

<b>Club Ventures II, LLC v Marks</b>
2005 NY Slip Op 30264(U)
June 30, 2005
Supreme Court, New York County
Docket Number:
Judge: Barbara Kapnick
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: HON. BARBARA R. KAPNICK  
*Justice*

PART 12

CLUB VENTURES II

INDEX NO.

600 438 / 05

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

MITCHELL MARKS

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion

**FILED**  
JUL -5 2005  
COUNTY CLERKS OFFICE  
NEW YORK

**MOTION IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

Dated: 10/30/05



BARBARA R. KAPNICK, S.C.

J.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 12

-----X  
CLUB VENTURES II, LLC d/b/a DAVID  
BARTON GYM,

Plaintiff,

-against-

MITCHELL MARKS and 213 WEST 23rd STREET  
GROUP, L.L.C.,

Defendants.

-----X  
BARBARA R. KAPNICK, J.:

DECISION/ORDER

Index No. 600438/05  
Motion Seq, No. 001

Defendant Mitchell Marks is the Managing Member and owns a 30% share of co-defendant 213 West 23rd Street Group, L.L.C., the "fee owner" of the 10-story building located at 213-219 West 23rd Street in Manhattan, formerly occupied by the YMCA. Defendant Marks leased portions of the basement, ground floor, and second floor of the building from the fee owner pursuant to a lease agreement dated October 14, 2003, and subleased that premises to plaintiff Club Ventures II, LLC d/b/a David Barton Gym ("the Gym") pursuant to a sublease agreement dated October 14, 2003.

Plaintiff seeks in this action:

- (i) to recover damages from defendant Marks for breach of contract based on his alleged failure to reimburse the Gym for payments made to contractors to complete certain work which Marks agreed to perform under their sublease agreement (first cause of action) and for breach of the covenant of good faith and fair dealing (second cause of action);

(ii) a judgment declaring certain lease provisions to be null and void (third cause of action) and asserting an equitable lien against the property based on the alleged failure of both defendants to complete certain work (fourth cause of action);

(iii) to recover damages against both defendants for unjust enrichment based upon their intentional and malicious pattern of fraud and misrepresentation (fifth cause of action); fraud (sixth cause of action); intentional misrepresentation (seventh cause of action); tortious interference with contract (eighth cause of action); fraudulent inducement (ninth cause of action); actual partial eviction (tenth cause of action); and retaliatory eviction (eleventh cause of action); and

(iv) a judgment declaring that plaintiff is entitled to an abatement of the rent paid pursuant to its sublease (twelfth cause of action).

Defendant the fee owner now moves for an order:

(1) pursuant to CPLR § 6514(b), immediately cancelling the notice of pendency dated February 4, 2005 which plaintiff filed in this action;

(2) pursuant to CPLR § 6514(c), awarding it all costs and expenses, including legal fees, occasioned by the filing and cancellation of the notice of pendency;

(3) pursuant to CPLR § 3212, granting summary judgment in favor of the fee owner and against the plaintiff with respect to each and every portion of plaintiff's complaint; and

(4) imposing sanctions against the plaintiff and its attorneys in the maximum sum permitted, and awarding legal fees and costs in favor of the fee owner and against plaintiff.

Defendants argue that the filing of the notice of pendency was improper because: (i) plaintiff, as a sublessee, has no privity with the fee owner and has no interest in the "real property" and, therefore, has no standing to file this notice of pendency; and (ii) plaintiff is not entitled to equitable relief because he has an adequate remedy at law and has failed to set forth a sufficient basis for asserting an 'equitable' lien against the building.<sup>1</sup>

Plaintiff argues in opposition to the motion that its filing of the notice of pendency was proper because plaintiff's sublease constitutes an interest in real property within the meaning of CPLR § 6501. Plaintiff further argues that it made substantial permanent structural improvements for the benefit of the building as a whole.

While it is true that a Notice of Pendency may be filed in any action which would affect the title to, or possession, use or enjoyment of real property, CPLR § 6501; Civ.Proc.Act. § 120, and a lis pendens may be filed in an action seeing to establish and impress an equitable lien, *Rosenberg v. Ritter*, 34 Misc.2d 1099, 1100, 229 N.Y.S.2d 766, 767, a lis pendens will be cancelled where the facts alleged in the Complaint are insufficient in law to support an equitable lien.

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<sup>1</sup> Defendants also argue that the notice of pendency is defective because it contains a typographical error; i.e., it states that this action is "based upon a shareholder dispute."

Borrero v. East Harlem Council for Human Services, Inc., 165 A.D.2d 807, 808 (1st Dep't 1990); see also, Bennett v. John, 151 A.D.2d 711 (2nd Dep't 1989).

