Malpass v Clarke
2006 NY Slip Op 30781(U)
August 15, 2006
Supreme Court, New York County
Docket Number: 110020/05
Judge: Rolando T. Acosta
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[* 1]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

David Malpass and Adele Malpass,

Plaintiff,

– against –

Harvey Clarke, Michael Jaglom and A.J. Clarke Real Estate Corp.,

Defendants.

DECISION/ORDER

Index No. 110020/05

Motion Seq. 1

Present:
Hon. Rolando T. Acosta
Supreme Court Justice

The following documents were considered in reviewing defendants Harvey Clarke, Michael Jaglom, and A.J. Clarke Real Estate Corp.'s motion to consolidate this action with a second action pursuant to CPLR § 602:

Papers	Numbered
Notice of Motion, Affirmation, Affidavit	1, 2 (Ex. 1-6), 3 (Ex. A-F)
Memorandum of Law In Support	4
Affidavit In Opposition	5 (Ex. A-T)
Memorandum of Law In Opposition	6
Reply Affirmation	7
Reply Memorandum of Law In Support	8

[* 2]

Plaintiffs David Malpass and Adele Malpass bring the present action against defendants Harvey Clarke, Michael Jaglom, and A.J. Clarke Real Estate Corp. claiming that they were defamed by the defendants via a letter alleging that the plaintiffs criminally forged a rider to a lease agreement executed by plaintiffs and Madison-68 Corp., the landlord's agent for their residential premises, located at 11 East 68th Street, New York, New York. The letter was allegedly mailed to plaintiffs' residential address as well as faxed on a number of occasions to plaintiffs' office of employment. According to plaintiffs, the letter was jointly drafted by defendants and falsely and maliciously accused plaintiffs of criminally forging the rider agreement as well as the signature of defendant Harvey Clarke. Plaintiffs deny that the Rider agreement was forged, and claim that it is valid, and permitted them, as tenants of the Madison-68 Corp. residential building, to terminate their lease agreement prior to its June 30, 2005 expiration upon 90 days written notice to the landlord.[1] Plaintiffs thus claim that they were lawfully permitted to vacate the premises upon proper notice to the landlord, and that the letter in question is an outright lie and defamed their character.

Defendants in turn move to consolidate the present action with an action

[1] Defendants also argue that notwithstanding that the rider agreement was forged, they were never given timely notice pursuant to the very terms of the forged document.

[* 3]

pending before this Court under the caption Madison-68 Corp. v. David Malpass and Adele Malpass, Index No. 112820/04 ("Action 1") pursuant to CPLR § 602(a). In Action 1, plaintiff Madison-68 Corp. alleges that the tenants abandoned their apartment on or about May 31, 2004, prior to the expiration of the lease, without legal justification. That is, Madison-68 Corp. claims that the rider agreement is forged, it was not signed by Madison-68 Corp. or its agent, and that no such rider agreement was ever executed by the parties. Thus in Action 1 Madison-68 Corp. seeks outstanding rental arrears and late fees due and owing to them as a result of plaintiffs' default.

Section 602(a) of the Civil Practice Law and Rules provides that upon motion, the Court may consolidate actions involving "common questions of law and fact." See also In re Arbitration Progressive Ins. Co., 10 A.D.3d 518, 519 (1st Dept.2004) ("there is a preference for consolidation in the interest of judicial economy and ease of decision-making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation will prejudice a substantial right"). Moreover, the trial court has broad discretion in consolidating two actions that have common questions of law and fact. JP Foodservice Distributors, Inc. v. PricewaterhouseCoopers LLP, 291 A.D.2d 323 (1st Dept. 2002).

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In the instant action, consolidation is appropriate inasmuch as defendant Michael Jaglom is a principal of plaintiff in Action 1, defendant A.J. Clark Real Estate Corp. is the managing agent of plaintiff in Action 1, and defendant Harvey Clark is the principal of the managing agent. Thus, both actions involve the same parties or parties in privity, and more significantly, both actions involve common questions of law and fact. That is, in Action 1 the landlord entity of Madison-68 Corp. claims that the alleged rider relied upon by David and Adele Malpass is invalid, and thus the tenants are in default of the lease. The validity of the rider agreement is also the central issue in the present action i.e. whether the rider agreement is indeed valid or a forgery. See Dillon v. City of New York, 261 A.D.2d 34 (1st Dept. 1999) (truth is an absolute defense to a defamation claim). Thus, it is abundantly clear that the issue of the validity of the rider must be determined in both actions.

Plaintiffs' contention that consolidation of the two actions would be prejudicial to them is unavailing. Their allegation that they have already incurred substantial legal fees in their defamation action and would be financially prejudiced by consolidation is belied by the fact that the same discovery and legal work would be necessary to prove their defamation claim should the two actions be consolidated. See Chinatown Apartments, Inc. v. New York City Transit

[* 5]

Authority, 100 A.D.2d 824 (1st Dept. 1984) (Consolidation is appropriate to avoid unnecessary duplicative trial, to save unnecessary costs, and to prevent inconsistent judgments).

Plaintiffs' contention that they will be substantially prejudiced by losing their right to a jury trial is equally unpersuasive. While it is conceded that the lease executed by plaintiffs waived their right to a jury trial for any matter concerning the lease of their apartment, plaintiffs' cause of action against the defendants is for defamation, which is specifically excluded from the lease. The right to a jury trial in one of the actions proposed, i.e. the defamation action, does not require denial of the consolidation of both actions. It has long been established that "there is no rule of law prohibiting the consolidation of a jury action with a non-jury action." Meuer v. Horowitz, 20 N.Y.S.2d 780 (1st Dept. 1940). Accordingly, based upon the foregoing, it is hereby

ORDERED that the motion to consolidate is GRANTED, and the above-captioned action is consolidated in the Court with Madison-68 Corp. v. David Malpass and Adele Malpass, Index No. 112820/04 under Index No. 112820/04, and the consolidated action shall bear the following caption:

[* 6]

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 61

Madison-68 Corp.,

Plaintiff,

– against –

David Malpass and Adele Malpass

Defendants.

Index No. 112820/04

Present:
Hon. Rolando T. Acosta
Supreme Court Justice

David Malpass and Adele Malpass

Third-Party Plaintiffs,

– against –

Harvey Clark, Michael Jaglom and A.J. Clarke Real Estate Corp.,

Third-Party Defendants.

Index No. 112820/04

Present:
Hon. Rolando T. Acosta
Supreme Court Justice

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and it is further

ORDERED that the pleadings in the actions hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this

order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and shall mark his records to reflect the consolidation, and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the Court's records to reflect the consolidation.

This constitutes the Decision and Order of the Court.

Dated: August 15 2006 ENTER

SO ORDERED

Rolando T. Acosta, J.S.C.

ROLANDO T. ACOSTA
J.S.C.

Check one: ❑ FINAL DISPOSITION ☒ NON-FINAL DISPOSITION

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