

Best Souvenirs, Inc. v 516 Fifth Ave. Partners LLC
2009 NY Slip Op 31649(U)
July 16, 2009
Supreme Court, New York County
Docket Number: 113764/08
Judge: Joan A. Madden
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: Madden
Justice

PART 11

Best Souvenirs

INDEX NO. 113764/08

516 Fifth Ave

MOTION DATE _____

MOTION SEQ. NO. 45

MOTION CAL. NO. _____

The following papers, numbered 1 to _____ were read on this motion to/for Dismiss Counterclaims

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 and cross-motion are consolidated for determination with motion sequence 006 and the consolidated motions are determined in accordance with the annexed decision and order.

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

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK

Dated: July 16, 2009

[Signature]
HON. JOAN A. MADDEN c.
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
BEST SOUVENIRS, INC.

Plaintiff,

INDEX NO. 113764/08

-against-

516 FIFTH AVENUE PARTNERS LLC,

Defendant.

-----X
516 FIFTH AVENUE PARTNERS LLC,

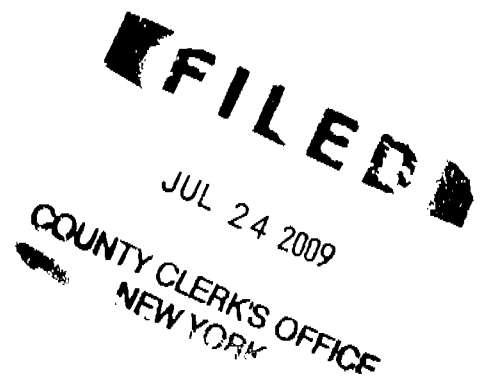
Plaintiff,

-against-

HERZEL OVADYA,

Additional Counterclaim Defendant.

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



In this action involving a dispute as to the possession of commercial premises, plaintiff Best Souvenirs, Inc. ("Best Souvenirs") moves for an order pursuant to CPLR 3212 granting summary judgment dismissing the counterclaims asserted by defendant 516 Fifth Avenue Partners LLC ("516 Partners") (motion sequence no. 005).¹ 516 Partners opposes the motion and cross-moves for an order pursuant to CPLR 3212 granting summary judgment against Best Souvenirs on its first counterclaim for ejectment, and summary judgment dismissing the

¹In opposing plaintiff's motion, defendant argues, *inter alia*, that plaintiff is attempting to make a second CPLR 3211 motion to dismiss in violation of CPLR 3211(e). At oral argument, plaintiff requested that its motion be converted to a motion for summary judgment pursuant to CPLR 3212, and defendant did not object. The court, therefore, will treat the motion as a CPLR 3212 motion for summary judgment.

complaint. By a separate motion, 516 Partners moves for summary judgment on its first counterclaim for ejectment against the additional counterclaim defendant Herzel Ovadya (“Ovadya”) (motion sequence no. 006).² For the reasons stated below, plaintiff’s motion is denied, and defendant’s motion and cross-motion are granted.

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law, by tendering evidentiary proof in admissible form establishing the absence of any material issues of fact. See Alvarez v Prospect Hospital, 68 NY2d 320, 324 (1986); Zuckerman v City of New York, 49 NY2d 557, 562 (1980). Once that showing is satisfied, the burden shifts to the opposing party to produce evidentiary proof in admissible form establishing the existence of material issues of fact requiring a trial. Alvarez v Prospect Hospital, supra. Both parties are required to lay bare their proof, and “mere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient.” Zuckerman v City of New York, supra at 562. Although summary judgment may be denied if the facts essential to oppose the motion “may exist but cannot not be stated,” CPLR 3212(f), mere hope that a party will uncover evidence to support a claim or defense, provides no basis for postponing a decision on a summary judgment motion. See Fulton v. Allstate Insurance Co., 14 AD3d 380 (1st Dept 2005); Jones v. Surrey Cooperative Apartments, Inc., 263 AD2d 33, 38 (1st Dept 1999).

