

**1134 1st Ave. Rest. Corp. v Morad
Assoc., L.L.C.**

2007 NY Slip Op 33463(U)

October 16, 2007

Supreme Court, New York County

Docket Number: 0603791/2006

Judge: Leland G. DeGrasse

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

HON. LELAND DEGRASSE

PRESENT:

PART 25

Index Number : 603791/2006
1134 1ST AVENUE RESTAURANT

INDEX NO. 603791/06

vs
MORAD ASSOCIATES

MOTION DATE 6/13/07

Sequence Number : 002
PARTIAL SUMMARY JUDGMENT

MOTION SEQ. NO. 002

MOTION CAL. NO. 101

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

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

PAPERS NUMBERED

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion

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

FILED
OCT 24 2007
NEW YORK
COUNTY CLERK'S OFFICE

ICE

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

OCT 16 2007

Dated: _____

J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST RETURN

SUPREME COURT : STATE OF NEW YORK
COUNTY OF NEW YORK : I.A.S. PART 25

----- X
1134 1st AVENUE RESTAURANT CORP., : Index No.: 603791/06
: Cal. No. 101 of 6/13/07
Plaintiff, :
-against- :
:
MORAD ASSOCIATES, L.L.C., ABRAHAM DANIELS, :
ADAM DANIELS :
Defendants. :
----- X

DeGRASSE, J.:

Plaintiff 1134 1st Avenue Restaurant Corp. in this landlord-tenant dispute moves, pursuant to CPLR 3212, for partial summary judgment on the first and fifth causes of action in the complaint. Defendants Morad Associates, L.L.C. (“MAL”), and Abraham and Adam Daniels oppose the motion.

The following facts are not in dispute. MAL, of which Abraham and Adam Daniels are the managing member and member, respectively, is the owner of property located at 1134 First Avenue in Manhattan. Pursuant to a commercial lease, plaintiff is a tenant of the subject premises and operates a restaurant. In April 2006, MAL commenced a nonpayment summary proceeding against plaintiff in the Civil Court of the City of New York, New York County, to recover possession of the commercial premises. After plaintiff failed to appear or submit an answer, MAL obtained a judgment of possession on default and plaintiff was evicted on July 27, 2006, pursuant to a warrant issued by the Civil Court. Thereafter, plaintiff moved by order to show cause to vacate its default and to be restored to possession of the premises based on lack of personal jurisdiction. On July 28,

2006, the Civil Court granted a temporary restraining order staying MAL from removing plaintiff's property from the premises. On August 1, 2006, the Civil Court ordered plaintiff restored to the premises, and a traverse hearing was held on August 22, 2006, to determine whether service of process had been properly made upon plaintiff. In an order by Judge Barbara Jaffe, dated October 27, 2006, the court found that MAL was unable to rebut plaintiff's prima facie evidence of improper service of process and dismissed the nonpayment proceeding for lack of jurisdiction.

Plaintiff then commenced the instant action against defendants on October 31, 2006. The amended complaint, dated November 1, 2006, asserts five causes of action. The first through fourth causes of action allege claims for wrongful eviction, conversion, lost profits, and harm to plaintiff's reputation and goodwill. The fifth cause of action seeks treble the amount of damages awarded under the first through fourth causes of action. Defendants interposed an answer, dated November 20, 2006, asserting eight affirmative defenses and counterclaims for nonpayment of rent, a judgment of possession, and attorney fees. By supplemental answer, dated May 23, 2007, defendants included a counterclaim for property damage. Plaintiff now moves for partial summary judgment on the first and fifth causes of action.

DISCUSSION

Summary judgment may be granted upon a prima facie showing of entitlement to judgment as a matter of law, through admissible evidence sufficient to eliminate material issues of fact (CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d 320, 324 [1986]; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). To defeat a motion for summary judgment the opposing party must come forward with admissible evidence to demonstrate the existence of a material issue of fact

requiring a trial (CPLR 3212 [b]); *see also GTF Mktg., Inc. v Colonial Aluminum Sales*, 66 NY2d 965, 968 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Conclusory allegations are insufficient to defeat the motion (*id.* at 562). In deciding the motion, the court must draw all reasonable inferences in favor of the non-moving party and must not decide credibility issues. (*Dauman Displays, Inc. v Masturzo*, 168 AD2d 204 [1990]; *lv denied* 77 NY2d 939 [1991]).

Plaintiff's First Cause of Action

Plaintiff's first cause of action alleges that "[p]laintiff had continued and uninterrupted possession of the said premises for more than 30 days before being illegally evicted by [d]efendants." Plaintiff seeks summary judgment on this claim based on the prior Civil Court order which dismissed MAL's nonpayment proceeding for lack of personal jurisdiction.