It is well settled that "a lease for years is deemed personalty" and not real property, and is thus not subject to the filing of a notice of pendency. Grumman Aircraft Engineering Corp. v. Board of Assessors of the Town of Riverhead, 2 N.Y.2d 500, 507 (1957), mot. for rearq. den./mot. to amend remittitur granted, 2 N.Y.2d 1012 (1957), cert. denied, 355 U.S. 814 (1957), rehearing denied, 355 U.S. 885 (1957). See also, Rose v. Montt Assets, Inc., 250 A.D.2d 451 (1st Dep't 1998).<sup>2</sup>

Moreover, plaintiff is not entitled to an equitable lien where, as here, plaintiff has an adequate remedy at law; namely, a claim against defendant Marks for monetary damages. See, Bennett v. John, supra.<sup>3</sup>

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<sup>2</sup> Likewise, "shares in a cooperative apartment are personal and not real property" and are not subject to the filing of a notice of pendency. Savasta v. Duffy, 257 A.D.2d 435, 436 (1st Dep't 1999).

<sup>3</sup> This Court rejects plaintiff's argument that an equitable lien is 'analogous' to a mechanic's lien which may be asserted by a contractor even where there is no privity of contract between the contractor and the fee owner. However, a mechanic's lien against the owner's property would not, in any event, be available where, as here, "the work was done for the tenant's convenience and at the tenant's request" and there was no lease provision which required the fee owner (as opposed to the sublessor) to perform the work. Paul Mock, Inc. v. 118 East 25th Street Realty Co., 87 A.D.2d 756 (1st Dep't 1982). See also, Dewees Mellor, Inc. v. Weise, 1993 WL 591608 (E.D.N.Y.).

Therefore, based on the papers submitted and the oral argument held on the record on April 13, 2005, those portions of defendant fee owner's motion seeking to cancel the notice of pendency filed in this action, to recover pursuant to CPLR § 6514(c) the costs and expenses occasioned by the filing and cancellation of the notice of pendency, and to dismiss plaintiff's fourth cause of action which seeks to assert an equitable lien, are granted.

That portion of the motion as it relates to plaintiff's third cause of action to declare certain lease provisions null and void and to plaintiff's fifth cause of action for unjust enrichment against the defendant fee owner is granted, since plaintiff's allegations (contained in paragraphs 41 through 45 of the Verified Complaint) relate to defendant Marks only.

Those portions of defendant's motion seeking to dismiss plaintiff's sixth cause of action for fraud, seventh cause of action for intentional misrepresentation, and ninth cause of action for fraudulent inducement are granted, plaintiff having failed to plead said claims with sufficient particularity. See, CPLR § 3016(b).

That portion of defendant's motion seeking to dismiss plaintiff's eighth cause of action against defendant fee owner for tortious interference with contract is granted, plaintiff having failed to set forth any proof or even to allege that defendant fee owner, as opposed to defendant Marks, tortiously interfered with a specific contract.

Those portions of the motion seeking to dismiss the tenth cause of action for actual partial eviction, eleventh cause of action for retaliatory eviction, and twelfth cause of action for a rent abatement are granted to the extent said claims are alleged against the fee owner, since there is no dispute that plaintiff's sublease agreement was with defendant Marks only.<sup>4</sup>

Accordingly, it is hereby

ORDERED that the Clerk may enter judgment dismissing plaintiff's Complaint against defendant 213 West 23rd Street Group, L.L.C. only, and it is further

ORDERED that upon service of a copy of this order with notice of entry, the County Clerk shall mark his records to reflect the cancellation of the notice of pendency; and it is further

ORDERED that the issue of the amount of costs and expenses occasioned by the filing and cancellation of the notice of pendency is referred to a Special Referee to hear and report with recommendations (or, upon stipulation of the parties, to hear and determine); and it is further

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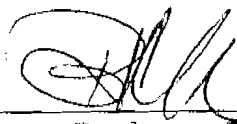
<sup>4</sup> The mere fact that defendant Marks is also the Managing Member and a partial owner of the fee owner is not sufficient to give rise to a claim against the fee owner, absent any showing that Marks was acting on behalf of the fee owner and not in his own interest as the sublessor of the premises.

ORDERED that upon service of a copy of this order with notice of entry, the Special Referee Clerk shall place this matter on the Part 50R calendar for referral to a Special Referee; and it is further

ORDERED that defendants' request for additional sanctions is denied, in the discretion of this Court.

This constitutes the decision and order of this Court.

Date: June 30, 2005

  
\_\_\_\_\_  
Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
**J.S.C.**

**FILED**  
JUL - 5 2005  
COUNTY CLERKS OFFICE  
NEW YORK