In seeking summary judgment dismissing defendant’s counterclaims, plaintiff contends that 516 Partners lacks standing and legal capacity to sue, and should be barred from proceeding

²Motion sequence nos. 005 and 006 are consolidated for determination

on its counterclaims in the absence of a necessary party, 518 Fifth Avenue Realty LLC (“518 Realty”). Specifically, plaintiff argues that 518 Realty is the “landlord” and the “only party with standing to recover possession of the premises from plaintiff.” Plaintiff’s argument is without merit.

Plaintiff commenced this action naming one defendant, 516 Partners, and alleges in the complaint that 516 Partners “is the fee owner of the building located at 518 Fifth Avenue” and “is Plaintiff’s landlord.” Plaintiff cannot now be permitted to take an inconsistent position and dispute its own allegations by denying that 516 Partners is the landlord, and asserting instead that a different entity, 518 Realty, is the landlord. Moreover, in its answer, defendant identifies itself as “Defendant 516 Fifth Avenue Partners, LLC, successor in interest to 518 Fifth Avenue Realty LLC (together, the “Landlord”).” In opposition to the motion, defendant submits an affidavit from an officer of its managing agent, Richard Farley, stating that 516 Partners is “the owner and landlord of the Building.” Defendant also submits a copy of a deed dated February 27, 2007, showing conveyance of the building from 518 Realty to 516 Partners, and a lease executed the same day by which 518 Realty leased the building back to 516 Partners. Based on the foregoing, it is clear that 516 Partners is the owner, landlord and successor in interest to 518 Realty. Thus, the grounds for plaintiff’s objections to defendant 516 Partners’ standing and capacity to sue are without merit, and plaintiff’s motion for summary judgment dismissing the counterclaims is denied.

Turning to defendant’s cross-motion and motion, the court finds that defendant is entitled to summary judgment dismissing the complaint, and summary judgment on its first counterclaim for ejectment against Ovadya and Best Souvenirs. As discussed in this court’s previous decision

denying plaintiff's motion for a preliminary injunction, plaintiff's affirmative claims as asserted in the complaint are all based on an assumption that it has a legal right to remain in possession of the premises. The complaint seeks injunctive and declaratory relief, and compensatory and punitive damages, and asserts six cause of action, including breach of the covenant of quiet enjoyment, trespass, nuisance, breach of the lease, breach of the implied covenant of good faith and fair dealing, and obtaining building permits "under false pretenses and in violation of law."

Defendant makes a sufficient prima facie showing of entitlement to judgment as a matter of law on its counterclaim for ejectment and possession of the premises, as the documentary proof in the record establishes that plaintiff's possessory rights in the premises terminated at the latest on July 31, 2008. See 1050 Tenants Corp v. Lapidus, 39 AD3d 379 (1st Dept), lv app den 9 NY3d 807 (2007); Clark Construction Corp v. BLF Realty Holding Co, 28 AD2d 367 (1st Dept), lv app den 7 NY3d 717 (2006). On August 13, 2002, 518 Realty as "landlord" and the "tenant," Herzel Ovadya, "as sponsor for a New York Corporation to be formed," executed a lease for a five year term, which expired on August 30, 2007. On August 29, 2007, 518 Realty as "landlord" and Ovadya as "tenant" executed a "First Amendment of Lease" ("First Amendment"), stating that the "landlord and tenant have previously entered into a Lease, dated August 13, 2002," and that the "term of the Lease is hereby extended for a period of 8 months, so as to terminate on April 30, 2008." It is undisputed that Ovadya received a 30-day notice of termination, effective July 31, 2008, which terminated any month-to-month tenancy created after the April 30, 2008 expiration of the lease. See RPL 232-a; Weiden v. 929 Park Avenue Corp, 154 AD2d 308 (1st Dept 1989).

In opposing defendant's cross-motion and motion, plaintiff argues that summary judgment is premature, and that issues of fact exist as to whether the landlord is 516 Partners or 518 Realty, whether the tenant is Best Souvenirs or Ovadya, whether a month-to-month tenancy was created by the landlord's acceptance of rent, and the propriety of the 30-day notice of termination. Even if discovery is outstanding, summary judgment is not premature, since plaintiff has not offered a sufficient evidentiary basis to suggest that the needed discovery may lead to evidence relevant to a viable claim or defense. See Lopez v. WS Distribution, Inc., 34 AD3d 759 (2nd Dept).

