

**Kelman v New York State Div. of Hous. &
Community Renewal**

2006 NY Slip Op 30844(U)

January 10, 2006

Supreme Court, New York County

Docket Number: 107175/04

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

ROBERT KELMAN,
Plaintiff,
- v -

Index No.: 107175/04

Motion Date: 09/09/05

THE NEW YORK STATE DIVISION OF HOUSING AND
COMMUNITY RENEWAL and MIKA PROPERTIES,

Motion Seq. No.: 02

Motion Cal. No.: 84

Defendants.

The following papers, numbered 1 to 4 were read on this motion for reconsideration.

PAPERS NUMBERED
1
2
3, 4

Notice of Motion/Order to Show Cause - Affidavits - Exhibits

Answering Affidavits - Exhibits

Replying Affidavits - Exhibits

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Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff-tenant moves to reargue pursuant to CPLR 2221 this court's Order and Judgment dated March 15, 2005, only to the extent that such Order granted judgment dismissing plaintiff's sixth cause of action against co-defendant Mika Properties.

Plaintiff argues that the court improperly dismissed the action against Mika without notice to plaintiff and an opportunity for plaintiff to be heard under CPLR 3212 (c) because plaintiff did not move for judgment against Mika on the prior motion. For both substantive and procedural reasons the

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

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Check If appropriate: DO NOT POST REFERENCE

plaintiff's motion must be denied. Substantively, the plaintiff misstates the law of summary judgment. CPLR 3212 (b) explicitly provides that "[i]f it shall appear that any party other than the moving party is entitled to a summary judgment, the court may grant such judgment without the necessity of a cross-motion."

The court stated in its prior decision that it searched the record and granted defendant Mika judgment dismissing the claims against it though Mika did not appear on the prior motion.

Plaintiff cites no authority for the argument that a motion for partial summary judgment limits the claims upon which a court may grant judgment. CPLR 3212 contains no such limitation. The case of Marini v Lombardo (17 AD3d 545, 546 [2d Dept 2005]) offers no support for plaintiff's position as the court in that case noted that "no motion for summary judgment was before the Supreme Court on the reargument application." In this case the plaintiff made a motion for summary judgment.

Procedurally, plaintiff fails on this motion to append a copy of the complaint or the prior motion papers which are required to evaluate plaintiff's claim that the court should reconsider its determination dismissing plaintiff's sixth cause of action. "In the absence [of the papers submitted on the motion for which reargument is sought] and other relevant documents providing a context for the position advanced, reargument is not available. Moving counsel, as a seasoned

lawyer, should be well aware and appreciate that the Court does not retain the papers following the disposition of an application and should not be compelled to retrieve the clerk's file in connection with its consideration of subsequent motions. On the contrary, it is the responsibility of the moving parties to assemble complete papers which document the procedural history of the application and provide a proper foundation for the relief requested." Lower Main St., LLC v Thomas Re & Partners, NYLJ, April 5, 2005, at 19, col 3 (Sup Ct, Nassau County, Alpert, J.). Plaintiff's omission prevents this court from evaluating arguments related to the particular claim plaintiff seeks to reinstate and therefore the court must deny plaintiff's motion.

The court shall also deny Mika's cross-motion for summary judgment on its counter-claim for attorney's fees and shall dismiss the counterclaim. Section 20 (5) of the parties' lease provides for reimbursement only for "[a]ny legal fees and disbursements for legal actions or proceedings brought by Owner against You because of a Lease default by You or for defending lawsuits brought against Owner because of your actions." This action does not fall within this lease provision as this action was not brought against Mika because of plaintiff's actions but rather attempted to challenge the DHCR proceedings. Therefore, the counterclaim is wholly meritless and shall be dismissed.

Accordingly, it is


ORDERED that plaintiff's motion for reargument is DENIED;
and it is further

ORDERED and ADJUDGED that MIKA PROPERTIES' cross-motion for
summary judgment on its counter-claim is DENIED and pursuant to
CPLR 3212 MIKA PROPERTIES' counterclaim is DISMISSED, and the
Clerk is directed to enter judgment accordingly.

This is the decision and order of the court.

Dated: January 10, 2006

ENTER:

~~Debra A. James~~
DEBRA A. JAMES.S.C.
J.S.C.


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