

<b>125 Maiden Equities, LLC v gary</b>
2007 NY Slip Op 34535(U)
August 9, 2007
Supreme Court, New York County
Docket Number: delete case special referee
Judge: Kenneth C. Holder
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4.

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

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125 MAIDEN EQUITIES, LLC

Plaintiff,

Index No. 104016/05

**Decision and Order**

-against-

TERRY GARY, a/k/a TERRY GRAY and WILLER  
VALERUS,

Defendants.

-----X

**ORDER OF THE SUPREME COURT, NEW YORK COUNTY: PART 81R**

By decision and order of the Honorable Leland DeGrasse dated January 16, 2007,  
the issue of the amount of damages to be awarded plaintiff was referred for assignment to a  
Special Referee to hear and determine.<sup>1</sup>

The matter was assigned to the undersigned Special Referee on April 5, 2007, at  
which time counsel for the respective parties appeared. Appearances were as follows:

For Plaintiff,  
David P. Haberman, Esq.  
Rose & Rose  
291 Broadway-Suite 1202  
New York, N.Y. 10007

For Defendant Terry Gary,  
Matthew Sheppe, Esq.  
Reiss Eisenpress, LLP  
425 Madison Avenue-11th Floor  
New York, N.Y. 10017-1110

For Defendant Willer Valerus,  
David Stern, Esq.  
Stern & Stern, Esqs.  
50 Court Street-Suite 1100  
Brooklyn, New York 11201

**FILED**  
AUG 14 2007  
NEW YORK  
COUNTY CLERK'S OFFICE

<sup>1</sup>Plaintiff commenced the underlying action seeking damages against the defendants for their alleged breach of certain lease guarantees. In due course, plaintiff made a motion for summary judgment on claims alleged in the complaint. In its decision and order, the court granted the motion in favor of plaintiff and as against defendant Willer Valerus. The motion was also granted against defendant Terry Gary on default. The court thereafter referred the matter for the instant hearing.

The instant matter was conferenced on April 5, 2007, and adjourned a number of times for various reasons. On the final adjourned date of August 6, 2007, plaintiff and defendant Willer Valerus ("Valerus") advised the undersigned Special Referee that they had reached a settlement with respect to the referenced issue.<sup>2</sup> Defendant Terry Gary ("Gary") was determined to be in default, due to his failure to appear at the hearing.<sup>3</sup> An inquest on the amount of damages owed to plaintiff by Gary was therefore held.

### Settlement

Plaintiff settled its claims against Valerus in the sum of \$50,000. The parties agreed that Valerus would pay plaintiff the sum of \$10,000 by August 20, 2007, and the sum of \$40,000 by November 20, 2007. It was further agreed that in the event Valerus failed to make either payments, "any remaining balance due shall be entitled to entry of judgment for the sum of \$120,937.21, representing the full amount claimed by plaintiff, upon filing [of] an attorney affirmation of payment default and service by mail of a written notice of payment default to defendant Valerus's attorney with 3 days to cure." The parties further agreed that "under such circumstances, the Clerk is directed to enter judgment against defendant Willer Valerus for the sum of \$120,937.21, less any payments made by defendant Valerus pursuant to [the] stipulation

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<sup>2</sup>Plaintiff's counsel read the terms of the settlement into the record.

<sup>3</sup>It must be noted that by Decision and Order dated June 11, 2007, the court granted without opposition a motion made by the firm of Reiss Eisenpress, LLC for leave to withdraw as counsel for Gary. The court ordered that "as a condition of the foregoing relief, movant shall serve Gary with a copy of this order and a notice directing him to retain new counsel within 20 days after entry." The court also directed that the firm serve Gary by certified mail, return receipt requested at Gary's last known address and that all proceedings against Gary be stayed for period of 45 days following entry of the order. Inasmuch as the undersigned Special Referee did not have an address for Gary, the law firm of Reiss Eisenpress, LLC was advised by letter dated July 12, 2007, of the final adjourned date of August 6, 2007.

[and] upon the filing of an affirmation of payment default.”<sup>4</sup>

### Inquest-Testimony

(1) Plaintiff called Richard Recny (“Recny”) to testify on its behalf. Recny testified that he has been an employee of Times Equities, Inc. for 20 years. Recny also testified that he has served as Director of Asset Management for the corporation for the past 10 years. Recny further testified that on June 18, 2003, plaintiff and an entity known as Brownstone Development, Inc.

(“Brownstone”) executed a lease agreement<sup>5</sup>, whereby plaintiff agreed to rent a portion of the second floor of the premises known as 125 Maiden Lane, New York (the “subject premises”).

Recny testified that on February 1, 2004, Brownstone assigned the rented space to an entity known as Global Home Loans & Finance, Inc. (“Global Homes”). According to Recny, he was responsible for the management of the subject premises at that time.

(2) Recny also testified that Brownstone vacated the premises prior to the lease term of January 31, 2014, and that plaintiff regained possession of the leased premises on April 5, 2005.<sup>6</sup> Recny further testified the monthly rent on the leased premises on April 5, 2005 was \$24,359.83, and that at the time plaintiff regained possession of the leased premises, Brownstone owed plaintiff the sum of \$120,937.21, representing four months in rent arrears, late charges, legal fees, and

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<sup>4</sup>The parties’ agreement is attached to this decision and order.

<sup>5</sup>The lease agreement was admitted into evidence as Plaintiff’s Exhibit#1.

<sup>6</sup>A copy of a letter dated April 5, 2005, from Meister, Seelig & Fein, LLP, counsel to Global Homes, to Rose & Rose, counsel for plaintiff, was admitted into evidence as Plaintiff’s Exhibit#2. In such letter, counsel to Global Homes states (in relevant part) that Global Homes “has no claims to possession of the premise [sic] at 125 Maiden Lane, portion of the second floor a/k/a Suite 200, New York, New York. . .”

additional rent.<sup>7</sup> Recny also testified that plaintiff has not been paid any portion of these monies.

(3) Recny testified that due to the fact that Gary executed a "holdover" guarantee under the parties' lease agreement and that Valerus executed a personal guarantee under the lease agreement, they are both liable to plaintiff in damages. He testified that plaintiff is entitled to a judgment against Gary in the total sum of \$120,937.21.

#### Conclusions of Law

(1) The Special Referee's query is limited by the scope of the instant reference (see, Marshall v. Pappas, 143 AD2d 979 [2<sup>nd</sup> Dept. 1988]-[a referee is controlled by the order of reference, and must comply with the direction contained therein]; Volk v. Volk, 254 AD2d 274 [2<sup>nd</sup> Dept. 1998]).

(2) In determining same, the referee is to consider the witness's character, demeanor, and interest. As the trier of fact, the referee determines whether or not the testimony is colored intentionally or unintentionally by those factors (see, Lauria v. Lauria, 187 AD2d 888, 889 [3<sup>rd</sup> Dept. 1992]).

(3) Although the witness may have an interest in the outcome of the litigation (see, Coleman v. New York City Tr. Auth., 41 AD2d 812, affirmed 37 NY2d 137 [1975]), which is highly material to the assessment of the witness's credibility (see, Calandra v. Norwood, 81 AD2d 650, 651 [2<sup>nd</sup> Dept. 1981]; Dobro v. Village of Sloan, 48 AD2d 237, 243-248, appeal dismissed 37 NY2d 804 [1975]-[it is widely accepted that whether a witness has a personal interest in the outcome of the litigation is a factor that must be identified in order to adequately perform the unique duty of

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<sup>7</sup>A copy of plaintiff's tenant records with respect to the subject premises was admitted into evidence as Plaintiff's Exhibit#3.

weighing the evidence and assessing the credibility of witnesses]).

(4) As the trier of fact, the referee has the liberty to disbelieve the testimony of such a witness even though it is not otherwise impeached or contradicted (see, Dominquez v. Manhattan & Bronx Surface Tr. Operating Auth., 46 NY2d 528, 534 [1979]-[issues of credibility are for the trier of fact]).