Plaintiff's additional arguments fails to raise a material issue of fact to defeat summary judgment as to defendant's counterclaim for ejectment. The court has already addressed and rejected as without merit, plaintiff's objections to 516 Partners' standing and capacity to sue as the landlord. Plaintiff's assertion that Best Souvenirs as opposed to Ovadya is the tenant, is insufficient to controvert the clear and express terms of the original lease and the First Amendment, which Ovadya executed as the "tenant." Moreover, it is undisputed that Ovadya is the president of Best Souvenirs, and even if the landlord accepted rent checks drawn on a Best Souvenirs' account and signed by Ovadya, paragraph 12 of the original lease expressly provides that the acceptance of such checks on behalf of an entity other than the tenant, does not effect an assignment of the lease to that entity.

Plaintiff also argues that a month-to-month tenancy was created by defendant's "failure to promptly reject rents tendered by Best for May 2008 and thereafter."³ The formation of a month-

³In support of its prior motion for a preliminary injunction, which this court denied, plaintiff argued that the First Amendment was invalid, and as a result a month-to-month tenancy was created when the landlord accepted rent after the expiration of the original lease term on

to-month tenant requires the acceptance of rent after the expiration of the lease. See RPL 232-c; Elite Gold, Inc. v. TT Jewelry Outlet Corp., 31 AD3d 338 (1st Dept 2006); Weiden v. 929 Park Avenue Corp., *supra*; Park Summit Realty Corp. v. Frank, 107 Misc2d 318 (App Term, 1st Dept 1980), *aff'd* 84 AD2d 700 (1st Dept 1981), *aff'd* 56 NY2d 1025 (1982). While defendant acknowledges that after the expiration of the lease on April 30, 2008, it received three rent checks, it is undisputed that two of the checks were returned and one was retained for back rent due and owing. However, even if a month-to-month tenancy were created, such tenancy was terminated pursuant to the 30-day notice of termination that expired on July 31, 2008. See RPL 232-a; Weiden v. 929 Park Avenue Corp., *supra*. Moreover, the notice of termination was properly served on Ovadya as the tenant. The remaining arguments raised by plaintiff are likewise insufficient to defeat summary judgment.

Based on the foregoing, plaintiff fails to raise a material issue fact as to its right to remain in possession of the premises, or a viable defense to defendant's ejectment counterclaims. Defendant, therefore, is entitled to summary judgment dismissing the complaint, and summary judgment on its first counterclaim for ejectment against Ovadya and Best Souvenirs.

Finally, the portion of defendant's cross-motion for an award of sanctions against plaintiff for frivolous litigation in making a second CPLR 3211 motion to dismiss, is denied in view of plaintiff's request at oral argument, without objection, that its motion be treated as a CPLR 3212 motion for summary judgment.

August 30, 2007. Plaintiff has abandoned that argument altogether in connection with the instant motions. Instead, the only month-to-month tenancy issue plaintiff now raises, is that a month-to-month tenancy was created when defendants did not "promptly reject rents tendered by Best for May 2008."

Accordingly, it is hereby

ORDERED that plaintiff's motion is denied; and it is further

ORDERED that defendant's cross-motion for summary judgment dismissing the complaint is granted, and the complaint is dismissed in its entirety, and the Clerk is directed to enter judgment accordingly; and it is further

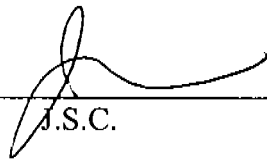
ORDERED that defendant's motion and cross-motion for summary judgment on its first counterclaim for ejectment against Herzel Ovadya and Best Souvenirs, Inc. and are granted; and it is further

ORDERED that defendant 516 Fifth Avenue Partners LLC is entitled to a judgment of possession against Herzel Ovadya and Best Souvenirs, Inc., and the Clerk is directed to enter judgment accordingly; and it is further

ORDERED that the action shall continue with respect to the balance of defendant's counterclaims.

DATED: July 16, 2009

ENTER:



J.S.C.

FILED
JUL 24 2009
COUNTY CLERK'S OFFICE
NEW YORK