

Canton v Grand Mach. Exch., Inc.

2010 NY Slip Op 30092(U)

January 13, 2010

Supreme Court, New York County

Docket Number: 101480/09

Judge: Joan M. Kenney

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

HON. JOAN M. KENNEY

PART 8

Index Number : 101480/2009

CANTON, NANCY J.

vs.

GRAND MACHINERY EXCHANGE, INC.,

SEQUENCE NUMBER : # 002

COMPEL

Justice

INDEX NO. 101480-09

MOTION DATE

MOTION SEQ. NO. #002

MOTION CAL. NO. _____

_____ were read on 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 THE ATTACHED MEMORANDUM DECISION.**

FILED

JAN 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

Dated: January 17, 2010

HON. JOAN M. KENNEY

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 8

-----X
Nancy J. Caton, Michael S. Jurewicz,
Hrafnhildur Arnardottir, and C Productions LLC,

Plaintiffs,

-against-

Grand Machinery Exchange Inc., and Paul Merandi,

Defendants,
-----X

DECISION AND ORDER
Index Number.: 101480/09
Motion Seq. No. 2
Motion Calendar: 11/4/09

KENNEY, JOAN M., J.

Recitation, as required by CPLR 2219(a), of the papers considered in review of this motion seeking use and occupancy payments and to compel.

Papers

Notice of Motion, Affidavit, Affirmation, and Exhibits
Affidavit in Opposition
Reply Affirmation

Numbered

1-9
10-16
17-21

Appearances

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JAN 18 2010
NEW YORK
COUNTY CLERK'S OFFICE

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In this action seeking a declaratory judgment, defendants, Grand Machinery Exchange, Inc., (GME) and Paul Merandi (Mr. Merandi) seek a *pendente lite* order: (1) granting defendants an award of use and occupancy¹; and (2) directing plaintiffs to purchase and maintain liability insurance coverage, pursuant to the terms of the parties' stipulation dated April 24, 2009 (the stipulation).

FACTUAL AND PROCEDURAL BACKGROUND

Briefly, the verified complaint seeks a declaration that plaintiffs are residential tenants of the 3rd floor north side loft located at 211-215 Centre Street, New York, NY 10013 (the premises) and

¹See also, defendants' second counterclaim in its verified amended answer dated June 2, 2009, page 8, paragraph 42-45, seeking an award of use and occupancy.

that the premises are housing accommodations, subject to rent stabilization laws. Plaintiffs allege that defendants had notice that plaintiffs would use the premises for residential purposes.

It is undisputed that defendant GME executed a five year lease (the lease) with plaintiff C Production LLC (CP) dated February 9, 2004 for the rental of the premises. The lease expired by its own terms in February, 2009 (see Exhibit "A" to the moving papers). The lease itself fails to identify whether the premises are to be used for commercial and/or residential purposes. However, the Rider to the Lease (the Rider) makes several references to the "business," that was to be conducted by CP in the premises (see paragraph 2 of the Rider). Further, CP was is to comply with all applicable laws regarding the conduct of its business (see paragraph 17 of the Rider).

Additionally, pursuant to the terms of the stipulation, plaintiffs agreed to obtain and deliver to defendants "a certificate of insurance evidencing the coverage required under the expired lease [seven] 7 days of date [illegible word]."²and that the tenant shall maintain general public liability insurance within 15 days of commencement of the lease (see paragraph 3 of the Rider).

This court has not been provided with any document, any evidence, setting forth immediate compliance with paragraph 3 of the Rider (the liability insurance provision of the lease). It is apparent to this Court that plaintiffs did have insurance coverage for the premises at some point during their tenancy. Notably, CP is identified as a "business owner," in the insurance policy cancellation/ non-renewal notice dated July 7, 2009 (see also Exhibit "F" to the moving papers). This Court has not been provided with the reason(s) for the cancellation and/or non-renewal, but it is clear that the insurance policy for the premises was issued to a corporate tenant, not residential tenants. Presumably, in procuring the insurance policy, plaintiffs identified themselves as "business owners"

²See stipulation annexed as Exhibit "E" to the moving papers.

of the premises.

The complaint alleges that a portion of the premises is occupied as a residence by plaintiff, Hrafnhildur Arnardottir (identified as the President of CP) and spouse plaintiff, Michael S. Jurewicz, along with their children. Plaintiff's allege the other portion of the premises is occupied as a residence by plaintiff, Nancy J. Caton, who is identified as a principal of CP. Since plaintiffs allege that the loft is a work-live premises, then CP is consequently running its business out one, or both of these portions of the premises.

In their responsive pleading, defendants generally deny the allegations contained in the complaint, assert affirmative defenses and several counterclaims. Defendants also aver that they were only made aware that plaintiff Hrafnhildur Arnardottir was the President of CP when this action was commenced. Defendants state that they had dealings only with Nancy J. Caton, who executed the lease on behalf of CP and represented that the leased premises was going to be used for business purposes.

