

**521 Fifth Ave. Partners LLC v Goodrich &
Sherwood Assoc., Inc.**

2008 NY Slip Op 30958(U)

March 31, 2008

Supreme Court, New York County

Docket Number: 0116237/2004

Judge: Martin Shulman

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

PRESENT: **MARTIN SHULMAN**

PART 1

Index Number : 116237/2004

J.S.C.

521 FIFTH AVENUE PARTNERS LLC

vs

GOODRICH & SHERWOOD ASSOCIATES

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO.

116237/04

MOTION DATE

MOTION SEQ. NO.

001

MOTION CAL. NO.

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

Notice of Motion/ ~~Order to Show Cause~~ — Affidavits — Exhibits A-P

Answering Affidavits — Exhibits 1-8

Replying Affidavits Exhibits A-D

PAPERS NUMBERED

<u>1, 2</u>
<u>3, 4</u>
<u>5, 6</u>

Cross-Motion: Yes No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached decision and order.

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

FILED
APR 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: MAR 27 2008

MARTIN SHULMAN J.S.C.
J.S.C.

Check one: FINAL DISPOSITION
Check if appropriate: DO NOT POST

NON-FINAL DISPOSITION
 REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 1

-----X
521 FIFTH AVENUE PARTNERS LLC,

Index No: 116237/04

Plaintiff,

-against-

Decision and Order

GOODRICH & SHERWOOD ASSOCIATES, INC.
and ANDREW SHERWOOD,

Defendants.
-----X

FILED
APR 03 2008
COUNTY CLERK'S OFFICE
NEW YORK

Hon. Martin Shulman, J.S.C.:

Plaintiff 521 Fifth Avenue Partners LLC ("plaintiff" or "landlord") moves for summary judgment on its complaint seeking damages for unpaid rent and additional rent against defendant tenant Goodrich & Sherwood Associates, Inc. ("tenant" or "G&S") pursuant to a commercial lease and against defendant Andrew Sherwood ("Sherwood") based upon his guaranty of said lease. Plaintiff also seeks dismissal of G&S's counterclaim for rent overcharges. Tenant and Sherwood (collectively "defendants") oppose the motion.

An award of summary judgment is appropriate when no issues of fact exist. See CPLR 3212(b); *Sun Yau Ko v. Lincoln Sav. Bank*, 99 A.D.2d 943, 473 N.Y.S.2d 397 (1st Dept., 1984), *aff'd* 62 N.Y.2d 938, 479 N.Y.S.2d 213 (1984); *Andre v. Pomeroy*, 35 N.Y.2d 361, 362 N.Y.S.2d 131 (1974). In order to prevail on a motion for summary judgment, the proponent must make a *prima facie* showing of entitlement to judgment as a matter of law by providing sufficient evidence to eliminate any material issues of fact. *Winegrad v. New York University Medical Center*, 64 N.Y.2d 851, 853, 487 N.Y.S.2d 316 (1985); *Alvarez v. Prospect Hosp.*, 68 N.Y.2d 320, 324, 508 N.Y.S.2d 923

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(1986). Indeed, the moving party has the burden to present evidentiary facts to establish his cause sufficiently to entitle him to judgment as a matter of law. *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979).

While the moving party has the initial burden of proving entitlement to summary judgment (*Winegrad v. N.Y. Univ. Med. Center*, 64 N.Y.2d 851, 487 N.Y.S.2d 316 (1985)), once such proof has been offered, in order to defend the summary judgment motion, the opposing party must "show facts sufficient to require a trial of any issue of fact." CPLR 3212(b); *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562, 427 N.Y.S.2d 595, 597 (1980); *Freedman v. Chemical Const. Corp.*, 43 N.Y.2d 260, 401 N.Y.S.2d 176 (1977); *Friends of Animals, Inc. v. Associated Fur Mfrs., Inc.*, 46 N.Y.2d 1065, 416 N.Y.S.2d 790 (1979). Upon plaintiff establishing its *prima facie* case, the burden of proof shifted to defendants to demonstrate by admissible evidence the existence of a factual issue requiring a trial. *Zuckerman, supra*; see also, *DeSouter v. HRH Const. Corp.*, 216 A.D.2d 249, 628 N.Y.S.2d 691 (1st Dept., 1995); *Commissioners of State Ins. Fund v. Photocircuits Corp.*, 773 N.Y.S.2d 190, 2 Misc.3d 300 (Sup. NY 2003). As set forth in *Spearmon, supra*:

"It is incumbent upon a defendant who opposes a motion for summary judgment to assemble, lay bare and reveal his proofs, in order to show that the matters set up in his answer are real and are capable of being established upon a trial." Bare conclusory allegations are insufficient to defeat a motion for summary judgment [citations omitted]. *Id.*, 96 A.D.2d at 553.

Mere conclusory allegations, expressions of hope, speculation or conjecture is not sufficient to resist summary judgment. *Zuckerman, supra*. If the opposing party fails to submit evidentiary facts to controvert the allegations set forth in the movant's papers,

the movant's allegations may be deemed admitted. *Kuehne & Nagel, Inc. v. F.W. Baiden*, 36 N.Y.2d 539, 544, 369 N.Y.S.2d 667, 671 (1975). Summary judgment may then be granted, as no triable issue of fact exists. *Id.*

Here, landlord has established its *prima facie* case for liability. Defendants' arguments in opposition are insufficient to overcome plaintiff's right to judgment as to liability. First, defendants' seventh affirmative defense alleges that plaintiff prevented the tenant from subletting the leased premises. This is insufficient to defeat summary judgment. Defendants fail to allege and/or establish that tenant had any right to sublet the premises. Further, even if true, the landlord's alleged conduct would not vitiate the tenant's obligation to pay rent. That a sublease of the premises might have reduced the rent arrears owed is purely speculative. Although plaintiff's motion does not seek dismissal of any of defendants' affirmative defenses, the seventh affirmative defense lacks merit as a matter of law and it is dismissed *sua sponte*.

