

**57W Operating Co., Inc. v Park Towers South
Company, LLC**

2004 NY Slip Op 30093(U)

February 17, 2004

Supreme Court, New York County

Docket Number: 0600436/0436

Judge: Karen S. Smith

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

PRESENT: Karen S. Smith
Index Number : 600436/2006
— 57 W. OPERATING CO., INC.
vs
PARK TOWERS SOUTH CO., LLC
Sequence Number : 001
CONSOLIDATION/JOINT TRIAL

PART 44

DEX NO. _____
OTION DATE _____
OTION SEQ. NO. _____
OTION CAL. NO. _____

The following papers, numbered 1 to 4 were read on this motion to/for consolidation

	PAPERS NUMBERED
Notice of Motlon/ Order to Show Cause — Affidavits — Exhibits ...	<u>1</u>
Answering Affidavits — Exhibits _____	<u>2</u>
Replying Affidavits _____	<u>3</u>
<u>Memorandum of Law</u>	<u>4</u>

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.

FILED
JUN 30 2006
NEW YORK
COUNTY CLERK'S OFFICE

Dated: 6-23-06

Karen S. Smith
Karen S. Smith N.Y.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST REFERENCE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 44

-----X
57W OPERATING CO., INC.

Index no.: 600436/2006

Plaintiff,

-against-

DECISION AND ORDER

PARK TOWERS SOUTH COMPANY, LLC

Defendant.

PRESENT: KAREN S. SMITH, J.S.C.

FILED
JUN 30 2006
NEW YORK
COUNTY CLERK'S OFFICE

Plaintiff 57W Operating Co., Inc. ("57")'s motion pursuant to CPLR § 602(a), to consolidate this action with an action entitled Park Towers South Company, LLC v. Neil Binder and Mark Broxmeyer, Index No. 117080/2005, ("Park Action") is granted.

57 was established for the sole purpose of leasing the commercial space for Bellmarc West, LLC ("Bellmarc"), a real estate brokerage business. Broxmeyer and Binder were the sole principals of both 57 and Bellmarc. On March 19, 2002, 57 entered into a lease with Park for commercial space in a building located at 352 Park Avenue South, New York, New York. The lease term was set to expire on April 30, 2012. Broxmeyer and Binder, principals of 57, executed guarantees for 57's obligations under the lease. On September 15, 2003, 57 and Park entered into a separate lease for additional commercial space in the same building. That lease term is set to expire on April 30, 2012, and Broxmeyer and Binder executed another guarantee for 57's obligations thereunder. Each guarantee provided that, for the time period relevant to these actions, Broxmeyer and Binder would not be liable for 57's obligations after the date 57 vacated the premises, provided that 57 gave Park at least 60 days written notice of the vacate date.

57 alleges that, after the commencement of the leases, the commercial space developed a serious mold problem. 57 alleges that, despite its repeated requests, Park failed to take any steps to remedy the condition. 57 alleges that the problem became so severe that it was constructively evicted in October of 2005, when Bellmarc vacated the premises. However, 57 retained possession

of the leased premises at that time and served written notice on Park setting the vacate date for December 31, 2005. Subsequently, 57 served another notice on Park, giving January 19 and February 19, 2006 as the vacate dates for the two commercial spaces.

On October 27, 2005, 57 alleges that Park requested that 57 give access to the commercial spaces for the purposes of showing them to prospective tenants. 57 refused. Sometime in early November of 2005, 57 alleges that Park entered onto the premises and showed it to prospective tenants without 57's permission. 57 also alleges that Park entered the premises on November 7, 2005 and demanded that an employee of 57's turn over the key to defendant. 57 alleges that Park then removed 57's property from the premises, continued to show the premises to prospective tenants, and eventually demolished the interior of the premises.

On December 2, 2005, Park commenced its action against Binder and Broxmeyer seeking back rent for the premises through December 31, 2005 pursuant to their guarantees, in an amount totalling \$93,898.87. Park also sought attorneys fees.

57 then commenced the instant action on January 31, 2006, seeking damages for trespass, constructive eviction, actual eviction, and an order enjoining Park from drawing down on two lines of credit 57 had posted as a security deposit. Park answered the complaint in the instant action on March 17, 2006 and set forth counterclaims seeking the entire outstanding balance of the rent due under the lease, as well as certain cost of living adjustments and real property taxes for the premises.

57 now moves to consolidate the actions on the grounds that they arise from the same set of transactions, require resolution of the same issues, and involve the same parties. Park opposes the motion on the grounds that, while the actions arise from the same set of transactions, they do not involve common questions of law. Specifically, Park argues that 57's obligation to pay rent continued while 57 remained in possession, regardless of any breach or tortious conduct on Park's part. Park further argues that, as its claims for back rent are straightforward and easily established and 57's claims are complex and will require extensive discovery before they can be resolved, consolidation would prejudicially delay resolution of its claims.

CPLR § 602 (a) provides that, when actions involving common questions of law or fact are

pending before the court, the court may grant an order consolidating the two actions. Indeed, when common issues of law and fact prevail, courts favor consolidation unless the party opposing consolidation can demonstrate that consolidation will prejudice a substantial right. (*Geneva Temps v. New World Communities, Inc.*, 24 AD3d 332, 334 [1st Dept 2005].)

Consolidation of these two actions is appropriate. Without reaching any factual or legal determination of the issues in either action, it appears from the face of the complaints in both actions that common questions of fact exist. While the complaint in the Park Action alleged that 57 remained in possession of the premises as of December 2, 2005, the complaint in the instant action alleges circumstances that could support a claim that Park retook possession of the premises as early as November 7, 2005, which could in turn affect Broxmeyer and Binder's liability to Park. Moreover, if Park's claims are as straightforward as it contends, it should have little difficulty establishing them on a motion for partial summary judgment, thus obviating any prejudice from a delay in the resolution of the claims in the instant action. Accordingly, it is hereby

ORDERED that the motion is granted and the above-captioned action is consolidated in this Court with Park Towers South Company, LLC v. Neil Binder and Mark Broxmeyer, Index No. 117080/2005, under Index No. 117080/2005, and the consolidated action shall bear the following caption:

Park Towers South Company, LLC
Plaintiff

-against-

57 W. Operating Co., Inc., Neil Binder, and Mark Broxmeyer
Defendants,

and it is further

ORDERED that the pleadings in the action hereby consolidated shall stand as the pleadings in the consolidated action; and it is further

ORDERED that upon service on the Clerk of the Court of a copy of this order with notice of entry, the Clerk shall consolidate the papers in the action hereby consolidated and shall mark his

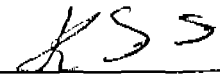
records to reflect the consolidation, and it is further

ORDERED that a copy of this order with notice of entry shall also be served upon the Clerk of the Trial Support Office (Room 158), who is hereby directed to mark the court's records to reflect the consolidation.

The parties are reminded of the compliance conference scheduled in this action for September 13, 2006 at 9:30 a.m. in Room 581 at 111 Center Street, New York, New York.

Dated: February 17, 2006
New York, New York

ENTER:



Karen S. Smith, J.S.C.

FILED
JUN 30 2006
NEW YORK
COUNTY CLERK'S OFFICE