

Dodds v 1926 Third Ave. Realty Corp.

2010 NY Slip Op 32319(U)

August 25, 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

HON. JUDITH J. GISCHE

PRESENT: _____ J.S.C. *Justice*

PART 10

Index Number : 100602/2010
DODDS, ANTHONY
 vs.
1926 THIRD AVENUE REALTY CORP.
 SEQUENCE NUMBER : 001
 DISMISS

INDEX NO. _____
 MOTION DATE _____
 MOTION SEQ. NO. 001
 MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

Motion withdrawn as to me per stip filed by [signature]

FILED
 AUG 27 2010
 NEW YORK
 COUNTY CLERK'S OFFICE

PC set for 9/23/10 @ 9:30 AM.

Dated: 8/25/10

[Signature]
 HON. JUDITH J. GISCHE J.S.C.
 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,
Plaintiffs,

Index No.: 100602/10
DECISION/ORDER

-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,
Defendants,

-and-

TAFA FIADZIGBE a/k/a TAFA LAWRENCE,
MARGARITA VERSATEGUI, GREG SMITH and
ERIC EIGEN,
Nominal Defendants.

FILED
AUG 27 2010
NEW YORK
COUNTY CLERK'S OFFICE

-----X
HON. JUDITH J. GISCHE, J.S.C.:

Pursuant to CPLR 2219(a) the following numbered papers were considered by the court on this motion:

PAPERS	NUMBERED
Notice of Motion, MR affd., JLL affd., JL affd., WJ affirm., exhibits.....	1
RG affirm., AD affd., exhibits.....	2
WJ Reply affirm.....	3
RG affirm., exhibits.....	4

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

In this landlord/tenant action, named defendants Jose Luis Lopez, Ross & Ross and 1926 Third Avenue Realty Corporation move to dismiss the complaint (motion sequence number 001). For the following reasons, the motion is denied.

BACKGROUND

Plaintiffs Anthony Dodds (Dodds) and Rebecca Herrero (Herrero) allege that they are the residential, rent-stabilized subtenants of apartment 2-3 in a building (the Building) located at 176 East 106th Street in the County, City and State of New York. *See* Dodds Affidavit in Opposition, ¶¶ 4, 12. Plaintiffs further allege that corporate co-defendant 1926 Third Avenue Realty Corporation (TARC) is the owner of the building, and that corporate co-defendant Ross & Ross, LLC a/k/a Ross & Ross (R&R) is a holding company that owns TARC. *See* Notice of Motion, Exhibit A (complaint), ¶¶ 3-5, 13-14. Plaintiffs contend that the Building has no certificate of occupancy (C of O), but that it is zoned for residential use, even though it is used mainly for commercial purposes. *Id.*, ¶¶ 26-30. Plaintiffs also allege that TARC has leased the Building's second floor to defendant Jose Luis Lopez (Lopez), has leased its fourth floor to defendants Luz Maria Gordillo (Gordillo), Marcello Cofone (Cofone) and Julio Valdez (Valdez), and has leased its fifth floor to defendant Jose Morales (Morales). *Id.*, ¶¶ 33-36. Plaintiffs have presented copies of the fourth and fifth floor leases, but not of Lopez's purported lease for the second floor.¹ *See* Grimble Affirmation in Opposition; Exhibits G, H. Plaintiffs further allege that they initially rented apartment 2-2 from Lopez in February 2008, and moved into apartment 2-3 in July 2009 at Lopez's request. *See* Notice of Motion; Exhibit A, ¶¶ 42-47. Plaintiffs state, however, that Lopez illegally changed the locks on apartment 2-2 before they left, and that they had to seek assistance from the police in order to gain access to their current apartment. *Id.*

¹ Plaintiffs assert that the "nominal defendants" sued herein, Tafa Fiadzigbe a/k/a Tafa Lawrence, Margarita Versategui, Greg Smith and Eric Eigen, are other residential tenants of the Building's third, fourth and fifth floors against whom they do not seek any relief, and whom they have included in this action only because the issue of whether or not their tenancies are rent-regulated is raised herein. *See* Notice of Motion, Exhibit A, ¶¶ 15-20.

Plaintiffs also allege that both their apartment and the Building require extensive repair work, and have annexed to their moving papers several complaints that have been registered with the New York City Department of Housing Preservation and Development (HPD). *See* Grimble Affirmation in Opposition, Exhibits D-E.

TARC officer John LeMarier (LeMarier) denies plaintiffs' rent-stabilized status. *See* Notice of Motion, LeMarier Affidavit (pages not numbered). LeMarier asserts that the entire Building is used for commercial purposes, and that TARC leased the Building's first floor to a Kentucky Fried Chicken franchise, but that Lopez illegally subdivided and rented the second floor to residential occupants like plaintiffs. *Id.* Plaintiffs have presented a copy of Kentucky Fried Chicken's lease. *See* Grimble Affirmation in Opposition; Exhibit F. Lopez does not appear to have any connection to that franchise.

