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

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W. 54-7, LLC, Index No. 114175/04

Plaintiff,

- against-

SHELDON FARBER AND DIANE KNIGHT,

Defendants.

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JOAN A. MADDEN, J.:

In this action, plaintiff building owner moves for an order (1) granting summary judgment on its Verified Complaint, (2) dismissing defendants' counterclaims, and (3) sanctioning defendants for refusing to withdraw their counterclaims. Defendants/tenants oppose the motion and cross move to dismiss the complaint based on documentary evidence or, in the alternative, for a stay of the action pursuant to CPLR 2201 pending the determination of various appeals.

Background

Plaintiff is the owner of a building located at 162 West 54th Street, in Manhattan ("the Building"), which it purchased in November 1995. The Building is managed by Michael Edelstein and his wife, Florence Edelstein (together "the Edelsteins").[1] Defendants Sheldon Farber ("Farber") and Diane Knight ("Knight") have resided in Apartment 8-F since the early 1990's.

Since April 1998, plaintiff, the Edelsteins and defendants have been involved in various legal disputes. After failing in their efforts to terminate Farber's tenancy on the grounds that he

[1]Florence Edelstein states in her affidavit that her husband also own the Building, although defendants reject the statement. In any event, as the Edelsteins are not parties to this action, the court need not resolve the issue.

was a non-primary resident of the Building, in October 2000, plaintiff commenced an action against Farber and Knight, seeking a declaratory judgment as to defendants' status in the Building, an order of ejectment or a judgment of possession, and damages consisting of unpaid use and occupancy ("the L&T action") . In the L&T action, the court severed defendants' counterclaims and proceeded to trial in 2003 on plaintiff's declaratory judgment action.

By decision and order rendered on the record on October 17, 2003, Justice Shulman decided that defendants were rent-stabilized tenants entitled to the rights of possession and therefore denied plaintiff's request for ejectment of a judgment of possession as moot, and that plaintiff was not entitled to use and occupancy since such relief "is generally granted when one obtains and judgment of possession" (Decision at 6). However, Justice Shulman also wrote that his dismissal of the claim for use and occupancy was "without prejudice to plaintiff's commencing a plenary action for rent." Id. In addition, Justice Shulman found that "the record developed in this case entitles plaintiff as a matter of law to proceed with the Division of Housing and Community Renewal to set the legal regulated rent, based upon the fact that the court finds there was a sweetheart arrangement in this case between Farber and the predecessor owner which was economically detrimental to the plaintiff." Id. at 10-11. Justice Shulman also ruled that "I think in fairness going forward the court would direct that the defendant resume paying the last rent charged without prejudice to its readjustment. The very monthly rent you are seeking should be paid without prejudice. Starting next month (i.e. November 2003) Mr. Farber will pay that rent forthwith subject to DHCR addressing the application" Id. at 11. It appears from the record that the last rent charged was $484.698, and that defendants have paid rent based on this amount, with increases going forward since November 2003..

Subsequently, plaintiff initiated a proceeding before the DHCR for a determination of the legally regulated rent for defendants' apartment. On December 10, 2004, the DHCR's Rent Administrator rendered an Order Determining the Facts or Establishing Legal Regulated Rent, and set the legally regulated rent at $1,073, effective April 2004. Plaintiff is appealing the order, and the appeal is now sub judice.

In July 1999, Farber incorporated the New York State trade names used by the Edelsteins to conduct their business. As a result, in May 2001, the Edelsteins commenced an action for misappropriation of these trade names in violation of the Lanham Act and New York common law (the "Trade Name Action"). Farber asserted counterclaims in the Trade Name Action for the intentional infliction of emotional distress and/or harassment, slander and breach of quiet enjoyment. By decision and order dated December 7, 2004, this court dismissed the Edelsteins' complaint and also dismissed Farber's counterclaims with prejudice. Farber has filed a notice of appeal of the court's decision to the extent that his counterclaims were dismissed, but has not perfected his appeal.

In the meantime, on October 5, 2004, before both this court's decision in the Trade Name Action and the DHCR's determination setting the legally regulated rent, plaintiffs commenced this action based on Justice Shulman's decision and seeking use and occupancy/rent for the period between April 1998 through May 2003, totaling $29,499.90, based on a monthly rent of (1) $422.93 from April 1998 to December 1998, (2) $454.65 from January 1, 1999 to July 2000, and (3) $484.69 from August 2000 to May 2003. Defendants interposed an answer which included the same four counterclaims asserted in the Trade Name Action.

