Ember v Denizard
2017 NY Slip Op 32704(U)
December 22, 2017
Supreme Court, New York County
Docket Number: 151379/2016
Judge: Lucy Billings
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 46
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MAX EMBER, Index No. 151379/2016

Plaintiff

- against - DECISION AND ORDER

CHARLENE DENIZARD, DANIELLE BIRKENFELD, ROGER BROWN, MICHAEL HOWARD SAUL, 65 WEST 95TH OWNERS CORP., FENWICK KEATS MANAGEMENT, INC., and R.J. PANDA,

Defendants

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LUCY BILLINGS, J.S.C.:

Defendants previously moved to dismiss the complaint based on its failure to state a claim, documentary evidence, releases, res judicata, and another pending proceeding. C.P.L.R. § 3211(a)(1), (4), (5), and (7). In a decision dated August 3, 2017, the court granted defendants' motion based on res judicata. C.P.L.R. § 3211(a)(5). Plaintiff now moves to reargue defendants' motion to dismiss his first claim only, which seeks damages for his respiratory condition caused by their failure to provide heat in his cooperative apartment in 2014. C.P.L.R. § 2221(d).

I. PRIOR LITIGATION BETWEEN PLAINTIFF AND DEFENDANTS

The court dismissed this first claim based on a Stipulation of Settlement dated October 26, 2015, between plaintiff and all defendants here in a proceeding by defendant residential cooperative corporation against plaintiff, a unit owner in the cooperative's building. In that proceeding plaintiff

counterclaimed for conditions dangerous to his health caused by the cooperative's failure to provide heat in his cooperative apartment in 2014. More significantly, the Stipulation of Settlement requires that, upon compliance with the Stipulation, plaintiff was to exchange releases that release all defendants now named in this action from liability for any claims plaintiff:

> ever had, now has, or may have against RELEASEE, for, upon or by reason of any matter, cause, or thing whatsoever, from the beginning of the world to the date of this Release, but limited to those claims asserted and/or that could have been asserted by Max Ember in the proceeding commenced in the Civil Court of the City of New York, County of New York, entitled 65 West 95th Owners Corp. v. Max Ember, et al., Index No. L&T 51752/2015 and the action commenced in the Supreme Court of the State of New York, County of New York, entitled Max Ember v. Charlene Denizard, et al., Index No. 652142/2014.

Aff. in Opp'n of Max Ember (May 12, 2016) Ex. C ¶ 5 (emphases added). The complaint in this action does not mention the October 2015 Stipulation of Settlement in the Civil Court proceeding, let alone allege defendants' noncompliance with that Stipulation of Settlement. Insofar as plaintiff insists that the parties did not intend the Stipulation of Settlement to preclude a later action based on a theory or seeking relief not litigated in the prior proceeding or action, the Stipulation of Settlement's agreement to execute the releases is the best evidence of the parties' intent. Ellington v. EMI Music, Inc., 24 N.Y.3d 239, 245 (2014); Schron v. Troutman Sanders LLP, 20 N.Y.3d 430, 436 (2013); Marin v. Constitution Realty, 128 A.D.3d 505, 507 (1st Dep't 2015).

Also significant is the prior action in this court to which

the releases refer and which alleged conditions in plaintiff's apartment in 2014 that "are, and continue to be, dangerous, hazardous and/or detrimental to Plaintiff's life, health and safety. Said conditions include, but are not limited to, the following: (a) lack of heat and non-working heating system . . . ." Aff. of Jeffrey H. Roth (Sept. 7, 2017) Ex. E ¶ 14. That action further alleged that the conduct by the same defendants as in this action in failing to provide heat "has injured the Plaintiff," id. ¶ 32, for which "Plaintiff is entitled to compensatory damages." Id. ¶ 33. A Stipulation of Discontinuance dated November 2, 2015, discontinued those claims with prejudice.

II. THAT LITIGATION'S PRECLUSIVE EFFECT ON THIS ACTION

The complaint in this action repeats those allegations almost verbatim, except plaintiff specifies that the lack of heat and defendants' failure to repair the heating system in 2014 have caused him to suffer pneumonia, and the detriment to his health and injury for which he is entitled to compensatory damages include irreparable damage to his lungs. Even though the diagnosis of damage to his lungs was after the Stipulation of Settlement and Stipulation of Discontinuance, this damage was caused by defendants' same conduct during 2014 alleged by plaintiff in both the prior Supreme Court action and the prior Civil Court proceeding. See Berkowitz v. Fischbein, Badillo, Wagner & Harding, 7 A.D.3d 385, 387 (1st Dep't 2004).

