

17 East 89th Street Tenants, Inc. v Tsabbar
2003 NY Slip Op 30113(U)
April 8, 2003
Supreme Court, New York County
Docket Number: 0111258/2002
Judge: Joan Madden
Republished from New York State Unified Court System's E-Courts Service. Search E-Courts (http://www.nycourts.gov/ecourts) for any additional information on this case.
This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. JOAN A. MADDEN
J.S.C.
Justice

PART 11

17 East 88TH St.

INDEX NO. 111258/02
MOTION DATE 11-21-02
MOTION SEQ. NO. 001
MOTION CAL. NO. _____

- v -
Z. Tsabbar

The following papers, numbered 1 to _____ were read on this motion to/for ANNED

PAPERS NUMBERED
<u>17 2003</u>

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 is decided in accordance with the annexed Memorandum Decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE _____

Dated: April 8, 2003 _____
J.S.C.

Check one: FINAL DISPOSITION MON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
17 EAST 89TH STREET TENANTS, INC.,

Index No. 111258/02

Plaintiff,

- against -

ZION TSABBAR, DR. ANTOINE E. CHIHA, "JOHN DOE,"

Defendants.

..... X

JOAN S. MADDEN, J.:

Defendant tenant Zion Tsabbar seeks an order dismissing this action for ejectment and rent arrears brought by plaintiff landlord 17 East 89th Street Tenants, Inc., based on plaintiffs alleged failure to satisfy a condition precedent, namely, service of a Notice of Termination, and wilful refusal to participate in discovery. Plaintiff cross-moves for an order granting summary judgment in its favor, restoring it to lawful possession of the premises located at 17 East 89th Street, Apartment 1D, New York, New York (the premises); directing defendants to pay use and occupancy charges; and awarding it attorney's fees for this action.

Tsabbar is a dentist, who, since November 3, 1995, **has held a proprietary lease for a** professional apartment in plaintiffs residential cooperative, out of which he operates a private dental practice. Defendant Dr. Antoine E. Chiha, who has not yet appeared in this action, is also a dentist, and, allegedly, works out of Tsabbar's offices in the premises.

At Article 11, Sixth paragraph, the proprietary lease prohibits any sublet without plaintiffs written approval. The Fourteenth paragraph of Article II specifies that the landlord must use registered mail to serve plaintiff with any notices, while the Fifteenth paragraph provides for the

landlord's collection of reasonable attorney's fees and disbursements, as additional rent or damages, if the landlord has to institute an action or summary proceedings to cure any default under the lease. The lease's Article 111, First paragraph specifies that upon the occurrence of any of the conditions listed in subparagraphs (a) to (h), the landlord shall give the lessee "a notice stating that the [lease] term will expire on a date at least ten days thereafter. . . and all right, title and interest of the Lessee shall thereupon wholly cease and expire." Plaintiffs Notice of Cross Motion, Proprietary Lease, Exhibit B. Subparagraph (c) of Article III's First paragraph states that a violation of the lease occurs if "any unauthorized person [is] permitted to use or occupy [an] apartment." *Id.*

This action is one of several that plaintiff and Tsabbar have participated in during the last five years, with most entailing significant motion practice. In the interests of brevity, the court limits its discussion to those actions initiated by Tsabbar that have some bearing on this one. In 1997, Tsabbar filed an action against plaintiff and its directors and management, challenging their denial of his requests to sublet his office space, to assign his lease, or to allow two other dentists, Allison Cook and Janet Stoess-Allen, to practice in his office. Tsabbar also litigated the claim that plaintiff had misallocated or overallocated the shares for his office, causing his monthly maintenance charges to be higher than they should be. Tsabbar's claims were rejected in *Tsubbar v Auld* (Sup Ct, **NY** County, January 18, 2001, Index No. 120641/97, Omansky, J., *affd* 289 AD2d 115 [1st Dept 2001], *lv denied* 98 NY2d 613 [2002]), upon a determination that the oral agreement alleged by Tsabbar, pursuant to which he would have been allowed to sublease his office space without the approval of the cooperative's board, was unenforceable, as the lease provision requiring board consent for subleases was unambiguous as a matter of law.

