

**Gattegno v Trustees of Columbia Univ. in the City of
N.Y.**

2012 NY Slip Op 30040(U)

January 11, 2012

Supreme Court, New York County

Docket Number: 400268/2011

Judge: Saliann Scarpulla

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

PRESENT: Saliann Scarpulla

PART 19

Index Number : 400268/2011

GATTEGNO, BENJAMIN
VS.
TRUSTEES OF COLUMBIA UNIVERSITY
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 _____

Gross Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED

JAN 11 2012

NEW YORK
COUNTY CLERKS OFFICE

Dated: 1/10/12

Saliann Scarpulla
J.S.C.

Check one: FINAL DISPOSITION

NON FINAL DISPOSITION

Check if appropriate: DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDGE

SETTLE ORDER/ JUDGE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CIVIL TERM: PART 19

-----X
BENJAMIN GATTEGNO,

Plaintiff,

Index No.: 400268/11
Submission Date: 10/19/11

- against-

THE TRUSTEES OF COLUMBIA UNIVERSITY
IN THE CITY OF NEW YORK S/H/A THE
TRUSTEES OF COLUMBIA UNIVERSITY AND
BAYA, INC.,

DECISION AND ORDER

Defendants.

-----X

For Plaintiff, *pro se*:
Benjamin Gattegno
9 Yale Ct.
Paramus, N.J.

For Defendant Columbia University:
Borah, Goldstein, Altschuler, Nahins & Goidel, P.C.
377 Broadway, 6th Floor
New York, NY 10013

Papers considered in review of this motion for summary judgment dismissing the complaint and summary judgment on counterclaim:

- Notice of Motion 1
- Aff in Opp 2
- Reply 3

FILED

JAN 11 2012

HON. SALIANN SCARPULLA, J.:

NEW YORK
COUNTY CLERK'S OFFICE

In this action to recover damages for, *inter alia*, tortious and wrongful loss of home and property, defendant The Trustees of Columbia University in the City of New York s/h/a The Trustees of Columbia University ("Columbia") moves for summary judgment dismissing the complaint insofar as asserted against it and for summary judgment on its first counterclaim for unpaid rent in the amount of \$8,532.98.

Columbia owns the building located at 601 West 112th Street ("the building"). Plaintiff Benjamin Gattegno ("Gattegno") resided in apartment 6E in the building pursuant

to a rental agreement dated August 1, 1977 for a period of one year, extended by written renewals, the most recent ending on December 31, 2005. Thereafter, the tenancy continued on a month to month basis. At that time, Columbia commenced a holdover proceeding against Gattegno, alleging that Gattegno's hoarding and nuisance conduct was causing dangerous and unhealthful conditions in the building.

Columbia had also commenced a non-payment proceeding against Gattegno, which was resolved by stipulation of settlement dated July 5, 2006, in which the parties agreed to a money judgment in the amount of \$15,634.15 with Gattegno paying (1) \$1,000 on July 15, 2006; (2) \$500.00 by July 31, 2006; and (3) the balance of \$14,134.15 to be paid in \$500.00 increments until the judgment was completely paid. From July 2006 through March 2007, Gattegno made payments covering the rent, plus extra toward the judgment. According to Columbia, from April 2007 through January 2008 (when he was ultimately evicted), he owed \$8,532.98.

According to Columbia, Gattegno was given multiple opportunities to cure the nuisance condition in the apartment but failed to do so, and on October 16, 2006, judgment of possession and warrant of eviction were issued. On January 26, 2007, Gattegno filed an order to show cause to vacate the judgment and stay the eviction, and subsequently, the parties entered into a stipulation whereby Gattegno was given the opportunity to cure the conditions. Gattegno agreed to a probationary period through August 22, 2008, during which time, *inter alia*, he would refrain from the complained of conduct and Columbia

would be granted access to his apartment to inspect. In the event of default, the warrant would execute after service of the Marshal's notice. Gattegno would be permitted to obtain an order to show cause for the limited purpose to disputing that a default had occurred, and the court would determine whether a default had occurred.

