

**Dwellings LLC v Hamilton 65th Partners LLC**

2007 NY Slip Op 31461(U)

June 4, 2007

Supreme Court, New York County

Docket Number: 0605828/2001

Judge: Barbara R. Kapnick

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

PRESENT: **BARBARA R. KAPNICK**

PART 1<sup>st</sup>

Index Number : 605828/2001

DWELLINGS

vs  
HAMILTON 65TH PARTNERS

Sequence Number : 002

SUMMARY JUDGMENT

EX NO.

605828/01

FILED DATE

FILED SEQ. NO.

002

FILED 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 IS DECIDED IN ACCORDANCE WITH  
ACCOMPANYING MEMORANDUM DECISION**

*Settle Order and Judgment*

Dated: 6/24/09

**BARBARA R. KAPNICK J.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

DWELLINGS LLC,

Plaintiff,

- against -

HAMILTON 65TH PARTNERS LLC a/k/a  
HAMILTON 65TH STREET PARTNERS LLC,  
CHARLES DARWISH and ALF NAMAN,

Defendants.

-----X

BARBARA R. KAPNICK, J:

**DECISION**

Index No. 605828/01  
Motion Seq. No. 002

Plaintiff Dwellings LLC ("Tenant") and defendant Hamilton 65th Partners LLC a/k/a Hamilton 65th Street Partners LLC ("65th Partners" or "Landlord") entered into a written Lease agreement dated November 21, 2000 for a portion of the building located at 135 East 65th Street, New York, New York. Defendants Charles Darwish and Alf Naman were Managing Members of 65th Partners.

At the time the lease was executed, the prior tenant was still occupying the demised premises. Paragraph 54(u) of the Lease thus provided that

Tenant acknowledges that the demised premises are currently occupied by existing tenants, and Landlord anticipates obtaining possession of the entire demised premises by no later than February 28, 2001. In the event Landlord has not obtained possession of the entire demised premises by August 31, 2001, then Tenant shall have the right, as its sole and only remedy, to terminate this lease by giving notice to Landlord no later than September 10, 2001 (emphasis supplied) (time being of the essence). Such termination shall be effective on the date Landlord receives said termination notice, provided that such effective date occurs prior to the date Landlord has obtained possession of the entire demised premises.

Pursuant to paragraph 68(A), the Landlord agreed "at Landlord's expense, except as otherwise expressly specified in this lease," to "cause its designated contractor to make and complete in and to the demised premises the work and installations (hereinafter called 'Landlord's Work')" as specified in an exhibit annexed to the Lease.

However, paragraph 68(D) explicitly provided that

Landlord has made and makes no representation of the date on which it will complete Landlord's Work, and Landlord shall be under no penalty or liability to Tenant whatsoever by reason of any delay in such performance and this lease shall not be affected thereby except as provided in Paragraph H hereof. Tenant's obligation to pay Fixed Rent (the "Fixed Rent Commencement Date") shall commence on the earlier of (i) the date Tenant (or anyone claiming under or through Tenant) first occupies the demised premises for the conduct of its business or (ii) the date of substantial completion of Landlord's Work (other than item 6, which may be performed after the Fixed Rent Commencement Date) as determined by Landlord (but no earlier than three (3) months from the Commencement Date) (emphasis supplied); ...

Pursuant to paragraph 68(H) of the Lease,

If the Fixed Rent Commencement Date has not occurred by December 31, 2001, then Tenant shall have the right, as its sole and only remedy, to terminate this lease by giving notice to Landlord no later than January 10, 2002 (emphasis supplied) (time being of the essence). Such termination shall be effective on the date Landlord receives said termination notice, provided that such effective date occurs prior to the Commencement Date.<sup>1</sup>

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<sup>1</sup> Defendants' counsel contends that the last sentence of paragraph 68H contains a typographical error and was intended to read, "provided that such effective date occurs prior to the Fixed Rate Commencement Date." Even if this Court were to consider this alleged error, it would have no bearing on the outcome of this motion.

Finally, paragraph 69 of the Lease provides that

A. The term of this lease shall commence on the date Landlord delivers possession of the entire demised premises to Tenant (hereinafter and hereinbefore in this lease referred to as the "Commencement Date"), which delivery may occur prior to substantial completion of Landlord's Work and at any time after Landlord has recovered possession from the existing tenants...

B. Landlord shall, in accordance with the foregoing, fix the Commencement Date, Fixed Rent Commencement Date, Expiration Date, and fixed rent schedule. When the Commencement Date, Expiration Date and fixed rent schedule have so been determined, at Landlord's request, Landlord and Tenant shall each promptly execute a written agreement confirming same.

In connection with executing the Lease, plaintiff paid defendants the sum of \$22,500.00 constituting payment of the first month's rent, and the sum of \$12,500.00 for work to be done to the leasehold space, for a total sum of \$35,000.00. Plaintiff also funded a Letter of Credit in the amount of \$156,502.00 with Chase Manhattan Bank to serve as a security deposit for the Lease.

There is no dispute that plaintiff never occupied the premises.

Defendant did not regain possession of the premises by August 31, 2001. Defendant thereafter sent a letter dated October 1, 2001 to plaintiff stating as follows:

This letter shall serve as notice of commencement of the lease term pursuant to Article 69 of the Lease. Delivery of possession to you of the entire premises

demised by the Lease shall be on October 15, 2001. Accordingly, the Commencement Date (as defined in Article 69 of the Lease) is hereby fixed as October 15, 2001. (emphasis supplied).

The Landlord's Work is expected to be substantially complete by October 31, 2001. Accordingly, and subject to modification at the election of the Landlord, the Fixed Rent Commencement Date (as defined in Article 68 of the Lease) is hereby fixed, as November 1, 2001 (emphasis supplied), and the Expiration Date is hereby fixed as October 31, 2011.

