

**Levine v East 70th Realty Corp.**

2008 NY Slip Op 32380(U)

August 21, 2008

Supreme Court, New York County

Docket Number: 0105766/2005

Judge: Doris Ling-Cohan

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

PRESENT: Hon. Doris Ling-Cohan

PART 36

Index Number : 105766/2005  
LEVINE, FRANCES  
vs  
EAST 70TH RELATY CORP.  
Sequence Number : 003  
OTHER RELIEFS

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

\_\_\_\_\_ on this motion to/for re-transfer

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...  
Answering Affidavits — Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED  
\_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion by defendant to re-transfer this case back to the Supreme Court is denied in accordance with the attached memorandum decisions.

**FILED**  
AUG 28 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

**HON. DORIS LING-COHAN**

Dated: 8/21/08

[Signature]  
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):

[\* 2 ]  
SUPREME COURT OF THE CITY OF NEW YORK  
COUNTY OF NEW YORK: PART 36

-----x  
FRANCES LEVINE,  
Plaintiff,

Index No.: 105766/05

Motion Seq. No.: 003

-against-

DECISION AND ORDER

EAST 70<sup>TH</sup> REALTY CORP.,

Defendant.

-----x  
LING-COHAN, J.

**FACTUAL BACKGROUND**

**FILED**  
AUG 28 2008  
COUNTY CLERK'S OFFICE  
NEW YORK

On or about July 15, 2005, plaintiff served the summons and complaint in this action in the Supreme Court, seeking damages for breach of an agreement she entered into with defendant. On or about August 4, 2005, defendant served its answer, in which it asserted two counterclaims: the first was for breach of the agreement, for which it sought monetary damages; and the second, which was for breach of the lease agreement, for which it also sought damages. On or about June 5, 2006, this matter was transferred to the New York Civil Court pursuant to CPLR 325 (d).

Defendant now seeks the retransfer of this action back to the Supreme Court, alleging that it is seeking declaratory relief and that the Civil Court lacks such equitable jurisdiction. The basis of this allegation is defendant's second counterclaim, in which it asserts that plaintiff is using the basement portion of

her unit as a bedroom, which is in direct violation of the certificate of occupancy.

#### DISCUSSION

Defendant supports its argument by reference to *Zuckermann v Spector* (287 AD2d 402 [1<sup>st</sup> Dept 2001]), in which the court stated that an action in which the plaintiff sought declaratory relief should not have been transferred to the Civil Court pursuant to CPLR 325 (d) because declaratory relief is not within that court's jurisdiction. Similarly, in *Feierstein v Moser* (306 AD2d 27 [1<sup>st</sup> Dept 2003]), the court stated that where the action commenced as one for declaratory relief, it should not have been transferred to Civil Court, "since the primary relief sought, a declaratory judgment, is not within that court's subject matter jurisdiction." *Id.* at 28.

However, defendant's reliance on these cases is misplaced. In both instances, the action was commenced by a plaintiff who was seeking equitable relief in the form of a declaratory judgment. Under those circumstances, the primary relief was not within the jurisdiction of the Civil Court.

Here, however, the action was instituted to recover monetary damages for breach of contract, making the primary relief sought one for damages. In its counterclaims, defendant sought monetary damages for the first counterclaim, and monetary damages (¶ 53 of the Verified Answer) for the second counterclaim, along with some

\* 4 ]  
injunctive relief. Defendant is now attempting to color that counterclaim, not only as one for declaratory relief, but as the primary relief sought in the action.

Section 905 of the New York City Civil Court Act states: "The court may consider any defense to a cause of action or claim asserted by any party, whether such defense be denominated or deemed legal or equitable." Therefore, the Civil Court does in fact have equitable jurisdiction in entertaining a counterclaim, provided that the primary relief sought by the plaintiff is one that is within the subject matter jurisdiction of the Civil Court.

Moreover, as over two years have elapsed since the matter was transferred to the Civil Court, and the parties have already had compliance conferences in such court, it would be prejudicial to plaintiff to retransfer the action back to Supreme Court, especially since defendant's arguments could have been raised when the matter was initially transferred. See *Di Bari v Stefansky*, 35 AD2d 971 (2d Dept 1970).

CONCLUSION

Based on the foregoing, it is hereby  
 ORDERED that defendant's motion to retransfer this action  
 back to Supreme Court is denied; it is further  
 ORDERED that within 30 days of entry of this order,  
 plaintiff shall serve a copy upon defendant with notice of entry.

Dated: August 21, 2008



Doris Ling-Cohan, J.S.C.

S:\Supreme Court\325D\prejudicial to retransfer back from civil court because  
civil ct conducted discovery.wpd

**FILED**  
 AUG 28 2008  
 COUNTY CLERK'S OFFICE  
 NEW YORK