

Velazquez v Leeds

2018 NY Slip Op 31137(U)

June 5, 2018

Supreme Court, New York County

Docket Number: 154851/2017

Judge: Robert D. Kalish

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ROBERT D. KALISH PART IAS MOTION 29EFM

Justice

ISRAEL VELAZQUEZ and JASMINE VELAZQUEZ,
Plaintiffs,

INDEX NO. 154851/2017
MOTION DATE 06/05/2018
MOTION SEQ. NO. 002

- v -

ARTHUR LEEDS, GRADY, INC., LEEDS ASSOCIATES, LLC,
"EDDIE" LOPEZ, "JOHN & JANE DOES I-X", DANNY WEINHAM,
NYC MARSHAL and "RICHARD & RENEE ROE(S) I-X",

DECISION AND ORDER

Defendants.

The following e-filed documents, listed by NYSCEF document number (Motion 002) 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32

were read on this motion to/for DISMISSAL

Motion by Defendant Danny M. Weinheim, City Marshall, to dismiss the complaint pursuant and the cross-claims against him in their entirety is granted for the reasons stated herein:

BACKGROUND

The instant action has been brought to recover for damage to personal property that allegedly occurred during a dispossession of Plaintiffs Israel Valazquez and Jasmine Velazquez from their apartment that took place on January 15, 2015. Said "legal dispossession" was carried out pursuant to a warrant of eviction, dated December 18, 2014. (Affirm. in Supp., Ex. B [Warrant of Eviction].)

The warrant of eviction listed two options for effecting the dispossession: "legal possession" or "eviction." (Warrant of Eviction.) "Legal possession" was checked off, which according to the New York City Marshals Handbook of Regulations occurs when "the landlord indicates that he or she desires mere possession of the property rather than having the premises delivered in broom clean condition." (Affirm. in Supp., Ex. F [NYC Marshals Handbook] § 6-4.) Defendant Weinheim states in his affidavit, that, pursuant to the Handbook, "when I perform a legal possession I am turning over the property in the apartment to the custody and control of the landlord." (Weinheim Aff. ¶ 4.) Pursuant to the Handbook, the following provision was signed at the bottom of the warrant of eviction:

"Possession of the premises with the contents intact is hereby acknowledged. The petitioner accepts responsibility for all property on the premises, releases the marshal from any liability, and agrees to hold the marshal harmless from any action resulting from the execution of this warrant."

(Id.) In addition, Defendant Weinheim states that the landlord signed an inventory that contains a signature right below the following provision:

“Possession of the tenant’s premises with the contents intact is hereby acknowledged by the undersigned. The landlord and/or his agent(s) assumes responsibility for all the property on the premises, and releases the marshal from any liability therefore. Further, the landlord and/or his agent(s) agrees to save the marshal harmless from any liability resulting from the enforcement of this warrant including but not limited to reimbursement for reasonable counsel fees and costs and disbursements in any action arising therefrom.”

(Affirm. in Supp., Ex. E [Inventory].)

DISCUSSION

I. The Complaint Is Dismissed as Untimely

Defendant Weinheim moves to dismiss the complaint in its entirety as against himself on the grounds that Plaintiffs failed to timely commence the instant action with within the one-year statute of limitations, pursuant CPLR 215.

CPLR 215 states as follows:

“The following actions shall be commenced within one year:

1. an action against a sheriff, coroner or constable, upon a liability incurred by him by doing an act in his official capacity or by omission of an official duty, except the non-payment of money collected upon an execution[.]”

(CPLR 215.) The Court of Appeals has held that the one-year statute of limitations applies to City Marshals as well as sheriffs. (*Jemison v Crichlow*, 74 NY2d 726, 728 [1989].)

Here, Plaintiffs filed the summons and complaint on May 25, 2017, more than one year after Defendant Weinheim effected a legal dispossession of them from their apartment on January 15, 2015. As such, Plaintiff’s complaint was not filed within the one-year statute of limitations, and, accordingly, must be dismissed.

The Court, here, notes that Plaintiff’s counsel filed an untimely, two-page affirmation in opposition, in which Plaintiff requests that this Court “deny Mr. Weinheim’s pending motion because Mr. Weinheim must remain in this action as a necessary party (CPLR 1001) and fact witness.” (Plaintiff’s Affirm in Opp. ¶ 4.) Furthermore, even if this Court were to consider these untimely submitted papers, Plaintiff cites no authority and makes no valid argument for why it should be allowed to commence an action beyond the applicable one-year statute of limitations.

II. The Cross-Claims Against Defendant Weinheim Must Also Be Dismissed Pursuant to the Indemnity Provisions Signed by the Landlord's Representative

Defendants Arthur Leeds, Grady, Inc. Leeds Associates, LLC and "Eddie" Lopez (collectively, Landlord Defendants) filed an answer in which they assert cross-claims against Defendant Weinheim seeking indemnity and contribution for any liability that they are exposed to as a result of the instant litigation.

Here, Defendant Weinheim puts forth two signed writings by the Landlord Defendants—the Warrant of Eviction (Ex. B) and Inventory (Ex. F)—wherein the Landlord Defendants agreed to accept responsibility for the property in Plaintiffs' apartment agreed to "hold the marshal harmless" from any action relating to the execution of the warrant.

In opposition, Landlord Defendants do not challenge Defendant Weinheim's assertion that they signed the aforesaid provisions agreeing to hold Defendant Weinheim harmless. Rather, Landlord Defendants contend that "the instant motion is premature, as plaintiff has yet to serve a bill of particulars." (Landlord Def. Affirm in Opp. ¶ 3.)

The Court finds, however, that the instant motion is not premature as Defendant Weinheim presents documentary evidence that is "explicit and unambiguous" and "conclusively establishes a defense to the [Landlord Defendants' cross-]claims as a matter of law." (*Dixon v 105 W. 75th St. LLC*, 148 AD3d 623, 626–27 [1st Dept 2017].)

CONCLUSION

Accordingly, it is hereby

ORDERED that the motion of Defendant Danny M. Weinheim, City Marshall, to dismiss the complaint herein is granted and the complaint is dismissed in its entirety as against said defendant, and all cross claims by and against said Defendant are dismissed, with costs and disbursements to said defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of said defendant; and it is further

ORDERED that the action is severed and continued against the remaining defendants; and it is further

ORDERED that the caption be amended to reflect the dismissal and that all future papers filed with the court bear the amended caption; and it is further

ORDERED that counsel for the moving party shall serve a copy of this order with notice of entry upon the Clerk of the Court (60 Centre Street, Room 141B) and the Clerk of the General Clerk's Office (60 Centre Street, Room 119), who are directed to mark the court's records to reflect the change in the caption herein:

ISRAEL VELAZQUEZ and JASMINE VELAZQUEZ,
Plaintiffs,

- v -

ARTHUR LEEDS, GRADY, INC., LEEDS ASSOCIATES, LLC, "EDDIE" LOPEZ, "JOHN & JANE DOES I-X", and "RICHARD & RENEE ROE(S) I-X",
Defendants.

And it is further

ORDERED that such service upon the Clerk of the Court and the Clerk of the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Case* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).


6/5/2018
DATE

CHECK ONE:

APPLICATION:

CHECK IF APPROPRIATE:

<input type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input checked="" type="checkbox"/>	GRANTED			<input type="checkbox"/>	GRANTED IN PART		
<input type="checkbox"/>	SETTLE ORDER			<input type="checkbox"/>	SUBMIT ORDER		
<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN			<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>	REFERENCE


HON. ROBERT D. KALISH
J.S.C.