

Dodds v 1926 Third Ave. Realty Corp.

2010 NY Slip Op 33297(U)

November 24, 2010

Supreme Court, New York County

Docket Number: 100602/10

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHE

PART 10

Justice

Anthony Dodds and
Rebecca Herro
Plaintiff(s)

INDEX NO.

100602/10

MOTION DATE

1926 Third Ave Realty
Corporation
Defendant(s)

MOTION SEQ. NO.

004

MOTION CAL. NO.

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

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH
THE ACCOMPANYING MEMORANDUM DECISION.

FILED

DEC 07 2010

NEW YORK
COUNTY CLERK'S OFFICE

NOV 24 2010

Dated: Nov. 24, 2010

[Signature]
Hon. Judith J. Gische, J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

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

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 10**

-----X
Anthony Dodds and Rebecca Herrero,

Plaintiff (s),

-against-

1926 Third Avenue Realty Corporation,
Jose Luis Lopez, Luz Maria Gordillo,
Marcello Cofone, Julio Valdez, Jose
Morales and Ross & Ross, LLC a/k/a
Ross & Ross,

Defendant (s).

-and-

Tafa Fiadzibe a/k/a Tafa Lawrence,
Margarita Versategui, Greg Smith and
Eric Eigen,

Nominal defendants.

-----X

DECISION/ ORDER

Index No.: 100602/10

Seq. No.: 004

PRESENT:

Hon. Judith J. Gische
J.S.C.

FILED

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NEW YORK
COUNTY CLERK'S OFFICE

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

Papers	Numbered
Pltff's OSC (amend) w/RL affirm, AD affid, exhs	1
Defs 1926, JLL, R&R opp w/WJ affirm, exhs	2

Upon the foregoing papers, the decision and order of the court is as follows:

GISCHE J.:

Plaintiffs seek a declaration that they are the rent regulated tenants of the building located at 233 West 19th Street, New York, York ("the building"). Defendant 1926 Third Avenue Realty Corporation ("landlord") is the owner of the building and plaintiffs' landlord. The individually named defendants are allegedly persons who have conspired with the landlord in an illusory tenant scheme. The nominal defendants reportedly have no role in this scheme but are named because their rights may be affected.

Plaintiffs seek to amend their complaint to add the name of John LeMarier to the caption and to assert direct+ claims against him. Plaintiffs also claim certain recent events raise new facts that they would like to include in the amended complaint. A third prong of their motion is for a directive from the court on how to serve those defendants who have not yet answered the complaint or appeared in this action.

A prior motion by plaintiffs (OSC sequence #3) for similar relief was denied because the new claims against LeMarier were insufficiently clear and the claims against LeMarier were indistinguishable from those against the named defendants (Order, Gische J., 9/3/10).

The only defendants who have answered the complaint are the landlord, Jose Luis Lopez and Ross & Ross, LLC. These defendants oppose the motion. They claim plaintiffs have still not clarified their claims and the "new" proposed amended complaint is virtually identical to the one the court already decided was inadequate. According to defendants, plaintiffs do not allege facts that support their claim that LeMarier engaged in deceptive business practices, in violation of The Consumer Protection Act (GBL § 349).

Discussion

Leave to amend and supplement pleadings should be freely given upon such terms as may be just as a matter of discretion in the absence of prejudice or surprise (CPLR § 3025 [b]; Stroock & Stroock & Lavan v. Beltramini, 157 A.D.2d 590 [1st Dept. 1990]). Leave, however, may not be granted where the amended pleading fails to state a cause of action (Stroock & Stroock & Lavan v. Beltramini, *supra*; Solomon v. Bell Atlantic Corp., 9 AD3d 49 [1st Dept. 2004]).

Plaintiffs' motion to serve an amended complaint adding claims against John LeMarier is without any factual basis and, therefore, denied for the reasons that follow.

Although LeMarier's name appears in the original complaint, there are no factual

claims against him. Thus, plaintiffs' statement that it was an oversight to leave his name off the caption and that all they are asking for is to correct that oversight is not borne by their pleadings. In the "Wherefore" clause, plaintiffs did not seek any relief against LeMarier. Thus, presently LeMarier is not a party to this action and plaintiff presently seeks to add him as a named party, not simply correct a "mistake."

By definition, an illusory tenant is a party who, while assuming the guise of a prime tenant, enter into a sublease agreement for profit which allows that person to circumvent the requirements of the Rent Stabilization Law (Avon Furniture Leasing Inc. v. Poplizio, 116 AD2d 280 [1st Dept 1986]). This arrangement can be with or without the knowledge of the landlord (Primrose Mgt. Co. v. Donahoe, 253 AD2d 404 [1st Dept. 1998]).

Plaintiffs allege that LeMarier was part of an illusory tenancy scheme. This claim is not explained or fleshed out with any facts. LeMarier is simply a managing agent and officer of the owner. There are no facts tending to show he was involved in defrauding the plaintiffs. There are also no facts that would support any claims against him in his individual capacity.

In order to assert a cause of action under GBL § 349 the 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 (see Stutman v. Chemical Bank, 95 N.Y.2d 24 [2000]). Plaintiffs' allegations, which the court accepts as true, do not meet this legal standard.

The Consumer Protection Act was initially enacted to give the Attorney General enforcement power to curtail deceptive acts and practices – willful or otherwise – directed at the consuming public (Gaidon v. Guardian Life Ins. Co. of America, 94 N.Y.2d 330, 344 [1999]). The practices alleged by plaintiffs do not come within the protections of the

Consumer Protection act because they are not "consumers" who were "mislead" or deceived by defendants. Plaintiffs are tenants/occupants of space they claim is protected by the rent regulations. According to plaintiffs, defendants used illusory tenants to charge the plaintiffs rent that is in excess of what is permitted by law. The rent regulations protect the plaintiffs if, in fact, they can prove their claims. Thus, plaintiffs' actual claim is not that they were misled into paying higher rent, but that defendants violated the law. Therefore, plaintiffs' GBL § 349 claim is indistinguishable and, therefore, redundant of their rent regulation claim (Aguaiza v. Vantage Properties, LLC, 69 AD3d 422 [1st Dept 2010]). Permission to amend their complaint to expand their 4th cause of action asserting claims under GBL § 349 is denied.

Plaintiffs are granted permission, however, to amend their complaint to assert a claim that defendants violated the Loft Law, as amended. Neither side has addressed, nor does the court now decide, whether the amendment can be applied retroactively.

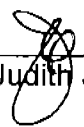
Plaintiffs may serve an amended complaint that complies with this court's decision within ten (10) days of this decision/order being entered. Defendants shall answer the amended complaint pursuant to the CPLR.

Any relief requested but not specifically addressed is hereby denied.

This constitutes the decision and order of the court.

Dated: New York, New York
November 24, 2010

So Ordered:



Hon. Judith J. Gische, JSC

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