Disp ____ Dec __x__ Seq. # _8__ Type _dismiss_____

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF WESTCHESTER

PRESENT: HON. LINDA S. JAMIESON

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GREGORY P. SCIALDONE,

Plaintiff,

-against-

STEPPING STONES ASSOCIATES, L.P., and DEROSA BUILDERS, INC.,

Defendants.

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Index No. 12514/2011

DECISION AND ORDER

The following papers numbered 1 to 3 were read on this motion:

Paper	Number
Notice of Motion, Affirmation and Exhibits	1
Affirmation and Exhibits in Opposition	2
Reply Affidavit and Exhibits	3

Defendants bring their motion seeking to dismiss the Amended Complaint[1] - all 23 causes of action of it. This case arises out of plaintiff's ire over a parking spot at his rental apartment building in White Plains. Plaintiff is a rent-stabilized tenant in the building known as Stepping Stones, and has been for

[1]Plaintiff argues that this motion is improper because defendants already moved to dismiss the first complaint in this action. The Court disagrees. This motion to dismiss is based on a different, amended complaint. *See generally Biscone v. JetBlue Airways Corp.*, 957 N.Y.S.2d 361 (2d Dept. 2012). Moreover, it promotes judicial economy for a court to dispose of cases when it may.

approximately 25 years. One parking spot came with the apartment unit. Plaintiff does not pay for the first parking spot.[2]

At some point plaintiff asked for a second spot, and it was given to him at a reduced rent. (Plaintiff and the DeRosas are relatives; according to defendants, family goodwill - plainly long-gone - may have accounted for certain accommodations that defendants had extended to plaintiff over the years.) In early 2009, plaintiff sought a third parking spot from defendants. Defendants agreed to let plaintiff have a third parking spot, at a reduced rent, on a month-to-month basis. There is no dispute that the contract that plaintiff signed[3] clearly states that the parking spot is on a month-to-month basis.

In early March 2011, defendants told plaintiff that they were terminating the month-to-month lease for the third parking spot, effective April 30, 2011. Defendants claim that they offered plaintiff a third parking spot at a nearby building. They also claim that they asked plaintiff whether he wanted to keep the third parking spot, and instead surrender one of his other two parking spots, but plaintiff chose to surrender the

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[2]The issue of whether or not plaintiff **should** pay for this first parking spot is not before the Court.

[3]Although plaintiff argues that he never signed the parking application attached to the motion papers, it is clear, from a review of the many letters submitted to the Court, that the parking application was signed by plaintiff's wife. While the application is signed "T. Scialdone," rather than "T. Gugliotta," the "T." is very distinctive. The Court thus concludes that plaintiff - by his wife/counsel - signed the application. *See* CPLR § 4536; *Brown v. Estate of Terry*, 77 A.D.3d 1050, 909 N.Y.S.2d 769 (3d Dept. 2010).

third parking spot. Thereafter, plaintiff filed a complaint with the New York State Homes & Community Renewal ("HCR"). HCR ruled that the third parking spot was an "ancillary service," and that defendants must restore the spot to plaintiff. Defendants have appealed that determination. Neither party submits any authority to the Court which indicates that this Court is bound by the HCR's determination.[4] Indeed, this is because it is well-settled that "Administrative determinations are binding on the parties and the courts until either vacated by the issuing agency or set aside upon judicial review." *Katz 737 Corp. v. Cohen*, 957 N.Y.S.2d 295 (1st Dept. 2012).

