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2022-03-09

### Carex Real Prop., L.P. v. McShea

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<b>Carex Real Prop., L.P. v McShea</b>
2022 NY Slip Op 30800(U)
March 9, 2022
Supreme Court, New York County
Docket Number: Index No. 158193/2021
Judge: Laurence Love
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This opinion is uncorrected and not selected for official publication.

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

**PRESENT: HON. LAURENCE LOVE PART 63M**

*Justice*

-----X

**INDEX NO. 158193/2021**

CAREX REAL PROPERTY, L.P.,  
Plaintiff,

**MOTION DATE 11/24/2022**

**MOTION SEQ. NO. 001**

- v -

SARA MCSHEA, MICHAEL GILROY, JOHN DOE, JANE  
DOE

**DECISION + ORDER ON  
MOTION**

Defendants.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 001) 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18

were read on this motion to/for DISMISSAL.

Upon the foregoing documents, it is

The following read on defendants’ motion to dismiss, CPLR 3211(a)(4) – there is another action pending between the same parties for the same cause of action; and plaintiff’s cross – motion for i) “per Part C, Subpart A, Section 10 of L. 2021, c. 417, and Administrative Order 261/21, paragraph 3, scheduling an immediate hearing to determine the validity of the January 14, 2021 hardship declaration sworn to under penalty of perjury by defendants based upon plaintiff’s good faith belief that the defendants have not experienced a hardship,” and ii) for this court to so order “subpoenas directing defendants to produce documents to plaintiff at the hearing narrowly tailored and inextricably intertwined to a determination of the validity of defendants’ financial hardship declaration.”

A summons and complaint for this action were filed with causes of action for i) ejectment, and ii) reasonable attorney’s fees. Defendants filed a “tenant’s declaration of

hardship during the covid-19 pandemic” with an address of 100 West 119th Street, #7B, New York, NY 10026.

“On a motion to dismiss pursuant to CPLR 3211, the pleading is to be afforded a liberal construction. We accept the facts as alleged in the complaint as true, accord plaintiffs the benefit of every possible favorable inference, and determine only whether the facts as alleged fit within any cognizable legal theory” (see *Leon v. Martinez*, 84 N.Y.2d 83 [1994]).

Per plaintiff’s affirmation, “[d]efendants are the current occupants of the luxury condominium unit located at 100 West 119th Street, Apt 7B a/k/a PHB, New York, New York 10026, pursuant to a written lease agreement which most recently expired November 6, 2018. On January 14, 2021, defendants served and filed a hardship declaration ... these representations are false and are nothing more than an attempt to exploit and take advantage of chapter 381 of the recently enacted COVID-19 Emergency Eviction and Foreclosure Prevention Act (“CEEFFPA”). At the time CEEFFPA was passed, the legislation stated that actions or proceedings to regain possession of a housing accommodation would be automatically stayed upon a tenant’s filing of a self-attesting ‘hardship declaration’ – the legislation did not serve any plenary actions seeking monetary judgments for unpaid rent and/or use and occupancy. As a result, Plaintiff commenced a separate Supreme Court plenary action against defendants entitled *Carex Properties L.P. v. McShea, et. al.* Index No. 651144/2021 seeking *only* the entry of a monetary judgment as a result of defendants’ refusal to pay monies to Plaintiff while continuing to occupy the Premises (the “plenary action”). Contrary to the representation imposed by counsel at paragraph five (5) of his affirmation in support, The Plenary Action intentionally does not seek to regain possession of the Premises because Plaintiff sought to commence an action unimpeded by the highly restrictive provisions of CEEFFPA. Inversely, this action only seeks to regain

possession of the Premises and does not seek entry of any monetary judgment or the payment of use and occupancy. This action is subject to the ‘hardship declaration’ section of CEEFPA, the Plenary Action is not subject to the ‘hardship declaration’ section of CEEFPA. Both actions seek completely differently relied (sic). As there is no ‘redundancy’ of the relief sought, or causes of action, Defendants’ motion made pursuant to CPLR R 3211(a)(4) must be denied” (see NYSCEF Doc. No. 11 Par. 3, 4, 8, 9).

“On August 12, 2021, the United States Supreme Court enjoined the ‘hardship declaration’ portion of CEEFPA (under 2020 N.Y. Laws ch. 38) permitting self-certification of financial hardship in its entirety, holding that it violates the Due Process Clause of the United States Constitution. *Chrysaftis et. al. v. Marks*, 594 U.S. \_\_\_\_ (2021)” (see NYSCEF Doc. No. 11 Par. 10).