Plaintiff now moves for summary judgment on the complaint, arguing that it is

undisputed that defendants have not paid rent between April 1998 and May 2003, and that Justice Shulman's order in the L&T action entitled plaintiff to seek this relief. Furthermore, plaintiff asserts that since the counterclaims should be dismissed based on res judicata and collateral estoppel based on the dismissal with prejudice of the counterclaims in the Trade Name Action. Plaintiff seeks the amount of rent in the complaint without prejudice to amending the complaint for additional rent based a further determination of the DHCR.

In opposition, defendants argue that plaintiff cannot recover in this action as plaintiff has refused to accept rent and, in support of this argument, defendants submit copies of checks for the payment of rent in the amount of $391.82 in April 1998 and May 1998, and letters from plaintiff returning the checks and indicating that the rent could not be accepted since there was a legal action pending against defendants. Defendants also argue that plaintiff's claims are barred by the doctrine of res judicata and collateral estoppel as complaint seeks "use and occupancy." and Justice Shulman found in the L&T action that plaintiff's were not entitled to such relief. In addition, defendants assert that plaintiff's claims are time barred under CPLR 213, since this action was commenced in October 2004, which is more than six years after defendants tendered rent beginning in April 1998. Defendants also argue that amount sought for rent is based on inaccurate figures and unsupported by admissible evidence.[2]

Defendants also seek to stay this action pending the outcome of the appeal of the Rent

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[2]Defendants also assert that the amount of rent will be affected by a DHCR order which limited the establishment of maximum base rents due for the period between 2002-2003, based on a rat infestation problem at the Building. However, the order appears to be irrelevant here since it did not provide for a reduction in rent but, instead, denied plaintiff's application for maximum base increases in rent.

Administrator's determination and their appeal of the court's decision in the Trade Name Action, which dismissed their counterclaims. Defendants further contend that collateral estoppel does not apply to bar their counterclaims since they are appealing court's dismissal of the counterclaims in the Trade Name Action.

Discussion

On a motion for summary judgment, the proponent "must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case..." Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851, 852 (1985). Once the proponent has made this showing, the burden of proof shifts to the party opposing the motion to produce evidentiary proof in admissible form to establish that material issues of fact exist which require a trial. Alvarez v. Prospect Hospital, 68 N.Y.2d 320, 324 (1986).

Here, plaintiff has made a prima facie showing that is entitled to summary judgment as to liability based on the affidavit of Florence Edelstein, who as a managing agent for the premises, avers that defendants occupied to Apartment for the period between April 1998 and May 2003 and did not pay rent.

Moreover, with the exception of those claims for rent which, as indicated below, are barred by the six-year statute of limitations, defendants have not met their burden of establishing a material issue of fact. Notably, defendants do not deny that plaintiff has not been paid rent for the period at issue. In addition, although defendants submit evidence that they tendered rent for April 1998 and May 1998, plaintiff's refusal to accept the rent does not constitute a defense to this action, particularly as plaintiff had good cause for rejecting the tender of rent from

defendants, based on the pending legal proceeding. Greenburger v. Leary, 119 Misc2d 358 (Civ Ct New York Co. 1983). Specifically, the acceptance of rent waives any default by the tenant and constitutes an election by the landlord to continue the landlord-tenant relationship. See Atkin's Waste Materials, Inc. v. May, 34 NY2d 422 (1974). In any event, after Justice Shulman found that defendants were rent-stabilized tenants, he specifically found that plaintiff had a right to bring a plenary action for rent.

Next, contrary to defendants' argument, although Justice Shulman found that plaintiff was not entitled to use and occupancy, the relief sought in the complaint is not barred by collateral estoppel or res judicata since the complaint seeks not only use and occupancy but also rent. Furthermore, the defendants have not shown that a stay is warranted under the circumstances here.

On the other hand, certain of plaintiff's claims are barred by the six-year statute of limitations applicable to breach of contract actions under CPLR 213. "The general rule is that the statute of limitations in an action on contract begins to run at the time of the breach of the agreement." Benson v. Boston Old Colony Ins Co., 134 AD2d 214, 215 (1st Dept 1987), lv denied, 71 NY2d 801 (1988). "However, where a contract provides for continuing performance over a period of time, each breach may begin the running of the statute anew such that the accrual occurs continuously." Stalis v. Sugar Creek Stores, Inc., 295 AD2d 939, 940 (4th Dept 2002)(citation omitted); see also, Benson v. Boston Old Colony Ins Co., 134 AD2d at 215 (holding that insured's three separate applications for lost wage benefits under no-fault policy had separate accrual dates for breach of contract suit against insurer for failure to pay maximum benefits; accrual date was day each payment from the insurer was first overdue). In this action,

each month that defendants failed to pay rent gave rise to a new accrual date. Here, as the action was commenced on October 5, 2004, defendants' claims for rent due and owing for the period between April 1998 and October 1998 are time barred since these claims accrued more than six years prior to the commencement of this action.

