

Avenue 37 LLC v Imperial Palace II, Inc.
2023 NY Slip Op 35019(U)
April 5, 2023
Supreme Court, Queens County
Docket Number: Index No. 700608/2022
Judge: Denise N. Johnson
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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

Present: HONORABLE DENISE N. JOHNSON IAS Part 11
Justice

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AVENUE 37 LLC Index No.:700608/2022

Plaintiff(s),

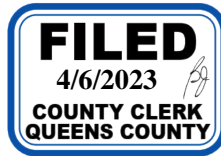
- and - Motion Date:2/6/2023

IMPERIAL PALACE II, INC., LAM PING Motion Cal. No.: 1

CHENG Motion Seq. No: 3

Defendant(s).

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The following papers numbered EF 98 - 157 read on this motion by the Plaintiff Avenue 37 LLC for an order granting Plaintiff summary judgment pursuant to CPLR §3212.

	<u>Papers Numbered</u>
Notice of Motion-Affirmation- Memorandum of Law -Exhibits-Service.....	EF 98-133
Affirmation in Opposition- Memorandum of Law -Exhibits-Service.....	EF134-149
Reply Affirmation- Memorandum of Law in Reply-Service.....	EF150 - 157

Upon the foregoing papers it is **ORDERED** that the motion is decided as follows:

This is an action brought by Plaintiff which stems from a lease agreement for the premises located at 136-13 37th Avenue, Suite 1A, Flushing, New York signed on or about January 31, 2012. The lease term was for 15 years. Plaintiff asserts that on January 8, 2021, Plaintiff properly terminated the lease, pursuant to the lease terms, due to damage caused by the fire which occurred on that date (“fire”). This action was commenced on January 11, 2022 by the filing of a summons and complaint. Plaintiff is now seeking declaratory judgement against the Defendants declaring that the lease to the subject premises (“lease”) was duly terminated on January 8, 2021 as a result of the fire occurring in the building located at 136-13 –136-17 37th Avenue, Flushing, New York

11354, also known as Block 4977 and Lot 102, (“Building”).

Plaintiff now moves, pursuant to CPLR §3212, inter alia, for an order of summary judgment in favor of Plaintiff, declaring that the commercial lease between Plaintiff and Defendant Imperial Palace II, Inc.(“Imperial”) has been duly terminated by Plaintiff, in accordance with the lease terms, due to the fire having damaged fifty percent or more of the premises. Plaintiff also moves for an order as to liability for trespass against the Defendants, in addition to, an order conforming the pleadings to the proof and granting summary judgement on an action for ejectment against the Defendants.

It is well-settled that the proponent of a summary judgment motion must make *prima facie* showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case. (*See Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 [1980]; *Sillman v. Twentieth Century-Fox Film Corp.*, 3 N.Y.2d 395, 404 [1957]). Failure to make such a showing requires denial of the motion.

CPLR §3212(b) requires that for a court to grant summary judgment the court must determine if the movant's papers justify holding as a matter of law, "that the cause of action or defense has no merit." The evidence submitted in support of the movant must be viewed in the light most favorable to the non-movant (*see, Grivas v. Grivas*, 113 A.D.2d 264, 269 [2d Dept. 1985]; *Airco Alloys Division, Airco Inc. v. Niagara Mohawk Power Corp.*, 76 A.D.2d 68 [4th Dept. 1980]; *Parvi v. Kingston*, 41 N.Y.2d 553, 557 [1977]). Summary judgment shall be granted only when there are no issues of material fact and the evidence requires the court to direct judgment in favor of the movant as a matter of law (*see, Friends of Animals, Inc., v. Associated Fur Mfrs.*, 46 N.Y.2d 1065 [1979]; *Orwell Bldg. Corp. v. Bessaha*, 5 A.D.3d 573 [2d Dept. 2003]).

