emotional distress, it is clear that underlying each of those claims is plaintiff's allegation that he is the holder of unsold shares, which is identical to his claim for declaratory relief. In seeking damages, plaintiff additionally alleges that he has suffered harm by defendant's failure to recognize his status as the holder of unsold shares. Thus, for statute of limitations purposes, the accrual date is the same for all claims asserted in the first cause of action. Notably, the court applied the longer six-year period in determining that the first

---

[1]The court is not considering plaintiff's June 15, 2012 letter and attachment, which were submitted without the court's permission after oral argument.

cause of action was time-barred.

Plaintiff argues that the court dismissed the first cause of action "on the basis of a defense that 1580 did not plead." Plaintiff's argument is without merit. Defendant's answer asserts 21 separate affirmative defenses, including unclean hands, estoppel, waiver, statute of frauds, culpable conduct, lack of standing, failure to mitigate, failure to state a cause of action, statute of limitations, res judicata, and collateral estoppel. Defendant moved to dismiss the complaint on grounds of res judicata, statute of limitations, unclean hands, failure to state a cause of action and lack of standing. With respect to the first cause of action, the court analyzed and rejected defendant's res judicata argument, but concluded that the first cause of action was barred by the statute of limitations.

Turning to the second cause of action for actual eviction, plaintiff argues that the court should "vacate" the dismissal which according to plaintiff was "based upon its time-bar dismissal of my first COA [cause of action]." Plaintiff mischaracterizes the court's decision, which dismissed the actual eviction claim for failure to state a cause of action, finding that "the complaint does not allege any facts establishing that plaintiff was actually evicted, i.e. physically expelled or excluded from the premises." As an additional and alternative ground for dismissal, the court determined that "since the second cause of action is based on defendant's alleged failure to provide plaintiff with a proprietary lease and stock certificate for apartment 5-L as the 'holder of unsold shares,' the second cause of action is dependent on the viability of the first cause of action, which as determined above, is time-barred."

As to the third cause of action for tortious interference, the court adheres to its prior decision that such claim is barred by the statute of limitations, which is clear from the face of the

complaint. Even if defendant did not specifically argue that the third cause of action was time-barred, defendant asserted a statute of limitations defense in its answer and moved to dismiss the complaint on several grounds, including the statute of limitations. Moreover, in now seeking renewal and reargument, plaintiff submits neither a factual or legal basis for reaching a different conclusion.

The court likewise adheres to its decision dismissing the fourth cause of action "which merely objects to the content of defendant's answer as 'false denials' and does not constitute a legally cognizable claim."

Accordingly, it

ORDERED that plaintiff's motion for reargument and renewal is denied.

DATED: October 22, 2012

ENTER: