

**John Hollings, Inc. v Nick & Duke, LLC**

2009 NY Slip Op 31937(U)

August 20, 2009

Supreme Court, New York County

Docket Number: 600298/08

Judge: Barbara R. Kapnick

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

**BARBARA R. KAPNICK**

PRESENT: \_\_\_\_\_

PART 39

Index Number : 600298/2008  
JOHN HOLLINGS, INC.,  
VS.  
NICK & DUKE, LLC,  
SEQUENCE NUMBER : 002  
DISMISS ACTION

INDEX NO. 600298/08  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 002  
MOTION CAL. NO. \_\_\_\_\_

n 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**  
AUG 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK

RECEIVED  
AUG 21 2009  
CLERK OF THE COURT  
JULIA M. ...

*(Handwritten initials)*

Dated: 8/20/09

*(Signature)*  
**BARBARA R. KAPNICK J.S.C.**  
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):

*(Handwritten mark)*

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 39

-----X  
JOHN HOLLINGS, INC.,

Plaintiff,

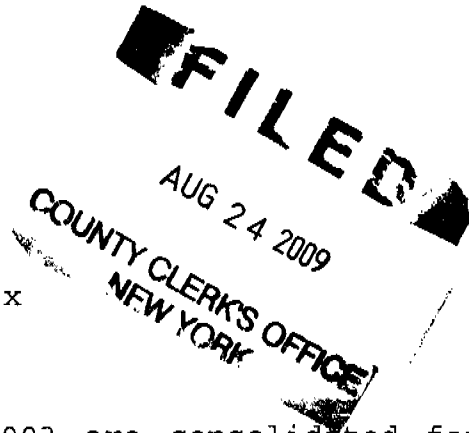
-against-

NICK & DUKE, LLC, WEST 23rd STREET  
HOSPITALITY, LLC., GURDAYAL P. KOHLY,  
RICHARD BORN, DAVIS & DAVIS, LLP,  
ERIC M. DAVIS, MJG HOLDINGS, LLC,  
ADVOCATE CAPITAL, INC., AND "JOHN AND  
JANE DOE", and "XYZ, INC." and  
"ABC, LLC", if any, being fictitious  
and unknown to Plaintiff,

Defendants.  
-----X

BARBARA R. KAPNICK, J.:

**DECISION/ORDER**  
Index No. 600298/08  
Motions Seq. Nos.  
002 and 003



Motions sequence numbers 002 and 003 are consolidated for disposition.

In this action, plaintiff John Hollings, Inc. ("John Hollings") alleges that the defendants engaged in a premeditated, concerted effort to deprive it of the use and enjoyment of its long term leasehold interest in the premises located at 561-567 West 23rd Street/182-192 Eleventh Avenue in Manhattan, which include a two story garage, a four story single room occupancy hotel and a night club.

Plaintiff's Complaint seeks to recover damages against (i) Nick & Duke, LLC ("Nick & Duke"), the owner of the premises; (ii) West 23<sup>rd</sup> Street Hospitality, LLC ("West 23rd"); (iii) Gurdayal P.

[\*3]

Kohly ("Kohly"), the managing and sole member of Nick & Duke; (iv) Richard Born ("Born"), the managing member of West 23<sup>rd</sup>; (v) the law firm of Davis & Davis, LLP ("Davis & Davis"), the registered agent for West 23<sup>rd</sup>; (vi) Eric M. Davis, Esq. ("Davis"); (vii) MJG Holdings, LLC ("MJG"); and (viii) Advocate Capital, Inc. ("Advocate"), a lender which made a loan to Davis & Davis and recorded nine UCC-1 financing statements with respect to the subject premises.

