

**NYC Goetz Realty Corporation v Martha Graham
Center of Contemporary Dance**

2006 NY Slip Op 30265(U)

October 25, 2006

Supreme Court, New York County

Docket Number:

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN
Justice

PART 17

NY C Goetz Realty Corp

INDEX NO. 113523/05

MOTION DATE _____

MOTION SEQ. NO. 001

MOTION CAL. NO. _____

- v -

Martine Graham

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 is denied per

attached

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MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE

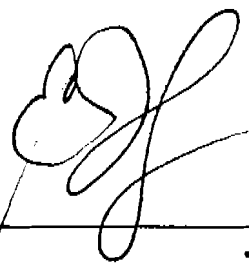
Dated: 10/25/06

Check one: FINAL DISPOSITION

NON-FINAL DISPOSITION

EMILY JANE GOODMAN

J.S.C.



SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 17

-----x
NYC GOETZ REALTY CORPORATION,

Plaintiff,

-against-

Index No.: 113523/05

MARTHA GRAHAM CENTER OF
CONTEMPORARY DANCE, a New York
Not for Profit Corporation,

Defendant.

-----x

MARTHA GRAHAM CENTER OF
CONTEMPORARY DANCE, a New York
Not for Profit Corporation,

Counterclaim-Plaintiff,

-against-

NYC GOETZ REALTY CORPORATION, and
JEWELMAK, INC.,

Counterclaim-Defendants.

-----x

EMILY JANE GOODMAN, J.S.C.:

This case involves a landlord-tenant dispute in which plaintiff, NYC Goetz Realty Corporation (Goetz), filed a complaint against defendant, Martha Graham Center of Contemporary Dance (Martha Graham), for rents remaining under an unexpired lease, after Martha Graham vacated the leased premises on the alleged basis of constructive eviction. In its answer to the complaint, Martha Graham asserts defenses and counterclaims against Goetz and Jewelmak, Inc. (Jewelmak). Before the parties

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conducted discovery, Goetz and Jewelmak moved, pursuant to CPLR 3212, for partial summary judgment on the complaint and dismissal of Martha Graham's defenses and counterclaims. For the reasons stated herein, the motion for summary judgment is denied.

Background

On March 7, 2003, Martha Graham entered into a five-year lease (the lease, together with a subsequent amendment, the Lease Agreement) with Eilger Enterprise, Inc. (Eilger), the predecessor to Goetz, to rent the second and third floors of a four story building located at 344 East 59th Street, Manhattan. The leased premises was to be used for the purposes of housing Martha Graham's executive offices and archives, as well as for holding conferences with the board of trustees and meetings with potential donors and benefactors.

In December 2004, Goetz purchased the building from Eilger, and informed Martha Graham that all future rent payments should be made to Goetz, in care of Jewelmak. Goetz and Jewelmak appear to be related business entities, because Andy Goetz, the person who executed the affidavit in support of the motion for summary judgment, is the owner and president of both companies.

In February 2005, without providing prior notice to Martha Graham, Goetz and Jewelmak began demolition and construction work in the building, including the ground floor and the basement, which consisted of a commercial retail and wholesale jewelry

business.¹ Shortly after demolition began, Martha Graham sent a letter to Goetz, alleging that the negative effects of the demolition (dust and debris) were causing its staff to become ill and endangering its valuable archives. In response, Goetz sent an e-mail apologizing for the inconvenience and difficulty, and asking Martha Graham "to give it a little more time to settle."

In April 2005, building renovation entered into a new phase, as demolition was completed and construction began. During this phase, Martha Graham alleges that heavy dusts and fumes caused many of its employees to become sick and absent from work, and that the construction frequently interrupted its utility services and air conditioning, as well as its internet and computer network. Such conditions, according to Martha Graham, undermined its ability to host meetings with donors to raise money, and impeded its ability to conduct board meetings and business operations. Martha Graham alleges that, despite its frequent written and verbal complaints regarding such conditions, and even though Goetz and Jewelmak made pleasant and apologetic promises to fix these conditions, many of the problems continued unabated.

Martha Graham also alleges that, in July 2005, two of its three bathrooms became inoperable, which resulted in leaks that

¹The record reflects that Jewelmak currently operates its jewelry wholesale business from the rear ground floor office and the basement of the building. The front ground floor office is now occupied by GINKO, a jewelry retailer.

caused water to pour into its office space, damaging and causing portions of the ceiling in its second floor to collapse. Martha Graham further alleges that Goetz and Jewelmak were notified of this condition, but they failed to fix the problem. On August 19, 2005, Martha Graham sent a letter to Goetz informing Goetz that it would vacate the leased premises by the end of August. When Martha Graham vacated the premises on August 31, 2005, it was current in its rent obligations under the Lease Agreement, except as to the August rent; Martha Graham believes that its security deposit would be used to offset such rent.

In its complaint, Goetz seeks a judgment against Martha Graham for the remaining unpaid rents under the Lease Agreement, in a sum exceeding \$50,000, plus legal fees. Martha Graham answered the complaint with affirmative defenses and asserts counterclaims, including constructive eviction, breach of the covenant of quiet enjoyment, negligence, nuisance and trespass. Before the parties conducted discovery, Goetz and Jewelmak move for entry of partial summary judgment on the issue of liability, and dismissal of Martha Graham's defenses and counterclaims.

Standards Governing Summary Judgment Motion

In setting forth the standards for granting or denying a motion for summary judgment, pursuant to CPLR 3212, the Court of Appeals noted, in *Alvarez v Prospect Hospital* (68 NY2d 320, 324 [1986]), the following:

As we have stated frequently, the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. Failure to make such prima facie showing requires a denial of the motion, regardless of the sufficiency of the opposing papers. Once this showing has been made, however, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action [internal citations omitted].