Having reviewed all of the voluminous papers submitted to the Court on this motion, the Court finds that both parties have larded their papers with issues that are not presently before the Court. Those extraneous issues shall not be addressed herein. Turning to the relevant issues, certain things are clear to the Court. First, there is no evidence that suggests that plaintiff had a **right** to the **third** parking spot. Plaintiff was, for

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[4]Plaintiff argues that a previous decision by the HCR's predecessor, the Division of Housing and Community Renewal, in a 1989 case entitled *Matter of Gary Greenberg v. J.S.De Management*, DRO Doc. No. 44243, "is binding upon the defendants in all respects, in all courts and tribunals and for all time. . . ." All that that decision finds is that "garage parking is included in the base rent for the subject apartment," and that that plaintiff had been overcharged. It does not discuss how many spots a tenant is entitled to, or what a month-to-month tenacy means. As there is no disagreement that plaintiff here is entitled to at least one parking spot - perhaps even the second one - the *Greenberg* case is irrelevant.

whatever reason, granted a month-to-month lease for that spot. That lease could be terminated with one month's notice. *See* Real Property Law § 232-b ("a monthly tenancy or tenancy from month to month of any lands or buildings located outside of the city of New York may be terminated by the landlord or the tenant upon his notifying the other at least one month before the expiration of the term of his election to terminate."). The lease for the third parking spot was validly terminated. Plaintiff thus has no right to retain that spot. Any cause of action premised on plaintiff's right to that spot must thus be dismissed, as a matter of law. That means that the First, Seventeenth and Twenty-Second Causes of Action, for constructive eviction, retaliatory eviction and wrongful eviction, respectively, are dismissed, since plaintiff cannot be evicted from something to which he has no right. The Second Cause of Action must also be dismissed, based on the same principle. The Third Cause of Action is also dismissed. Plaintiff has no right to the third parking spot; plaintiff should not be paying for a parking spot to which he is not entitled. That being said, the Court finds that there is no basis for defendants to reject plaintiff's rent for his apartment or his other two parking spots.

The Sixth Cause of Action, for a declaration that plaintiff is entitled to the three parking spots, is also dismissed. The Court has already determined that plaintiff has no right to spot 11-OF, the third spot. There is no ripe controversy as to the

other two spots, which plaintiff presently possesses, without challenge. The Court must also dismiss the Fourteenth Cause of Action, which argues, among other things, trespass. Since plaintiff has no right to the third parking spot, there is no claim for trespass. Nor does the Fifteenth Cause of Action stand. There can be no quiet enjoyment of something to which plaintiff has no right.

Turning to the fraud cause of action, the Sixteenth, the Court finds that it is inadequate as a matter of law. Plaintiff has not alleged any reliance on any representations by defendants; merely stating that plaintiff relied on certain misrepresentations is inadequate. Although plaintiff spends multiple pages detailing the myriad alleged misrepresentations, at no point does he detail any definitive reliance on those many misrepresentations. *See* pages 65-81 of the opposition papers.

Similarly, the Twelfth Cause of Action, for the intentional infliction of emotional distress, must be dismissed as a matter of law. Nothing alleged by plaintiff, despite his characterization, is "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency." *McGovern v. Nassau County Dept. of Social Services*, 60 A.D.3d 1016, 876 N.Y.S.2d 141 (2d Dept. 2009). The Thirteenth Cause of Action must also be dismissed, because there is no common law claim for harassment. *Mago, LLC v. Singh*, 47 A.D.3d 772, 851

N.Y.S.2d 593 (2d Dept. 2008). Any such claims for harassment that are before the HCR remain before that forum, until such time as the HCR finally determines them.

The Eighteenth Cause of Action, for deceptive acts pursuant to General Business Law Section 349, must also be dismissed. As the Court of Appeals has held, General Business Law § 349 "declares unlawful deceptive acts or practices in the conduct of any business. To successfully assert a section 349 ... claim, a plaintiff must allege that a defendant has engaged in (1) consumer-oriented conduct that is (2) materially misleading and that (3) plaintiff suffered injury as a result of the allegedly deceptive act or practice." *City of New York v. Smokes-Spirits.Com, Inc.*, 12 N.Y.3d 616, 883 N.Y.S.2d 772 (2009). Here, there was no "consumer-oriented conduct" that was directed to the broader public at large. *Yellow Book Sales and Distribution Co., Inc. v. Hillside Van Lines, Inc.*, 98 A.D.3d 663, 950 N.Y.S.2d 151 (2d Dept. 2012).