Plaintiff seeks to recover damages --

(1) against all the defendants for tortious interference with an existing contract, i.e., the prime ground lease for the premises which was entered into between defendant Nick & Duke (as landlord) and John Hollings (as tenant) dated March 1, 1973 as amended and extended on October 24, 1997 (first cause of action);

(2) against defendant Nick & Duke for breach of contract as a result of Nick & Duke (as landlord) entering into a lease on September 10, 2004 with West 23<sup>rd</sup> (as tenant) when the same premises had already been leased to John Hollings (second cause of action);

(3) for tortious interference with business relationships between John Hollings and its subtenants and other entities. Specifically, plaintiff claims that defendants Kohly, Born, West 23<sup>rd</sup>, Davis, and Davis & Davis caused Nick & Duke to breach the

[\*4]  
lease with John Hollings, ultimately resulting in the eviction of plaintiff and all of its subtenants (third cause of action);

(4) for breach of its rights to quiet enjoyment and exclusive possession under the existing lease between the parties (fourth cause of action);

(5) for anticipatory breach of contract, i.e., plaintiff's lease (fifth cause of action);

(6) for common law civil conspiracy "to dispossess, evict and remove the Plaintiff from the Subject Premises" (sixth cause of action);

(7) for fraudulent conveyance of the leasehold interest in the subject property to West 23rd, which plaintiff claims Nick & Duke did in an effort to defraud plaintiff of its outstanding future obligations to extend the lease or purchase the buildings and improvements on the property at the end of the current term; (seventh cause of action);

(8) for unjust enrichment (eighth cause of action);

(9) for unfair business practices (ninth cause of action);

(10) for slander of title against the defendants based on the recording of a lease assignment to MJG, which plaintiff claims deprived it of its property interest<sup>1</sup> (tenth cause of action);

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<sup>1</sup> According to the Complaint, the September 10, 2004 lease with West 23rd was incorporated by reference in a re-assignment of the leasehold from West 23<sup>rd</sup> to MJG on or about May 31, 2007. This assignment was allegedly recorded as a memorandum of lease in the New York County Office of the City Register on June 25, 2007. Plaintiff further alleges that prior to or concurrently with the assignment, MJG transferred an easement of air rights to the premises to West 23<sup>rd</sup> and sublet a portion of the property to another entity.

(11) for disseisin and forcible taking of plaintiff's property, entitling plaintiff to recover treble damages (eleventh cause of action); and

(12) for loss of business opportunity for plaintiff at the subject premises (twelfth cause of action).

Defendants Nick & Duke, West 23<sup>rd</sup>, Kohly, Born, Davis & Davis, Davis and MJG now move, under motion sequence number 002, for an order: (i) pursuant to CPLR § 3211(a)(1), (5) and (7) dismissing plaintiff's Complaint against them, and (ii) pursuant to 22 NYCRR § 130-1.1 imposing sanctions against plaintiff and its attorney for commencing this frivolous action and awarding defendants attorneys' fees and expenses.

Defendant Advocate moves, under motion sequence number 003, for an order: (i) pursuant to CPLR § 3211 dismissing plaintiff's Complaint against it; and (ii) pursuant to 22 NYCRR § 130-1.1 imposing sanctions against plaintiff and its counsel for commencing what defendant Advocate contends is a frivolous action, and awarding attorneys' fees and expenses to Advocate.

Defendants argue that this action based upon an alleged conspiracy to evict John Hollings is without merit because plaintiff's Complaint fails to disclose that John Hollings was lawfully evicted from the premises after: (a) service of a Notice

[\* 6]

to Cure on or about February 1, 2005 alleging multiple violations; (b) a *Yellowstone* proceeding commenced by John Hollings was dismissed based on its failure to post a bond, as directed by Order of the Hon. Rosalyn Richter dated August 5, 2005;<sup>2</sup> and (c) a holdover proceeding, which was tried over four days in April 2006 before the Hon. Milagros Matos, resulted in a Judgment of possession dated July 21, 2006 in favor of Nick & Duke LLC and against John Hollings and certain of its subtenants.