R&R partner Leonard Ross (Ross) denies that R&R has any ownership interest in the building. *See* Notice of Motion, Ross Affidavit (pages and paragraphs not numbered). He asserts that R&R never issued leases to either plaintiffs or Lopez, and that R&R is not a proper party to this action. *Id.* Ross makes no allegations about R&R's purported ownership of TARC, however. *Id.* Dodds states that he has observed both Lopez and LeMarier transacting business in the Building, and that Lopez has told him that he makes regular cash payments of rent to both LeMarier and to Ross. *See* Dodds Affidavit in Opposition, ¶¶ 60-67. Dodds has also presented a number of work permit applications to the New York City Department of Buildings (DOB) that list the Building's owner as, variously, Ross, LeMarier and Ross's late brother, Morton Ross. *Id.*, ¶¶ 69-76; Exhibits I-O.

Lopez submits an affidavit challenging the adequacy of plaintiffs' service of process on

him in this action. *See* Notice of Motion, Lopez Affidavit (pages not numbered). Plaintiffs assert that such service was valid, and have annexed copies of the affidavits of service in this action to their moving papers. *See* Grimble Affirmation in Opposition, ¶¶ 6-9; Exhibit A.

On October 30, 2009, Lopez commenced a “commercial holdover” proceeding against plaintiffs in the Civil Court of the City of New York under Index No. 89980/09 (the Civil Court proceeding). *See* Notice of Motion, Exhibit C. On November 19, 2009, plaintiffs filed an answer with affirmative defenses and counterclaims in the Civil Court proceeding. *Id.*; Exhibit D. Thereafter, on December 1, 2009, plaintiffs filed a motion to dismiss the Civil Court proceeding, which the court (Singh, J.) granted in a decision dated June 2, 2010. *Id.*; Exhibit E; Grimble Affirmation in Further Support, Exhibit B

Plaintiffs commenced this action on January 15, 2010, by filing a summons and complaint that set forth causes of action for: 1) a declaratory judgment that they are rent-stabilized tenants; 2) a declaratory judgment that defendants are jointly and severally liable to them; 3) a declaratory judgment that defendants may not return apartment 2-2 to commercial use, and a permanent injunction to prevent them from doing so; 4) a money judgment to compensate plaintiffs for defendants’ “deceptive acts and practices”; and 5) legal fees. *Id.*; Exhibit A. The defendants herein (i.e., TARC, R&R and Lopez) filed a combined answer in this action on February 8, 2010. *Id.*; Exhibit B. Defendants now move to dismiss the instant complaint (motion sequence number 001). Before defendants’ motion was submitted, however, the parties entered into a stipulation, on July 8, 2010, in which they agreed to withdraw the portion of the motion that seeks to dismiss the complaint as against TARC.

DISCUSSION

Defendants style this motion as one to dismiss, although they do not mention CPLR 3211 or cite any case law in support of their arguments. Plaintiffs note that “this appears to be a hybrid ... pre-answer motion under CPLR rule 3211” as well as “a motion for summary judgment,” and argue that “summary judgment is premature, in that issue is not yet joined.” *See* Grimble Affirmation in Opposition, ¶¶ 3-4. As previously noted, however, defendants did file an answer before this motion was brought. *See* Notice of Motion, Exhibit B. Therefore the motions is not procedurally infirm.

The first branch of defendants’ motion seeks dismissal of the complaint as against Lopez on the ground of improper service of process. *See* Notice of Motion, Lopez Affidavit. Pursuant to CPLR 3211 (e), a request for such relief is timely as long as it is made within 60 days after the service of a defendant’s answer. *See e.g. Aretakis v Tarantino*, 300 AD2d 160, 160 (1st Dept 2002), citing *Worldcom, Inc. v Dialing Loving Care*, 269 AD2d 159 (1st Dept 2000). Here, defendants filed their answer on February 8, 2010, and made this motion returnable on March 22, 2010 - well within the statute’s 60 day time limit. Therefore, defendants claim of improper service is timely interposed.

In support of Lopez’ claim he states that he “believes that the summons and complaint were not properly served upon me.” *See* Notice of Motion, Lopez Affidavit. Plaintiffs respond by presenting a copy of their affidavit of service on Lopez, which indicates that a process server attempted to effect personal service on him at the Building on January 26, February 11 and February 16, 2010 (at different times of day), and thereafter effected conspicuous place service on February 16, 2010, and mailed copies of the summons and complaint via first class mail on

February 17, 2010. *See* Grimble Affirmation in Opposition, Exhibit A. The allegations in the affidavit of service are prima facie evidence that plaintiffs' process server complied with the statutory requirements of "nail and mail" service. By contrast, the statements in Lopez's affidavit consist of boilerplate allegations that the "papers were not properly served upon me" without any particular, factual statements as to how, when or why said alleged service was improper. In this circumstance, the court finds that Lopez has failed to "submit proof indicative of an irregularity in the affidavit of service of the summons and complaint sufficient to rebut the presumptive validity of the affidavit." *Commissioners of State Ins. Fund v Fisher*, 197 AD2d 446, 447 (1st Dept 1993). Therefore, the court rejects defendants' argument, and denies so much of their motion as seeks dismissal of the complaint against Lopez on the grounds of improper service.