In opposition, defendants argue that since there has been no judicial determination of a wrongful eviction, triable issues of fact exist as to whether plaintiff's eviction from the premises for no more than a 72 hour period was unlawful. Defendants further argue that plaintiff is not entitled to recover damages for its alleged wrongful eviction because defendants procured a valid judgment of possession and warrant of eviction from the Civil Court. In a supporting affidavit, Adam Daniels asserts that "[d]efendants did not wrongfully allege that [p]laintiff failed to pay its monthly rental obligations since January 2006, thus, the basis for the commencement of the summary non-payment proceeding was valid."

It is well settled that a tenant is entitled to recover damages from a landlord where the tenant's eviction was illegal because of lack of service of process (*Brandt v de Kosenko*, 57 Misc2d 574 [1968], [finding the landlords therein to be liable for compensatory damages arising out of their

having procured a judgment of possession for nonpayment of rent causing the tenant's eviction to be effected by a city marshal under the mandate of a warrant of eviction later determined to be illegal due to lack of service of process]). Moreover, the fact that a landlord acted in accordance with court orders does not prevent the tenant from stating a cause of action to recover the premises or to recover damages (*see Maracina v Shirrmeister*, 105 AD2d 672 [1984] ["a judgment of possession in favor of the landlord which is later reversed or vacated renders the resultant eviction unlawful and the tenant is thereby entitled to be restored to the premises and to damages"]; *Golde Clothes Shop v Loew's Buffalo Theatres*, 236 NY 465, 470-471 [1923] [unlawful eviction occurs when a tenant is ousted pursuant to a judgment of possession which is reversed or vacated]); *Mon Amour Rest. v Helgeson*, 90 AD2d 742, 744 [1982] [the vacatur of a judgment of eviction precludes a landlord from pleading reliance on a valid judgment of possession at the time of eviction]).

Here, the record shows that after the Civil Court judgment awarded possession of the subject premises to MAL on default, the judgment was reversed when the nonpayment proceeding was dismissed as jurisdictionally defective. Under these circumstances, the court finds that plaintiff is entitled to recover damages against defendants for its wrongful eviction.

Plaintiff's Fifth Cause of Action

The fifth cause of action alleges that "[p]laintiff is entitled to treble the amount of damages awarded ... under the first through fourth causes of action." Plaintiff seeks summary judgment on this claim based on the alleged damages it sustained as a result of its wrongful eviction. In the second cause of action, sounding in conversion, it is alleged that plaintiff sustained damages when MAL's employees, as well as Adam Daniels, "wrongfully entered the premises, ate and drank at the

[p]laintiff's bar and thereafter converted [p]laintiff's entire inventory of food and alcoholic beverages ... by removing the inventory and trucking it away from the premises." In the third cause of action sounding in lost profits, it is alleged that "[a]s a direct result of [defendants'] unlawful conversion and larceny and willful violation of a Civil Court [o]rder," plaintiff was "without a food and beverage inventory on site, and [was] deprived of its business records, [and] could not recommence immediate operation of its restaurant." Lastly, the fourth cause of action seeks damages for harm to plaintiff's reputation and goodwill and alleges that defendants failed to return plaintiff's inventory upon demand which compounded the harm caused by the illegal eviction.

Plaintiff's claim for treble damages is based on RPAPL 853, which provides, in pertinent part, "if a person is disseized, ejected, or put out of real property in a forcible or unlawful manner ... he is entitled to recover treble damages in an action therefor against the wrong-doer." The statute applies to removal in an unlawful manner or by unlawful means and does not require an act of force or violence (*see O'Hara v Bishop*, 256 AD2d 983, 984 [1998]). However, the award of treble damages is discretionary with the court to be exercised when the conduct is intentional rather than an inadvertent unlawful act (*see Lyke v Anderson*, 147 AD2d 18, 25-26 [1989]).

In opposition, defendants argue that plaintiff is not entitled to summary judgment on its fifth cause of action, because plaintiff has not established that it suffered any damages that may be trebled. The court notes that while plaintiff has sought summary judgment in respect to the first cause of action, it has not sought similar summary relief in respect to its second through fourth causes of action. Although plaintiff argues that it is entitled to treble damages, plaintiff's proof does not establish its alleged damages. Plaintiff has submitted only an affirmation of an attorney who does not have any personal knowledge of the events and is thus insufficient to make a prima facie showing

[* 7]

of entitlement to judgment as a matter of law (*see* CPLR 3212 [b]; *Alvarez v Prospect Hosp.*, 68 NY2d at 324; *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d at 853). Moreover, in his affidavit in opposition to the motion, Adam Daniels states that “[n]one of the instances alleged by [p]laintiff ever occurred.” Thus, there are clearly issues of fact precluding summary judgment on plaintiff’s fifth cause of action.


CONCLUSION

For the foregoing reasons, plaintiff’s motion for partial summary judgment on its first cause of action for wrongful eviction is granted. An assessment of damages shall be conducted at the time of trial.

The branch of the motion by which plaintiff seeks partial summary judgment on its fifth cause of action for treble damages is denied without prejudice to a determination at the time of trial.

This constitutes the decision and order of the court.

DATED: OCT 16 2007



J.S.C.

HON. LELAND DeGRASSE

FILED
OCT 24 2007
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