

**Oscar Blandi Salon, Inc. v CPS 1 Realty LP**

2007 NY Slip Op 31070(U)

April 30, 2007

Supreme Court, New York County

Docket Number: 0108774/2006

Judge: Judith J. Gische

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

PRESENT: JUDITH J. GISCHE  
*Justice*

PART 10

Oscar Blandi Salen, Inc.  
CPS I Realty LP  
et al

INDEX NO. 10877406  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 001  
MOTION CAL. NO. \_\_\_\_\_

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~~

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

**FILED**  
MAY 07 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

**motion (s) and cross-motion(s)  
decided in accordance with  
the annexed decision/order  
of even date.**

Dated: April 30, 2007

JUDITH J. GISCHE, J.S.C. J.S.C.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 10

-----X  
OSCAR BLANDI SALON, INC.

Plaintiff,

**DECISION/ORDER**

-against-

Index#10877/06  
Mot. Seq. #001

CPS 1 REALTY LP d/b/a THE PLAZA  
HOTEL and EL-AD PROPERTIES NY LLC,  
Defendants.

Present:  
Hon. Judith J. Gische  
J.S.C.

-----  
Pursuant to CPLR 2219(a) the court considered the following numbered papers on this motion:

<b>PAPERS</b>		<b>NUMBERED</b>
Notice of Motion, LKK affirm., exhibits.....	MAY 07 2007	1
LJR affirm., exhibits.....		2
GML affirm., exhibit.....		3
LJR affirm.....	NEW YORK	4
GML Sur-Sur Reply affirm.....	COUNTY CLERK'S OFFICE	5

*Upon the foregoing papers the decision and order of the court is as follows:*

Defendants bring this pre-answer motion to dismiss the first and third causes of action asserted in the Verified Complaint pursuant to CPLR § 3211(a)(5) and (7). The first cause of action is for illegal lockout and the third cause of action seeks treble damages on account of illegal lockout. RPAPL § 853. The basis for the motion to dismiss is that the action is barred by the statute of limitations. Additionally, defendants argue that the facts as alleged do not support a claim for treble damages, warranting dismissal of at least the third cause of action.

The complaint alleges that: Plaintiff is the tenant and defendants are the successor in interest to the landlord under a ten year commercial lease, made in July 1999, for retail

space located on the third floor of the building known as the Plaza Hotel ("the Plaza"). Plaintiff operated a beauty salon out of the leased space. The only means of ingress and egress to the leased space was through the public entrances, passageways, elevators, stairs and other public parts of the Plaza. Beginning April 30, 2005 defendants, acting without plaintiff's consent, eliminated all means of ingress and egress to the Plaza and discontinued all services to the leased space. Plaintiff claims as a result thereof, it was compelled to and did vacate the leased premises.

This action was commenced by filing the summons and complaint with the court on June 23, 2006.

The state of limitations for wrongful eviction is one year. Kolomensky v. Wiener, 135 AD2d 505 (2<sup>nd</sup> dept. 1987). Defendants argue that since the action was commenced after the one year period passed, the causes of action for wrongful eviction should be dismissed. Defendants concede that the second cause of action based upon breach of contract will continue no matter what the outcome is of this motion.

Plaintiff does not refute that the statute of limitations had passed when it commenced this action. It argues instead that defendants waived their right to raise that defense by failing to timely raise it. CPLR § 3211(e) requires that a defense founded upon the expiration of the statute of limitations be raised within the time permitted for a responsive pleading.

The summons and complaint were served upon defendant on July 11, 2006. The time to move or answer expired on July 31, 2006. The instant motion to dismiss was not made until two weeks thereafter, on August 14, 2006. Defendants do not contest that they were two weeks late in raising the defense. However, their attorney claims that he

had a verbal understanding with opposing counsel that he had given him an extension of time to answer. Plaintiff's counsel vehemently denies that there was any such agreement between counsel.

The court need not resolve this factual issue. Assuming, without deciding, that defendants were operating under a mis-impression, the fact remains that a two week adjournment to interpose an answer is reasonable and would have been granted by the court in any event. The two week delay in receiving an answer caused no prejudice to the plaintiff and the statute of limitations remains a viable defense. In Hickey v. Hutton, 182 AD2d 801 (2<sup>nd</sup> dept. 1992), the Appellate Division permitted amendment of a pleading to assert an affirmative defense of statute of limitations even three months after the answer was initially due. There is no need for hearing to resolve the disputed facts. Nor is there any need to exalt from over substance to require a motion to amend an answer before considering this defense under the circumstances presented.

Plaintiff otherwise claims that the defendants should be equitably estopped from raising the defense of the statute of limitations. This would require proof that the defendants made an actual mis-representation or concealed facts he was required to disclose that plaintiffs relied upon in delaying bringing a timely action. Kaufman v. Cohen, 307 AD2d 113 (1<sup>st</sup> dept. 2003). Plaintiff has failed to prove equitable estoppel. While the parties discussed settlement, and there was an exchange of documentation, there is nothing in the record indicating that defendants in any way induced plaintiff to forebear from bringing any legal action against them. Nor is there any record that they concealed information that would have prevented them from bringing an action against a correct party. H & P Research, Inc. V. Integra Realty, Inc. 258 AD2d 270 (1<sup>st</sup> dept. 1999).

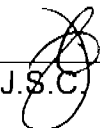
[\* 5 ]

The court, therefore, finds that the first and third causes of action for wrongful eviction are barred by the applicable statute of limitations and should be dismissed. In view of this conclusion, the court need not consider the other basis argued for dismissal of the third cause of action. Defendants are directed to interpose an answer to the second cause of action only within 20 days of the date of this decision. **The parties are directed to appear for a preliminary conference before this court on June 14, 2007 at 9:30 am in Part 10 at 80 Centre street, Room 122.**

The motion to dismiss the first and third causes of action is hereby granted. Any requested relief not otherwise expressly granted herein is denied. This constitutes the decision and order of the court.

Dated: New York, New York  
April 30, 2007

SO ORDERED:

  
\_\_\_\_\_  
J.G. J.S.C.

**FILED**  
MAY 07 2007  
NEW YORK  
COUNTY CLERKS OFFICE