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Fontilme v Atzmon
2022 NY Slip Op 50272(U)
Decided on April 15, 2022
Civil Court Of The City Of New York, Queens County
Guthrie, J.
Published by New York State Law Reporting Bureau pursuant to Judiciary Law § 431.
This opinion is uncorrected and will not be published in the printed Official Reports.

Decided on April 15, 2022

Civil Court of the City of New York, Queens County

<p>Enock Fontilme, Petitioner,</p> <p>against</p> <p>Lisa Atzmon, Respondent, and Department of Housing Preservation and Development, Respondent.</p>
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Index No. HP 145/21

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Clinton J. Guthrie, J.

Recitation, as required by CPLR § 2219(a), of the papers considered in the review of respondent Lisa Atzmon's motion, pursuant to Civil Court Act § 1001 and CPLR § 602, to consolidate the instant harassment case with a holdover proceeding, index number L & T 305160/21.

Papers	Numbered
Notice of Motion & Affidavit/Affirmation Annexed 1 (NYSCEF No.59-60)	
Affirmation in Opposition 2 (NYSCEF #61)	

Upon the foregoing cited papers, the decision and order on respondent's motion to consolidate is as follows.

PROCEDURAL HISTORY

This harassment HP action was commenced by pro se order to show cause in March 2021. Both parties then retained counsel and respondent moved for summary judgment and dismissal, and to supplement and amend the answer. By Decision/Order dated July 29, 2021, Judge Maria Ressos denied the portion of respondent's motion seeking summary judgment and dismissal but granted respondent's request to supplement and amend the answer. Following several more adjournments, this court held a pre-trial conference with the attorneys for the parties on February 3, 2022. A trial date of March 10, 2022 was selected. Before this trial date, however, respondent made the instant motion to consolidate pursuant to Civil Court Act § 1001 and CPLR § 602. Petitioner, through counsel, submitted opposition papers (and asked for motion costs therein). The court heard argument on the motion on March 10, 2022 and reserved decision.

DISCUSSION & CONCLUSION

While Civil Court Act § 1001 merely provides that motion practice in the court is governed by the CPLR, except as the act "otherwise provides," CPLR § 602 specifically references consolidation. Pursuant to CPLR § 602(a), "[w]hen actions involving a common question of law or fact are pending before a court, the court, upon motion, may order a joint

trial of any or all the matters in issue, may order the actions consolidated, and may make such other orders concerning proceedings therein as may tend to avoid unnecessary costs or delay." Generally, a motion for consolidation under the statute "is addressed to the sound discretion of the court, and absent a showing of substantial prejudice by the party opposing the motion, consolidation is proper where there are common questions of law and fact." [RCN Constr. Corp. v. Fleet Bank, N.A., 34 AD3d 776](#), 777 [2d Dept 2006]. Nonetheless, consolidation is not appropriate where the movant "fail[s] to specify the commonality in issues of law." *Id.* at 777. [\[FN1\]](#) A motion for consolidation should also be denied "where the actions involve dissimilar issues or disparate legal theories or where a joint trial would substantially prejudice an opposing party or pose a risk of rendering the litigation unwieldy." [Cromwell v. CRP 482 Riverdale Ave., LLC, 163 AD3d 626](#), 627-628 [2d Dept 2018] [internal citations omitted].

In assessing the potential commonality of legal and factual questions raised in this harassment action and the holdover proceeding, the court first observes that the harassment claim is grounded in the Housing Maintenance Code, specifically NYC Admin. Code §§ 27-2005(d) and 27-2115(h)(1). The enactment of the harassment cause of action (via Local Law No. 7 in 2008) was "to address a perceived effort by landlords to empty rent-regulated apartments by harassing tenants into giving up their occupancy rights, using such tactics as 'commencing repeated baseless or frivolous court proceedings' against those tenants[.]" [Aguaiza v. Vantage Props., LLC, 69 AD3d 422](#), 423 [1st Dept 2010]; *see also* [Prometheus Realty Corp. v. City of New York, 80 AD3d 206](#), 209 [1st Dept 2010] [Local Law 7 amended portions of the [\[*2\]](#)Housing Maintenance Code "to provide new and greater protections for tenants experiencing harassment by landlords attempting to force them to abandon their apartments." [internal citation omitted]. On the other hand, a summary holdover proceeding is brought pursuant to article 7 of the RPAPL. A summary eviction proceeding is brought "to recover real property," as stated in RPAPL § 701. The Court of Appeals has held that a summary proceeding "is of a purely possessory character." *Jones v. Gianferante*, 305 NY 135, 139 [1953]. [\[FN2\]](#) Moreover, a claim brought under article 7 of the RPAPL requires the establishment of several procedural elements that do not exist in harassment actions. *See e.g.* [1646 Union, LLC v. Simpson, 62 Misc 3d 142](#)[A], 2019 NY Slip Op 50089[U], *2 [App Term, 2d Dept, 2d, 11th & 13th Jud Dists 2019] [In a summary eviction proceeding brought pursuant to article 7 of the RPAPL, "relief can be granted to a petitioner only where all the elements of the petitioner's cause of action have been made out, a requirement which is sometimes referred to as 'jurisdictional'["] [internal citations omitted].