Adhering to the guidance of the Court of Appeals, the lower courts uniformly scrutinize motions for summary judgment as well as the facts and circumstances of each case to determine whether relief may be granted. See, e.g., *Akseizer v Kramer*, 265 AD2d 356, 356 (2nd Dept 1999) ("[i]t is well settled that summary judgment is a drastic remedy that is to be granted only where there is no clear triable issue of fact") (citations omitted); *Martin v Briggs*, 235 AD2d 192, 196 (1st Dept 1997) ("[i]n considering a summary judgment motion, evidence should be analyzed in the light most favorable to the party opposing the motion").

Summary Judgment Motion Should Be Denied

As part of its defenses and counterclaims, Martha Graham alleges that Goetz and Jewelmak breached the covenant of quiet enjoyment of the Lease Agreement by failing to remedy the adverse conditions caused by demolition and renovation of the building,

and that such failure was tantamount to constructively evicting Martha Graham from its premises. Goetz and Jewelmak argue that paragraph 20 of the Lease Agreement precludes such defenses and counterclaims.² In relevant part, paragraph 20 provides that:

Owner shall have the right at any time without the same constituting an eviction and without incurring liability to Tenant therefor, to change the arrangement and/or location of public entrances, passageways, doors, doorways, corridors, elevators, stairs, toilets or other public parts of the building ... There shall be no allowance to Tenant for diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance or injury to business arising from Owner or other Tenants making any repairs in the building or any such alterations, additions and improvements [emphasis added].

Martha Graham contends that paragraph 20 is limited only to changes made to "public parts of the building," and because the demolition and renovation occurred in private retail areas, the paragraph is inapplicable to its claims and defenses.

Goetz and Jewelmak have not met their burden to establish entitlement to summary judgment, based upon paragraph 20. Martha Graham's claims and defenses regarding constructive eviction are not barred by the first sentence, which only relates to the public areas of the building. With respect to the second sentence, even if the phrase "such alterations, additions and

²Paragraph 4 of the Lease Agreement also contains certain similar language, but is not cited as the basis for this motion.

* 8]

improvements" refers to work done in any portion of the building, as opposed to referring back to the first sentence, which is limited to the public areas, movants have not established that all of Martha Graham's claims and defenses are limited to "inconvenience, annoyance or injury to business."³

Contrary to movant's arguments, issues of fact exist as to the nature of the conditions. To establish a breach of the covenant of quiet enjoyment, a tenant must show actual or constructive eviction. *Grammar v Turits*, 271 AD2d 644, 645 (2nd Dept 2000). A constructive eviction occurs when a landlord's act or omission materially deprives the tenant of the beneficial use and enjoyment of the leased premises. *Id.* The tenant also must have abandoned the premises, in whole or in part, within a reasonable time after the condition began. *428 Camera Corp. v Tandy Corp.*, 272 AD2d 72 (1st Dept 2000). Here, although Goetz and Jewelmak maintain that the demolition and construction work in the building caused at most temporary inconveniences and annoyances to Martha Graham, Martha Graham alleges that such work caused intolerable conditions, which made the premises untenable, and severely affected its quiet enjoyment and business operations. Whether the alleged conditions were slight

³Goetz and Jewelmak have not established what, in fact, this language means. Certainly, the language does not bar all claims, especially considering that paragraph 4 of the Lease Agreement permits the tenant to bring an action for damages for breach of contract.

or severe is an issue of fact. Also, whether Goetz and Jewelmak's alleged failure in making timely and adequate remediation may constitute an actual or constructive eviction is equally an issue of fact. *34-35th Corp. v 1-10 Industry Associates, LLC*, 16 AD3d 579, 580 (2nd Dept 2005) ("[T]here is evidence in the record that the defendant made repairs in an attempt to cure the problems. Whether its efforts were sufficient constitutes a triable issue of fact.").

There is also an issue of fact as to when construction work in the building was actually completed. Goetz and Jewelmak assert that construction work was completed well before August 31, 2005, when Martha Graham abandoned its lease. They also argue that Jewelmak and GINKO began their respective business operations in the building on July 23rd and August 29th of 2005 as circumstantial evidence that construction work was completed. Hence, they contend that there is no support for the constructive eviction counterclaim, where the alleged conditions caused by building construction no longer existed when Martha Graham vacated the premises. Martha Graham argues that construction was ongoing when it vacated, and that even the "punch list" prepared by the contractors indicated that portions of the construction work were not completed until December of 2005. Whether and when construction was completed is an issue of fact, and the dispute over such and other facts preclude summary dismissal of the

affirmative defense and counterclaim of constructive eviction. See *Joseph Day Realty Corp. v Franciscan Sisters For the Poor Health System, Inc.*, 256 AD2d 134, 135 (1st Dept 1998) (whether tenant failed to abandon the leased premises with reasonable promptness, after landlord's alleged failure to provide services, was an issue of fact that precluded dismissal of tenant's counterclaim of constructive eviction).⁴

Accordingly, it is

ORDERED that the motion of Goetz and Jewelmak for partial summary judgment and dismissal of Martha Graham's defenses and counterclaims is hereby denied.

This Constitutes the Decision and Order of the Court.

Dated: October 25, 2006

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EMILY JANE GOODMAN

⁴ Goetz and Jewelmak also argue that a landlord has no obligation to relet a leased premises to mitigate its damage claim when a tenant abandons the premises. Because the partial summary judgment motion seeks a determination on liability only, the issue of damages is not before the court and need not be addressed.