

Todd Rotwein, D.P.M., P.C. v Nader Enters., LLC
2008 NY Slip Op 33384(U)
December 3, 2008
Supreme Court, Nassau County
Docket Number: 454/08
Judge: Leonard B. Austin
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No. 454/08

SUPREME COURT - STATE OF NEW YORK
IAS TERM PART 12 NASSAU COUNTY

PRESENT:

HONORABLE LEONARD B. AUSTIN

Justice

Motion R/D: 001, 1/11/08; 002, 2-28-08
Submission Date: 3-28-08
Motion Sequence No.: 001,002/MOT D

TODD ROTWEIN, D.P.M., P.C.,

Plaintiff,

- against -

COUNSEL FOR PLAINTIFF
Ira H. Leibowitz, Esq.
5507-10 Nesconset Highway #203
Mount Sinai, New York 11766

NADER ENTERPRISES, LLC and REZA
NABINEJAD a/k/a REZA NABAVI,

Defendants.

COUNSEL FOR DEFENDANTS
J. Barrington Jackson, Esq.
734 Franklin Avenue #321
Garden City, New York 11530

x

ORDER

The following papers were read on Plaintiff's motion, pursuant to CPLR 6311, for a preliminary injunction and Defendants' cross-motion, pursuant to CPLR 3211, to dismiss the complaint:

- Order to Show Cause dated January 9, 2008;
- Affidavit of Todd Rotwein sworn to on January 8, 2008;
- Supplemental Affidavit of Todd Rotwein sworn to on January 8, 2008;
- Second Supplemental Affidavit of Todd Rotwein sworn to on January 10, 2008;
- Notice of Motion dated February 12, 2008;
- Affirmation of J. Barrington Jackson, Esq. dated February 12, 2008;

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Affidavit of Reza Nabavinejad sworn to on February 12, 2008;
Affidavit of Todd Rotwein sworn to on March 6, 2008;
Affirmation of Ira H. Liebowitz, Esq. dated March 7, 2008;
Plaintiff's Memorandum of Law in Opposition to Defendants' Motion to dismiss and in further support of Plaintiff's Order to Show Cause;
Reply Affirmation of J. Barrington Jackson, Esq. dated March 28, 2008.

Plaintiff, Todd Rotwein, D.P.M., P.C. ("Rotwein PC"), moves for an order pursuant to CPLR 6311 granting it a preliminary injunction requiring the Defendants: (1) to provide heat to the common areas of their property at 131 Fulton Avenue in Hempstead and to Suites 602 and 603, to maintain the central heating system in good repair, to keep the oil tank filled, and to continuously provide heat to the building until May 31, 2008; (2) to repair and maintain the central hot water heater and to provide hot water to the sinks in Suites 602 and 603 and all of the Plaintiff's leased premises; (3) to repair the elevators, have them inspected, and keep them in good repair and operational; (4) to remove furniture, construction materials and other junk from the parking lot at the premises; (5) to fill the sinkhole near the rear entrance of the premises and keep the area safe; and (6) to keep the common areas of the premises, including the parking lot, in good repair, free from debris and broom clean.

Defendants cross-move to dismiss the complaint pursuant to CPLR 3211.

BACKGROUND

Rotwein PC has operated a podiatric practice at 131 Fulton Avenue in Hempstead since 1980. It entered into a lease with the Defendants on December 17, 2002, effective from January 1, 2003 through December 31, 2007.

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In bringing this action, Rotwein PC alleges that it validly exercised its option to extend that lease and that Defendants violated the lease by failing to provide adequate heat, hot water, elevator service and general maintenance, to the outdoor area in particular. Causes of action sounding in breach of the lease, a preliminary injunction, punitive damages, fraud, nuisance and breach of the covenant of quiet enjoyment were advanced in the original complaint. Defendants counterclaimed for overdue rent.

Initially, Plaintiff sought injunctive relief along with its complaint. Defendants interposed an answer and sought dismissal of the complaint pursuant to CPLR 3211. Plaintiff responded by serving an amended complaint.

DISCUSSION

A. Amended Complaint

Defendants served their answer on February 12, 2008 along with their motion to dismiss the complaint pursuant to CPLR 3211. Accordingly, pursuant to CPLR 3025(a), Rotwein had 20 days plus an additional five days for mailing (CPLR 2103[b][2]) for a total of 25 days in which to amend its complaint or March 10, 2008.¹ Carp v. Marcus, 105 A.D.2d 584 (3rd Dept. 1984). The amended complaint, dated March 6, 2008, was served on March 7, 2008. The amended complaint was timely interposed as of right and supercedes the original complaint.

¹Since March 8 was a Saturday, Plaintiff's time to serve its amended complaint was extended to March 10.

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Normally, a “Defendant should . . . move to dismiss before serving an answer.” Siegel, *Practice Commentaries*, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3211:52 at p.78. In fact, some courts have held that “the interposition of an answer waives the right to make the CPLR 3211 motion.” *Id.*, citing Incorporated Village of Laurel Hollow v. Laverne, Inc., 43 Misc.2d 248 (Sup. Ct. Nassau Co. 1964), *mod.*, 24 A.D.2d 615 (2nd Dept. 1965). See, Wahrhaftig v. Space Design Group, Inc., 29 A.D.2d 699 (3rd Dept. 1968).