On March 13, 2001, plaintiff served Tsabbar with a notice of default, based on Chiha's use of the premises, and Tsabbar brought another action, in which he moved unsuccessfully for a *Yellowstone* injunction, seeking to stop plaintiff from terminating the lease. Justice Omansky granted plaintiff summary judgment in that action, finding that the issue of unauthorized use of Tsabbar's space had already been decided against him in prior litigation. *Tsabbar v Delena*, Sup Ct, NY County, May 21, 2001, Index No. 107920/01. Plaintiff alleges that after Justice Omansky rendered her decision, and prior to the entry of a judgment, Tsabbar cured the default in that Chiha moved out of the premises. However, Chiha moved back into the premises, and in July 2001, Tsabbar brought a third action against plaintiff, its managing agent, and members of its board of directors, seeking to enjoin them from interfering with Chiha's use and occupancy of the premises. After Justice Omansky recused herself, the action was assigned to Justice Walter Tolub, who granted summary judgment in favor of the defendants and dismissed the action, upon finding that Tsabbar's claims of disparate and inequitable cooperative share allocation and selective enforcement of sublease requirements were precluded by the doctrines of *resjudicata* and collateral estoppel, as they were rejected in a prior action, after Tsabbar was afforded a lengthy period of discovery. *Tsabbar v Delena*, Sup Ct, NY County, Sept. 24, 2001, Index No. 603578/01, *affd* 300 AD2d 196 (1st Dept 2002).

On February 13, 2002, appearing *pro se* and moving by order to show cause, Tsabbar filed *Tsabbar v Delena*, under Index No. 103066/02, seeking a *Yellowstone* injunction and a temporary restraining order, that would stay or toll the cure period cited in a Notice of Default dated January 22, 2002, that plaintiff had served on him. Tsabbar's pleading cited the Default Notice, which was attached and which advised that plaintiff would terminate his lease on

February 28,2002, if the alleged violation was not corrected in 30 days. On February 21,2002, Justice Tolub denied Tsabbar's request for the *Yellowstone* injunction, "for the reasons set forth in [his] opinion of Sept. 24,2001, Index No. 603758/01 and Judge Omansky's decision of Jan. 18, 2001, Index No. 120641/97." Plaintiffs Notice of Cross Motion, Exhibit Q. The Appellate Division affirmed Justice Tolub's decision on May 28, 2002, "without prejudice to plaintiff proceeding by way of notice of motion." *Id.* There is no evidence that Tsabbar has prosecuted that action any further.

On May 29,2002, plaintiff initiated this action, alleging that, since January 2002, Chiha has been occupying Tsabbar's office for use as a dental practice, in violation of Tsabbar's lease. Plaintiff alleges that on January 25,2002, it served a Notice of Default on Tsabbar, dated January 22,2002, citing the unauthorized sublet to Chiha, and advising that Tsabbar had 30 days, or until February 28,2002, to cure the default. Plaintiff alleges that Tsabbar did not cure the default and that both Tsabbar and Chiha continued to occupy the premises after February 28,2002. Plaintiff alleges that, on April 4,2002, it served Tsabbar with a Notice of Termination, citing Tsabbar's failure to comply with the default notice, and advising that the lease would expire in 10 days.

Tsabbar, who continues to occupy the premises, answered the Complaint on June 28, 2002, through counsel, asserting several affirmative defenses, including the claims that as a condition precedent to this litigation, plaintiff was required to, but did not, serve him with Default and Termination Notices; that Chiha is an authorized user of the premises; and that he was overallocated shares in the cooperative, in that more shares were ascribed to his unit than to the other professional office on the premises, rendering his maintenance fees higher than they would otherwise have been. Tsabbar also served discovery demands on plaintiff, seeking

documents and noticing depositions for July 31, 2002, regarding plaintiffs allocation of shares, calculation of maintenance charges, and policies and guidelines for reviewing sublet requests.

Plaintiff did not comply with Tsabbar's discovery demands, and on August 8, 2002, Tsabbar served this dismissal motion, repeating the claims and defenses asserted in his answer, including the claim that this court lacks jurisdiction over him, based on plaintiffs alleged failure to serve the default and termination notices.

