

Party Chef v East 58th St. Realty, LLC

2015 NY Slip Op 31611(U)

August 25, 2015

Supreme Court, New York County

Docket Number: 155207/2012

Judge: Kelly O'Neill Levy

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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PARTY CHEF, NEWCIRK PROPERTIES, INC.,
a/k/a NEWCIRC PROPERTIES, INC.,
NICHOLSON GROUP CORP. and THE ARTIST
AUCTION CENTER CORP.,

Plaintiffs,

- against -

EAST 58TH STREET REALTY, LLC, ELI D.
DWECK, JEFFREY GOLDMAN and
"JOHN DOE", said name being fictitious and
unknown, intended to identify the locksmith who
assisted the Co-Defendants in breaking and entering
premises at 323 East 58th Street, New York, New York
on August 8, 2012,

Defendants.
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Index No: 155207/2012

**DECISION/ORDER
ON MOTION**

Index NO. 155510/12

KELLY O'NEILL LEVY, J.:

Defendant East 58th Street Realty, LLC moves pursuant to CPLR § 602 to consolidate this action with two related matters also pending in Supreme Court, New York County, *Carolyn Newkirk v. East 58th Street Realty, LLC, Eli D. Dweck, Jeffrey Goldman, and "John Doe"* (Index No. 155510/2012) and *Party Chef, Newcirk Properties, Inc., a/k/a Newcirk Properties, Inc., Nicholson Group Corp., and The Artist Auction Center Corp. v. East 58th Street Realty, LLC, Eli D. Dweck, Jeffrey Goldman and "John Doe"* (Index No. 155513/2012, which is in the Pre-RJI stage). Defendant's counsel, who also represents East 58th Street Realty LLC and Jeffrey Goldman in the actions under Index Nos. 155510/2012 and 155513/2012, further moves for summary judgment on all three actions pursuant to CPLR § 3212, arguing that there remain no triable issues of material fact before the court, or alternatively pursuant to CPLR § 3216, dismissing all three actions for Plaintiff's failure to

prosecute.¹ In addition, Defendant requests the award of attorneys' fees and that the court files be sealed.²

The motion is granted without opposition to the extent as set forth below.

Actions may be consolidated when they involve a common question of law or fact unless the party opposing consolidation demonstrates prejudice to a substantial right. *Matter of Progressive Ins. Co. (Vasquez-Countrywide Ins. Co.)*, 10 AD3d 518, 519 (1st Dept. 2004). Here two of the three actions (Index Nos. 155510/2012 and 155513/2012) arise from the same alleged trespass of the premises at 323 East 58th Street, New York, New York and seek the same relief and Index No. 155207/2012 seeks declaratory and injunctive relief concerning the property where the alleged trespass occurred. The court finds that the three actions present common questions of law and fact and concern the same parties. *See* CPLR § 602; *In re New York City Asbestos Litigation*, 121 AD3d 230, 244-245 (1st Dept. 2014). In the absence of opposition, there is no evidence suggesting that consolidation would prejudice a substantial right of any party here. *See Geneva Temps, Inc. v. New World Communities, Inc.*, 24 AD3d 332, 334 (1st Dept. 2005).

Therefore, and upon the foregoing papers, it is

ORDERED that the motion to consolidate is granted without opposition and the above-captioned action is consolidated in this court with *Carolyn Newkirk v. East 58th Street Realty, LLC, Eli D. Dweck, Jeffrey Goldman, and "John Doe"* (Index No. 155510/2012) and *Party Chef, Newcirk Properties, Inc., a/k/a Newcirk Properties, Inc., Nicholson Group Corp., and The Artist Auction Center Corp. v. East 58th Street Realty, LLC, Eli D. Dweck, Jeffrey*

¹ Eli D. Dweck, through counsel, requests the same relief by similar motion under Index No. 155510/2012 (Mot. Seq. 001) in which he incorporates by reference this motion and the supporting papers filed by defendant.

Goldman and "John Doe" (Index No. 155513/2012) under the Index Number 155207/2012;
and it is further

ORDERED that the consolidated action shall bear the following caption:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 19

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CAROLYN NEWKIRK, PARTY CHEF, NEWCIRK
PROPERTIES, INC., a/k/a NEWCIRC PROPERTIES, INC.,
NICHOLSON GROUP CORP., and THE ARTIST
AUCTION CENTER CORP.,

Index No: 155207/2012

Plaintiffs,

- against -

EAST 58TH STREET REALTY, LLC, ELI D.
DWECK, JEFFREY GOLDMAN and
"JOHN DOE", said name being fictitious and
unknown, intended to identify the locksmith who
assisted the Co-Defendants in breaking and entering
premises at 323 East 58th Street, New York, New York
on August 8, 2012,

Defendants.