With the instant motion, Plaintiff has the initial burden of presenting competent evidence

to show that the lease was duly terminated on January 8, 2021, as a result of a fire occurring in the building. In support of this motion the Plaintiff has submitted the pleadings, the lease, the certified deed to the Building, a Department of Buildings (“DOB”) Full Vacate Order, DOB Notice of Violation, photographs, Notice of Termination to Defendants, attorney letters, and a DOB work permit. Based upon the totality of Plaintiffs submissions there is clear evidence presented showing that the building structure has been damaged due to the fire and that the building itself sustained damage to more than fifty percent (50%) of its structure. As such, pursuant the terms of the lease the Defendants’ tenancy was terminated as of the date of the fire. The lease did not require further notice be given under the circumstances.

“When such a showing has been made by the movant, then to defeat summary judgment ‘the opposing party must show facts sufficient to require a trial of any issue of fact’”(Khorana v Stop & Shop Supermarket Co. LLC, 2012 NY Slip Op 31878[U] [Sup Ct, Nassau County 2012]). Defendant must now come forward with competent admissible evidence sufficient to raise a triable issue of fact. Defendants’ contentions that the building that sustained the damage was a “next-door” building is without merit. The building is one undivided parcel as determined by the Block and Lot designation, despite the building having a physical address of 136-13/136-15/136-17 37th Avenue. The vacate order was issued to the entire building not just the portion of the building where the fire initiated. Defendants have failed to raise triable issues of material fact as to whether the tenancy was duly terminated on January 8, 2021, as a result of the fire.

Regarding Plaintiff’s Motion for Summary Judgement as to liability for trespass by the Defendants, the basis for a trespass lies in the absence of a legal right or authority to enter and/or possess property. Because there was a prior existing landlord/tenant agreement trespass is not

applicable. *See, Alcoa Residences v. Association of Tenants of Lincoln Towers*, 28 A.D.2d 831, 281 N.Y.S.2d 567 (1st Dept 1967); *See, also, Padded Accessories Corp. v. Five Herriot Street Corp.*, 16 Misc.2d 1060, 184 N.Y.S.2d 244 (1959). (*Haslacha, Inc. v Jubilee, Inc.*, 8 Misc 3d 1003[A], 1003A, 2005 NY Slip Op 50908[U], *6 [Civ Ct, New York County 2005]). Here, the parties have established that there was a valid landlord/tenant agreement until January 8, 2021, when said agreement was duly terminated due to the fire as previously established. Once a valid agreement has been in place, Plaintiff's remedy is that which applies to a holdover tenant not to a trespasser. The Plaintiff has failed to meet their burden and therefore this portion of the motion is denied.

Lastly, Plaintiff seeks to conform the pleadings to the proof to establish an ejectment cause of action, for which they are seeking summary judgement. It is well established that summary judgement can only be granted upon a cause of action which has been previously plead. (*Galatti v Alliance Funding Co.*, 228 AD2d 550 [2d Dept 1996]; *Alvord & Swift v Stewart M. Muller Constr. Co.*, 46 NY2d 276 [1978]); *Lefft v Canada Life Assur. Co.*, 40 AD2d 641 [1st Dept 1972]). Plaintiff has not plead ejectment as a cause of action within their pleadings and therefore Defendant has not had the opportunity to properly defend against such cause of action. Plaintiff also did not seek to amend the pleadings despite it being an available remedy, instead they have moved pursuant to CPLR §3025 to conform the pleadings to the proof that has been presented in an attempt improperly obtain summary judgement on an un-plead cause of action. Therefore, this branch of Plaintiff's motion is denied without prejudice to renew. Accordingly, it is

ORDERED, that Plaintiff's second cause of action, Defendant's first and third through eighth affirmative defenses and Defendant's counterclaim are all dismissed.

ORDERED, that Plaintiff's motion for an order of summary judgment in favor of Plaintiff, declaring that the commercial lease between Plaintiff and Defendant Imperial has been duly

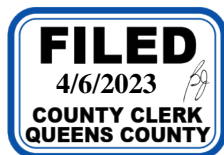
terminated is granted. It is further,

ORDERED, that Plaintiff's motion for an order as to liability for trespass against the Defendants is denied. It is further,

ORDERED, that Plaintiff's motion an order conforming the pleadings to the proof and granting summary judgement on an action for ejection against the Defendants is denied without prejudice to renew upon proper application.

The foregoing shall constitute the decision and order of this court.

Dated: April 5, 2023



Denise N. Johnson

DENISE N. JOHNSON
J.S.C.