Fisk Bldg. Assoc., LLC v Shimazaki II, Inc.
2009 NY Slip Op 31620(U)
July 13, 2009
Supreme Court, New York County
Docket Number: 108647/2008
Judge: Louis B. York
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: **LOUIS B. YORK** J.S.C. Justice

PART 2

Index Number : 108647/2008

FISK BUILDING ASSOCIATES

VS.

SHIMAZAKI II

SEQUENCE NUMBER : 001

PARTIAL SUMMARY JUDGMENT

INDEX NO.

MOTION DATE

MOTION SEQ. NO.

MOTION CAL. NO.

this motion to/for

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☒ No

Upon the foregoing papers, it is ordered that this motion

MOTION IS DECIDED IN ACCORDANCE WITH ACCOMPANYING MEMORANDUM DECISION.

FILED
JUL 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

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

Dated: 7/13/09

LOUIS B. YORK 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: IAS PART 2

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FISK BUILDING ASSOCIATES, LLC.,

Plaintiff,

Index No. 108647/2008

-against-

SHIMAZAKI II, INC., JOHN SHIMAZAKI, RUDOLF F. LUCCIOLA and JOHN DOE "1" THROUGH "5),

Defendants.

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FILED
JUL 22 2009
COUNTY CLERK'S OFFICE
NEW YORK

LOUIS B. YORK, J.:

Background

Around May of 2003, plaintiff Fisk Building Associates, LLC, the landlord ("Landlord), entered into a lease with Shimazaki II, LLC, the tenant ("Tenant"). This was the second lease between the parties, and it coincided with Tenant's move into a smaller, less expensive rental in the same commercial building. The lease commenced on May 1, 2003 and was to expire on April 30, 2008. It provided for a monthly rental of $4995.00 and also for cost of living increases, tax escalations, and electric adjustments (collectively, "the additional rent").

Following the execution of the second lease, disputes arose between the parties. Landlord asserts that Tenant was chronically late in making rental payments. Defendants counter that Tenant paid all the base rent but challenged the computations of the additional rent. Regardless, Landlord commenced a number of nonpayment proceedings against Tenant between March 5, 2004 and August 31, 2006.

In addition, Landlord states, Tenant allowed smoking on its premises in violation of the lease and the New York City Smoke Free Air Act. At one point, Landlord served a notice of default upon Tenant based on this violation. At another, Landlord alleges it was threatened with legal action by neighboring tenants due to the heavy, nonstop smoking at the premises.

Subsequently, according to Landlord, a gentleman identifying himself as "Mr. Shimazaki" asked Landlord if Tenant could move to a smaller, less expensive space in the building. Allegedly based on Tenant's history of nonpayment and the smoking problem, Landlord refused to accommodate this request and also refused to cancel the existing lease.

Around August 2, 2006, Landlord served Tenant with a demand for $19,492.17 in rent and additional rent which Tenant allegedly owed under the lease. In response, Tenant made a $5,000.00 payment. Landlord commenced a nonpayment proceeding against Tenant around September 1, 2006, seeking $14,492.17 – the $19,492.17 minus the $5,000.00 payment. Defendants state that Tenant made additional payments of $5,000.00 on September 13, 2006 and on October 6, 2006. Landlord acknowledges that it accepted these payments. However, Landlord further states that it applied the payments to the current rent and additional rent that Tenant owed under the lease before it applied the remainder, if any existed, to the amount set forth in the petition. By way of explanation, Landlord points to Article 26 of the lease, which states in pertinent part:

> Acceptance by Landlord of less than the rent herein provided shall <u>at Landlord's option</u> be deemed on account of earliest rent remaining unpaid.

(emphasis supplied by Landlord). This option implicitly includes the right to apply the payment to the latest rent remaining unpaid as well, Landlord states.

On October 12, 2006, Landlord obtained a judgment of possession and a warrant enabling it to evict Tenant ("the warrant"). The warrant does not contain a money judgment for a set amount, and each side has provided a different total to the Court. Defendants state that Tenant made two additional payments after the judgment of possession, $5,000.00 on November 1 and $5,000 on December 1. As the petition sought only $14,492.17 and Tenant had made two earlier $5,000.00 payments, defendants assert that Tenant's four $5,000.00 payments left it with a credit toward future rent.

As with the September 13 and October 1 payments, Landlord acknowledges the November and December payments by Tenant. As earlier, Landlord states that it applied the November and December payments to the latest rental payments due before crediting it toward the amount sought in the petition. Therefore, Landlord states that Tenant's debt on January 2, 2007, when it executed the warrant, was $17,111.18. In addition, Landlord states that Tenant's four payments covered $4995.00 in base rent but did not include the additional rent due monthly to cover the escalations, taxes and cost of living increases for which the lease provides.

Landlord also notes that on December 26, 2001, the Secretary of State dissolved Tenant's corporate status based on its failure to pay taxes. Therefore, when in May 2003 the parties entered into the lease agreement, Tenant did not exist as a legal entity. However, on August 22, 2008, Tenant paid off its delinquent taxes and its corporate status was reinstated. Landlord provides additional information about Tenant's history as

a taxpaying entity and about an allegedly related New Jersey corporation; however, this information does not appear pertinent to the parties' current motions.

Finally by way of background, Article 6 of the lease states, in pertinent part:

> If Landlord shall re-enter the premises on the default of Tenant, by summary proceedings or otherwise: (a) Landlord may re-let the premises or any part thereof . . . for a term shorter or longer than the balance of the term of this lease . . .; (b) Tenant shall pay Landlord any deficiency between the rent herein reserved and the net amount of any rents collected by the Landlord for the remaining term of this lease . . . .

Landlord states that it re-rented the property in March 2008 and that a deficiency of $108,034. 66 exists.

In June of 2008, Landlord commenced this action against Tenant; Mr. Shimazaki, as president of Tenant company; Rudolf V. Lucciola, allegedly the vice president of Tenant company; and unnamed John Does who are the other officers of the company. The complaint seeks the $9,567.24 allegedly still outstanding in arrears at the time of the judgment; the Court notes that the alleged debt of $9,567.24 comes from the allegation in the complaint that Tenant owed $19,567.24 when the warrant was executed, and that this amount varies from the current allegation that Tenant owed $17,111.18 when the warrant was executed. In addition, the complaint seeks $108,034.66, constituting the rent Tenant allegedly owed from the date of the judgment to the date Landlord re-rented the property. Finally, the complaint seeks attorney's fees. Landlord alleges that Mr. Shimazaki, Mr. Lucciola and the other John Doe defendants are individually liable because Tenant Shimazaki II did not exist under New York law at the time it entered into the lease agreement with Landlord.

In their answer dated August 25, 2008, defendants challenged the complaint's allegations on several grounds. As to the $9,567.24, defendants stated that Landlord obtained the judgment for $14, 492.17 and did not seek to amend the petition and judgment to include additional rent. Moreover, defendants point to Tenant's four $5,000 payments, which this Court has described above. Based on these payments, defendants contend that Tenant fully paid its debt under the judgment. Defendants further contend that by accepting payments after the date of the judgment and after the judgment was paid in full, Landlord implicitly reinstated the landlord-tenant relationship. Once the landlord-tenant relationship was reinstated and the debt was paid fully, defendants claim, the warrant was no longer effective. Thus, as a first affirmative defense, defendants claim that Landlord improperly evicted Tenant from the premises.

In addition, defendants state that the reinstatement of Shimazaki II's corporate status retroactively validated the lease. Because of this, they state as a second affirmative defense that the individual defendants are not personally liable for the money at issue in this action.

As a third affirmative defense, defendants assert equitable estoppel. Defendants do not specify the basis of this defense other than to cite generally to the prior paragraphs of their answer. However, as the current papers make clear, defendants refer to the alleged acceptance of future rent by plaintiff, also the basis of their first affirmative defense; and also refer to the past history of the relationship between Landlord and Tenant.

Finally, defendants assert a counterclaim for abuse of process. Defendants' argument is that the January 2007 eviction of Shimazaki II was illegal because it had paid

plaintiff all rental arrears along with additional rent by that time. Accordingly, defendants seek damages and attorney's fees.

Currently before the Court at this time are plaintiff's motion for an order granting partial summary judgment, dismissing the counterclaim and the first and third affirmative defenses; quashing a subpoena issued to Robert J. Barsh, the marshal who executed the warrant of eviction; and compelling defendants' compliance with plaintiff's September 2008 discovery demands. In addition, the Court has before it defendants' cross motion for summary judgment dismissing the complaint based on the third affirmative defense. Based on the defense that the eviction was illegal, defendants argue that Landlord rather than Tenant prematurely terminated the lease, and Landlord therefore cannot obtain base and additional rent due to the termination. Accordingly, defendants currently seek dismissal of the action, also under CPLR 3212.