Gattegno violated the stipulation and the Marshal's notice of eviction was served on April 16, 2007. On April 24, 2007, Gattegno filed an order to show cause to vacate the judgment. He failed to appear at the return date, and the court denied the order to show cause and permitted execution of the warrant with further notice. On May 29, 2007, Gattegno filed another order to show cause to vacate the judgment for his failure to appear. On May 30, 2007, the court issued an order directing Gattegno to grant access to Columbia on June 1, 2007 and directing him to remove his property from the hallways and yard.

After several adjournments and additional orders to show cause filed by Gattegno, a sixth order to show cause was filed by Gattegno alleging remediation. That motion was denied at a hearing held on January 29, 2008, whereby the court determined,

[Gattegno] did not effectuate a cure by moving the effects of his apartment into the public hallways and other common areas of the building. It may be that [Gattegno] suffers from psychological problems which - as [Gattegno] contends - have prevented him from dealing with the issues raised in this proceeding...Nonetheless, the court cannot ignore the very real and immediate hazards to the health, safety and welfare of other residents of the building. Accordingly, [Gattegno's] motion is denied as set out above.

On January 29, 2008, the Marshal executed on the warrant and defendant moving company Baya, Inc. began packing and moving Gattegno's property into its trucks and transported it to a warehouse. Columbia paid Baya for packing and moving plus 60 days of storage. In February 2008, Baya notified Gattegno that he was responsible for monthly storage charges starting at the end of the month. In July 2008, Baya served Gattegno with written notice that his property was scheduled to be auctioned on August 15, 2008.

Gattegno again filed an order to show cause, on August 7, 2008, requesting to be restored to possession. The court denied the motion, finding that the motion was not timely served, it was also untimely because notice of entry of the eviction order was served on January 31, 2008, and in any event, Gattegno had not offered any explanation for the six month delay in seeking this restoration.

Gattegno then commenced this action alleging that he suffered mental injury due to Columbia's continued harassment, including placement of a "hidden camera" outside of his apartment; he was wrongfully removed from his home based on "perjurious testimony" by Columbia employees and wrongful reliance on Columbia employee Monica Kuth; and Columbia and Baya refused to give him access to his property. Gattegno is not seeking to return to the apartment, rather, he is seeking relief for "tortious and wrongful loss of property and home."

Columbia now moves for summary judgment dismissing the complaint insofar as asserted against it and for summary judgment on its counterclaim in the amount of

\$8,532.98. In support of the motion, Columbia submits the affidavit of Director of Leasing Services, University Apartment Housing at Columbia University, Monica Kuth (“Kuth”). With regard to the tortious loss of home and property claim, Columbia argues that the claim is time barred, it is barred by res judicata and collateral estoppel, and in any event, Columbia never accepted delivery or took possession of Gattegno’s property, nor did it breach any duty owed to Gattegno with regard to the property because it was entitled to arrange for removal and storage of the property in connection with the eviction. With regard to the emotional distress claim, Columbia argues that the claim is time barred, and in any event, Gattegno has not alleged facts sufficient to support a claim for emotional distress.

In opposition, Gattegno first argues that his claim is not barred by res judicata or collateral estoppel because no “hearing on the merits” was held. Rather, the Housing Court was misled during a hearing on an order to show cause where the court only heard false testimony of three employees. He claims that he was not afforded full and fair opportunity to litigate the issue.

He further argues that: (1) the statute of limitations did not run because, *inter alia*, even though the action was initiated on February 4, 2011, Columbia was still arranging the move of some of Gattegno’s belongings on February 12, 2008 and engaged in communications with Gattegno until September 2008; (2) Columbia was responsible for

[* 7]

the actions of Baya by the “chain of causation”; (3) Columbia is not entitled to any monetary amount on its counterclaim; and (4) he suffered mental and emotional distress.

Discussion

Columbia first argues that Gattegno’s claim for “tortious loss of home” must be dismissed. The Housing Court, in its January 29, 2008 decision, found that Gattegno’s eviction from his home was warranted. Contrary to Gattegno’s contention, that decision was reached after a hearing, in which he was afforded a full and fair opportunity to be heard. Furthermore, the Housing Court considered Gattegno’s applications to be restored to possession, gave him ample opportunities to cure the deficiencies in his apartment, and ultimately reached the final determination to evict him. Gattegno has submitted no evidence to support his allegations that he was wrongfully evicted. This court will not disturb the Housing Court’s determination that eviction was warranted.