Counsel for plaintiff responded by letter dated October 3, 2001 stating, in relevant part, as follows:

Unfortunately, we must reject your October 1, 2001 Notice of Commencement of the Lease term, ostensibly issued pursuant to Article 69 of the Lease, and advise you that the Tenant is exercising its rights to terminate the Lease under Articles 54.(u) and 68.H thereof, as well as under prevailing law.

By letter dated October 5, 2001, counsel for defendant 65th Partners acknowledged receipt of the October 3, 2001 letter, but rejected the notice of lease termination, stating, in relevant part, that

Article 54(u) of the lease is clear in setting September 10, 2001 as a "time being of the essence" deadline for the exercise of the right to terminate the lease if the landlord has not obtained possession of the entire demised premises by August 31, 2001. By failing to provide the required notice, your client waived the termination right contained in that provision, and thereby agreed to await possession to a later date.

By letter dated November 21, 2001, defendant Darwish notified Chase Manhattan Bank that the Letter of Credit given by plaintiff

as a security deposit "represents funds due us as Dwellings LLC, our tenant, is in default beyond the applicable grace periods under the terms of its lease dated November 21, 2000 with Hamilton 65th Street Partners, L.L.C. (Landlord)."

Plaintiff claims that the allegations contained in the November 21, 2001 letter to Chase Bank were false and that defendant thus improperly drew on its Letter of Credit. Specifically, plaintiff contends that the earliest date on which the Fixed Rate Commencement Date could have been set was January 15, 2002, and thus plaintiff denies that it was in default of the Lease on November 21, 2001. In addition, plaintiff contends that it properly exercised its absolute right to terminate the Lease, and that defendants never became entitled to any of the Letter of Credit proceeds.

Plaintiff seeks in this action:

(1) to recover damages in the amount of at least \$191,502.00, plus punitive damages, reasonable attorneys' fees and other costs (a) against defendants 65th Partners and Darwish for conversion of its security deposit for their own use (first cause of action), (b) against all the defendants for fraud (second cause of action), and (c) against defendant 65th Partners for breach of contract (third cause of action);

(2) a declaratory judgment against defendant 65th Partners declaring that the lease has been terminated and that plaintiff has

no obligation under the Lease to make any payments, whether for work to be done, for rent, or for a security deposit (fourth cause of action); and

(3) imposition of a constructive trust against all the defendants on \$191,502.00 of plaintiff's funds in the possession of defendants (fifth cause of action).

Defendants 65th Partners and Darwish have asserted a counterclaim for breach of the Lease seeking to recover a sum in excess of \$598,100.00 for rent and additional rent allegedly due.

Plaintiff now moves for an order: (i) granting summary judgment in its favor on the first, third and fourth causes of action; and (ii) dismissing the counterclaim.

Defendants argue in opposition that plaintiff did not effectively terminate the Lease and that they had no obligation to return the security deposit and other funds to plaintiff because: (a) the Lease could not be terminated pursuant to paragraph 54(u) after September 10, 2001, and (b) the Lease could not be terminated pursuant to 68(H) of the lease prior to December 31, 2001.

Plaintiff argues in reply that defendants are incorrectly interpreting paragraph 68(H) of the Lease, since the Fixed Rent Commencement Date commenced pursuant to paragraph 68(D) on the earlier of: (i) the date Tenant "first occupies the demised premises for the conduct of its business", an event which did not

occur in this case, or (ii) "the date of substantial completion of Landlord's Work", but no earlier than three months from the Commencement Date.

Since the Landlord fixed the Commencement Date as October 15, 2001, the Fixed Rent Commencement Date could not have commenced until three months later, i.e., January 15, 2002.

Defendants' counsel argues that paragraph 68(H) contemplated a "look back" on or after January 1, 2002 to determine whether or not the Landlord had substantially completed the Landlord's work.

However, regardless of when the date of substantial completion of Landlord's work occurred, plaintiff is correct that under the facts of this case, the Fixed Rent Commencement Date could not have commenced prior to December 31, 2001. Therefore, this Courts finds that plaintiff had a right pursuant to paragraph 68(H) of the Lease to terminate the Lease by giving Notice to the Landlord no later than January 10, 2002, and was not required under the circumstances presented to wait until January 1, 2002 to exercise that right. Moreover, the effective date of the termination occurred prior to the Commencement Date of October 15, 2001, as fixed by the defendants in their letter dated October 1, 2001.

Thus, defendants had no right to draw down on the Letter of Credit or to retain the \$35,000 paid by plaintiff to defendant when the lease was executed in November of 2000 for work to be done at the premises and on account of the first month's rent.

Accordingly, based on the papers submitted and the oral argument held on the record on September 6, 2006, plaintiff's motion for an order granting summary judgment on its first, third and fourth causes of action and dismissing defendants' counterclaim is granted.


However, punitive damages are generally "not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights (citation omitted)" Rocanova v. Equitable Life Assurance Society of The United States, 83 N.Y.2d 603, 613 (1994).

In the instant case, the Complaint fails to allege that the wrong to plaintiff "not only rose to the level of 'such wanton dishonesty as to imply a criminal indifference to civil obligations' (citation omitted), but was also part of a pattern of similar, publicly directed misconduct." Rocanova v. Equitable Life Assurance Society of The United States, supra at 614. See also, Rivas v. Amerimed USA, Inc., 34 A.D.3d 250 (1st Dep't 2006), lv. to app. denied in part, dism'd in part, 8 N.Y.3d 908 (2007).

Therefore, plaintiff's request for punitive damages is denied.

Settle Order and Judgment.

Dated: June 21, 2007

  
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 BARBARA R. KAPNICK  
 J.S.C.

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