Analysis

First, Landlord moves for an order of summary judgment dismissing defendants' counterclaim for abuse of process and their first affirmative defense for illegal eviction. Initially, Landlord raises the procedural argument that the counterclaim and affirmative defense are untimely. As Landlord notes, the applicable statute of limitations is one year, see CPLR § 215, and the eviction occurred more than a year before the filing of the Answer and Counterclaim. However, as defendants argue in opposition, a counterclaim is permissible (1) if it arose out of the same transactions or occurrences that form the basis of the action (2) to the limited extent of allowing recoupment, or recovery-back predicated on the original facts. Id.; Bloomfield v. Bloomfield, 97 N.Y.2d 188, 192-93, 738 N.Y.S.2d 650, 652 (2001). The matter may be used solely to defend against and

offset a defendant's purported liability on a plaintiff's claims, even though the counterclaim is time-barred, see In re Watson, 8 A.D.3d 1092, 1094, 778 N.Y.S.2d 658, 659 (4th Dept. 2004), as long as a sufficient thread exists which ties the two together so as to warrant revival of the counterclaim. Messinger v. Mount Sinai Medical Center, 279 A.D.2d 344, 345, 720 N.Y.S.2d 13, 14 - 15 (1st Dept. 2001).

Under this principal, defendants argue, they should be permitted to assert the counterclaim to defend against and offset their alleged liability. The Court agrees. The counterclaim relates solely to the eviction and the legality (or lack thereof) of the termination of the lease by Landlord. Thus, the counterclaim is based on the same transactions or occurrences that form the basis of the complaint and is allowable. Indeed, in its reply to defendants' opposition and cross motion, Landlord does not challenge defendants on this point.

However, the counterclaim also seeks recovery of attorney's fees under the lease. This affirmative request for relief goes beyond the right to offset their own liability and therefore it should be barred as untimely. Indeed, defendants apparently acknowledge this when they assert that "the counterclaim of abuse of legal process is not time barred to the extent of the demand in the Complaint." (Ross Aff. in Support of Cross-Motion & Opp. to Motion, at ¶ 13 ("Ross Aff.")(emphasis supplied)). Therefore, the portion of the counterclaim that requests attorney's fees is untimely but both the remainder of the counterclaim and the first affirmative defense survive this threshold challenge.

Next, the Court turns to Landlord's substantive challenges to the counterclaim and the first affirmative defense. As the Court indicated above, the first affirmative defense asserts that Landlord improperly evicted Tenant from the premises after

defendant?

accepting rental payments and effectively reinstating the tenancy. As the ~~Court~~ further explained, the counterclaim asserts that by relying on a warrant of eviction which a Court issued prior to the reinstatement of the tenancy, Landlord was guilty of illegal eviction. Landlord states that the counterclaim and defense should be dismissed because, for one thing, the warrant constituted a valid legal process. For another, Landlord argues, its acceptance of rental payments from Tenant did not reinstate the landlord-tenant relationship.

If a landlord "accepts payment from a tenant after issuance of a Warrant of Eviction and Judgment of Possession, the court must determine whether it was the landlord's intent, upon receiving said payment, to reinstate the landlord-tenant relationship." 284-285 Cent. Owners Corp. v. Alexandre, 14 Misc.3d 1230(A), 836 N.Y.S.2d 495(table) (Dist. Ct. Nassau County 2007)(avail at 2007 WL 445468, at *2). By itself, the acceptance of rent arrears payments "does not constitute good cause to vacate the warrant of eviction after the issuance of same." 32-05 Newton Ave. Associates v. Hailazopoulos, 168 Misc.2d 125, 127, 645 N.Y.S.2d 260, 262 (App. T. 2nd Dept. 1996). Accordingly, unless the tenant submits "a writing or other evidence indicating a clear intent to reinstate the relationship after issuance of the Warrant of Eviction, Petitioner's acceptance of payment from Respondents is insufficient to reinstate the landlord-tenant relationship." 284-285 Cent. Owners Corp., 2007 WL 445468, at *2 (citing New York City Housing Authority v. Torres, 61 A.D.2d 681, 403 N.Y.S.2d 527 (1st Dept. 1978)).

Here, in support of its contention that Landlord's acceptance of the four $5,000.00 payments reinstated the legal tenancy, Tenant solely on (1) Landlord's

admission that it accepted these payments and (2) co-defendant Lucciola's statement that Landlord "accepted this payment of rent without any reservation of right and did not seek to amend its . . . petition to include [additional rent due]." Significantly, Tenant does not state that Landlord represented it was reviving the tenancy or present evidence which shows that Landlord indicated "a clear intent to reinstate the relationship." 284-285 Cent. Owners Corp., 2007 WL 445468, at *2; see also Spirer v. Adams, 144 Misc.2d 903, 906, 545 N.Y.S.2d 504, 507 (Civ. Ct. N.Y. County 1989)(mailing by landlord of renewal lease to tenant after issuance of warrant, coupled with acceptance of rent, was sufficient to revive tenancy).