Second, defendants assert that landlord breached the covenant of quiet enjoyment, constructively evicting G&S from the leased premises.¹ Defendants base their constructive eviction claim upon plaintiff performing construction in the building which allegedly damaged tenant's ceiling fixtures and balasts, created excessive dirt, dust and noise, and caused leaks (Sherwood Opp. Aff. at ¶¶ 16-23). Defendants contend that the tenant is entitled to an offset against the rent owed and argue that discovery is needed with respect to this issue. Defendants support these claims with

¹ The lease term was to expire on April 30, 2007. Tenant vacated the demised premises in or about July 2004.

copies of correspondence between G&S and the landlord's managing agent. *Id.* at Exhs. 3-5.

To establish a breach of the covenant of quiet enjoyment, a tenant must show actual or constructive eviction. *Grammar v. Turits*, 271 A.D.2d 644, 645, 706 N.Y.S.2d 453 (2nd Dept., 2000). "[C]onstructive eviction exists where, although there has been no physical expulsion or exclusion of the tenant, the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises (citations omitted)." *Barash v. Pennsylvania Terminal Real Estate Corp.*, 26 N.Y.2d 77, 83, 308 N.Y.S.2d 649, 653 (1970). The tenant must have been deprived of something it was entitled to under the lease. *Id.*, 26 N.Y.2d at 82, 308 N.Y.S.2d at 652.

Tenant's claims consist of bare, conclusory allegations with no specific details as to the dates and duration of the alleged conditions claimed to interfere with G&S's quiet enjoyment. As plaintiff notes, the majority of the correspondence defendants rely upon predates a stipulation the parties entered into in February 2003 in settlement of a non-payment summary proceeding (Exh. G to motion). In that stipulation, the tenant *inter alia* conceded that rent and additional rent totaling \$230,259.11² was owed through February 28, 2003, agreed to a payout of said sum and waived all defenses. The tenant's only correspondence post-dating the stipulation merely refers to unspecified "electric problems" in the form of "outages in our overhead lighting fixtures." (Sherwood

² Plaintiff entered judgment against G&S for \$230,259.11 and claims that a balance of \$97,253.04 remains outstanding. Having obtained judgment solely against G&S in the non-payment summary proceeding, landlord in this action seeks to hold Sherwood responsible for the judgment balance. As Sherwood does not refute his obligations under the guaranty, the court grants judgment to plaintiff against Sherwood for the unpaid balance of the judgment.

Opp. Aff. at Exh. 5). Without more, G&S does not establish a substantial and material deprivation of the beneficial use and enjoyment of the premises.³ The court can only conclude that these allegations, which are not articulated in the amended answer, are merely borne of afterthought and fail to create an issue of fact to defeat summary judgment.

Finally, although defendants do not refute plaintiff's *prima facie* case as to liability, an issue of fact is presented by defendants' counterclaim alleging plaintiff overcharged G&S for additional rent of real estate taxes, electric charges and portorage. Plaintiff's supporting proof does not clearly establish its right to collect additional rent in the amounts sought. Moreover, a cursory review of the occupant ledger annexed to landlord's motion at Exhibit N indicates G&S was billed for items other than base rent, electricity, portorage and real estate taxes, such as legal fees, administrative fees, rubbish removal and freight. Plaintiff must establish its entitlement to all sums it seeks and a hearing as to the amount of damages is hereby directed. The branch of plaintiff's motion seeking dismissal of the counterclaim is thus denied. For the foregoing reasons, it is hereby

ORDERED that plaintiff's motion is granted to the extent that plaintiff is granted partial summary judgment as to liability on the first through sixth causes of action against defendants Goodrich & Sherwood Associates, Inc. and Andrew Sherwood, and the motion is otherwise denied; and it is further

³ The court must further note that tenant's correspondence is dated April 28, 2003, yet G&S vacated the premises over a year later in July 2004. See *Barash v. Pennsylvania Terminal Real Estate Corp.*, *supra* (tenant must abandon possession in order to claim constructive eviction).

ORDERED that plaintiff 521 Fifth Avenue Partners LLC is granted judgment against defendant Andrew Sherwood on its second cause of action in the amount of \$97,253.04 with interest at the statutory rate from March 29, 2004; and it is further

ORDERED that the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that plaintiff's motion is granted to the extent that a hearing is hereby directed for an assessment of the amount of damages plaintiff is entitled to recover from defendants on the first, third, fourth, fifth and sixth causes of action, and the remaining portion of the second cause of action for which judgment was not granted above. Such hearing shall be referred to a Special Referee to hear and report with recommendations except that, in the event of and upon the filing of a stipulation of the parties, as permitted by CPLR §4317, the Special Referee, or another person designated by the parties to serve as referee, shall determine these issues. The final determination of this matter is held in abeyance pending receipt of the report and recommendations of the Special Referee and a motion pursuant to CPLR 4403 or receipt of the determination of the Special Referee or the designated referee; and it is further

ORDERED that within 60 days from the date hereof, plaintiff shall serve a copy of this decision and order with notice of entry upon the Special Referee Clerk (Room 119) to arrange a date for the reference herein directed.

This constitutes this court's Decision and Order. Courtesy copies of same have been provided to counsel for the parties.

DATED: New York, New York
March 31, 2008


HON. MARTIN SHULMAN, J.S.C.

FILED
APR 03 2008
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NEW YORK