

Cobb v 1710 Carroll Owners Corp.

2024 NY Slip Op 34033(U)

November 7, 2024

Supreme Court, Kings County

Docket Number: Index No. 508771/2018

Judge: Carolyn E. Wade

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part 84, of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at 360 Adams Street, Brooklyn, New York, on the 7th day of November 2024.

PRESENT:

HON. CAROLYN B. WADE,
Justice.

-----X

THOMAS COBB,

Plaintiff,

-against-

Index No.: 508771/2018

1710 CARROLL OWNERS CORP., MEDALLION REAL ESTATE LLC, SCADI ETIENNE and CHASS PROPERTIES, LLC,

DECISION AND ORDER

MS#8

Defendants.

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The following e-filed papers read herein:

NYSCEF Nos.:

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed

296, 300 -303

Opposing Affidavits (Affirmations)

304-305

Affidavits/ Affirmations in Reply

306

Other Papers:

Upon the foregoing papers, and after oral argument, in this action to annul the auction sale and transfer of a lease and shares of stock, defendants Scadi Etienne ("Etienne") and Chass Properties, LLC, ("Chass") (collectively, "the Chass defendants") move (in motion [mot.] sequence [seq.] eight) by order to show cause, pursuant to CPLR § 6315, for an order directing the Kings County Clerk to discharge the \$45,000.00

undertaking posted by plaintiff Thomas Cobb (“plaintiff”) and award the full amount, to be shared equally, to the Chass defendants and defendant 1710 Carroll Owners Corp. (“1710 Owners”) due to this Court’s vacatur of the preliminary injunction and dismissal of this action in its decision and order dated June 1, 2021.

Facts and Procedural History

1710 Owners, a cooperative corporation, is the owner of the cooperative residential apartment building located at 1710 Carroll Street in Brooklyn, New York. In June 2016, plaintiff purchased 153 shares of stock in 1710 Owners and executed a proprietary lease appurtenant to Apartment F10 (“the apartment”). Defendant Medallion Real Estate LLC (“Medallion”) is the managing agent for the apartment building. Shortly after the purchase, plaintiff alleged that he quickly encountered material problems with the apartment, such as flooding, a nonfunctioning elevator, and various vermin, which rendered the apartment uninhabitable. In response, plaintiff withheld paying maintenance dues. Given that plaintiff was delinquent on his payment for maintenance dues, a non-judicial foreclosure auction was held in January 2018, at which point Etienne, the principal and sole member of Chass, purchased the shares of stock related to plaintiff’s apartment.

Plaintiff subsequently commenced the within action seeking to void the auction sale of his shares of stock and obtain a return of said shares and lease to the apartment, as well as, *inter alia*, a preliminary injunction to stop his eviction from the apartment. On November 27, 2018, this court granted plaintiff a preliminary injunction which stayed plaintiff’s eviction from the apartment pending disposition of the action and directed plaintiff to post a \$45,000.00 bond, pursuant to CPLR § 6312 (b) (*Cobb v 1710 Carroll*

Owners Corp., 2018 NY Slip Op 33118[U], *10 [Sup Ct, Kings County 2018]). Upon the completion of discovery, defendants moved for summary judgment dismissing plaintiff's complaint and plaintiff cross-moved for summary judgment in his favor. On June 1, 2021, this court granted defendants' motions and denied plaintiff's cross-motions (*Cobb v 1710 Carroll Owners Corp.*, 2021 N.Y. Misc. LEXIS 25432 [Sup Ct, Kings County June 1, 2021]) ("June 2021 decision"). Relevant to the present motion (mot. seq. eight), the court lifted the preliminary injunction and directed the Kings County Clerk to release the bond. Plaintiff appealed this decision, arguing that he did not receive proper notice of the sale. While the appeal was pending, Chass, on July 1, 2022, commenced a holdover proceeding in Housing Court and moved for, *inter alia*, a judgment of possession (of the apartment) against plaintiff. Chass did not seek a money judgment. By decision and order dated August 1, 2022, Housing Court (Hannah Cohen, J.H.C.) granted summary judgment in Chass' favor and awarded it possession of the apartment, and plaintiff's eviction from the premises. The court did not award any monetary damages.

