Corino v 448-450 West 19 Realty LLC
2015 NY Slip Op 32241(U)
November 23, 2015
Supreme Court, New York County
Docket Number: 158927/2015
Judge: Kathryn E. Freed
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SUPREME COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK
HON. KATHRYN FREED
JUSTICE OF SUPREME COURT
---X
ADELFINO CORINO,

Plaintiff,

- against -

448-450 WEST 19 REALTY LLC and
T & T REALTY MANAGEMENT LLC,

Defendants.
---X

DECISION/ORDER
Index No.: 158927/2015
Mot. Seq. 001

HON. KATHRYN E. FREED:

RECITATION, AS REQUIRED BY CPLR 2219(a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION.

PAPERS	NUMBERED
DEF.'S NOTICE OF MOTION AND AFF. ANNEXED	1-2 (Exs. A-G)
PLTF.'S NOTICE OF CROSS-MOT. AND AFF. ANNEXED	3 (Exs. A-D)
DEF.'S AFF. IN FURTHER SUPPORT OF MOTION	4 (Ex.A)
MEMORANDA OF LAW	5-7

UPON THE FOREGOING CITED PAPERS, THIS DECISION/ORDER ON THE MOTION IS AS FOLLOWS:

In this action for declaratory relief, defendants 448-450 West 19 Realty LLC and T & T Realty Management LLC move, pursuant to CPLR 3211 (a)(4), to dismiss the complaint on the ground that there is another action pending between the parties in the Housing Part of the Civil Court of the City of New York, New York County ("Housing Court"). Plaintiff Adelfino Corino cross-moves, pursuant to CPLR 602, for an order removing to this Court the action pending between the parties in Housing Court and consolidating it with the above-captioned action. After oral argument, and after a review of the parties' papers and the relevant statutes and case law, defendants' motion

[* 2]

is **granted** and plaintiff's cross motion is **denied** as moot.

Factual and Procedural Background:

Plaintiff is the tenant of apartment 5E at 448 West 19th Street, New York, New York ("the apartment" and "the building", respectively). The building was owned and managed by defendants 448-450 West 19 Realty LLC ("448-450 West 19 Realty") and T & T Realty Management LLC, respectively. He took possession of the premises pursuant to a rent stabilized lease dated July 26, 2006 for a term commencing August 1, 2006 and ending July 31, 2008. Ex. A.[1] He was in possession of the premises continuously since that time and the term of plaintiff's most recent renewal lease, which was also rent stabilized, ended on August 31, 2015. Ex. B. By correspondence dated March 11, 2015, defendants advised plaintiff that his renewal lease would expire on August 31, 2015 and that he would have to vacate the apartment by that date. Ex. C.

Instead of vacating the apartment at the end of August, 2015, plaintiff commenced the above-captioned action on or about August 28, 2015 by filing a summons and complaint against defendants seeking a declaration that the apartment and the building were subject to the Rent Stabilization Law and that defendants were required to offer him a rent stabilized lease.

On or about September 17, 2015, defendant 448-450 West 19 Realty commenced a summary holdover proceeding in Housing Court seeking, inter alia, to recover possession of the apartment and for reasonable use and occupancy of the premises for the period since plaintiff's tenancy ended. Ex. D. The Housing Court action, styled *448-450 West 19 Realty LLC v Adelfino Corino*, was

[1]Unless otherwise noted, all references are to exhibits annexed to the affidavit of Alexander B. Fotopoulos, Esq. dated September 18, 2015 submitted in support of defendants' motion to dismiss.

commenced under New York County L & T Index No. 077236/15.

On September 18, 2015, defendants moved, pursuant to CPLR 3211(a)(4), to dismiss the above-captioned action on the ground that another action was pending between the parties in Housing Court.

On or about October 13, 2015, plaintiff cross-moved to remove the Housing Court action to this Court and to consolidate it with the above-captioned action for joint trial pursuant to CPLR 602(b) on the ground that the issues in the two actions involved the same parties and issues.

Positions of the Parties:

Defendants argue that the above-captioned action should be dismissed pursuant to CPLR 3211(a)(4) since the Housing Court action pending between the parties is the preferred forum for the resolution of landlord-tenant disputes such as those raised herein. They further assert that the building and apartment are not subject to the Rent Stabilization Law and that there is no need for a declaratory judgment action before this Court because the issue of rent stabilization will be litigated in Housing Court. Additionally, they assert that the fact that plaintiff's Supreme Court action was commenced prior to the Housing Court proceeding does not warrant that plaintiff's case be venued in Supreme Court.

