

Houston Mgt. Corp. v Houston Essex Realty Corp.
2008 NY Slip Op 30176(U)
January 14, 2008
Supreme Court, New York County
Docket Number: 0112884/2004
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK / - NEW YORK COUNTY

PRE-INDEX YORK
Index Number : 112884/2004

PART 2

HOUSTON MANAGEMENT

vs
HOUSTON ESSEX REALTY

Sequence Number : 001

SUMMARY JUDGMENT

X NO.

112884/2004

FILED DATE

FILED SEQ. NO.

001

FILED CAL. NO.

The following papers, numbered 1 to _____ were ...

... filed in this case for ...

PAPERS NUMBERED

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

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

JAN 22 2008

NEW YORK
COUNTY CLERK

Dated: 1/14/08

Luy **LOUIS B. YORK**
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 2**

-----X
HOUSTON MANAGEMENT CORP.,

Plaintiff,

Index No. 112884/2004

-against-

**HOUSTON ESSEX REALTY CORP.,
TONY LAI and DUNNIE LAI,**

Defendants.

York, J.S.C.:

Defendant Houston Essex Realty Corporation ["Realty"] owns a building located at 2225 East Houston Street in New York. Defendants Tony and Dunnie Lai ["the individual defendants"] are the sole owners of Realty. For a number of years, the individual defendants ran a nightclub, Club Old Banque Corp. ["the club"] at the building. However, in September 1999, the individual defendants sold 88% of their ownership interest in the club to Essex Street Club, LLC ["Essex"], retaining a 6% share apiece in the club.

Apparently, numerous problems arose between Essex Street Club and defendants, ultimately costing defendants lost rent and other expenses. In March 2003, defendants commenced a holdover proceeding against Essex in Part 52 of the Civil Court of this County [Case I]. Defendants prevailed, and received judgment of possession in an order dated August 21, 2003. The Appellate Term stayed eviction proceedings pending Essex Street Club's appeal and directed that, as a condition of the stay, Essex pay use and occupancy. Ultimately, on March 30, 2004, the original judgment was affirmed; and, on April 28, 2004, Essex was evicted from the building.

In December 2003, based on the pending controversy, defendants brought an action in

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the Supreme Court of this County to prevent Essex from selling its 88% interest in the club [Case II]. Starting on June 1, 2005, plaintiff entered into stipulations of settlement with several of the Case II defendants in which, among other things, the settling defendants agreed to transfer Essex's interest in the club back to plaintiff. A May 11, 2006 order by Justice Lowe in Case II adopted Special Referee Sue Ann Hoahng's Report and Recommendation and granted defendants – who were the plaintiffs in Case II – judgment of \$1,354,066.48 plus legal fees of \$91,617.56 against the defendants who were not parties to the stipulations of settlement. According to defendants, pursuant to these orders and settlements, defendants therefore owned not only the club but all of its contents. This last point is critical to the current dispute.

Meanwhile, according to the complaint in this action [Case III], on November 7, 2003 – while Case I, the holdover proceeding, was pending – plaintiff Houston Management Corporation (plaintiff, or “Management”) entered into an agreement with the club. Under the agreement, plaintiff was to acquire the lease and assume ownership of the club. Plaintiff states that defendants knew or should have known of this agreement.

Moreover, plaintiff states that, through the club's law firm, it paid base rent, real estate taxes and use and occupancy for the premises, and that it believes this money was paid to and accepted by defendants. In March 2004, plaintiff and defendants entered into negotiations through which plaintiff was to lease the premises directly from defendants. On April 5, 2004, plaintiff and defendants signed a Memorandum of Understanding which signified the parties' intention to enter into a lease. In reliance on this provisional agreement and on defendants' apparent past acceptance of base rent, real estate taxes, and use and occupancy from it, plaintiff also furnished and equipped the club and, for several months, operated the club as well. According to plaintiff, defendants were aware of plaintiff's work on and use of the premises.

By the time of the Memorandum of Intent, defendants had initiated Case II, which sought to prevent Essex from selling its 88% share of the club. Significantly, too, Case I was nearing its end. In fact, a few weeks before plaintiff and defendants signed their Memorandum of Intent, the Appellate Term affirmed the judgment of possession in that case. On April 27 or 28, 2004, a few weeks after the parties in Case III signed the Memorandum of Intent, defendants executed the warrant of eviction against Essex.

At this point, according to the current complaint (in Case III), defendants gave plaintiff keys to the club. Defendants state they did this so that plaintiff could retrieve mail and perform various other functions, but that they also directed plaintiff not to operate the club until a lease had been signed. Plaintiff alleges that defendants knew it was operating the club. At any rate, it is undisputed that plaintiff continued to operate the club. Defendant Dinnie Lai allegedly learned this around a week later, on May 6, when she was in the vicinity of the premises. According to defendants, this was illegal as plaintiff did not have a liquor license yet; as part of the negotiations, defendants were to transfer their license to plaintiff.¹ Ms. Lai confronted plaintiff at this time, but agreed to accept the keys on May 7 rather than shut down the club that night. Therefore, on May 7, 2004, with the assistance of the police, defendants changed the locks and barred plaintiff from the premises. Defendants allege that plaintiff handed over the keys voluntarily.

Subsequently, in September 2004, plaintiff initiated the current action. Plaintiff claims that it was entitled to operate the business and that it was improperly denied the right to its property – in particular, the improvements and other personal property left in the club on May 7, 2004. Plaintiff seeks an accounting so that it can recover the value of its lost business, along

¹ The nature of the transfer, and the question of whose name would be on the license, was in dispute.

with treble damages under RPAPL 853; \$300,000 to compensate it for the lost property, along with \$3,000,000 in punitive damages; and, costs disbursements and attorneys fees. Before the Court at present is defendants' motion for summary judgment, which the Court grants in part and denies in part, as set forth below.