Turning to the present motion before the Court, the Chass defendants, on January 2, 2024, moved by order to show cause to direct the Kings County Clerk to release the bond pursuant to CPLR § 6315. 1710 Owners and Medallion filed an attorney's affirmation in support, contending that they are entitled to a portion of the bond and that they entered into a stipulation agreement with the Chass defendants pursuant to which they agreed to split the bond 50/50 with each other (NYSCEF Doc No. 301). They also asserted that 1710 Owners has incurred over \$80,000 in legal fees. In opposition, plaintiff filed an attorney's affirmation noting that in the holdover proceeding, Judge Cohen did not award the

defendants any monetary damages, and that the defendants never appealed that decision. Thus, plaintiff argues that the defendants are bound by that decision and cannot now seek damages in the present motion which would be impermissibly splitting claims. Plaintiff also argues that since the June 2021 decision is pending before the Second Department, the present motion is premature.

Discussion

A court can require a plaintiff to post a bond to obtain a preliminary injunction and a defendant can recover that undertaking should the court later determine that the plaintiff was not entitled to a preliminary injunction (see *Candlewood Holdings, Inc. v Valle*, 168 AD3d 804, 805 [2d Dept 2019]; see *Schreiber v Republic Intermodal Corp.*, 57 AD2d 830, 831 [2d Dept 1977] [discharge of a bond]). Specifically, the CPLR states:

“[T]he plaintiff shall give an undertaking in an amount to be fixed by the court, that the plaintiff, if it is finally determined that he or she was not entitled to an injunction, will pay to the defendant all damages and costs which may be sustained by reason of the injunction” (CPLR 6312 [b]; see *Candlewood Holdings, Inc.*, 168 AD3d at 805).

“[T]he purpose and function of an undertaking given by a plaintiff pursuant to the provisions of CPLR 6312(b), prior to the granting of a preliminary injunction, is to reimburse the defendant for damages sustained if it is later finally determined that the preliminary injunction was erroneously granted” (*Margolies v Encounter, Inc.*, 42 NY2d 475, 477 [1977]). “The damages sustained by reason of a preliminary injunction or temporary restraining order may be ascertained upon motion on such notice to all interested persons as the court shall direct” (CPLR § 6315; see *Margolies*, 42 NY2d at 477). The party seeking damages bears the burden of showing that there was a final determination

that held that the preliminary injunction was improper and, when seeking attorney's fees, must show "entitlement to the full amount of the undertaking based on their submission of legal expenses in excess of that amount sustained by reason of the injunction (*Board of Mgrs. of Pomona Park v Gennis*, 61 AD3d 905, 906-907 [2d Dept 2009] [internal quotation marks omitted]; see also *Cross Props., Inc. v Brook Realty Co.*, 76 AD2d 445, 458 [2d Dept 1980]). Attorneys' fees are recoverable "only as it relates to the preliminary injunction, and not the underlying issues or trial" (*Cross Props., Inc.*, 76 AD2d at 458-459).

Here, defendants have demonstrated that there was a final determination that held that plaintiff was not entitled to the preliminary injunction by pointing to the court's June 2021 decision (see *Forest Labs., Inc. v Lowey*, 118 AD2d 828, 828-829 [2d Dept 1986]). This satisfied their initial burden (see *Board of Mgrs. of Pomona Park*, 61 AD3d at 906). Defendants, however did not meet their burden in demonstrating that they are entitled to the full amount of the bond as based upon attorney's fees related to the preliminary injunction. Specifically, 1701 Owners states that "it incurred [legal fees] in the defense of the injunction as well as the underlying case" and that it "has incurred in excess of \$80,000 in legal fees in connection with this action." As noted above, in order for attorney's fees to be recoverable as damages for wrongfully procuring a preliminary injunction, they must have been incurred solely or principally in consequence of the injunction (see *Cross Props., Inc.*, 76 AD2d at 458-459). Here, not only did 1710 Owners fail to distinguish whether that \$80,000 was in connection with the preliminary injunction or the underlying issues, it failed to explain how it arrived at that number and provided no supporting documentation. "In

determining reasonable compensation for an attorney, the court must consider such factors as the time, effort, and skill required; the difficulty of the questions presented; counsel's experience, ability, and reputation; the fee customarily charged in the locality; and the contingency or certainty of compensation" (*People's United Bank v Patio Gardens III, LLC*, 143 AD3d 689, 691 [2d Dept 2016] [internal quotation marks omitted]). As none of the defendants provided any of this information (*see Citicorp Trust Bank, FSB v Vidaurre*, 155 AD3d 934, 935 [2d Dept 2017]), the court lacks "sufficient information upon which to make an informed assessment of the reasonable value of the legal services rendered" which specifically relate to the issuance of the preliminary injunction (*People's United Bank*, 143 AD3d at 691 [internal quotation marks omitted]; *see SO/Bluestar, LLC v Canarsie Hotel Corp.*, 33 AD3d 986, 988 [2d Dept 2006]).