-----X

The Court now considers Defendant's motion for summary judgment on the consolidated action. On a motion for summary judgment, the moving party has the burden to offer sufficient evidence making a prima facie showing that there is no triable material issue of fact. *Santiago v. Filstein*, 35 AD3d 184, 185-86 (1st Dept. 2006). Once the Petitioner makes a prima facie showing of entitlement to judgment as a matter of law, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that there exist material factual issues. *Grossman v. Amalgamated Housing Corp.*, 298 AD2d 224, 226 (1st Dept. 2002).

In complaints filed under Index Numbers 155510/2012 and 155513/2012, Plaintiffs make claims of intentional infliction of emotional distress resulting from an alleged incident

of August 8, 2012 wherein the defendants forcibly, wrongfully and illegally broke into and entered the above-mentioned premises, without her knowledge or consent, causing damage to the building and various business and residential portions of the building in violation of a temporary restraining order issued by the Hon. Anil Singh. Under the 155207/2012 action, Plaintiffs seek declaratory and injunctive relief, seeking to avoid eviction and for a finding that they are entitled to remain in possession of the premises.

The court notes that in a decision made on the record on September 12, 2012, Justice Singh denied plaintiff's motion for injunctive relief and a finding of contempt against the defendants sought under Index No. 155207/2012. Justice Singh denied injunctive relief based on plaintiffs' failure to disclose in the foreclosure proceedings [*Banco Popular North America v. Zingarella Realty, et al.* (Index No. 109089/2007) (Friedman, J.)] leases plaintiffs subsequently claimed existed, and denied the request for a contempt order finding that neither the defendants nor their counsel were on notice of the temporary restraining order at the time they entered the premises. By same decision, Justice Singh noted, as to Artist Auction Center Corp., that pursuant to the judgment of foreclosure and sale concerning the building at issue dated September 9, 2010 in *Banco Popular* (in which Carol Newkirk was a named defendant), "all defendants in this action and all persons claiming under them or any or either of them...be and are hereby forever barred and foreclosed of all right, claim, lien, title, interest and equity or redemption in the said mortgaged premises and each of every part thereof." An appeal of that order was denied by Order of the Appellate Division, First Department on or about October 23, 2012.

Moreover, following the entry of judgments of possession and issuance of warrants of eviction against her in housing court proceedings (Civil Ct. Index Nos. 084691/2012 and 084692/2012), Plaintiffs were evicted from the subject premises on or about May 8, 2013 pursuant to a lawful warrant of eviction further rendering the claims for declaratory and

injunctive relief in an effort to stop her eviction moot. In the absence of any opposition, there remain no issues to be determined at trial.

Defendant's request for a money judgment against Plaintiff and her attorney and for a fine to be levied against Plaintiff's counsel is denied.

The court further has found good cause to seal the court records in the matters bearing Index Nos. 155510/2012, 155513/2012, and 155207/2012 as potentially injurious to the reputations of Defendant attorneys Eli D. Dweck and Jeffrey L. Goldman.

It is therefore

ORDERED that the pleadings in the actions hereby consolidated (Index Nos. 155207/2012, 155510/2012, 155513/2012, and) shall stand as the pleadings in the consolidated action, and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the actions hereby consolidated and mark the files and record to reflect the consolidation and shall seal the files pursuant to N.Y. Ct. Rule § 216.1, and it is further

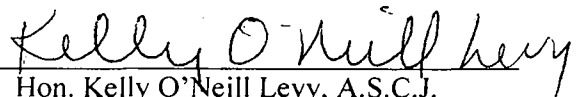
ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (60 Centre St, Room 158), who is hereby directed to mark the court's records to reflect the consolidation; and it is further

ORDERED that Defendant's motion for summary judgment is granted and the actions under Index Nos. 155510/2012, 155513/2012, and 155207/2012 are dismissed against all defendants.

The court has considered the remainder of Defendant's arguments and declines to grant any further relief.

This constitutes the Decision and Order of the court.

Dated: August 25, 2015
New York, New York



Hon. Kelly O'Neill Levy, A.S.C.J.

HON. KELLY O'NEILL LEVY