Plaintiff’s affirmation continues with “[p]art C, Subpart A, Section 10 of L. 2021, c. 417 provides, in pertinent part, that ‘a motion may be made by the petitioner, attesting a good faith belief that the respondent has not experienced a hardship, with notice to the respondent, and the court shall grant a hearing to determine whether to find the respondent’s hardship claim invalid” (see NYSCEF Doc. No. 11 Par. 13).

“After the Supreme Court of the United States enjoined the last version of the CEEFPA in *Chrysaftis et. al. v. Marks*, 594 U.S. \_\_\_\_ (2021), a modified and extended version of CEEFPA was signed into law on September 2, 2021 with the intended purpose of providing landlords with the procedural due process right to a hearing to contest a tenant’s assertion of hardship” (see NYSCEF Doc. No. 11 Par. 38).

The affidavit from Alexandra Herbst, principal and head officer of plaintiff affirms,

“[o]n September 29, 2014, plaintiff, as landlord, and defendants, as tenants, entered into a lease for the premises. In order to ensure

compliance with the Condominium's bylaws, I asked defendants to complete and execute a rental application and financial statement, to be submitted to the Condominium for approval of the Lease. In her 2014 financial disclosures, McShea represented that she: i) made \$200,000.00 annually, ii) had \$150,000 in securities, iii) had cash assets of \$50,000.00 and iv) had approximately \$950,000 in a retirement account (which generally can be drawn upon penalty free for emergencies such as rental payments to prevent eviction). Similarly, Gilroy represented that he: i) made at least \$50,000.00 annual, ii) had 81,500.00 in retirement accounts, and iii) had \$25,000.00 in cash assets. On or about August 11, 2020, I informed defendants of plaintiff's intention to sell the apartment by April 2021, alerting them to the fact that their tenancy could not be renewed beyond March 31, 2021. On December 22, 2020, I was advised that defendants' attorney had approached plaintiff's attorneys to propose the purchase of the apartment, albeit at a price below the then – current asking price of \$1,690,000.00. I rejected that offer. Shortly thereafter, on January 14, 2021, Defendants served their hardship affidavit on Plaintiff. This action does not seek unpaid rental arrears. To the contrary, it only seeks to regain possession of the Apartment. The reason these actions were commenced separately is because my attorneys advised me that recently enacted New York State Law permitted 'automatic stays' of causes of action seeking ejectment, however, those automatic stays did not apply to actions for money only. As such, my attorneys advised me this action and the Plenary Action which Plaintiff previously filed do not 'share' any cause of action in any way, shape or form" (see NYSCEF Doc. No. 12 Par. 3, 4, 5, 6, 8, 12).

Plaintiff submits the Original Lease and Renewal (see NYSCEF Doc. No. 14) and the Defendants' Financials (see NYSCEF Doc. No. 15), and Judicial Subpoena Duces Tecum and Ad Testificandum (see NYSCEF Doc. No. 13).

Defendants do not submit affidavits on this motion sequence.

ORDERED that defendants' motion to dismiss, per CPLR 3211(a)(4), is DENIED; and it is further

ORDERED that plaintiff's cross – motion for a "financial hardship hearing" is GRANTED, and there is to be scheduled a hearing, on June 8, 2022 at 10:00 a.m., in – person at Courtroom 355, at 60 Centre St., New York, New York 10007, to determine the validity of the

January 14, 2021 hardship declaration sworn to under penalty of perjury by defendants based upon plaintiff's good faith belief that the defendants have not experienced a hardship; and it is further

ORDERED that a Virtual Microsoft Teams Appearance for a pre – hearing conference with the Court is to be scheduled for May 25, 2022, at 10:00 a.m.; and it is further

ORDERED that plaintiff's cross – motion to so order “subpoenas directing defendants to produce documents to plaintiff at the hearing narrowly tailored and inextricably intertwined to a determination of the validity of defendants’ financial hardship declaration” is GRANTED.

3/9/2022  
DATE

  
LAURENCE LOVE, J.S.C.

CHECK ONE:	<input type="checkbox"/>	CASE DISPOSED	<input checked="" type="checkbox"/>	NON-FINAL DISPOSITION	
	<input type="checkbox"/>	GRANTED	<input type="checkbox"/>	GRANTED IN PART	<input type="checkbox"/>
APPLICATION:	<input type="checkbox"/>	SETTLE ORDER	<input type="checkbox"/>	SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/>	INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/>	FIDUCIARY APPOINTMENT	<input type="checkbox"/>
					REFERENCE