Initially, plaintiff responds that the above-captioned action should not be dismissed because it was commenced prior to defendants' Housing Court proceeding ("the first filed rule"). Plaintiff further asserts that this Court is a better forum in which to globally resolve all issues raised between the parties in both actions. Plaintiff adds that the Supreme Court and Housing Court actions involve common questions of law and fact and should be consolidated for joint trial. He emphasizes that,

[* 4]

in their motion to dismiss, defendants admitted that the two actions involved "the same parties for the same cause of action" and that, in the Housing Court proceeding, defendants sought "possession of the subject apartment on the basis that the subject apartment is not covered by the Rent Stabilization Law and Code and that the Plaintiff's lease has expired." Memo. of Law in Supp. of Defendant's Mot. to Dismiss, at 2-3. Plaintiff states, however, that, in the above-captioned action, he seeks a declaratory judgment that the apartment and the building are covered by the Rent Stabilization Law and that defendants must be enjoined from withholding from him a rent-stabilized renewal lease. Given these common issues of law and fact, asserts plaintiff, joint trial of the actions is appropriate.

Plaintiff argues that a joint trial will avoid the possibility of inconsistent outcomes, the need to litigate similar issues in two forums, and the risk that he will be evicted before a determination is made on his case by this Court. He further asserts that the adjudication of the actions in this Court is necessary because discovery is required in order to ascertain whether the building is rent stabilized, and that such discovery cannot be obtained in a Housing Court proceeding.[2] Additionally, he maintains that he cannot obtain all of the relief he needs in Housing Court, such as an order enjoining defendants from withholding a rent stabilized renewal lease, since that court does not award injunctive relief.

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[2]In the alternative, plaintiff asserts that, should this Court agree that the dismissal of the declaratory judgment action is improper but decline to order a joint trial of the pending actions, then this Court should preliminarily enjoin the prosecution of the holdover proceeding. In fact, plaintiff's counsel encloses a blank order to show cause and affirmation in support of a preliminary injunction with plaintiff's cross motion. However, since the order to show cause was not presented to this Court in the proper fashion (see, 22 NYCRR § 202.7([f]), this Court cannot consider the same upon this application. In any event, it is not necessary for this Court to consider this alternative relief since, as discussed below, it is granting defendants' motion to dismiss the declaratory judgment action.

In an affirmation in further support of their motion, defendants argue that the cases relied on by plaintiff for the proposition that the Supreme Court action takes precedence over the Housing Court action because it was filed first do not apply to landlord-tenant disputes. The defendants further assert that this Court should not remove or consolidate the Housing Court proceeding with the above-captioned action.

In his reply memorandum of law in further support of his cross motion, plaintiff asserts that defendants failed to demonstrate that a joint trial would result in any prejudice to them. Plaintiff further asserts that the cases he cites do not hold that the first filed rule never applies in landlord-tenant actions.

<u>Conclusions of Law:</u>

Defendants' Motion To Dismiss

Defendants' motion to dismiss the above-captioned action pursuant to CPLR 3211(a)(4) is granted. "CPLR 3211(a)(4) vests a court with broad discretion in considering whether to dismiss an action on the ground that another action is pending between the same parties on the same cause of action." *Whitney v Whitney*, 57 NY2d 731, 732 (1982). The exact same legal theories need not be set forth in each action in order for dismissal to be granted pursuant to this section. *See Syncora Guar. Inc. v J.P. Morgan Sec. L.L.C.*, 110 AD3d 87 (1st Dept 2013).

The defense of another action pending pursuant to CPLR 3211(a)(4) will not succeed where the relief sought in the second action is not available in the first action. *See Walsh v Goldman Sachs & Co.*, 185 AD2d 748 (1st Dept 1992). Here, in the above-captioned action, plaintiff seeks a declaration that the apartment and building are rent stabilized and that he is entitled to a rent

stabilized lease. Although the Housing Court has only limited declaratory relief (see CCA 203 [o]), it does have the power to determine that the apartment and the building are or are not rent stabilized, which would essentially have the same effect as the declaration sought by plaintiff in this Court. Since the relief sought in the second action is thus available in the first action, the defense of another action pending thus cannot succeed and the above-captioned action must be dismissed. *See Walsh v Goldman Sachs & Co., supra.*[3]

