

**Alpha Holding Corp. v Brescio**

2009 NY Slip Op 30936(U)

April 21, 2009

Supreme Court, New York County

Docket Number: 112225/07

Judge: Martin Shulman

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

MARTIN SHULMAN

PRESENT: J.S.C.

PART 1

Index Number : 112225/2007

ALPHA HOLDING

VS.

BRESCIO, JOHN

SEQUENCE NUMBER : # 001

AMEND (COMPLAINT)

INDEX NO. 112225-07

MOTION DATE

MOTION SEQ. NO. #001

MOTION CAL. NO.

ad on this motion to/for

PAPERS NUMBERED

Notice of Motion/ ~~Order to Show Cause~~ - Affidavits - Exhibits A-F  
Cross-motion  
Answering Affidavits - Exhibits 1

1,2  
3,4  
5  
6

Replying Affidavits + Exh. A  
Replying Aff. + Exh. 1

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this motion and cross-motion are decided in accordance with the attached decision and order.

FILED

APR 23 2009

COUNTY CLERK'S OFFICE  
NEW YORK

Dated: April 21, 2009

MARTIN SHULMAN 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):

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 1

-----x  
ALPHA HOLDING CORP.,

Plaintiff,

-against-

JOHN BRESCIO, HOWARD NIEGO and  
KWANGSUP KIM,

Defendants.  
-----x

MARTIN SHULMAN, J. :

Index No. 112225/07

Decision & Order

**FILED**  
APR 23 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

Plaintiff Alpha Holding Corp. ("plaintiff") commenced this plenary action seeking to recover outstanding rent and additional rent from defendants. In or about November 2001 plaintiff, as landlord, and non-party Professional Tae Kwon Do Inc. ("tenant" or "assignor"), as tenant, entered into a lease for the entire third floor of the building located at 200 East 23<sup>rd</sup> Street in Manhattan (the "premises") for a ten year term commencing December 1, 2001 and ending November 30, 2011. Simultaneously therewith, defendant Kwangsup Kim ("Kim"), the tenant's president, executed a personal guaranty of tenant's obligations under the lease. Thereafter, in or about November 2003 the tenant assigned the lease to defendants John Brescio ("Brescio"), Howard Niego ("Niego") and non-party J.H. Management, Inc (collectively "assignees").

The assignees ultimately defaulted under the lease by failing to timely tender rent and additional rent to plaintiff. As a result, plaintiff commenced a non-payment summary proceeding which was settled by stipulation dated June 29, 2007 which *inter alia* provided for the assignees to vacate the premises on or before July 10, 2007 without prejudice to plaintiff's claims for unpaid rent and additional rent.

In September 2007 plaintiff commenced the instant action against Brescio, Niego and Kim as defendants. The complaint (Exh. D to motion) asserts six causes of action against all three defendants, the third of which plaintiff seeks to withdraw without prejudice. The first seeks outstanding rent and additional rent through the date the premises were vacated; the second seeks rent and additional rent from the vacatur date through September 30, 2007; the fourth seeks \$1,500 pursuant to the lease as attorney's fees plaintiff incurred in the non-payment summary proceeding; and the fifth requests attorney's fees incurred in this action; and the sixth seeks additional rent. Each defendant appeared in this action by counsel and asserted various defenses, counterclaims and/or cross-claims.

Plaintiff now moves to amend the complaint and to dismiss all three defendants' affirmative defenses and counterclaims. Defendant Kim does not oppose the motion. Defendants Brescio and Niego (hereinafter "defendants") oppose<sup>1</sup> only the portion of the motion seeking dismissal of their defenses and counterclaims and cross-move to amend their answer.

### **Analysis**

At the outset, the motion to amend the complaint is granted without opposition. The portion of plaintiff's motion seeking dismissal of Kim's affirmative defenses is also granted without opposition. Finally, the portion of plaintiff's motion seeking dismissal of defendants' first, fifth, sixth, seventh, eighth and tenth affirmative defenses is granted

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<sup>1</sup> Defendants do not oppose plaintiff's proposed amendment of the complaint, which seeks only to change the amount of damages sought in the first and second causes of action and to reflect the defendants' correct move-out date. They do, however, clarify that this in no way admits the amount plaintiff claims.

as defendants' counsel agrees that the first affirmative defense has been waived and has sought to voluntarily withdraw the fifth through eighth and tenth affirmative defenses.