A motion to dismiss, pursuant to CPLR 3211, made after an answer is served must, in fact, be treated as a motion for summary judgment and that compliance with CPLR 3211(c), which mandates that notice as such be provided, is required. Rich v. Lefkovits, 56 N.Y.2d 276 (1982). Assuming, *arguendo*, that the Defendants could move under CPLR 3211, despite their simultaneous interposition of an answer, while they had the option to direct their motion to the amended complaint (Sage Realty Corp. v. Proskauer Rose LLP, 251 A.D.2d 35 [1st Dept. 1988]; see also, Siegel, *Practice Commentaries*, McKinney’s Cons. Laws of N.Y., Book 7B, CPLR 3211:65 at p. 94), defense counsel has specifically chosen not to, instead stating “[i]f the court decides to accept the filing of the Amended Verified Complaint . . . then Defendants respectfully request time to file an Amended Answer and renew the motion now pending . . .”. The Defendants’ motion to dismiss the complaint pursuant to CPLR 3211 must be denied as moot.

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B. Preliminary Injunction

As for Plaintiff's application for injunctive relief, in its Amended Complaint, Rotwein alleges that he properly exercised his option to extend the lease and that he accordingly has a leasehold interest in the premises. In addition, Rotwein alleges that the Defendants have wrongfully failed and refused to properly heat the premises, to provide hot water and elevator service and to keep the outdoors of the premises safe and free from debris. Nevertheless, Rotwein also alleges that the Defendants' actions forced him to relocate; that he entered into an alternative lease in February, 2008; and, that he required three or four months to move out.

As and for damages, Rotwein alleges being required to pay full rent despite the lack of heat, hot water and basic services and to have invested in building improvements, including costs incurred to obtain accreditation by the Joint Commission of Accreditation of Healthcare Organizations for his offices. Rotwein further alleges that he has incurred a loss of income on account of the building's deficient condition, as well as additional advertising costs, an anticipated resultant loss of business, a loss of good will, moving costs and increased rent costs.

In the amended complaint, Plaintiff advances causes of action sounding in breach of contract, constructive eviction, breach of warranty of quiet enjoyment, nuisance and fraudulent inducement by Defendant Reza Nabavinejad, sued herein as Reza a/k/a Reza Nabavi, based on his alleged misrepresentations regarding his intentions with respect to the building which induced the Plaintiff to enter into the lease.

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Plaintiff thus seeks a permanent injunction requiring Defendants to specifically perform their lease obligations, including providing heat, hot water, elevator repairs and service and general maintenance.

To obtain injunctive relief, a movant must establish a likelihood of success on the merits, that irreparable injury will result if the injunctive relief is not granted and that a balance of the equities tips decidedly in his favor. W.T. Grant Co. v. Srogi, 52 N.Y.2d 496 (1981). See also, Aetna Ins. Co. v. Capasso, 75 N.Y.2d 860 (1990).

Rotwein has failed to meet his burden. As to the extension of the lease, the lease states: “[p]roviding that the Tenant is in good standing and the lease has not at any time been in default, the Tenant shall have the option to extend this lease for an additional five (5) years [January 1, 2008 to December 31, 2012] under the same terms and conditions as this lease,” with certain exceptions not relevant here.

The lease, at ¶ 44, also provides “[a]ll notices to the Owner shall be in writing, sent by registered or certified mail, return receipt requested, addressed to the Owner at the place where rent was last payable, or any other address that the Owner may designate in writing.” While the Defendants maintain that Plaintiff’s notice exercising his option to extend the lease was not given in accordance with the lease’s notice provision, the Defendants have failed to establish that the lease required that notice of Plaintiff’s intention to extend the lease be given in any particular fashion or at any particular time.

Assuming for the purposes of this motion that Rotwein PC timely and properly exercised its option, it cannot prevail. Plaintiff indisputably withheld a portion of his rent

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throughout 2007. While Rotwein maintains that this was with Defendants' consent, Defendants dispute this.

Contrary to Plaintiff's position that the lease affords the landlord certain rights; such as, the right to re-enter and summarily evict upon specific defaults, but not rent deficiencies, does not mean that rent deficiencies do not constitute a default. Given Plaintiff's failure to pay its rent in full during 2007, it cannot be said that Plaintiff was "in good standing and [that] the lease had not at any time been in default." Thus, Plaintiff was not in a position to exercise its option to extend the lease which was conditioned on Plaintiff's being "in good standing"..

In any event, the sworn statement of Todd Rotwein, Plaintiff's principal, as well as those of Plaintiff's attorney, establish that Plaintiff procured a new lease in February 2008 and has been in the process of moving out of the Defendants' premises for a period of time. Thus, not only does the Plaintiff lack a continuing possessory interest in the premises, under these circumstances, money damages will suffice negating any finding of irreparable harm which bars injunctive relief. Nor do the equities tip in Plaintiff's favor under these circumstances. Plaintiff's motion for a preliminary injunction must be denied.

Accordingly, it is,

ORDERED, that Plaintiff's motion for a preliminary injunction is **denied**; and it is further,

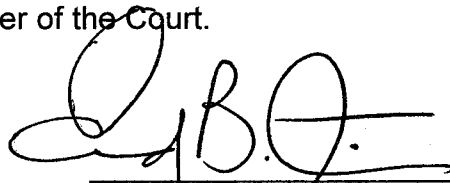
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ORDERED, that Defendants' cross-motion to dismiss the complaint is **denied**;
and it is further,

ORDERED, that counsel for the parties shall appear for a status conference on
December 19, 2008 at 9:30 a.m.

This constitutes the decision and Order of the Court.

Dated: Mineola, NY
December 3, 2008



Hon. LEONARD B. AUSTIN, J.S.C.

ENTERED

DEC 09 2008

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**