The second branch of defendants' motion seeks dismissal of the complaint against Lopez on the ground that there is a prior action for the same relief pending, i.e., the Civil Court action. *See* Notice of Motion, Jennings Affirmation, at 2-3 (pages not numbered). The Civil Court action, however, was dismissed with prejudice on June 2, 2010. *See* Grimble Reply Affirmation, Exhibit B. Therefore, the defendants' argument is moot, and the court denies so much of their motion as seeks dismissal of the complaint against Lopez on the ground that there is a prior action for the same relief pending.

The third branch of defendants' motion seeks dismissal of the complaint as against R&R on the ground that it is "an improper party defendant herein." *See* Notice of Motion, Ross Affidavit. This application corresponds to a request to dismiss for failure to state a claim, pursuant to CPLR 3211 (a) (7).

When evaluating a defendant's motion to dismiss, pursuant to CPLR 3211 (a) (7), the test "is not whether the plaintiff has artfully drafted the complaint but whether, deeming the complaint to allege whatever can be reasonably implied from its statements, a cause of action can be sustained." *Jones Lang Wootton USA v LeBoeuf, Lamb, Greene & MacRae*, 243 AD2d 168, 176 (1st Dept 1998), quoting *Stendig, Inc. v Thom Rock Realty Co.*, 163 AD2d 46, 48 (1st Dept 1990). To this end, the court must accept all of the facts alleged in the complaint as true, and determine whether they fit within any "cognizable legal theory." *Arnav Indus., Inc. Retirement Trust v Brown, Raysman, Millstein, Felder & Steiner*, 96 NY2d 300, 303 (2001). Here, the complaint alleges that R&R "is ... a domestic [LLC]" and that TARC "is owned and/or controlled, and/or has been dissolved and [its] assets transferred to [R&R]." See Notice of Motion, Exhibit A, ¶¶ 13-14. The complaint also alleges that R&R was aware that Lopez was executing residential leases in the Building and making cash payments to R&R as part of an illicit "illusory prime tenant" scheme. *Id.*, ¶¶ 91, 94, 98-101, 124, 129, 133. In defendants' motion, Ross objects that R&R "does not own the [Building] ... does not issue leases for the Building ... [and has not] rented to [plaintiffs or] to ... Lopez." See Notice of Motion, Ross Affidavit. However, Ross does not make any statement regarding R&R's purported ownership of TARC, nor does he present any documentary evidence that would demonstrate that TARC is owned by parties other than R&R. Plaintiffs' claims for declaratory, injunctive and monetary relief herein are all predicated, as against R&R, on the claim that R&R owns and/or controls the other named defendants. The court finds that plaintiffs' causes of action are all sufficiently pled as against R&R. The court also notes that plaintiffs have presented documentary evidence tending to show that R&R is, in fact, the Building's owner (although plaintiffs were not obligated

to do so on a motion to dismiss). See Grimble Affirmation in Opposition, Exhibits I-O. In any case, the court rejects defendants' argument, and denies so much of their motion as seeks dismissal of the complaint against R&R on the ground that it is an "improper party."

The fourth branch of defendants' motion sought dismissal of the complaint as against TARC; however, as was previously mentioned, the parties agreed to withdraw this branch of the motion in the July 8, 2010 stipulation. Therefore, the court need not consider it.

Accordingly, the court finds that defendants' motion should be denied.

DECISION

ACCORDINGLY, for the foregoing reasons, it is hereby

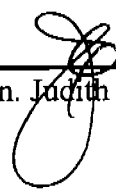
ORDERED that the motion, pursuant to CPLR 3211, of defendants 1926 Third Avenue Realty Corporation, Jose Luis Lopez, and Ross & Ross, LLC a/k/a Ross & Ross is, in all respects, denied, and it is further

ORDERED that this case is scheduled for a preliminary conference on September 23, 2010 at 9:30 am. No further notices will be sent, and it is further

ORDERED that any requested relief not expressly granted herein is denied and that this constitutes the decision and order of the Court.

Dated: New York, New York
August 25, 2010

ENTER:


Hon. Judith J. Gisch J.S.C.
FILED
AUG 27 2010
NEW YORK
COUNTY CLERK'S OFFICE