Turning to the remaining affirmative defenses (2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 9<sup>th</sup>) and affirmative defenses/counterclaims (11<sup>th</sup> affirmative defense/1st counterclaim, 12<sup>th</sup> affirmative defense/2nd counterclaim and 13<sup>th</sup> affirmative defense/3rd counterclaim), "[t]he standard of review on a motion to dismiss an affirmative defense pursuant to CPLR 3211(b) is akin to that used under CPLR 3211(a)(7), i.e., whether there is any legal or factual basis for the assertion of the defense.... The truth of the allegations must be assumed, and if under any view of the facts a defense is stated, the motion must be denied" (*Matter of Liquidation of Ideal Mut. Ins. Co. [Becker]*, 140 A.D.2d 62 [1st Dept 1988], citing *Winter v. Leigh-Mannell*, 51 A.D.2d 1012 [2d Dept 1976]).

Plaintiff generally contends that the answer sets forth only conclusory allegations and is not verified. Defendants' proposed amended answer adds factual allegations to bolster their claims and includes a verification. No new defenses or counterclaims are sought to be added.

Upon plaintiff serving the amended complaint, defendants must serve an answer thereto. The cross-motion seeking leave of this court to amend the present answer is thus denied as academic. In answering the amended complaint, defendants are free to add to their defenses as presently alleged, consistent with this court's determination of plaintiff's motion to dismiss the defenses and counterclaims as set forth herein below.

## Second Affirmative Defense

The second affirmative defense alleges that the amounts sought are excessive or incorrect or are subject to a setoff for damages plaintiff caused to defendants.<sup>2</sup>

Plaintiff's motion to dismiss the second affirmative defense must be granted. First, paragraph 42(a) of the parties' lease obligates defendants to tender rent to plaintiff "without set off or deduction of any kind whatsoever . . ." Further, even if plaintiff breached a duty under the lease, defendants must still tender rent in full. As aptly stated in *Westchester County Indus. Development Agency v. Morris Indus. Builders*, 278 A.D.2d 232, 232-233 (2<sup>nd</sup> Dept. 2000):

A tenant's duty to continue to pay rent is not suspended, even if the landlord breaches its obligations under the lease, unless there is an express provision in the lease declaring the circumstances under which the tenant may withhold his rent (*see*, 56-70 58th Street Holding Corp. v. Fedders-Quigan Corp., 5 N.Y.2d 557, 186 N.Y.S.2d 583, 159 N.E.2d 150; 1225 Fulton Ave. Corp. v. Carbonell, 24 N.Y.S.2d 749; *Matter of New York City Hous. Auth. v. Jackson*, 58 Misc.2d 847, 296 N.Y.S.2d 237). No such lease provision exists here. Particularly in a commercial context, where both parties are represented by counsel, "[t]he obligation of a commercial tenant to pay rent is not suspended if the tenant remains in possession of the leased premises, even if the landlord fails to provide essential services" (*Towers Org. v. Glockhurst Corp.*, 160 A.D.2d 597, 599, 554 N.Y.S.2d 242; *see*, *City of New York v. Pike Realty Corp.*, 247 N.Y. 245, 247, 160 N.E. 359; *Douglas v. Chesebrough Bldg. Co.*, 56 A.D. 403, 67 N.Y.S. 755).

To the extent that the second affirmative defense alleges that the amounts sought are incorrect, defendants have denied the complaint's allegations regarding the

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<sup>2</sup> The proposed amended answer elaborates that plaintiff breached the covenant of quiet enjoyment by failing to provide a secure entrance to the building and failing to regulate noise caused by a neighboring tenant.

amounts sought. Such denials are preserved and defendants need not affirmatively assert its denials as a separate defense.