Landlord swears through its own affidavit that it did not express this intent and in fact did not intend to revive the tenancy. Moreover, Landlord explains, because during the period in question base rent and additional rent continued to accrue, Tenant never did become current in its rental obligations under either the lease or the warrant. In addition, Landlord submits the affidavit of George P. Fabian, who worked for Cushman & Wakefield, Inc., Landlord's leasing manager at the building in question. The Fabian affidavit not only reiterates Landlord's statements as to Tenant's habitually late payments and the practice of smoking on the premises, but provides a more detailed explanation of the rent which Tenant owed in addition to the amount Landlord sought in the Petition. Exhibits 4 and 5 to the Fabian affidavit contain billing details which show how this amount was computed for two months in question.

In opposing this motion for summary judgment and supporting their own cross-motion for summary judgment, defendants must lay bare their evidence in support of their position. See Johnson v. Phillips, 261 A.D.2d 269, 270, 690 N.Y.S.2d 545, 547 (1st

Dept. 1999). Defendants have not submitted "a scintilla of [additional] evidence . . . to indicate that Petitioner intended to revive the tenancy." 101 Maiden Lane Realty Co., LLC. v. Han Ho, 1 Misc.3d 908(A), 781 N.Y.S.2d 628 (Civ. Ct. N.Y. County 2004) (avail at 2004 WL 190076, at * 2). In light of this, Tenant cannot prevail on the first affirmative defense or the counterclaim. The case upon which defendants rely, J.A.R. Management Corp. v. Foster, 109 Misc. 2d 693, 693, 442 N.Y.S.2d 723, 724 (App. T. 2nd Dept. 1980), holds that the landlord's intent to revive or not to revive the tenancy upon the acceptance of rent governs in this context, rather than the acceptance of rent itself.

The petition under which Landlord obtained the warrant only covered rent due up to and including the date of the petition. As defendants point out repeatedly, the petition was not amended to include rent which accrued subsequent to that time. Defendants rely on this to argue that their $20,000 payments gave them a rental credit. For this to be true, Tenant would not owe rent for September, October, November or December, while it admittedly stayed on in the commercial space. Thus, Tenant acts as if its liability under the petition negates its duties under the lease. The argument lacks merit for reasons too obvious to warrant discussion.

Similarly, defendants' arguments supporting an affirmative defense of equitable estoppel are unpersuasive. Defendants' vague allegation that all prior nonpayment proceedings against Tenant were discontinued and/or resolved, see Ross Aff. at ¶ 23, is also irrelevant. Here, in fact, Landlord never discontinued the proceeding. Defendants do not explain, much less provide legal support, for its argument that the prior proceedings somehow estop Landlord from evicting Tenant under the final proceeding and it is not for this Court to create an argument for Tenant. Similarly, defendants do not

explain or legally support their argument that Landlord's two-month delay in posting the warrant or the additional one-month delay in executing it support an affirmative defense based on estoppel. Finally on this point, Tenant has not alleged or shown detrimental reliance, which is a necessary element of the claim. See Solow Management Corp. v. Arista Records, Inc., 41 A.D.3d 219, 220, 838 N.Y.S.2d 517, 518 (1st Dept. 2007). The fact that Tenant paid some or all of its debt to Landlord - which it was legally required to do – is insufficient to satisfy this element of the claim. The Court need not address the parties' additional arguments on this point in light of its conclusion.

In addition to opposing the motion of plaintiff, defendants also cross move for an order dismissing the complaint, based on the third affirmative defense. However, for the same reasons the Court grants the motion to dismiss the third affirmative defense, the Court denies the cross motion. The Court notes that plaintiff does not seek summary judgment on the issue of liability and that there remain issues of fact as to the amount due based, among other things, on inconsistencies in plaintiff's own papers as to the outstanding debt.

Finally, based on this Court's decision to dismiss the first counterclaim and first and third affirmative defenses, the Court grants the request to quash the subpoena as well. The articulated purpose for the subpoena is to obtain evidence in support of the illegal eviction defense and the abuse of process counterclaim. These having been dismissed, the subpoena is no longer relevant. The Court need not reach the parties' other arguments with respect to this issue.

As for the prong of Landlord's motion seeking responses to its September 2008 discovery demands, defendants are correct that plaintiff's demands are overly broad.

