

**Roosevelt v 165 William St., LLC**

2008 NY Slip Op 31331(U)

May 7, 2008

Supreme Court, New York County

Docket Number: 0602684/2007

Judge: Walter Tolub

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SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 15

-----x  
RUTH ROOSEVELT

Plaintiff,

Index No. 602684/07  
Mtn Seq. 002

-against-

165 WILLIAM STREET, LLC, 165 WILLIAM  
STREET INVESTOR, LLC, NB 165 WILLIAM  
STREET, LLC and METRO LOFT MANAGEMENT, LLC

Defendants.

**FILED**  
MAY 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

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WALTER B. TOLUB, J.:

This is a motion by the Plaintiff to dismiss all of  
Defendants' counter-claims and for an award of attorneys' fees.  
Defendants cross-move for attorneys' fees for necessitating the  
defense of a frivolous motion.

Facts

Plaintiff is the tenant of the entire fifth floor at the  
premises owned by defendant 165 William Street, LLC and located  
at 165 William Street, New York, New York (the "Building" or  
"Premises"). Defendant Metro Loft Management, LLC is the  
managing agent of 165 William Street. Defendants 165 William  
Street, LLC, 165 William Street Investor, LLC and NB 165 William  
Street, LLC hold and control the ownership interest in the 154  
William Street property.

Defendants established a plan to create new apartments on  
the 6<sup>th</sup>, 7<sup>th</sup> and 10<sup>th</sup> floors of the Building. In order to create

these new apartments, Defendants will have to install sanitary water lines, plumbing vents, storm water drains, risers and gas lines in the apartments and require access to Plaintiff's apartment.

When the Defendants wanted to begin work on the additional apartments, Plaintiff refused to allow the work to proceed in what Defendants argue is a violation of paragraph 15 of the lease. Therefore, Defendants served Plaintiff a Ten-Day Notice to Cure dated July 3, 2007. After Plaintiff refused to cure, defendants served Plaintiff with a Ten-Day Notice of Lease Termination dated July 23, 2007.

After receipt of the notices, Plaintiff commenced this action in August 2007 alleging that Defendants are in breach of their lease and are unlawfully interfering with Plaintiff's rights to quiet enjoyment of her apartment by virtue of the plumbing installation plan. Plaintiff's Complaint also sought a permanent injunction against the contemplated installation plan, a declaratory judgment nullifying the Notice of Termination, damages for breach of the Lease, damages for the breach of the covenant of quiet use and enjoyment and breach of the warranty of habitability.

In September, 2007, Plaintiff moved for a preliminary injunction seeking to enjoin the Defendants, during the pendency of this action, from entering the demised premises to perform

installation work. Plaintiff also moved for a temporary restraining order to restrain the Defendants pending the hearing of the preliminary injunction motion.

On November 15, 2007 a Stipulation ("Stipulation") was entered into by the parties in order to resolve the preliminary injunction motion without a hearing. The stipulation was "So Ordered" by this court on November 16, 2007.

The parties mutually agreed to the language used and the agreement provides, that the Defendants are preliminarily enjoined from:

- (a). . .pending the outcome of this action, from entering Plaintiff's apartment. . .and performing drilling, and other construction within the Subject Premises, including, but not limited to, the installation of sanitary waste lines, piping and relation construction work; and
- (b). . .pending the outcome of this action, from terminating Plaintiff's lease agreement and from commencing and/or proceeding with any landlord tenant action predicated upon the allegations set forth in Defendants' Notice to Cure. . .and Notice of termination . . .and complaint in this action; and
- ©. . .pending the outcome of this action, from taking any action to deprive Plaintiff of her possession of the Subject Premises predicated upon the allegations set forth in the Notices and the complaint in this action.

. . .

It IS FURTHER STIPULATED AND AGREED that Defendants shall serve their Answer to Plaintiff's Verified Complaint upon the Plaintiff's attorneys on or before fourteen (14) days after the date of this Stipulation.

(Plaintiff's Ex. G)

The Defendants' served their answer and counter-claims within the fourteen day period outlined in the Stipulation. The counter-claims plead allegations relating to Plaintiff's refusal to allow them reasonable access to the Premises in breach of her lease provision which Defendants claim permits such access in the event of Defendants' desire to improve the Building.

By this motion Plaintiff argues that Defendants' counter-claims should be dismissed because the Stipulation preliminarily enjoins the Defendants' from seeking such relief. Defendants argue that they are not in any violation of the Stipulation and that the counter-claims assert allegations which are within the context of a request for relief upon the outcome of this action, in the form of a final judgment in this action and seek a determination that Plaintiff must allow for reasonable access to her apartment as required by her lease. Furthermore, Defendants argue that this motion is baseless and that they should be awarded attorneys fees.

#### Discussion

CPLR 3211(a)(6) provides that a party may move for judgment dismissing one or more causes of action asserted against him on the grounds that, with respect to a counter-claim, it may not be properly interposed in the action. (CPLR 3211(a)(6)). Plaintiff argues that the Stipulation the parties entered into prohibits

Defendants from asserting counter-claims which may seek to deprive Plaintiff of possession of her apartment. Plaintiff's arguments are misguided.

No reasonable interpretation of the Stipulation can sustain the conclusion that the Stipulation bars the Defendants from serving a responsive pleading containing counter-claims. The Stipulation was created against the backdrop of Defendants' Notice to Cure and Notice of Termination. Had Plaintiff not commenced this action and related motion practice, Defendants' next step would be to proceed with the filing of a landlord-tenant proceeding. The Stipulation addresses, inter alia, exactly such action and prohibits Defendants from starting a landlord-tenant action before this action has concluded. (Plaintiff's Ex. G para b, c).

It follows that the very context of the present circumstances coupled with the Stipulation's plain language, compels the conclusion that only summary proceedings or re-entry and dispossession were enjoined pending the outcome of this action. (See generally, Tri-State Employment Services, Inc. v. Moutbatten Surety Co., 99 NY2d 476 [2003]). There is nothing to prevent the lawful assertion of counter-claims in this action with nothing more. Furthermore, the Stipulation itself even provides that the Defendants shall serve responsive pleadings withing fourteen days after the date of the Stipulation. It is

clear that Defendants were well within the four corners of the Stipulation, however, the court defers the issue of attorneys' fees to the conclusion of the action when the court can determine the prevailing party and award attorneys' fees in accordance with the lease.

Accordingly, it is

ORDERED that the Plaintiff's motion to dismiss is denied in its entirety; and it is further

ORDERED that defendants' motion for attorneys' fees is denied with leave to renew.

Counsel for the parties are directed to appear as previously scheduled on May 30, 2008 at 11:00 AM in room 335 at 60 Centre Street.

This memorandum opinion constitutes the decision and order of the Court.

Dated: 5/7/08

**FILED**  
MAY 09 2008  
COUNTY CLERK'S OFFICE  
NEW YORK  
HON. WALTER B. TOLUB, J.S.C.