

Cunningham v R & K Lerner, Inc.

2008 NY Slip Op 32392(U)

August 20, 2008

Supreme Court, New York County

Docket Number: 0604089/2007

Judge: Joan A. Madden

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

PRESENT: MADDEN
Justice

PART 11

CUNNINGHAM, LYNDIA

INDEX NO. 604089/07

MOTION DATE _____

- v -
R. + K. LERNER, INC.,
ETAL.

MOTION SEQ. NO. 03

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 ...

Answering Affidavits — Exhibits _____

Replying Affidavits _____

PAPERS NUMBERED

Cross-Motion: Yes No

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

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

FILED
AUG 28 2008
COUNTY CLERK'S OFFICE
NEW YORK

Dated: August 30, 2008

[Signature]
J.S.C.
HON. JOAN A. MADDEN
J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION

Check if appropriate: DO NOT POST REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 11

-----X
LYNDA CUNNINGHAM,

Plaintiff,

INDEX NO. 604089/07

-against-

R & K LERNER, INC., J.P. LERNER, JACK LERNER,
45 UNIVERSITY PLACE ASSOCIATES, "JOHN DOE,
INC.," "JOHN DOE, INC. II," "JOHN DOE, INC., III,"
EPICUREAN MARKET, LEEMOUR PELLI, MARIA F.
WIJANGCO, GREGORY RODGERS, "X" BERGMAN,
JOHN FLEODDER, ALAIN CONFERO, "JOHN DOE"
AND "JANE DOE,"

Defendants.

-----X
JOAN A. MADDEN, J.:



This is an action for ejectment against plaintiff's net lessee, R & K Lerner, Inc. (R & K), and the net lessee's subtenants. By a decision and order dated April 24, 2008, this court directed R & K to pay plaintiff past use and occupancy in the amount of \$80,000 by May 29, 2008, and to continue paying monthly use and occupancy in the amount of \$17,500 commencing May 1, 2008. The court also directed the only other appearing defendant, Leemour Pelli ("Pelli"), to pay use and occupancy in the amount of \$4,500 per month, to be held in her attorney's escrow account.

It is not disputed that R & K has failed to comply with the court's order and has not paid any past or current use and occupancy. R & K provides no explanation for violating the clear order of this court, and simply states that it has counterclaims against plaintiff and is entitled to "setoffs." Based on R & K's violation of the court's order and failure to pay use and occupancy, plaintiff is now seeking a money judgment against defendant R & K the amount of \$97,500 as

well as a judgment of possession against all defendants.

It is well established that a tenant's failure to pay court ordered use and occupancy is a violation of a condition of its right to remain in possession of the premises, which permits a landlord to apply not only for a money judgment, but also for a possessory judgment, or both. See Rose Associates v. Johnson, 247 AD2d 222, 223 (1st Dept 1998)(citing Hodo v. Serrecchia, 102 AD2d 807 ([1st Dept 1984]); 313 West 57 Restaurant Corp v. 313 West 57th Assocs, 186 AD2d 466 (1st Dept 1992), lv app dism 83 NY2d 952 (1994); Calvert v. Le Tam Realty Corp., 118 AD2d 426, 428 91st Dept 1986). In light of the net lessee's failure to pay use and occupancy in accordance with this court's order, plaintiff is entitled to a money judgment in the amount of \$115,000¹ and a judgment of possession against her net lessee, R & K Lerner, Inc. Plaintiff is also entitled to a judgment of possession against the defaulting subtenants, Epicurean Market and John Doe, Inc. II (first floor of building), Starbelly Imaging s/h/a "John Doe, Inc." (unit 2 of building), Maria F. Wijangco (apartment 3 in building), Lolita Foster s/h/a "Jane Doe" (apartment 4 in building), and Gregory Rogers s/h/a "John Doe" (apartment 5 in building).

Plaintiff has not established a sufficient basis for awarding relief against defendants J.P. Lerner, Jack Lerner and 45 University Place Associates, as these defendants are not named in the lease. Defendant R & K is the entity named as the tenant in the net lease, and the court's April 24, 2008 order directed that entity, R & K, to pay plaintiff use and occupancy, without mentioning J.P. Lerner, Jack Lerner or 45 University Place Associates. Thus, the claims against

¹The amount awarded includes use and occupancy for the month of June. When plaintiff submitted her order to show cause on May 8, 2008, use and occupancy for June had not yet become due. The parties appeared for oral argument on June 5, and at that time R & K had not paid any use and occupancy.

* 4]

defendants J.P. Lerner, Jack Lerner and 45 University Place Associates are severed and shall continue. The counterclaims asserted by R & K, as well as J.P. Lerner, Jack Lerner and 45 University Place Associates, shall also continue.

With respect to defendant Pelli, the one subtenant who has appeared and answered, it is not disputed that she has complied with the court's order to pay use and occupancy into her attorney's escrow account. In light of the defenses she has asserted, summary judgment at this time is premature. The claims against her are severed and shall continue, along with her counterclaims and cross-claims.

Based on the foregoing, the court need not determine the balance of plaintiff's motion.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted to the extent that plaintiff Lynda Cunningham is entitled to a money judgment in the amount of \$115,000 against defendant R & K Lerner, Inc., and a judgment of possession against defendant R & K Lerner, Inc., and the Clerk is directed to enter the judgments accordingly; and it is further

ORDERED that plaintiff's motion is also granted to the extent that plaintiff Lynda Cunningham is entitled to a judgment of possession against defendants Epicurean Market and John Doe, Inc. II (first floor of building), Starbelly Imaging s/h/a "John Doe, Inc." (unit 2 of building), Maria F. Wijangco (apartment 3 in building), Lolita Foster s/h/a "Jane Doe" (apartment 4 in building), and Gregory Rogers s/h/a "John Doe" (apartment 5 in building); and it is further

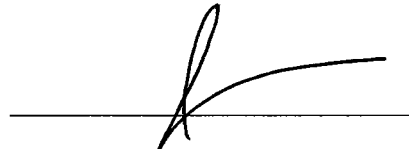
ORDERED that plaintiff's motion as to defendants J.P. Lerner, Jack Lerner, 45 University Place and Leemour Pelli, is denied, and the claims against said defendants, and the

cross-claims and counterclaims asserted by said defendants and defendant R &K, are severed and shall continue; and it is further

ORDERED that the remaining parties are directed to appear for a preliminary conference on September 25, 2008, at 9:30 a.m., Part 11, Room 315, 60 Centre Street.

DATED: August 20, 2008

ENTER:



J.S.C.

FILED
AUG 28 2008
COUNTY CLERK'S OFFICE
NEW YORK