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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK

Present: **ANTONIO I. BRANDVEEN**
J. S. C.

LIGHTHOUSE 925 HEMPSTEAD, LLC,

Plaintiff,

- against -

CITIBANK, N.A., and CITIGROUP INC.,

Defendant.

TRIAL / IAS PART 32
NASSAU COUNTY

Index No. 16234/07

Motion Sequence No. 001

The following papers having been read on this motion:

Notice of Motion, Affidavits, & Exhibits 1
Answering Affidavits 2
Replying Affidavits 3
Briefs: Plaintiff's / Petitioner's .....
Defendant's / Respondent's .....

The defendants move for an order pursuant to CPLR 3212 granting them summary judgment and dismissing the plaintiff's complaint. The plaintiff opposes the motion. The underlying action is the third litigation involving the defendant Citibank, N.A.'s former tenancy of the bank building located at 925 Hempstead Turnpike, Franklin Square, Long Island, New York.

The defense attorney states, in a supporting affirmation dated March 14, 2008, the defendant Citigroup, Inc. was never a party to the net lease agreement, which expired on August 31, 2004, between the defendant Citibank, N.A. and the then landlord and owner,

American Real Estate holdings nor occupied the subject premises. The defense attorney states the lessee surrendered possession of the premises to American Real Estate, and approximately three months after that surrender, American Real Estate conveyed ownership to the plaintiff by deed dated October 27, 2004. The defense attorney also states on October 27, 2004, the plaintiff deeded the premises to the Town of Hempstead Industrial Development Agency which, in turn, net leased the premises back to it, and on November 30, 2007, the Town of Hempstead Industrial Development Agency transferred back to the plaintiff which sold the property to Newport Partners Realty., LLC on that same date, so the plaintiff no longer has any interest in the subject premises. The defense attorney also details the prior litigation between the parties.

The plaintiff's attorney states, in an opposing affirmation dated April 14, 2008, the underlying action seeks damages on account of the trespass and nuisance committed by the defendants. The plaintiff's attorney challenges the defense erroneous allegation that a prior action between the parties involving a breach of contract which the Court dismissed for lack of privity of contract precluding the plaintiff from seeking relief on account of the defendants' trespass and nuisance. The plaintiff's attorney states the defense argument is based on egregious misrepresentation of the law and the facts, to wit the breach of contract action wholly separate from the instant action, so a judgment in the instant action will not affect the judgment in the breach of contract action. The plaintiff's attorney avers a drive thru ATM, referred to in the complaint as the masonry building,

happens to be present in the factual allegations of both actions is not a basis upon which to claim a defense of *res judicata* and collateral estoppel. The plaintiff's attorney contends the plaintiff is not judicially estopped from asserting any claims, and denies it is seeking to split a cause of action.

The defense attorney addresses, in a reply affirmation dated April 22, 2008, each of the plaintiff attorney's assertions in the opposing affirmation. The defense attorney asserts *res judicata* applies here covering all of the matters litigated in the prior action or which could have been litigated. The defense attorney asserts the ATM was a direct part of the prior action, and cannot now be relitigated in the guise of a trespass and nuisance claim. The defense attorney avers the plaintiff is attempting to split the cause of action by alleging the failure to remove the ATM. The defense attorney reiterates the defendant Citigroup, Inc. was never a party to the net lease agreement, and had nothing to do with the operative facts, so its dismissal is clearly warranted. The defense attorney notes any request for injunctive relief has been mooted by the plaintiff's sale of the property to another entity, but the plaintiff does not bring that critical fact to the Court's attention.

This Court has carefully reviewed and considered all of the papers submitted by the parties with respect to this motion. Under CPLR 3212(b), a motion for summary judgment "shall show that there is no defense to the cause of action or that the cause of action or defense has no merit. The motion shall be granted if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant

the court as a matter of law in directing judgment in favor of any party." "The motion shall be denied if any party shall show facts sufficient to require a trial of any issue of fact." Summary judgment is a drastic remedy that is awarded only when it is clear that no triable issue of fact exists (***Alvarez v. Prospect Hosp.***, 68 N.Y.2d 320, 325; ***Andre v. Pomeroy***, 35 N.Y.2d 361). Summary judgment is the procedural equivalent of a trial (***Museums at Stony Brook v. Village of Patchogue Fire Dept.***, 146 A.D. 2d 572). Thus the burden falls upon the moving party to demonstrate that, on the facts, it is entitled to judgment as a matter of law (***see, Whelen v. G.T.E. Sylvania Inc.***, 182 A.D. 2d 446). The court's role is issue finding rather than issue determination (***see, e.g., Sillman v. Twentieth Century-Fox Film Corp.***, 3 N.Y.2d 395; ***Gervasio v. Di Napoli***, 134 A.D.2d 235, 236; ***Assing v. United Rubber Supply Co.***, 126 A.D.2d 590). Nevertheless, "the court must evaluate whether the alleged factual issues presented are genuine or unsubstantiated" (***Gervasio v. Di Napoli, supra***, 134 A.D.2d at 236, quoting from ***Assing v. United Rubber Supply Co., supra; see, Columbus Trust Co. v. Campolo***, 110 A.D.2d 616, ***aff'd*** 66 N.Y.2d 701). If the issue claimed to exist is not genuine, and, therefore, there is nothing to be resolved at the trial, the case should be summarily decided (***see, Andre v. Pomeroy***, 35 N.Y.2d at 364; ***Assing v. United Rubber Supply Co., supra***).

The Second Department has held in an analogous matter dealing with the doctrine of res judicata:

> In an identical prior action which the plaintiff commenced against the defendants, the Supreme Court dismissed the complaint based upon a

preclusion order it had issued because of the plaintiff's repeated failures to appear for an independent medical examination. Although the order of the Supreme Court did not specifically recite that the dismissal was "on the merits," it should have been accorded *res judicata* effect in order to prevent the plaintiff from circumventing the preclusion decree (***see Strange v Montefiore Hosp. & Med. Ctr.***, 59 NY2d 737, 738-739 [1983]; ***Kalinka v Saint Francis Hosp.***, 34 AD3d 742, 744 [2006])
Yates v. Roco Co., 48 A.D.3d 800, 851 N.Y.S.2d 356 [2nd Dept., 2008].

The Court finds the defendants have satisfied their *prima facie* burden, and demonstrated their entitlement to judgment as a matter of law by tendering sufficient evidence to eliminate any material issues of fact from the case. The plaintiff showing is insufficient to raise a triable issue.

Accordingly, the motion is granted.

So ordered.

Dated: **June 18, 2008**

ENTER:

J. S. C.
HON. ANTONIO I. BRANDVEEN

FINAL DISPOSITION XXX NON FINAL DISPOSITION