192 Morgan Realty LLC v Yaney
2022 NY Slip Op 33410(U)
October 6, 2022
Supreme Court, New York County
Docket Number: Index No. 656504/2022
Judge: Arlene P. Bluth
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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. ARLENE P. BLUTH** **PART** **14**

Justice

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192 MORGAN REALTY LLC, MORGAN WILLIAMSBURG LLC

Plaintiff,

- v -

JONATHAN YANEY,

Defendant.

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INDEX NO. 656504/2022

MOTION DATE 09/30/2022

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21

were read on this motion to/for DISMISS.

Defendant's motion to dismiss is denied.

Background

Plaintiffs explain that their predecessor-in-interest entered into a license agreement to provide dockage for a vessel at a location in Brooklyn. They insist that defendant signed a guarantee in connection with the license. Plaintiffs allege that the agreement ended on March 31, 2018 but that it continued on a month-to-month basis until they terminated it on July 6, 2020. They claim that over $400,000 is outstanding, which includes a monthly wharfage of $2,700 plus an additional $1,000 per day for each day the vessel remained docked at the property after the agreement expired.

Defendant points out that plaintiffs brought a complaint in August 2020 in the Eastern District of New York alleging the same exact claims as they do here. He insists that plaintiffs voluntarily dismissed the EDNY case against defendant pursuant to Federal Rule of Civil

Procedure 41(a)(1)(A)(i). Defendant maintains that plaintiffs then filed another complaint against him May 2022, also in the Eastern District of New York, that made similar allegations relating to the unpaid dockage fees pursuant to the same agreement at issue here. He observes that plaintiffs then voluntarily discontinued this second action on May 26, 2022 and commenced this action on the same day.

Defendant moves to dismiss on the ground of res judicata. Specifically, he claims that there is a two-dismissal rule in federal court that renders the second voluntary dismissal of an action against him as an adjudication on the merits. He claims it does not matter whether or not the dismissal is labeled with or without prejudice.

In opposition, plaintiffs contend that the two-dismissal rule does not apply because the dismissals were the result of a motion and effectuated by the federal court. They claim the first EDNY case was dismissed because they could not timely effectuate service and the second case was dismissed pursuant to Federal Rule of Civil Procedure 41(a)(2).

In reply, defendant claims that he has a motion pending in the EDNY about that court's order dismissing the case. He argues that his Rule 60 motion will resolve all issues and that this Court should *sua sponte* stay this matter pending the outcome of that case.

Discussion

"The federal rules provide that a plaintiff may dismiss his own action without court order in certain circumstances, and the dismissal is without prejudice, unless the plaintiff has previously dismissed a federal or state court action 'based on or including the same claim,' in which case a notice of dismissal operates as an adjudication on the merits (two-dismissal rule). (FRCP § 41 [a][1][B])" (*Nix v Major League Baseball*, 2018 N.Y. Slip Op. 31141[U], 5 [Sup Ct,

NY County 2018], affd sub nom. *Neiman Nix v Major League Baseball*, 2020 N.Y. Slip Op. 07505 [1st Dept 2020]).

Here, there is no dispute that the federal court construed the second dismissal as a dismissal pursuant to Federal Rule of Civil Procedure 41(a)(2), which is a dismissal by court order. That renders the provision upon which defendant relies for this motion (FRCP 41[a][1][B]) inapplicable and so the two-dismissal rule does not compel the Court to dismiss this case. In fact, defendant contends he filed a motion to have the Court's orders construed as a voluntary dismissal rather than a court-ordered dismissal so the two-dismissal rule would apply (NYSCEF Doc. No. 21). Of course, the fact that defendant made the motion means that the two-dismissal rule does not apply.

The Court also declines to stay this case. This case was commenced in May 2022 and the RJI was not filed until August 19, 2022. Pursuant to 22 NYCRR 202.19(2), the note of issue should be filed within 12 months for a standard case (a designation this Court believes should apply here). Therefore, the Court will schedule a preliminary conference so that discovery can commence rather than issue a stay that might endlessly delay this matter.

Accordingly, it is hereby

ORDERED that defendant's motion to dismiss is denied and he must answer pursuant to the CPLR.

Preliminary Conference: November 16, 2022 at 12 p.m. By November 9, 2022, the parties are directed to upload 1) a preliminary conference order signed by all sides, 2) a stipulation of partial agreement about discovery or 3) letters explaining why no discovery agreement could be reached. The Court will then assess whether an in-person preliminary conference is appropriate (if, for example, a completed stipulation is e-filed by November 9,

2022, then an in-person conference may not be necessary). The failure to upload anything to NYSCEF by November 9, 2022 will result in an adjournment.

10/6/2022
DATE

ARLENE P. BLUTH, J.S.C.

CHECK ONE:		CASE DISPOSED		X	NON-FINAL DISPOSITION		
		GRANTED	X DENIED		GRANTED IN PART		OTHER
APPLICATION:		SETTLE ORDER			SUBMIT ORDER		
CHECK IF APPROPRIATE:		INCLUDES TRANSFER/REASSIGN			FIDUCIARY APPOINTMENT		REFERENCE