### **Third Affirmative Defense**

The third affirmative defense alleges that defendants were constructively and actually evicted from the premises and as a result, the complaint should be dismissed because plaintiff has unclean hands.<sup>3</sup> In this action for damages for breach of contract, the equitable defense of unclean hands is not available. *Greenpoint Mortgage Funding Inc. v. Stewart Title Ins. Co.*, 12 Misc.3d 1194(A), 824 N.Y.S.2d 768 (Sup. Ct., Nassau Cty., 2006), citing *Manshion Joho Center Co., Ltd v. Manshion Joho Center, Inc.*, 24 A.D.3d 189 (1st Dept. 2005) (doctrine of unclean hands is an equitable defense that is unavailable in an action exclusively for damages). Accordingly, the third affirmative defense is dismissed.

### **Fourth Affirmative Defense**

The fourth affirmative defense alleges waiver.<sup>4</sup> It is well established that a waiver is a "voluntary abandonment or relinquishment of a known right". *Park Holding Co. v. Power*, 161 A.D.2d 143 (1<sup>st</sup> Dept. 1990), citing *Jefpaul Garage Corp. v. Presbyterian Hosp.*, 61 N.Y.2d 442, 446 (1984). Here, it is evident that plaintiff has not waived any rights to collect outstanding rent and additional rent, both parties having

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<sup>3</sup> The proposed amended answer elaborates that plaintiff's alleged conduct set forth in the proposed second affirmative defense, together with its alleged failure to maintain the premises, compelled the assignees' vacatur. Defendants claim that plaintiff's conduct violated paragraphs 4 (maintenance and repairs) and 23 (quiet enjoyment) of the lease.

<sup>4</sup> The proposed amended answer states that, by violating the lease as set forth in defendants' counterclaims, plaintiff waived its right to enforce the lease provisions.

specifically reserved all rights in the stipulation settling the landlord-tenant summary proceeding.

Further, the lease contains a valid "no waiver" clause at paragraph 25 which provides in relevant part that "no provision of this lease shall be deemed to have been waived by Owner unless such waiver be in writing signed by Owner." It is well settled that such clauses are fully enforceable. *Jefpaul Garage Corp. v. Presbyterian Hosp.*, *supra*; *Monarch Information Services v. 161 William Associates*, 103 A.D.2d 703 (1<sup>st</sup> Dept. 1984); *Excel Graphics Technologies, Inc. v. CFG/AGSCB 75 Ninth Ave., L.L.C.*, 1 A.D.3d 65 (1st Dept. 2003). For the foregoing reasons, plaintiff's motion to dismiss the fourth affirmative defense must be granted.

#### **Ninth Affirmative Defense**

Defendants' ninth affirmative defense alleges that plaintiff failed to name a necessary party. Although defendants argue in their opposition that co-tenant J.H. Management, Inc. should have been named as a defendant, the proposed amended answer omits this defense. Plaintiff is free to pursue its remedies against defendants without naming the co-tenant as a defendant. Accordingly, plaintiff's motion to dismiss the ninth affirmative defense is granted and the cross-motion to amend such defense is denied.

#### **Eleventh Affirmative Defense & First Counterclaim**

The eleventh affirmative defense and first counterclaim alleges that plaintiff fraudulently induced defendants to vacate the premises by reneging on an oral agreement to permit defendants to vacate the premises and waive past and future rent

if defendants found a tenant to occupy the space for the remainder of the lease term. Here, any agreement to permit defendants to vacate the premises prior to the lease's expiration would modify the lease's terms and as such must be in writing as provided in paragraph 21 of the lease. See General Obligations Law § 15-301[1]; *85 John St. P'ship v. Kaye Ins. Assocs., L.P.*, 261 A.D.2d 104 (1<sup>st</sup> Dept. 1999); *Netti v. LeFrois*, 303 A.D.2d 971, 972 (4<sup>th</sup> Dept. 2003); *Fleet Bank v. Pine Knoll Corp.*, 290 A.D.2d 792, 795 (3<sup>rd</sup> Dept. 2002).

As to defendants' fraud claim, New York law precludes fraud claims where, as here, the fraud charge relates only to a breach of contract in the same action. See *Ackermans v. Metropolitan Life Ins. Co.*, 204 A.D.2d 88, 89 (1<sup>st</sup> Dept. 1994); see also, *Miller v. Volk & Huxley*, 44 A.D.2d 810 (1<sup>st</sup> Dept. 1974). For the foregoing reasons, the eleventh defense and first counterclaim based upon such an oral modification must therefore be dismissed.