In a Decision dated January 31, 2008, the Appellate Term, First Department, affirmed the Judgment and determined that there was

ample support in the record for the trial court's determination that appellants [i.e., John Hollings and its undertenants] defaulted in their performance under the parties' governing lease agreements by failing to make any effort to cure nearly 40 violations issued against the subject premises (citation omitted). Nor did appellants demonstrate that their ability to cure the violations was rendered impossible (citation omitted) due to a change in zoning regulations. Appellants' own expert testified that the majority of the violations could readily have been corrected without implicating the zoning regulations and all the violations could have

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<sup>2</sup> Justice Richter granted the *Yellowstone* injunction by Decision/Order dated April 29, 2005. However, plaintiff failed to post the bond directed in Justice Richter's August 5, 2005 Order, even though Justice Richter reduced the amount of the bond (from \$4 million to \$2.5 million) by Decision/Order dated August 26, 2005 and then extended the deadline for posting the bond by Order dated August 31, 2005.

[\*7]  
[been] cured prior to trial had appellants commenced work upon receipt of the notice to cure.<sup>3</sup>

18 Misc. 3d 135(A)\*1.

Defendants thus argue that this action is barred by the doctrines of res judicata and collateral estoppel since it has already been determined that plaintiff's losses (and, specifically, the loss of John Hollings' lease and eviction from the property) were not the result of any wrongdoing by the landlord or others, but rather the result of plaintiff's defaults under the lease.<sup>4</sup>

Plaintiff, on the other hand, argues that the decisions by the Civil Court and the Appellate Term are not entitled to res judicata and collateral estoppel effect because the holdover proceeding involved different parties, causes of action and issues. See, *Energycrescent, Inc. v Creative Modules Enterprises, Inc.*, 183 AD2d 804, 805 (2<sup>nd</sup> Dep't 1992), *lv to app disp'd*, 80 NY2d 925 (1992), which found that res judicata did not bar the plaintiff's claims

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<sup>3</sup> By Decision dated May 28, 2008, the Appellate Term denied John Hollings' motion for leave to appeal to the Appellate Division, First Department. By Decision dated December 30, 2008, the Appellate Division also denied leave to appeal.

<sup>4</sup> Defendant Advocate argues that the Complaint against it must be dismissed on the further ground that it fails to state a cause of action against it, because there is no allegation that plaintiff leased property from Advocate, contracted with Advocate, conducted any business with Advocate, borrowed funds from Advocate, met with representatives of Advocate, or indeed ever had anything to do with Advocate.

8 ]  
because they were not based on "the same wrong which was at issue in the prior litigation."

Specifically, plaintiff argues that: (i) the defendants (other than Nick & Duke) were not parties to the earlier proceeding; (ii) the summary holdover proceeding focused on narrow issues regarding the Notice to Cure; (iii) plaintiff was precluded from asserting counterclaims in the summary proceeding; and (iv) Nick & Duke never disclosed in the earlier proceeding that it had conveyed the leasehold interest to West 23<sup>rd</sup> on September 10, 2004.

However, while there is not a complete identity of parties or claims in the two actions, John Hollings had a full and fair opportunity to litigate the central issue in this action, i.e., whether John Hollings was wrongfully deprived of the use of the leased premises. Thus, plaintiff is precluded from re-litigating the claims asserted herein. *See, Amboy Mgt. Co. v Monarch Car Servs.*, 157 AD2d 761 (2<sup>nd</sup> Dep't 1990).

Accordingly, based on the papers submitted and the oral argument held on the record on December 17, 2008, defendants' motions to dismiss plaintiff's Complaint are granted. The Clerk may enter judgment dismissing plaintiff's Complaint with prejudice.


[\*9]

Those portions of the motions seeking sanctions are granted only to the extent of finding that defendants are entitled to recover the costs, including reasonable attorneys' fees, incurred in connection with this motion.

The issue of the amount of costs, including reasonable attorneys' fees, incurred by defendants in connection with this motion is referred to a Special Referee to hear and determine. Upon service of a copy of this order with notice of entry, the Special Referee Clerk shall place this matter on the Part 50R calendar for referral to a Special Referee.

This constitutes the decision and order of this Court.

Date: August 20, 2009



Barbara R. Kapnick  
J.S.C.

**BARBARA R. KAPNICK**  
J.S.C.

**FILED**  
AUG 24 2009  
COUNTY CLERK'S OFFICE  
NEW YORK