Second, Columbia argues that Gattegno’s claim for “tortious loss of property” must be dismissed. The evidence submitted establishes that after the eviction, Columbia retained Baya to remove Gattegno’s personal property from the apartment. Columbia paid Baya for the removal, and paid for two months of storage of the property. Thereafter, Baya gave Gattegno notice that he had to pay for future storage, and gave Gattegno notice when, ultimately, the property was going to be sold. Gattegno has not alleged any facts sufficient to state a claim for tortious loss of property. Gattegno claims that he made numerous attempts to access his personal property through phone calls, emails and faxes to

Baya and Columbia but was denied access. However, Columbia arranged for removal of the personal property immediately after the Marshal executed on the warrant by having Baya come and begin removal of the property. Any wrongful denial of access to the property by independent contractor Baya can not be imputed to Columbia. *See generally Fernandez v 707, Inc.*, 85 A.D.3d 539 (1st Dept. 2011).

Third, Columbia properly maintains that Gattegno's infliction of emotional distress claim is barred by the statute of limitations. Whether Gattegno is claiming intentional infliction of emotional distress, which is governed by a one year statute of limitations, or negligent infliction of emotional distress, which is governed by a three year statute of limitations, the claim is time barred. *See CPLR 215; Yokley v. Henry-Clark Assocs.*, 170 Misc. 2d 779 (App. Term 2nd Dept. 1996). Using the date of eviction, January 29, 2008 as the date of accrual of this claim – even though Gattegno asserts that the distress was initially inflicted years before when a hidden surveillance camera was installed outside of his apartment – the statute of limitations would have run before this action was commenced on February 3, 2011.

In any event, Gattegno fails to state a claim for intentional infliction of emotional distress or negligent infliction of emotional distress. None of the behavior complained of rises to the level of conduct 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 community” to establish intentional infliction of emotional

distress, and insufficient facts have been alleged to support a claim that Columbia owed Gattegno a duty, and that a breach of that duty directly resulted in serious and verifiable mental or emotional harm to establish negligent infliction of emotional distress. *Salibello v 4Kids Entertainment, Inc.*, 31 Misc. 3d 150A, *2 (App. Term 1st Dept. 2011); *see Bernstein v East 51st St. Dev. Co., LLC*, 78 A.D.3d 590 (1st Dept. 2010).

Finally, the court finds that Columbia has met its burden of establishing entitlement to summary judgment on its counterclaim for unpaid rent. A so-ordered stipulation is a contract between the parties thereto and as such, is binding on them and "will be construed in accordance with contract principles and the parties' intent." *Aivaliotis v. Continental Broker-Dealer Corp.*, 30 A.D.3d 446, 447 (2006); *see Sharp v. Stavisky*, 221 A.D.2d 216 (1st Dept. 1995). Columbia has submitted evidence establishing that Gattegno did not fulfill his obligations under the stipulation of settlement executed by the parties on July 5, 2006. According to Kuth, from the time period of April 2007 through January 2008, when Gattegno was ultimately evicted, he owed \$8,532.98 in unpaid rent. Gattegno fails to submit evidence sufficient to raise an issue of fact disputing whether he owes that amount.

In accordance with the foregoing, it is hereby

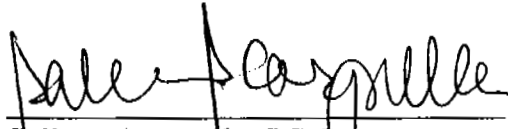
ORDERED that defendant The Trustees of Columbia University in the City of New York s/h/a The Trustees of Columbia University's motion for summary judgment dismissing the complaint insofar as asserted against it is granted and the action is severed and shall continue as to the remaining defendant; and it is further

ORDERED that defendant The Trustees of Columbia University in the City of New York s/h/a The Trustees of Columbia University's motion for summary judgment on its first counterclaim for unpaid rent in the amount of \$8,532.98 is granted and the Clerk of the Court is directed to enter judgment in favor of defendant The Trustees of Columbia University in the City of New York s/h/a The Trustees of Columbia University and against plaintiff Benjamin Gattegno in the amount of \$8,532.98.

This constitutes the decision and order of the Court.

Dated: New York, New York
January 9, 2012

ENTER:


Saliann Scarpulla, J.S.C.

FILED

JAN 11 2012

NEW YORK
COUNTY CLERK'S OFFICE