ARGUMENTS

Defendants contend that they are entitled to an award of use and occupation because plaintiffs continue to use and occupy the premises without paying any rent since September 8, 2009, to the present (see Mr. Merandi's affidavit dated December 31, 2009 annexed to the reply papers). Defendants also contend that plaintiffs must be compelled to comply with the stipulation and provide defendants with proof of insurance coverage for the premises. When the instant motion was served and filed, plaintiffs had yet to obtain insurance coverage as per the terms of the stipulation.

Plaintiffs argue that use and occupancy must be denied pending the outcome of the underlying action for declaratory relief. Plaintiffs also contend that use and occupancy cannot be awarded

because: (1) plaintiffs are entitled to a hearing regarding an alleged breach of warranty of habitability; (2) defendants retain a security deposit in excess of what defendants are entitled to; and (3) defendant landlord has overcharged plaintiffs for water usage.

DISCUSSION

It has been held that it is fundamentally unfair for a party to continue to possess a commercial space, without paying for its use (see *Abright v Shapiro*, 92 Ad2d 452 [1st Dept 1983]). A landlord may recover reasonable compensation for the use and occupation of real property, by any person, under any agreement, and a parol lease or other agreement may be used as evidence of the amount to which he or she is entitled (see 74 N.Y. Jur. 2d Landlord and Tenant § 385).

Plaintiffs' argument that the underlying declaratory judgment must first be determined before an award of use and occupancy can be granted, lacks merit. In the event rent stabilization laws are applicable, a landlord is still entitled to an appropriate payment for use and occupancy, pending the outcome of the underlying litigation (*Trump CPS LLP v. Meyer*, 249 AD2d 22, 670 NYS2d 854 [1st Dept 1998]).

Plaintiffs' remaining arguments in opposition to the application for use and occupancy, are also unpersuasive. Plaintiffs do not cite any case law and/or statutory reference to support their legal contentions. This Court cannot give due consideration to plaintiffs' unsupported and unspecified allegations that a breach of warranty of habitability occurred when such cause of action was never pled in the complaint and/or in the reply to defendants counterclaims. Consequently, defendants' application for use and occupancy is granted.

With respect to the amount of use and occupancy sought to be collected, plaintiffs did not

rebut and/or challenge payment of use and occupancy in the amount of \$6,190.20 (exclusive of real estate taxes, water and sewer charges). In fact, the parties' stipulation included a provision that the agreed upon amount for use and occupancy was \$6,190.20 per month. Defendants' claim seeking payment for water and sewer charges, as well as real estate taxes, was never computed to be part of the use and occupancy amount in April 2009. Additionally, the parties disagree as to the amount of water and sewer charges to be assessed (see Exhibits "E" and "F" in opposition). Defendants have not satisfied their prima facie burden of demonstrating that additional rent for water, sewer and real estate taxes are routinely applied in calculating the amount of use and occupancy to be awarded. Moreover, defendants did not present any documents that would support the amounts sought for real estate taxes, sewer and water charges.

Defendants also seek to compel plaintiffs to purchase and maintain insurance for the premises, pursuant to the expired lease and the stipulation, is granted. This branch of the motion is also granted. Plaintiffs did not address this portion of defendants' motion; therefore, this portion of the application is uncontested.

Enforcement of a stipulation is strongly favored by the courts, and can only be set aside upon a showing of good cause, such as fraud, collusion, mistake, accident or a similar ground (*see Jeanne Napoli et al. v Murray J. Winter et al.*, 284 AD2d 286 [1st Dept 2001]). Here, plaintiffs have not set forth any legally cognizable arguments that could set aside the stipulation, and vacate plaintiffs' in acquiring the requisite insurance policy for the premises. It is also noted that plaintiffs have not presented any reasonable excuse for their failure to obtain the insurance policy in a timely manner. Accordingly, it is

ORDERED, that defendants' motion is granted, in its entirety; and it is further

ORDERED, that plaintiffs shall make all use and occupancy payments now due (in the amount of \$30,952.00), representing use and occupancy from September 2009 through to January 2010), no later than January 25, 2010 to defendants; and it is further

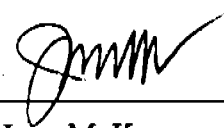
ORDERED, that plaintiffs continue to pay use and occupancy in the amount of \$6,190.40, on a timely basis, going forward from February 1, 2010 until a final disposition of the underlying declaratory judgment action; and it is further

ORDERED, that plaintiffs shall provide the requisite insurance policy for the premises, in accordance with the terms of the expired lease and as agreed to by the parties' stipulation, within thirty (30) days from the date of entry of this Order; and it is further

ORDERED, that defendants' motion for summary judgment is to be submitted to this Court on or about January 20, 2010 for decision. In the event the motion is withdrawn, the moving party is to notify the Clerk in Part 8, in writing and on notice to the other side, and it is further

ORDERED, that the parties are to appear for a preliminary conference on March 25, 2010.

DATED: January 13, 2010

ENTER:


Hon. Joan M. Kenney
J.S.C.

FILED
JAN 18 2010
NEW YORK
COUNTY CLERK'S OFFICE