

Lapin v Blair Ventures LLC

2012 NY Slip Op 33421(U)

August 13, 2012

Sup Ct, New York County

Docket Number: 150750/12

Judge: Cynthia S. Kern

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: CYNTHIA S. KERN
J.S.C.

PART 55

Index Number : 150750/2012
LAPIN, ALEX
vs
BLAIR VENTURES LLC
Sequence Number : 001
DISMISS

INDEX NO. 150750/12
MOTION DATE _____
MOTION SEQ. NO. 01

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

is decided in accordance with the annexed decision.

is decided in accordance with the annexed decision.

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

Dated: 8/13/12

_____, J.S.C.

CYNTHIA S. KERN

- 1. CHECK ONE: CASE DISPOSED NONFINAL DISPOSITION
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: Part 55

-----X
ALEX LAPIN,

Plaintiff,

Index No. 150750/12

-against-

DECISION/ORDER

BLAIR VENTURES LLC,

Defendant.

-----X
HON. CYNTHIA S. KERN, J.S.C.

Recitation, as required by CPLR 2219(a), of the papers considered in the review of this motion for : _____

Papers	Numbered
Notice of Motion and Affidavits Annexed.....	<u>1</u>
Answering Affidavits.....	<u>2</u>
Cross-Motion and Affidavits Annexed.....	_____
Answering Affidavits to Cross-Motion.....	_____
Replying Affidavits.....	_____
Exhibits.....	<u>3</u>

Plaintiff commenced the instant action against defendant Blair Ventures LLC (“Blair”) seeking damages for personal injuries he allegedly sustained when he fell down a staircase in a building owned by defendant. Plaintiff now moves for an Order pursuant to Civil Practice Law & Rules (“CPLR”) § 3211(b) dismissing defendant’s tenth affirmative defense claiming that plaintiff’s summons and complaint is a nullity since it was filed after the filing of a voluntary bankruptcy petition in federal court. For the reasons set for the below, plaintiff’s motion is granted.

The relevant facts are as follows. On January 18, 2012, plaintiff allegedly sustained injuries when he fell down a staircase in a building owned by defendant located at 450 Audubon

Avenue, New York, New York (the “building”). Plaintiff commenced the instant action with the filing of a summons and verified complaint on March 13, 2012. On April 12, 2012, plaintiff’s attorney was informed by defendant’s counsel that defendant had filed a voluntary petition under Chapter 11 of the Bankruptcy Code on February 14, 2012 and thus, an automatic stay was in place since that date. Until that date, plaintiff alleges that he was unaware of any pending bankruptcy proceeding involving defendant. When plaintiff learned of the pending bankruptcy proceeding and stay, he took no further actions with regard to prosecuting the instant case.

On May 7, 2012, plaintiff filed a motion with the United States Bankruptcy Court for the Southern District of New York requesting that the court lift the automatic stay pursuant to the provisions of 11 U.S.C. § 362(d)(1). All the parties listed in defendant’s bankruptcy petition were served with a copy of the motion. The parties did not oppose the motion. Thus, on June 15, 2012, the Bankruptcy Court granted plaintiff’s motion and ordered the lift of the automatic stay. On June 20, 2012, defendant interposed an answer, asserting as its tenth affirmative defense that “plaintiff’s action was commenced after the defendant filed for bankruptcy thereby triggering the law which precluded plaintiff’s commencement of an action. Plaintiff’s summons and complaint are therefore in violation of law and a nullity.”

Pursuant to 11 U.S.C. § 362(a)(1), “...a petition filed under...this title...operates as a stay, applicable to all entities, of – (1) the commencement or continuation...of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title.” “[A]cts taken in violation of the stay may be voided in appropriate circumstances where they have prejudiced the

other parties to the bankruptcy proceeding.” *International Fid. Ins. Co. v. European Am. Bank*, 129 A.D.2d 679 (2d Dept 1987). However, courts have found that the debtor will not be prejudiced where the party in violation of the stay “ceased prosecution of the action when informed of the bankruptcy proceeding” and either waited until the termination of the bankruptcy proceeding to prosecute the case or moved the Bankruptcy Court to lift the stay. *Id.* at 680. In such a case, the voidable act may be deemed proper *nunc pro tunc*.

In the instant case, plaintiff’s motion for an order pursuant to CPLR § 3211(b) dismissing defendant’s tenth affirmative defense is granted. Although plaintiff filed his summons and complaint against defendant in violation of the automatic stay pursuant to 11 U.S.C. § 362(a)(1), plaintiff did so when he was unaware of the pending bankruptcy proceeding and the automatic stay. Further, once plaintiff was informed of the stay, he ceased prosecution of the action and instead moved the Bankruptcy Court to lift the stay in order to proceed with the instant case. As the motion was unopposed, the Bankruptcy Court lifted the stay. Thus, as the defendant debtor was not prejudiced by the commencement of the instant action after it had already filed for bankruptcy, plaintiff’s summons and complaint filed on March 13, 2012 is deemed filed *nunc pro tunc* and plaintiff’s motion to dismiss defendant’s tenth affirmative defense is granted.

Accordingly, plaintiff’s motion to dismiss defendant’s tenth affirmative defense is granted. This constitutes the decision and order of the court.

Date:

8/13/12

Enter: _____

egk
J.S.C.

CYNTHIA S. KERN
J.S.C.