RPAPL 853 provides that:

If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.

The Court agrees with defendant that plaintiff has not stated a claim under RPAPL 853 for treble damages. A party may recover under RPAPL 853 only if it had possession of the premises pursuant to a valid lease. Massare v. Di Nardo, 35 A.D.3d 1157, 1158, 830 N.Y.S.2d 395, 396 (4th Dept. 2006); see Gold v. Schuster, 264 A.D.2d 547, 550, 694 N.Y.S.2d 646, 649 (1st Dept. 1999). There was no lease in May 2004; and, based on the e-mails annexed to the parties' papers, it appears that the lease negotiations were breaking down. Also, though defendants may have accepted rent from plaintiff while the eviction proceeding against the predecessor tenant was unresolved, an e-mail dated May 2 indicates that defendants were rejecting the April and May payment, which plaintiff sent around this time. Plaintiff also attempts to rely on the Memorandum of Intent to show that RPAPL 853 applies. However, the Memorandum was not a binding agreement which gave plaintiff the rights it would have under a lease. See Inside Swing v. Le Chase, 236 A.D.2d 884, 653 N.Y.S.2d 474 (4th Dept. 1997).

Even if the statute applied, an award of treble damages would be permissive rather than mandatory. Lee v. Park, 16 A.D.3d 986, 989, 793 N.Y.S.2d 214, 217 (3rd Dept. 2005).

Accepting the facts as presented in plaintiff's current affidavit, the parties maintained a relatively

civil manner toward each other throughout. Also, defendants brought a police officer along to make sure they locked out plaintiff in an orderly fashion. Therefore, this is not a case in which this Court finds treble damages to be appropriate. See Paulino v. Wright, 210 A.D.2d 171, 172, 620 N.Y.S.2d 363, 364 (1st Dept. 1994)(treble damages not awarded where police and HPD officers acted within the parameters of the law, not inflicting injury or forcibly/physically removing anyone from the premises).

Moreover, plaintiff has no basis for damages for lost profits. “Lost profits may be recovered if they were caused by the contract breach, the alleged loss can be proven with reasonable certainty and they were within the contemplation of the parties at the time the contract was made.” Lee v. Park, 16 A.D.3d 986, 988, 793 N.Y.S.2d 214, 216 -17 (3rd Dept. 2005). As stated above, the parties had a Memorandum indicating their intent to enter into a lease, but no lease had been signed yet. Therefore, there was no contractual breach and there is no claim. See also North Main Street Bagel Corp. v. Duncan, 37 A.D.3d 785, 786, 831 N.Y.S.2d 239, 241 (2nd Dept. 2007)(measure of compensatory damages for wrongful eviction is computed based on unexpired term of the lease, including lost profits). For the same reason, there is no claim for attorney’s fees under RPAPL 853.

Similarly, there is no basis for punitive damages. “[P]unitive damages are only available in the extreme case where the defendant has been shown to have been motivated by actual malice or to have acted in such a reckless, wanton or criminal manner so as to indicate a conscious disregard of the rights of others.” Moran v. Orth, 36 A.D.3d 771, 773, 828 N.Y.S.2d 516, 518 (2nd Dept. 2007)(citation and internal quotation marks omitted). In Moran, the appellate court found that even an unlawful eviction was not sufficient to justify punitive damages absent a showing of egregious, morally culpable conduct. Id. Here, the circumstances

provide even less of a basis for punitive damages.

Although treble damages are denied, the Court does find a triable issue of fact exists as to plaintiff's claim for personal property which defendants did not return to it. It does not appear that plaintiff is entitled to reimbursement for improvements made to the property. See Rocar Realty Northeast, Inc. v. Jefferson Valley Mall, 38 A.D.3d 744, 833 N.Y.S.2d 522 (2nd Dept. 2007)(landlord-tenant relationship had existed but was terminated by tenant's refusal to vacate; thus, landlord's obligation to reimburse tenant for making improvements to leasehold property also had been terminated). At this point, plaintiff has not satisfactorily argued or established a legal basis for a contrary determination.

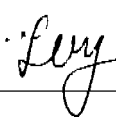
However, plaintiff may have a viable claim for reimbursement for the conversion of items of value which the landlord retained, although plaintiff sought their return. See 8902 Corp. v. Helmsley-Spear, Inc., 23 A.D.3d 316, 804 N.Y.S.2d 725 (1st Dept. 2005); Wilson v. CRL Management, Inc., 14 Misc. 3d 231, 233, 829 N.Y.S.2d 424, 426 (City Ct. Rochester 2006). Defendants state they have the right to plaintiff's property because of the successful conclusion of the eviction proceedings against the prior tenants; but on its face this argument has no merit, and defendants have provided insufficient legal factual support for this contention. Even in a legal eviction, there is no right to retain the personal property of the tenants. At this point, however, too many factual issues remain, in light of the parties conflicting versions of the fact, for the court to determine the nature and expense of any wrongfully retained personal property. Therefore, discovery and/or a hearing must be conducted on this issue.

Accordingly, it is

ORDERED that the motion for summary judgment is granted to the extent of severing and dismissing the first cause of action, the part of the second cause of action seeking punitive

damages, and the part of the complaint seeking attorney's fees, and is denied to the extent that it seeks to dismiss the portion of the second cause of action that is based on conversion.

ENTER:



**LOUIS B. YORK
J.S.C.**

Dated: 1/14/08

Louis B. York, J.S.C.

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