Discussion

Plaintiff asks that this motion and cross motion be assigned to Justice Tolub, as when Tsabbar submitted this motion, he had two other actions pending there. However, due to the passage of time and interim Appellate Division rulings on Tsabbar's other pending actions, this court finds that judicial economy would be better served by rendering a decision in this matter. Therefore, plaintiffs request for a transfer to Justice Tolub is denied.

Plaintiff asserts that it served Tsabbar with the requisite notices and is entitled to an order ejecting Tsabbar from the premises. In support of this claim, plaintiff submits copies of an affidavit of service, dated April 1, 2002, and of postal receipts indicating that, on January 25, 2002, a Notice of Default was sent to Tsabbar by certified mail; by certified mail return receipt requested; by regular mail; and by registered mail. Plaintiff also submits a copy of a Notice of Termination, dated March 5, 2002, which advised that Tsabbar's lease would be terminated on March 19, 2002, based on Tsabbar's failure to cure the condition stated in the Notice of Default. The copies of the postal slips that serve as evidence of its mailing are dated April 4, 2002, and the affidavit of service accompanying the Termination Notice is dated April 6, 2002.

Plaintiffs evidence tends to establish, therefore, that it more than complied with the

lease, which required only that notices be sent to Tsabbar by registered mail. Although the Termination Notice sent to Tsabbar was dated March 5, 2002, and advised that Tsabbar's tenancy would be terminated on March 19, 2002, it was not mailed until April 4, 2002. This is not a fatal error, however, as it did not prejudice Tsabbar, who merely received additional time to correct the violation mentioned in the default notice, which was mailed to him in January 2002. Further, in accord with the lease terms, the Termination Notice advised that Tsabbar's lease would be terminated "ten (10) days after service of this Notice upon you." Plaintiffs Notice of Cross Motion, Exhibits B and V.

As plaintiff has tendered admissible evidence, including the unrefuted postal mailing certificates, to establish that it mailed Tsabbar both the Default and Termination Notices to the same address where all other correspondence for Tsabbar was sent, Tsabbar's bare denials of receipt are unavailing. Such denials are also disingenuous, given Tsabbar's attempts, in *Tsabbar v Delena* (Index No. 103066/02), to stay or toll the cure period cited in the January 2002 Notice of Default. As plaintiff has tendered admissible evidence to establish that it satisfied a condition precedent to this suit, by mailing the Default and Termination Notices, as required by the parties' lease, the court has jurisdiction over this matter. Thus, Tsabbar's motion to dismiss, for lack of jurisdiction, is denied.

Plaintiff seeks, and has established its entitlement to, possession of the premises, as of April 15, 2002, as Tsabbar received the Notice of Default and an opportunity to cure, and failed to cure, causing the lease to expire on its own terms. *See, First Natl. Stores v Yellowstone Shopping Ctr.*, 21 NY2d 630 (1968). As the lease expired more than a month before plaintiff started this action, on May 29, 2002, the court is powerless to revive the lease, and may not hear

Tsabbar's claims about plaintiffs refusal to let Chiha practice out of his office, or the fairness of the shares and maintenance charges allocated to his office space. *See, id.*; *see also, Graubard Mollen Horowitz Pomeranz & Shapiro v 600 Third Ave. Assocs.*, 93 NY2d 508, 513 (1999); *Benenson v SKEK Assocs.*, 293 AD2d 694,695 (2d Dept 2002). Plaintiff is, therefore, entitled to summary judgment on its first cause of action, for ejection of Tsabbar from, and immediate possession of, the premises.

Plaintiff also cross-moves for summary judgment on its claim for use and occupancy charges, including rent arrears of \$16,242.94 allegedly due August 15, 2002, as detailed in the Complaint's second and fourth causes of action. Plaintiff submits an affidavit from David C. Delena, an employee of Insignia Residential Group, plaintiffs managing agent, who attests that Tsabbar owed \$44,997.07 in unpaid maintenance charges as of October 2002, and would remain liable for monthly charges until the date of his eviction from the premises. Plaintiff also proffers copies of ledger entries depicting various charges to Tsabbar's account, including the monthly maintenance fees, from December 1997 to November 2002.

