

Benitez v Neighborhood W. 126th St. LLC

2011 NY Slip Op 33817(U)

August 9, 2011

Sup Ct, New York County

Docket Number: 113675/2010

Judge: Emily Jane Goodman

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

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

PRESENT: EMILY JANE GOODMAN

PART 17

Index Number : 113675/2010
BENITEZ, PEDRO L.
 VS.
NEIGHBORHOOD WEST 126TH STREET
 SEQUENCE NUMBER : 001
 DISMISS

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. _____
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits -- Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion *And mds memo are*
decided per attached

FILED

AUG 12 2011

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/9/11

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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

[Handwritten signature]
J.S.C.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 17

FILED

AUG 12 2011

-----X
PEDRO BENITEZ,

Plaintiffs,

- against -

NEW YORK
COUNTY CLERK'S OFFICE
Index No. 113675/2010

NEIGHBORHOOD WEST 126TH STREET LLC,

Defendants.

-----X
EMILY JANE GOODMAN, J.S.C.:

Defendant moves to dismiss Plaintiff's cause of action for malicious prosecution and for legal fees, based on failure to state a claim because Defendant did not commence an action or proceeding which terminated in favor of Plaintiff. Although an administrative proceeding before DHCR was ultimately resolved in Plaintiff's favor, with a finding that Plaintiff was entitled to a rent stabilized lease, Defendant argues that because the proceeding was commenced by Plaintiff, a malicious prosecution cause of action is not stated. Moreover, although Defendant commenced a holdover proceeding against Plaintiff, which was "marked off" calendar in August 2009 (which Defendant characterizes as "pending" despite its admission that there is a current and active nonpayment proceeding), Defendant argues that it could not have acted with malice or lack of probable cause by commencing the holdover proceeding, because it was supported by DHCR's determination, initially in Defendant's favor.

Defendant also moves to dismiss the cause of action for punitive damages because it is not a separate claim, is merely an element of damages, and is, in any event, unsupported by the facts. Defendant further states that it should be entitled to an inquest on damages on its counterclaims because Plaintiff did not serve a reply to the counterclaims, as required under CPLR 3011.

Plaintiff cross moves for an extension of time to reply to the counterclaims under CPLR 2004 and CPLR 3012(d), and explains that the reply was not previously filed because settlement negotiations were pending. Plaintiff notes that there is a strong preference for decisions on the merits and cites a lack of prejudice. Plaintiff also explains that the malicious prosecution cause of action states a claim based on the holdover proceeding, which was commenced by Defendant with

malice because Defendant had no evidence to indicate that Plaintiff did not reside in the apartment with his brother, nor evidence to indicate that the brothers were unrelated. Plaintiff further maintains that the only reason why the holdover was marked off calendar in August 2009 and was never restored, was because of 9/7/10 DIICR decision, favorable to Plaintiff.

Discussion

On a motion to dismiss pursuant to CPLR 3211 (a) (7), the court must “accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (*Leon v Martinez*, 84 NY2d 83, 87-88 [1994]). However, “bare legal conclusions, as well as factual claims either inherently incredible or flatly contradicted by documentary evidence, are not presumed to be true and accorded every favorable inference” (*M & B Joint Venture, Inc. v Laurus Master Fund, Ltd.*, 49 AD3d 258, 260 [1st Dept 2008], *affd as mod* 12 NY3d 798 [2009] [internal quotation marks and citation omitted]). Where extrinsic evidence is submitted in connection with the motion, the appropriate standard of review “is whether the proponent of the pleading has a cause of action, not whether he has stated one” (*IIG Capital LLC v Archipelago, L.L.C.*, 36 AD3d 401, 402 [1st Dept 2007] [internal quotation marks and citation omitted]). Dismissal of a complaint pursuant to CPLR 3211 (a) (1) is proper where the documentary evidence “conclusively establishes a defense to the asserted claims as a matter of law” (*Leon*, 84 NY2d at 88).

A claim for malicious prosecution accrues when the underlying action which is the basis for the claim is terminated in the plaintiff’s favor by dismissal (*see e.g. Nunez v City of New York*, 307 AD2d 218, 219 [1st Dept 2003]; *Hessel v Goldman, Sachs & Co.*, 281 AD2d 247, 248 [1st Dept 2001]; *Spinale v Guest*, 270 AD2d 39, 40 [1st Dept 2000]). It requires that legal action be initiated by the defendant, with malice and without probable cause to believe it can succeed, along with a termination in plaintiff’s favor (*see Purdue Frederick Co. v Steadfast Ins. Co.*, 40 AD3d 285 [1st Dept 2007]).

Here, Defendant has not conclusively established its defense, as a matter of law. Defendant

has not established that the holdover proceeding cannot be effectively deemed a proceeding which terminated in Plaintiff's favor (and Defendant has provided no cases to support its argument), because the procceding was never restored as it would have necessarily resulted in a finding in favor of Plaintiff. Nor has Defendant, who has submitted no affidavits, conclusively established the lack of malice merely because it commenced the holdover proceeding at a time when DHCR found, apparently on incomplete evidence, that Plaintiff was not entitled to the protections of rent stabilization. Plaintiff has submitted evidence indicating the questionable nature of Defendant's failure to provide Plaintiff with a rent stabilized lease, and whether or not Defendant had the requisite intent cannot be established at this juncture. Nor can it be established that legal fees or punitive damages are not warranted as a matter of law, although Defendant is correct in maintaining that punitive damages are not a separate cause of action.

The cross motion for leave to serve a reply is granted (even though Plaintiff's attorney should have secured an extension during settlement negotiations), based on the Court's preference for deciding cases on the merits. In any event, Defendant has not demonstrated a prima facie case for a default judgment on its counterclaims and therefore, even if the Court had not granted an extension, that aspect of the motion would have to be denied.

For the foregoing reasons, it is hereby

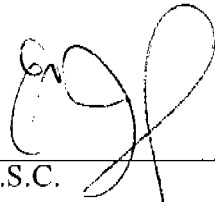
ORDERED that the motion is denied except to the extent that the Third Cause of Action (for punitive damages) is dismissed as a separate claim but is not dismissed from the WHEREFORE clause as an element of damages; and it is further

ORDERED that the cross motion is granted and Plaintiff may serve a reply to Defendant's counterclaim within 20 days after receipt of a copy of this Decision and Order.

This Constitutes the Decision and Order of the Court.

Dated: August 9, 2011

FILED
AUG 12 2011
NEW YORK
COUNTY CLERK'S OFFICE

ENTER: 

J.S.C.
3 **EMILY JANE GOODMAN**