

**NYC Goetz Realty Corp. v Martha Graham
Ctr. of Contemporary Dance**

2008 NY Slip Op 30286(U)

January 29, 2008

Supreme Court, New York County

Docket Number: 0113523/2005

Judge: Emily Jane Goodman

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

PRESENT: EMILY JANE GOODMAN

Justice

PART 17

Index Number : 113523/2005

NYC GOETZ REALTY

VS.

MARTHA GRAHAM CENTER

SEQUENCE NUMBER : 003

REARGUMENT/RECONSIDERATION

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

MOTION CAL. NO. _____

this motion to/for _____

PAPERS NUMBERED

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

Answering Affidavits — Exhibits _____

Replying Affidavits _____

Cross-Motion: Yes No

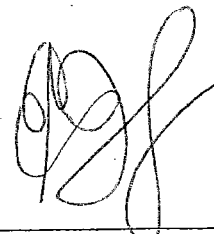
Upon the foregoing papers, it is ordered that this motion *for clarification as to the intent of this court's grant of a judgment as to the extent of granting summary judgment by order of the Appellate Division and the cross motion to settle and order is decided for attached*

FILED

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NEW YORK COUNTY CLERK'S OFFICE

Dated: 1/24/08



J.S.C.

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NON-FINAL DISPOSITION

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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: PART 17

-----x
NYC GOETZ REALTY CORPORATION,

Plaintiff,

-against-

Index No.: 113523/05

MARTHA GRAHAM CENTER OF
CONTEMPORARY DANCE, a New York
Not for Profit Corporation,

Defendant.
-----x

MARTHA GRAHAM CENTER OF
CONTEMPORARY DANCE, a New York
Not for Profit Corporation,

Counterclaim-Plaintiff,

-against-

NYC GOETZ REALTY CORPORATION, and
JEWELMAK, INC.,

Counterclaim-Defendants.
-----x

EMILY JANE GOODMAN, J.S.C.:

Defendant moves to clarify what this Court meant when it stated, in its Decision and Order, dated October 11, 2007, that Plaintiff was granted partial summary judgment "to the extent of granting summary judgment by order of the Appellate Division." This statement requires interpretation of the Decision and Order of the Appellate Division First Department, dated April 19, 2007. Plaintiff cross moves for settlement of an order, maintaining that the First Department not only granted it partial summary

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judgment on the issue of liability for breach of lease but also dismissed Defendant's affirmative defenses and counterclaims, including those for negligence, breach of contract, nuisance and trespass. Defendant maintains that these claims were not dismissed by the First Department, and must be litigated by this Court on remand.

Although it would have been preferable for this motion to have been made to the First Department, this Court is left in the position of interpreting the intent of the First Department, when it reversed this Court's Decision and Order, dated October 25, 2006. In the October 25th Decision, this Court denied Plaintiff's motion for partial summary judgment and for dismissal of Defendant's defenses and counterclaims, holding that an issue of fact existed as to whether Plaintiff constructively evicted Defendant and breached the covenant of quiet enjoyment. This Court also denied Plaintiff's request for dismissal of Defendant's defenses and counterclaims, but did not discuss those defenses and counterclaims individually; Plaintiff did not discuss same, and therefore, Plaintiff could not have met its prima face burden.

As noted in this Court's October 25th Decision, Plaintiff/landlord filed a complaint against Defendant/tenant for rents remaining under an unexpired lease, after Defendant vacated the premises on the basis of constructive eviction. Defendant

[*4]

alleged that it vacated the premises because Plaintiff began demolition and construction work in the building, and the negative effects of the demolition (dust and debris) caused staff to become ill and endangered its valuable archives. Defendant claimed that heavy dusts and fumes caused many of its employees to miss work, and that the construction frequently interrupted its utility services and air conditioning, as well as its internet and computer network. Defendant further alleged that two of its three bathrooms became inoperable, resulting in leaks that caused water to pour into its office space, damaging and causing portions of the ceiling in its second floor to collapse. Such conditions allegedly undermined Defendant's ability to host meetings with donors to raise money, and impeded board meetings and business operations. In its answer to the complaint, Defendant asserted defenses and counterclaims of (1) constructive eviction, (2) breach of covenant of quiet enjoyment (3)breach of contract, (4) negligence, (5) nuisance, and (6) trespass.