In opposition, plaintiff argues that since Housing Court did not award a monetary judgment to the Chass defendants, which they did not appeal, they are bound by that judgment and that the doctrine of splitting causes of action prevents them from now seeking monetary damages from the bond. This argument lacks merit. While plaintiff is correct that the Housing Court awarded the Chass defendants a warrant of eviction and did not award any monetary damages, as the Second Department explained, "Housing Court . . . is a court of limited jurisdiction and only allows for proceedings for the recovery of possession of real property and for the collection of rent" (*Matter of Singh v New York State Div. of Human Rights*, 186 AD3d 1694, 1695 [2d Dept 2020]; *see Caffrey v North Arrow Abstract & Settlement Servs., Inc.*, 160 AD3d 121, 125 [2d Dept 2018]; *see Bedford Gardens Co. v Silberstein*, 269 AD2d 445, 445 [2d Dept 2000]). Thus, defendants could

not seek a discharge of the bond from Housing Court as that court lacks jurisdiction to provide such remedy.

Moreover, as “there is no common-law or statutory cause of action for damages due to an improperly procured preliminary injunction” (*Shu Yiu Louie v David & Chiu Place Rest., Inc.*, 261 AD2d 150, 152 [1st Dept 1999], citing *Honeywell, Inc. v Tech. Bldg. Servs., Inc.*, 103 AD2d 433, 434 [3d Dept 1984]), “the sole remedy for damages suffered [as a result of the injunction] . . . is to proceed against the undertaking” (*Honeywell, Inc. v Tech. Bldg. Servs., Inc.*, 103 AD2d 433, 434 [3d Dept 1984]; see CPLR § 6315). Indeed, the basis for damages “is the undertaking itself” which is, in essence, a contract between the parties “that the plaintiff, if it is finally determined that he was not entitled to an injunction, will pay to the defendant[s] all damages and costs which may be sustained by reason of the injunction” (*Honeywell, Inc.*, 103 AD2d at 434; see *2339 Empire Mgmt., LLC v 2329 Nostrand Realty, LLC*, 71 AD3d 998, 999 [2d Dept 2010]; CPLR § 6312 [b]). Therefore, plaintiff’s contention that defendants are splitting causes of action by seeking the release of the bond herein even though the Housing Court judgment did not award monetary damages is devoid of merit (see *Shu Yiu Louie*, 261 AD2d at 152; *Honeywell, Inc.*, 103 AD2d at 434).

Finally, plaintiff’s contention that the motion is premature because his appeal of the June 2021 decision is still pending before the Appellate Division, Second Department is moot, as the Second Department recently affirmed the June 2021 decision on October 30, 2024 (see *Olmann v Willoughby Rehabilitation & Health Care LLC*, 2020 NY Slip Op 33567[U], *16 [Sup Ct, Kings County 2020]).

Based upon the parties' submissions, the court finds that the defendants have failed to establish that they are entitled to the full amount of plaintiff's \$45,000 bond posted as an undertaking for the preliminary injunction, and that a hearing before a special referee must be conducted to determine the reasonable attorneys' fees, costs and expenses defendants incurred related to the injunction.

Accordingly, it is hereby

ORDERED that the Chass defendants' motion for an order directing that the \$45,000 bond be released and split 50/50 between the Chass defendants and 1710 Owners is granted *only to the extent* that said defendants, as the prevailing parties in the action, are to be awarded reasonable attorneys' fees, costs and expenses related to the preliminary injunction to be determined at a hearing before a special referee.

This constitutes the decision and order of the Court.

ENTER



HON. CAROLYN E. WADE, J. S. C.
HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT

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KINGS COUNTY CLERK
FILED