(5) The parties must establish a fair preponderance of the credible evidence that the claim they are making is true (see, Spangenberg v. Chaloupka, 229 AD2d 482, 483 [2<sup>nd</sup> Dept. 1996]). The evidence must be relevant and have the tendency to make the existence of a fact more probable or less probable than it would be without the evidence (see, Epstein & Wessenberger, New York Evidence 1996/1997 Courtroom Manual 1996, Chap. 3-1, at 35; People v. Lewis, 69 NY2d 321, 325 [1987]-[evidence is relevant if it has any tendency in reason to prove any material fact]).

Evidence which is "evenly balance" is insufficient to overcome the burden of any applicable presumption (see, Rinaldi & Sons, Inc. v. Wells Fargo Alarm Service, Inc., 39 NY2d 191, 192 [1976]).

(6) Damages for breach of contract or an agreement must not be speculative, must be generally foreseeable, and within the contemplation of the contracting parties (see, Dinicur v. Groff Studios Corp., 257 AD2d 218, 223 [1<sup>st</sup> Dept. 1999]).

(7) Damages awarded in breach of contract cases are intended to return parties to the point at which the breach arose, and to place the non-breaching party in a good a position as it would have been had the contract been performed (see, Brushton-Moira Cent. School Dist. v. Fred H. Thomas Associates, P.C., 91 NY2d 256, 261 [1998]).

### Findings of Fact/Analysis

(1) I have considered all of the relevant evidence, and I find that plaintiff has established, by a fair preponderance of the credible evidence, that it is entitled to an award in damages against Gary in the total sum of \$120,937.21 (see, Spangenberg v. Chaloupka, supra).

(2) Specifically, I find that Recny testified credibly as to employment with Time Equities, Inc., and his title as Director of Asset Management for the past 10 years (see, Lauria v. Lauria, supra).

I also find that Recny testified credibly that he was responsible for managing the subject premises in February 2004, and that Brownstone, a tenant of plaintiff who rented a portion of the second floor of the subject premises, assigned the leased space to Global Homes on February 1, 2004 (id). I find that the document evidence (i.e., lease agreement and letter dated April 5, 2005) corroborates Recny's testimony on this issue.

(3) I find that the documentary evidence (i.e., lease agreement and tenant records) also corroborates Recny's credible testimony (id) that the monthly rent for the leased space was \$24,359.83, that Brownstone vacated the premises prior to the lease term of January 31, 2014, and that plaintiff regained possession of the leased space on April 5, 2005 (id).

(4) I find that the tenant records reflect that plaintiff received payments with regard to the leased premises through October 13, 2005, leaving a balance owed in the total sum of \$120,937.21. I find that Recny testified credibly that this sum represents four months in rent arrears, late charges, legal fees, and additional rent (id).

(5) I find that the documentary evidence (i.e., lease agreement and tenant records) also corroborates Recny's credible testimony (id) that plaintiff is entitled to an award in damages against Gary in the total sum of \$120,937.21, pursuant to the holdover guarantee executed by

Gary set forth in the parties' lease agreement (see, Brushton-Moira Cent. School Dist. v. Fred H. Thomas Associates, P.C., *supra*).

**Conclusion**

Upon consideration of all the testimony presented, the considered credibility to be afforded the witness, and review of all exhibits admitted into evidence, I find that plaintiff is entitled to an award in damages against Gary in the total sum of \$120,937.21.

The foregoing constitutes the decision and order of the court.

ORDERED that the Clerk of the Court is directed to enter judgment in favor of plaintiff 125 Maiden Equities, LLC, and against defendant Terry Gary a/k/a Terry Gray, in the amount of \$120,937.21; and it is further;

ORDERED that interest on the judgment shall be calculated at the statutory rate, together with costs and disbursements, to be taxed by the Clerk upon submission of an appropriate bill of costs.

Dated: August 9, 2007.

*Lancelot B. Hewitt*

Lancelot B. Hewitt,  
Special Referee

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Clerk of the Court

**FILED**

AUG 14 2007

NEW YORK  
COUNTY CLERK'S OFFICE

Enter:

DATE 11/10/08  
I hereby certify that the foregoing  
paper is a true copy of the original  
thereof, filed in my office on the  
14 day of Aug. 2007

*Thomas J. Peltone*

County Clerk and Clerk of the  
Supreme Court New York County  
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