It must also be noted that there are currently several administrative orders and directives affecting eviction proceedings that have been issued in response to the COVID-19 pandemic. No analogous orders or directives affect harassment actions brought under the Housing Maintenance Code. At this time, Administrative Orders (AO) 245/21 and 34/22, and DRP-217, DPR-221, and DRP-222, establish procedures (beyond what is required under article 7 of the RPAPL) for motions, conferences, warrant requisitions, default judgments, and other matters arising in summary eviction proceedings in New York City. *See generally* [3905 Assoc., LLC v. Clark](#), 2022 NY Slip Op 22110 [Civ Ct, Bronx County 2022] [Addressing DRP-222]; [Hernandez v. Vasquez](#), 73 Misc 3d 1213[A], 2021 NY Slip Op 51034[U] [Civ Ct, Bronx County 2021] [Addressing AO 245/21 and DRP-217, as well as precursor COVID-19 era administrative orders and directives].

The permissible remedies in harassment actions and summary holdover proceedings vary as well. In a harassment action, NYC Admin. Code § 27-2115(m) provides that upon a finding of harassment, a court may determine that a class "c" violation exists, issue a restraining order and direct the owner to ensure that no further violation occurs, impose a civil penalty, and "such other relief as the court deems appropriate." Additionally, both compensatory (mandatory) and punitive (permissive) damages may be awarded upon a successful harassment claim brought under the Housing Maintenance Code. *See* NYC Admin. Code § 27-2115(o); [Guang Y. Leung v. Zi Chang Realty Corp.](#), 74 Misc 3d 126[A], 2022 NY Slip Op 50034[U] [App Term, 1st Dept 2022]. Conversely, in a summary holdover proceeding, the primary relief consists of a final judgment (of possession) and a warrant of eviction. *See* RPAPL §§ 747 and 749. Any other ultimate relief granted, including a monetary judgment for rent or use and occupancy, "can only be made concomitant with an award of possession." [615 Nostrand Ave. Corp. v. Roach](#), 15 Misc 3d 1, 4 [App Term, 2d Dept, 2d & 11th Jud Dists 2006]; *see also* [Fieldbridge Assoc., LLC v. Sanders](#), 70 Misc 3d 140[A], 2021 NY Slip Op 50128[U] [App Term, 2d Dept, 2d, 11th & 13th [*3]Jud Dists 2021] [Use and occupancy was not warranted where landlord was not awarded possession].

Respondent argues that there is nonetheless sufficient overlap between the facts in the harassment action and the holdover proceeding to justify consolidation. The focus is primarily on the counterclaims included in respondent's supplemental answer, which include breach of contract, breach of substantial obligation of tenancy, use and occupancy, private nuisance, assault, and trespass, and the assertion that certain facts giving rise to those counterclaims will be litigated in the holdover proceeding. While that is conceivable, respondent's motion offers no *specific facts* that overlap, only conclusory remedies ("obligation for use and occupancy") and factual generalities ("the behavior of the parties vis-

à-vis each other and vis-à-vis the apartment") (Dembia Aff. § 9). Additionally, the procedural postures of the respective cases are dissimilar. The harassment action has been pending for over a year, has appeared on this court's calendar multiple times, and was scheduled for trial at the time that respondent made the instant motion. On the other hand, the holdover proceeding, while commenced in July 2021, was stayed by the filing of a COVID-19 hardship declaration and has yet to be calendared in a resolution part. [\[FN3\]](#)

For each of these reasons, the court holds that consolidation of this harassment HP action with the summary holdover proceeding involving the same parties is unwarranted under CPLR § 602. [\[FN4\]](#) Accordingly, respondent's motion is denied in its entirety. The court refrains from imposing costs upon respondent, as requested in petitioner's opposition papers. Petitioner has not moved for this relief by cross-motion (*see* CPLR § 2215), so the request is procedurally improper. Additionally, without the court finding that sanctions are warranted under 22 NYCRR § 130-1.1 (and there is no request for this relief), the court sees no legal basis for the imposition of costs.

This matter will be restored to the Part C calendar for trial on May 3, 2022 at 2:30 PM (Room 407, 89-17 Sutphin Boulevard, Jamaica, New York 11435). This Decision/Order will be filed to NYSCEF.

THIS CONSTITUTES THE DECISION AND ORDER OF THE COURT.

Dated: April 15, 2022
Queens, New York
HON. CLINTON J. GUTHRIE, J.H.C.

Footnotes

[Footnote 1:](#) In *RCN Constr. Corp.*, the Appellate Division held that an action sounding in fraud could not appropriately be consolidated with an action sounding in contract. 34 AD3d at 777.

[Footnote 2:](#) *Jones* involved a summary proceeding pursuant to article 83 of the Civil Practice Act, a precursor to article 7 of the RPAPL. Nonetheless, the preeminently possessory nature of summary proceedings has been recognized in relation to Article 7 of the RPAPL. *See e.g. Patchogue Assoc. v. Sears, Roebuck & Co.*, 37 Misc 3d 1, 4 [App Term, 9th & 10th Jud Dists 2012].

[Footnote 3:](#) The status of the holdover proceeding (index no. L & T 305160/21) has been confirmed by reviewing the UCMS (Universal Case Management System) database

maintained by the court.

Footnote 4: While Civil Court Act § 110(b) specifically addresses consolidation of housing part actions and proceedings, it is not raised in respondent's motion and the court will not address it sua sponte.

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