There is no freestanding cause of action for damages. The Nineteenth Cause of Action is thus dismissed. The Twenty-First Cause of Action, which alleges that 10 off-street guest parking spaces and the roof are "ancillary services" is also dismissed, as it is not based on any legal principles. There is also no cause of action under New York law for the Court to determine

that plaintiff has a right to file a DHCR complaint. The Twenty-Third Cause of Action is thus dismissed.

The Fourth Cause of Action seeks an injunction barring defendants from bringing any summary proceeding against plaintiff, aside from the nonpayment of rent. This is untenable on its face. If plaintiff were to violate the law, or a standard provision of his lease such that a summary proceeding is warranted, the Court cannot preclude defendants from doing so. This cause of action must thus be dismissed. The Fifth Cause of Action, seeking to preclude defendants from declaring a parking default, is also untenable as a matter of law.

As an aside, plaintiff argues throughout his papers that Justice Colabella did rule on certain issues that were before him previously. *See, e.g.*, paragraph 9 of the Affirmation of Theresa M. Gugliotta (noting that defendants' motion "attempts to revisit issues already fully briefed, already considered by the Court and decided. . . . Nothing has changed."; paragraph 10 ("issues fully briefed and determined by Justice Colabella"); paragraphs 68 through 76. According to plaintiff himself, **none** of these issues may be relitigated on this motion. Specifically, in plaintiff's first motion in this case, filed on July 14, 2011, plaintiff sought certain relief that is identical to the relief sought in the complaint. For example, paragraphs b (enjoin defendants from taking any steps to commence a summary

proceeding); c (enjoin defendants from refusing to accept rent); and d (enjoin defendants from taking any steps to evict plaintiff from possession of the three parking spaces) all seek certain injunctive relief duplicative of the relief sought in the complaint. In his February 9, 2012 Decision and Order (the "Injunction Decision") resolving plaintiff's motion (among others), Justice Colabella denied plaintiff's requests for injunctive relief, stating that "Plaintiff has failed to demonstrate a sufficient likelihood of success on the merits, the absence of an available legal remedy or irreparable injury in the absence of injunctive relief. In addition, plaintiff has failed to establish that the balance of equities warrants such relief." To the extent that plaintiff argues that the Court held that the injunction was denied because the HCR was still considering the matter, the Court disagrees. That is not what the Injunction Decision states at all. The Injunction Decision merely notes that certain other issues are not yet final before the HCR.

As stated, plaintiff argues vociferously that certain issues have already been finally determined by Justice Colabella in the Injunction Decision, and may not be relitigated here. While it is true that Justice Colabella's determination on the preliminary injunction in the Injunction Decision is not law of the case, *Kaplan v. Queens Optometric Associates, P.C.*, 293 A.D.2d 449, 739 N.Y.S.2d 461 (2d Dept. 2002), the Court finds that plaintiff is precluded from arguing that the Injunction Decision is binding as

to defendants, but not binding as to himself. In any event, even if the Court were to ignore the Injunction Decision entirely, it would still find, based on a review of all of the documents submitted on this motion, that plaintiff's causes of action seeking injunctions must fail, as a matter of law. This is because plaintiff has no likelihood of success on the merits, since he has no right to the parking spot; and there is no absence of a legal remedy, since plaintiff could be compensated with money damages if he were able to prevail (which he cannot). For this reason as well, plaintiff's causes of action for injunctions, listed above, must also be dismissed.

Having reviewed each cause of action of the Amended Complaint, the Court finds that the Seventh, Eighth, Ninth, Tenth, Eleventh and Twentieth Causes of Action remain. Some of these may be appropriately decided by the HCR; the Court expresses no opinion on this.

As this case is presently in the Compliance Part, the parties are directed to contact that Part to request their next appearance date.

The foregoing constitutes the decision and order of the Court.

Dated: White Plains, New York
February 27, 2013

HON. LINDA S. JAMIESON
Justice of the Supreme Court