It is well settled that "[t]he general rule is that, in order to sustain a claim that another action is pending for purposes of CPLR 3211(a)(4), the movant must establish that the other action was commenced first." *Reckson Assoc. Realty Corp. v Blasland, Bouck & Lee, Inc.*, 230 AD2d 723, 725 (2d Dept 1996). Here, defendants cannot make this showing, as they are attempting to dismiss the above-captioned action, commenced in August, 2015, when the other action was commenced in Housing Court in September, 2015. However, this rule is not inflexible. Although technical priority in commencement of an action is a factor to be considered, it is not dispositive, especially where both actions are, as here, at the earliest stages of litigation and one court's connections clearly predominate (*See AIG Fin. Prods. Corp. v Penncara Energy, LLC, 83 AD3d 495* [1st Dept 2011]; *San Ysidro Corp. v Robinow*, 1 AD3d 185 [1st Dept 2003]), since it is well settled that Housing Court is the preferred forum for resolving landlord-tenant disputes. *See Post v 120 East End Ave. Corp.*,

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[3]This Court notes that 448-450 West 19 Realty and T & T Realty are defendants in the above-captioned action but only 448-450 West 19 Realty is a petitioner in the Housing Court action. However, T & T Realty, as managing agent of 448-450 West 19 Realty, is united in interest with 448-450 West 19 Realty. Since only substantial, as opposed to complete, identity of parties is sufficient to invoke CPLR 3211(a)(4) (*see Morgulas v J. Yudell Realty, Inc.*, 161 AD2d 211 [1st Dept 1990]), this does not defeat defendants' motion to dismiss.

62 NY2d 19 (1984). For this reason, too, the captioned action must be dismissed.[4]

Plaintiff's Cross Motion To Remove and Consolidate For Joint Trial

CPLR 602(b) provides that "[w]here an action is pending in the [S]upreme [C]ourt it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the [S]upreme [C]ourt." Although there is usually a "strong preference" for resolving holdover proceedings in Housing Court (*44-46 W. 65th Apt. Corp. v Stvan*, 3 AD3d 440, 441 [1st Dept 2004]), where complete relief cannot be provided by the Housing Court and common questions of law and fact exist, judicial economy is served by consolidation of a Housing Court and Supreme Court matter. *See Murphy v 317-319 Second Realty LLC*, 95 AD3d 443 (1st Dept 2012). The decision whether to consolidate is one to be made in the Court's discretion. *Id.*

Here, since the Supreme Court matter has been dismissed pursuant to CPLR 3211(a)(4), there is nothing with which to consolidate the Housing Court proceeding. In any event, the consolidation motion would have been denied given plaintiff's failure to establish any "special circumstances or novel issues requiring Supreme Court involvement." *Brecker v 295 Central Park West, Inc.*, 71 AD3d 564, 565 (1st Dept 2010). Thus, plaintiff's cross motion must be denied as moot.

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[4]Although defendants, relying on *Scheff v 230 East 73rd Owners Corp.*, 203 AD2d 151 (1st Dept 1994) and *Cohen v Goldfein*, 100 AD2d 795 (1st Dept 1984), assert that the first filed rule "does not apply in the context of . . . a landlord-tenant dispute" (Defendants' Affirmation in Further Support, at Par. 11), plaintiffs correctly maintain that neither of these decisions holds that the rule never applies in such actions. In any event, in light of the holding above, this Court need not reach these arguments.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that defendants' motion to dismiss the captioned action pursuant to CPLR 3211(a)(4) is granted and the complaint in the above-captioned action is dismissed; and it is further,

ORDERED that plaintiff's cross motion, pursuant to CPLR 602, to remove and consolidate for joint trial with the above-captioned action the proceeding commenced against him by defendants in Housing Court is denied as moot; and it is further,

ORDERED that this constitutes the decision and order of the Court.

DATED: November 23, 2015

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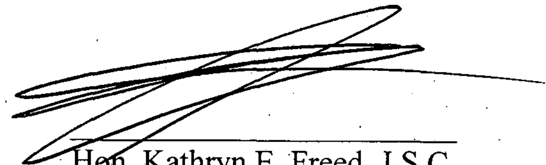

Hon. Kathryn E. Freed, J.S.C.

HON. KATHRYN FREED
JUSTICE OF SUPREME COURT