In reversing this Court, the First Department held, in relevant part:

Order, Supreme Court, New York County (Emily Jane Goodman, J.), entered November 6, 2006, which denied plaintiff landlord's motion for partial summary judgment on the issue of defendant tenant's liability for breach of lease, and dismissing defendant's affirmative defenses and counterclaims, unanimously reversed, on the law, without costs, the motion is granted and the matter remanded for further proceedings. Whether a landlord's renovation work is of such character as to justify a tenant's abandonment of the premises is normally a question of fact...Here, however,

[* 5]

tenant failed to put forth specific evidence of conditions rising to the level of constructive eviction...Thus, there are no issues of fact and summary judgment should have been granted in favor of the landlord. The remaining conditions complained of were tenant's responsibility under the lease.

As Defendant notes, the First Department made no "express findings or conclusions with respect to Martha Graham's defenses and counterclaims for negligence, breach of contract, nuisance and trespass" (Defendant's Mem of Law at 6), creating an ambiguity. On the one hand, the First Department appears to have granted Plaintiff's motion in its entirety. By reciting that Plaintiff's motion below included a request for dismissal of Defendant's affirmative defenses and counterclaims, the First Department recognized that the motion was two-fold, yet reversed, as opposed to modified, this Court (which had denied the motion in its entirety).

On the other hand, Defendant asserts that the First Department could not have dismissed the affirmative defenses and counterclaims of negligence, breach of contract, nuisance and trespass because the legal standards and factual requirements of those claims are different from the legal standards and factual requirements for constructive eviction and breach of the covenant of quiet enjoyment, citing Duane Reade v Reva Holding Corp. (30 AD3d 299 [1st Dept 2006] [causes of action for breach of contract, negligence, nuisance and trespass were reinstated even though claim for breach of the covenant of quiet enjoyment was

[* 6]

dismissed]). This point is well taken, and has led the Court to request a copy of the Notice of Appeal and the Pre-Argument Statement from the parties to determine if the appeal was limited to the issue of partial summary judgment for breach of lease. Review of those documents indicates that the appeal was taken only from the Court's denial of summary judgment for breach of lease, and no mention is made of the Court's denial of dismissal of Defendant's defenses and counterclaims, nor any argument asserted as to why this Court erred by declining to dismiss those defenses and counterclaims. Therefore, in light of the fact that (1) the appeal was a limited appeal, (2) distinctions exist between legal standards and factual requirements for the claims at issue and (3) Defendant never addressed the defenses and counterclaims in either its summary judgment motion or in its Pre-Argument Statement, this Court concludes that Defendant's defenses and counterclaims were not dismissed by the First Department, and they may be properly considered by this Court as counterclaims.¹

¹Although the claims for negligence, breach of contract, nuisance and trespass are denominated as defenses and counterclaims, they are, in actuality, counterclaims. If they were defenses to the established breach of lease, they would prevent this Court from awarding Plaintiff partial summary judgment on liability for breach of lease, which was clearly not the intent of the First Department. Further, the mere assertion of a counterclaim does not bar summary judgment for a plaintiff who is otherwise entitled to it on the main claim (see M & S Mercury Air Conditioning Corp. v Rodolitz, 24 AD2d 873 [2d Dept 1965], affd 17 NY2d 909 [1966]).

[* 7]
Accordingly, it is

ORDERED that the motion for clarification is granted and clarified as stated herein; and it is further

ORDERED that the cross motion is granted to the extent that Plaintiff is granted partial summary judgment on its complaint for breach of lease in the amount of \$104,574.88, consisting of \$89,868.82 in rent (after credit of security deposit), \$2,774.82 for advertising expenses and \$11,932.00 in brokerage fees, plus interest on \$89,868.82 from August 1, 2005 at the statutory rate, plus costs and disbursements as taxed by the Clerk of the Court; and it is further

ORDERED that based upon the Stipulation, dated January 24, 2008, Plaintiff may renew its claim for legal fees; and it is further

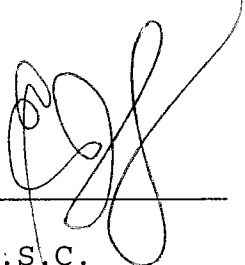
ORDERED that Defendant's affirmative defenses and counterclaims are severed and shall continue as counterclaims against Plaintiff; and it is further

ORDERED that the Clerk of the Court is directed to enter judgment accordingly.

This Constitutes the Decision and Order of the Court.

Dated: January 29, 2008

ENTER:



J.S.C.

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