#### **Twelfth Affirmative Defense & Second Counterclaim**

The twelfth affirmative defense and second counterclaim alleges that plaintiff breached the covenant of quiet enjoyment based upon allegations that plaintiff took no action to eliminate noise from another tenant which the assignees advised plaintiff interfered with their use of the premises. Plaintiff argues, without any elaboration, that this defense and counterclaim is precluded by the lease terms, to wit, paragraphs 37 (usage), 21 (no representations by owner), 42 (rent to be paid without deduction or setoff) and 56 (premises accepted in "as is" condition). Plaintiff further contends that

defendants never properly notified plaintiff of any noise issues as required by paragraph 28 of the lease and plaintiff is not responsible for the conduct of others.

In its reply affirmation, plaintiff correctly argues that defendants cannot maintain a claim for breach of the covenant of quiet enjoyment where, as here, the lease predicates such a claim upon the tenant paying the rent. *Dave Herstein Co., Inc. v. Columbia Pictures Corp.*, 4 NY2d 117 (1958) (tenant who has not paid rent for the period demanded may not prevail on a defense alleging a breach of quiet enjoyment). Here, while defendants challenge the amount of rent owed to plaintiff, they do not dispute that they did not pay plaintiff all rent owed pursuant to the lease for the period they occupied the premises.

Finally, the lease contains no indication that plaintiff owed defendants any duty with respect to noise created by other tenants. To the contrary, paragraph 33 of the lease provides in relevant part that “[n]othing in this lease contained shall be construed to impose upon Owner any duty or obligation to enforce the Rules and Regulations or terms, covenants or conditions in any other lease, as against any other tenant and Owner shall not be liable to Tenant for violation of the same by any other tenant . . . . For all of the above reasons, the twelfth defense and second counterclaim are dismissed.

#### **Thirteenth Affirmative Defense & Third Counterclaim**

The thirteenth affirmative defense and third counterclaim alleges constructive eviction based upon allegations that the hall leading to the premises was used by other occupants for storage, which blocked the stairway and prevented assignees' customers

from entering the premises.<sup>5</sup> Plaintiff argues defendants failed to notify plaintiff of any such alleged condition as required under the lease, and further points to the fact that paragraph 62 of the lease provides that defendants are responsible for maintaining the hallway.

Given that the lease obligated defendants to maintain the hallway in question, defendants cannot establish a breach of the lease on plaintiff's part which could be deemed a constructive eviction. Accordingly, the thirteenth affirmative defense and third counterclaim is dismissed.

The court does not address the sufficiency of defendants' additional allegations in the proposed amended answer. Specifically, the allegation that vagrants are allowed access to the building and allegedly disrupt defendants' business raises a security issue. It is unclear from the lease whether defendants assumed this obligation and the issue is not adequately briefed by the parties.

Accordingly, it is hereby

ORDERED that plaintiff's motion is granted and defendants Brescio's and Niego's cross-motion is denied; and it is further

ORDERED that Plaintiff is directed to serve and file an amended complaint in the form set forth in its moving affidavits within twenty (20) days of the date hereof; and it is further

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<sup>5</sup> The proposed amended answer cites paragraph 4 of the lease, which requires plaintiff to maintain the building and public areas in good working order, and adds that vagrants entered the building, slept in the hall and used the hall as a bathroom.

ORDERED that defendant Kim's affirmative defenses are dismissed; and it is further


ORDERED that defendants Brescio's and Niego's first through tenth affirmative defenses, and eleventh affirmative defense/first counterclaim, twelfth affirmative defense/second counterclaim are dismissed.

The Clerk is directed to enter judgment accordingly.

Counsel for the parties are directed to appear for a preliminary conference on June 2, 2009 at 9:30 a.m., I.A.S. Part 1, 111 Centre Street, Room 1127B, New York, New York.

The foregoing constitutes this court's Decision and Order. Courtesy copies of this Decision and Order have been provided to counsel for the parties.

Dated: New York, New York  
April 21, 2009

  
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Hon. Martin Shulman, J.S.C.

**FILED**  
APR 23 2009  
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