Plaintiff seeks the following – not only for defendant Shimazaki II but for Shimazaki Corporation, Shimazaki Communications, Incorporated, Shimazaki Electronics Incorporated, Shimazaki Warehouse, Incorporated and Shimazaki America, LLC:

1) the Certificates of Incorporation
2) the By-Laws and management agreements
3) all documents relating to the issuance and control of stock
4) a list of all shareholders
5) all resolutions relating to the appointment of officers, directors and/or managers
6) all minutes of board and manager meetings
7) all minutes of shareholder meetings
8) all minutes of officer and manager meetings
9) all tax returns
10) all financial statements, whether audited or not
11) all documents any of the companies received from any governmental authority relating to their incorporation, dissolution or reinstatement at any time in history
12) all documents relating to the above which were filed by any New York State or other governmental agency

In addition, there are a number of other demands relating to all of Shimazaki II's correspondence, financial transactions, real estate ventures, payments, and other data between itself and plaintiff and among any of the above listed parties and nonparties. The Court notes that none of these demands have any time constraints – that is, the demands on their face seek documents from the inception of each of these companies to the present day. In addition, there are no limitations specifying the documents required in each item – indeed, each demand is for "all" documents "including but not limited to." The demands apply to all of the above listed companies. Moreover, several of the demands – such as 6 and 8, and 11 and 12, seem to overlap and/or be duplicative.

The First Department has held that a demand for "every document and paper with respect to all 'related entities' of the defendants" was are palpably improper because of it

was overly broad. Haller v. North Riverside PartnersU, 189 A.D.2d 615, 616, 592 N.Y.S.2d 316, 317 (1st Dept. 1993). Similarly, in another case a demand "for all documents maintained in plaintiff's databases or files, without reference to the nature of the documents or the particular claim at issue, [was deemed] overly broad and therefore improper." Steadfast Ins. Co. v. Sentinel Real Estate Corp., 278 A.D.2d 157, 157, 719 N.Y.S.2d 221, 222 (1st Dept. 2000). The court thus disallowed the demand but provided that the plaintiff could renew the demand, "if necessary, after depositions, so that specific documents can be named or described with reasonable particularity." Id. In another matter, the Fourth Department declared that the demand for "records of all Executive Board and other union meetings" was so overly broad and burdensome that it should be stricken despite the untimeliness of the defendant's challenge. Kern v. City of Rochester 261 A.D.2d 904, 904-905, 689 N.Y.S.2d 842, 843 (N.Y.A.D. 4 Dept.,1999). This was true notwithstanding the fact that, unlike the case at hand, the demand was for minutes from a specific date to the date of the trial. See id.

For reasons too obvious to explain further, under these cases and the prevailing law the discovery demand is improper. While there may be some information within the requests that are relevant, they are embedded in demands that are overly broad and burdensome. Moreover, in moving for compliance with its demand and in responding to defendants' valid objections to the demands, plaintiff makes no effort to prune his request. "Where, as here, discovery demands are palpably improper in that they are overbroad, lack specificity, or seek irrelevant or confidential information, the appropriate remedy is to vacate the entire demand rather than to prune it . . . . The burden of serving a proper demand is upon counsel, and it is not for the courts to correct a palpably bad one."

Bell v. Cobble Hill Health Center, Inc., 22 A.D.3d 620, 621, 804 N.Y.S.2d 362, 363 (2nd Dept 2005)(citations and internal quotation marks omitted). However, this does not prevent plaintiff – or defendants, for that matter – from serving properly tailored discovery demands which are not unduly broad or burdensome. In addition, the Court schedules a discovery conference for Wednesday, September 9, 2009 at 2 p.m. so the parties can schedule a discovery timetable and address any discovery issues. In the meantime, the Court expects that parties to be professional and cooperative in their conduct toward each other and in their discovery demands and responses.

The Court has considered all the other arguments and they do not change the Court's conclusion. Therefore, it is

ORDERED that the portions of the motion seeking to quash the subpoena and dismiss the first and third affirmative defenses and the counterclaim are granted, the subpoena is quashed, and the first and third affirmative defenses and counterclaim are severed and dismissed; and it is further

ORDERED that the portion of the motion seeking to compel compliance with the September 2008 document demand is denied; and it is

ORDERED that the parties shall appear in Part 2, 71 Thomas Street, room 205, at 2 p.m. on Wednesday September 2, 2009 for a preliminary conference; and it is further

ORDERED that the cross motion for partial summary judgment in defendants' favor is denied.

Dated: July 13, 2009

ENTER: [signature]

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