Next, the court finds that defendants' counterclaims are barred under the doctrine of collateral estoppel. The doctrine of collateral estoppel prevents a party from relitigating an issue which has previously been decided against him in a prior proceeding in which he had a fair opportunity to fully litigate the issue. Gilberg v Barbieri, 53 N.Y.2d 285 (1981). The policies underlying the application of collateral estoppel are avoiding relitigation of a decided issue and the possibility of an inconsistent result. D'Arata v New York Central Mutual Fire Insurance Co., 76 N.Y.2d 659 (1990).

Here, there is no dispute that the counterclaims for the intentional infliction of emotional distress and/or harassment, slander and breach of quiet enjoyment, which this court dismissed in the Trade Name Action, are identical to those asserted here. Moreover, Farber had a full and fair opportunity to litigate the merits of the counterclaims in the Trade Name Action. In addition, although plaintiff was not a party to the Trade Name Action, it may assert assert collateral estoppel so long as "the party against whom estoppel is being asserted had a full opportunity to contest the issues." Schwartz v Public Administrator of the County of Bronx, 24 NY2d 65 (1969). Furthermore, contrary to Farber's position, "it is well established that the pendency of an appeal does not affect the use of an order or judgment as an estoppel." In the Matter of Capoccia, 272 AD2d 838 (3d Dept), lv dismissed, 95 NY2d 887 (2000)(citations omitted); Anonymous v Dobbs Ferry Union Free School District, 19 AD3d 522 (2d Dept 2005).

In any event, even absent collateral estoppel, the counterclaims must be dismissed as to both Farber and Knight as they are without merit for the reasons indicated in this court's decision in the Trade Name Action.

Specifically, the gravamen of the first and second counterclaims was for the intentional infliction of emotional distress, and these counterclaims did not state a claim as the alleged conduct was not "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious and utterly intolerable in a civilized society." *Murphy v American Home Products Corp.*, 58 NY2d 293, 303 (1983). In addition, to the extent the counterclaims are grounded in harassment, New York does not recognize such a cause of action. *See Jacobs v 200 East 36th Owners Corp.*, 281 AD2d 281 (1st Dept 2001); *Goldstein v. Tabb*, 177 AD2d 470, 471 (2d Dept 1991), *lv denied*, 80 NY2d 753 (1992).

The third counterclaim alleges that plaintiff Michael Edelstein embarrassed him when he said in the lobby of the building that Farber was a mother fu–er.[3]" The third counterclaim is not actionable as no special damages were shown, and the statements do not constitute slander per se. *See Aronson v Wiersma*, 65 NY2d 592, 594 (1985). Moreover, curse words and name calling are generally held not to constitute slander or slander per se. *See Depuy v St. John Fisher College*, 129 AD2d 972 (4th Dept), *appeal denied*, 70 NY2d 602 (1987).

The fourth counterclaim appears to be a claim for the breach of quiet enjoyment. Since defendants were found by Justice Shulman to be a lawful tenants of the building and defendant has not alleged that he has been actually or constructively evicted, there is no cognizable claim

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[3]Although the third counterclaim is made on behalf of both defendants there are no allegations of any slanderous statements directed at Knight.

based on the breach of the covenant of quiet enjoyment. *See Jacobs v 200 East 36th Owners Corp.*, 281 AD2d at 281. Thus, the counterclaims must be dismissed.

Next, although plaintiff is entitled to summary judgment as to liability, it has submitted insufficient proof to establish, as a matter of law, that it is entitled to the amounts sought in the complaint. Specifically, the only basis for the amount sought is an exhibit to the Verified Complaint listing the amount of rent due for each month, without any admissible evidence, such as a lease, or rent records to support these amounts. Moreover, Farber states in his affidavit that plaintiff has charged different amounts of rent than those alleged to be due and owing in the complaint. The court also notes that despite plaintiff's assertions otherwise, it is unclear from the record whether the DHCR's decision which is now on appeal is relevant to determining the amounts due and owing for rent in this action since DHCR set the legally regulated rent beginning in April 2004, and not for the period at issue here.

Accordingly, summary judgment is not warranted as to the amounts sought in the complaint.

Conclusion

In view of the above, it is

ORDERED that the motion for summary judgment is granted as to liability is granted with respect to the claims for rent for the period between November 1998 through May 2003; and it is further

ORDERED that plaintiff's claims for rent for the period between April 1998 and October 1998 are dismissed as time-barred; and it is further

ORDERED that defendants' counterclaims are dismissed; and it is further

ORDERED that plaintiff's request for sanctions is denied; and it is further

ORDERED that defendants' cross motion is denied; and it is further

ORDERED that a preliminary conference shall be held on February 2, 2006 at 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

A copy of this decision and order is being mailed by my chambers to counsel/parties.

DATED: January 24, 2006

J.S.C.