This damage thus might have been claimed in the prior

Supreme Court action as among the detriments to his health and injuries he developed or would develop from defendants' same conduct, even if based on different theories or seeking additional relief, and therefore is precluded. Matter of Hunter, 4 N.Y.3d 260, 269 (2005); Matter of Empire State Building Assoc., L.L.C. Participant Litig., 133 A.D.3d 538, 538 (1st Dep't 2015); Jones v. Riese Organization, 93 A.D.3d 598, 598-99 (1st Dep't 2012); Fifty CPW Tenants Corp. v. Epstein, 16 A.D.3d 292, 293-94 (1st Dep't 2005). See Centro Empressarial Cempressa S.A. v. America Movil, S.A.B. de C.V., 17 N.Y.3d 269, 276 (2011); Long v. O'Neill, 126 A.D.3d 404, 407-408 (1st Dep't 2015); Broyhill Furniture Indus., Inc. v. Hudson Furniture Galleries, LLC, 61 A.D.3d 554, 555 (1st Dep't 2009); Langhorne v. Amchem Prods., Inc., 23 A.D.3d 208, 209 (1st Dep't 2005). His claim for damage to his lungs accrued when plaintiff suffered the lack of heat in his apartment, not when the damage was diagnosed. C.P.L.R. § 214(5); Sanchez v. National R.R. Passenger Corp., 21 N.Y.3d 890, 891 (2013); Kent v. 534 E. 11th St., 80 A.D.3d 106, 112 (1st Dep't 2010); Miniero v. City of New York, 65 A.D.3d 861, 862 (1st Dep't 2009); Torres v. Greyhound Bus Lines, Inc., 48 A.D.3d 1264, 1265 (4th Dep't 2008). See, e.g., Mohonk Preserve, Inc. v. Ullrich, 119 A.D.3d 1130, 1134 (3d Dep't 2014). Lack of heat is not a latent hazard, a claim for which accrues when the injury is discovered. C.P.L.R. § 214-c; Fabiano v. Philip Morris Inc., 54 A.D.3d 146, 152 (1st Dep't 2008). If plaintiff sought to preserve a claim for future further injuries to his health or

other effects from the fully evident cold condition of his apartment that might develop after the Stipulation of Settlement, he needed to reserve such a right expressly in the Stipulation or releases. Long v. O'Neill, 126 A.D.3d at 408; Broyhill Furniture Indus., Inc. v. Hudson Furniture Galleries, LLC, 61 A.D.3d at 555; Fifty CPW Tenants Corp. v. Epstein, 16 A.D.3d at 294; Gowda v. Reddy, 105 A.D.3d 957, 958 (2d Dep't 2013). See Ellington v. EMI Music, Inc., 24 N.Y.3d at 246; Schron v. Troutman Sanders LLP, 20 N.Y.3d at 437.

III. PLAINTIFF'S REMAINING REMEDIES

Plaintiff may be relieved of the requirement to execute the releases if he persuades the Civil Court, before which the Stipulation of Settlement requiring them was executed, that defendants have not complied with that Stipulation, but have continued to treat him differently from all other cooperative shareholders in violation of the Stipulation or otherwise violated it. Depending on the extent to which the Stipulation remains intact, it still imposes its own preclusive effect without the releases, as does the Stipulation of Discontinuance with prejudice in the prior Supreme Court action. Matter of Empire State Building Assoc., L.L.C. Participant Litig., 133 A.D.3d at 538; Jones v. Riese Organization, 93 A.D.3d at 598-99; Fifty CPW Tenants Corp. v. Epstein, 16 A.D.3d at 293-94. The Stipulation of Discontinuance precludes only the claims alleged in the Supreme Court action, however, without encompassing claims that might have been alleged or that plaintiff might have as are

encompassed in the required releases. Nonetheless, that action was not limited, as plaintiff now insists, to claims of unlawful discrimination.

Yet plaintiff may maintain an action claiming that, through conduct after the two stipulations were executed, defendants have further discriminated unlawfully against him. He did not allege any such subsequent discrimination in this action. Similarly, he may maintain an action claiming that, through defendants' failure to provide adequate heat or to repair their building's heating system after the stipulations were executed, defendants have caused further injuries to his health.

IV. CONCLUSION

The court did not overlook any of the above analysis in reaching the August 2017 decision to dismiss plaintiff's first claim. C.P.L.R. § 2221(d)(2); Windham v. New York City Tr. Auth., 115 A.D.3d 597, 600 (1st Dep't 2014); Social Serv. Empls. Union, Local 371 v. New York City Bd. of Correction, 93 A.D.3d 454, 454 (1st Dep't 2012); Hernandez v. St. Stephen of Hungary School, 72 A.D.3d 595, 595 (1st Dep't 2010). See People v. D'Alessandro, 13 N.Y.3d 216, 219 (2009); Board of Educ. of City Sch. Dist. of City of N.Y. v. Grullon, 117 A.D.3d 572, 573 (1st Dep't 2014); Scelzo v. Acklinis Realty Holding LLC, 101 A.D.3d 468, 468 (1st Dep't 2012). Until the Civil Court vacates any part of the Stipulation of Settlement, its requirement for the releases binds both plaintiff and this court and bars any future claim based on defendants' conduct alleged in the Civil Court

proceeding or in plaintiff's prior Supreme Court action. Berkowitz v. Fischbein, Badillo, Wagner & Harding, 7 A.D.3d at 387. See Calavano v. New York City Health & Hosps. Corp., 246 A.D.3d 317, 319 (1st Dep't 1998). Therefore the court denies plaintiff's motion for reargument. C.P.L.R. § 2221(d).

The court also denies defendants' request for further sanctions, which is not sought via a cross-motion. 22 N.Y.C.R.R. § 130-1.1. See Matter of Lawrence, 79 A.D.3d 417, 417 (1st Dep't 2010); Corrigan v. Orosco, 84 A.D.3d 955, 956 (2d Dep't 2011); Greenwood Trust Co. v. Roylance, 280 A.D.2d 848, 849 (3d Dep't 2001). The court's prior award of sanctions was based primarily on the second through eighth claims, which were indistinguishable from the claims in plaintiff's prior Supreme Court action. Contrary to plaintiff's interpretation, the award was not based on defendants' character attacks.

Plaintiff's current motion does not seek to reinstate the second through eighth claims. Moreover, defendants' repeated character attacks and tactics to divert attention from the merits in opposing plaintiff's current motion is reason alone to deny defendants' request for sanctions in connection with this motion. Landes v. Landes, 248 A.D.2d 268, 269 (1st Dep't 1998).

DATED: December 22, 2017

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