Tsabbar disputes plaintiffs figures for the overdue rent and contends that he has the right to conduct discovery, including an inspection of plaintiffs books and records, to ascertain the accuracy and fairness of plaintiffs share allocation and maintenance calculation formulae. He contends further that plaintiffs claim for rent arrears is excessive, is linked to the refusal to allow Chiha to work in his dental practice, and is an attempt to extort \$18,000.00 in additional rent from him, or to cause him to forfeit a practice in which he invested almost a million dollars.

Tsabbar's challenges to plaintiffs data and records, which allegedly specify the amounts due for rent and maintenance, center on the claims that he was overallocated shares in the

cooperative and, consequently, overcharged for maintenance, and that Chiha is, or should be, permitted to practice out of his office. As Tsabbar and plaintiff or its privies were all parties to previous litigation that decided these issues in plaintiffs favor, the doctrines of *resjudicata* and collateral estoppel preclude Tsabbar from relitigating them. See, *Tsabbar v Delena, supra*, 300 AD2d 196, citing *Matter of Reilly v Reid*, 45 NY2d 24, 27-28 (1978). Consequently, plaintiff is entitled to summary judgment on the issue of Tsabbar's liability for use and occupancy charges, and Tsabbar's request for discovery on this issue becomes moot.

The only issues remaining here are the amounts that Tsabbar owes plaintiff, as use and occupancy charges, and for the attorney's fees, costs, and disbursements incurred to prosecute this action, as provided for in Article II, paragraph Fifteenth of the lease. While plaintiff has established that Tsabbar is liable for use and occupancy charges up to the date that he vacates the premises, it is unclear when the arrears started to accumulate, or the precise amounts due, as plaintiffs rent ledger does not appear to reflect the balances stated in the Complaint or in Delena's affidavit. Therefore, this matter will be set down for a reference on the issue of use and occupancy charges, as demanded in plaintiffs second and fourth causes of action. Similarly, the attorney's fees and costs demanded in the third cause of action cannot be determined at this point, and will also be set down for a reference.

Tsabbar's remaining contentions were reviewed and found to lack merit. Given the parties' litigation history, the court repeats the Appellate Division's admonitions, that any further attempts on Tsabbar's part to forestall payments due to plaintiff, or to frustrate plaintiffs repossession of the premises, could subject him to the imposition of sanctions, pursuant to 22 NYCRR 130-1.1 (a) and (c). *Tsabbar v Delena, supra*, 300 AD2d, at ___, 752 NYS2d, at 637.

Accordingly, it is hereby

ORDERED that the motion of defendant Zion Tsabbar for an order dismissing this action is denied; and it is further

ORDERED that the cross motion is granted to the extent of granting partial summary judgment in favor of plaintiff 17 East 89th Street Tenants, Inc., and against defendant Zion Tsabbar as follows:

1. Plaintiff is granted judgment on its first cause of action for ejectment of defendants Zion Tsabbar and Dr. Antoine E. Chiha; the first cause of action is severed; and the Clerk is directed to enter judgment accordingly;

2. Defendant Zion Tsabbar is found liable to plaintiff on the second, third, and fourth causes of action, for use and occupancy, attorney's fees, and rent arrears, respectively; and it is further

ORDERED that the issues of use and occupancy, attorney's fees, and rent arrears are referred to a Special Referee to hear and report with recommendations, except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR 4317, the Special Referee, or another party designated by the parties to serve as referee, shall determine the aforesaid issue; and it is further

ORDERED that plaintiffs cross motion is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further


ORDERED that a copy of this order with notice of entry shall be served on the Clerk of the Judicial Support Office (Room 311) to arrange a date for the reference to a Special Referee;

and it is further

ORDERED and ADJUDGED that plaintiff is entitled to possession of the premises at 17 East 89th Street, Apartment 1D, New York, New York as against defendants Zion Tsabbar and Dr. Antoine E. Chiha, and the Sheriff of the City of New York, County of New York, upon receipt of a certified copy of this Order and Judgment and payment of proper fees, is directed to place plaintiff in possession accordingly, and it is further

ORDERED and ADJUDGED that immediately upon entry of this Order and Judgment, plaintiff may exercise all acts of ownership and possession of 17 East 89th Street, Apartment 1D, New York, New York, including entry thereto, as against defendants Zion Tsabbar and Dr. Antoine E. Chiha.

Date: April 8, 2023

ENTER


J.S.C.