

Matphil Corp. v 200 Elmont Rd. LLC

2010 NY Slip Op 31504(U)

June 10, 2010

Supreme Court, Nassau County

Docket Number: 025915-09

Judge: Timothy S. Driscoll

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**SUPREME COURT-STATE OF NEW YORK
SHORT FORM ORDER**

Present:

HON. TIMOTHY S. DRISCOLL
Justice Supreme Court

-----X
MATPHIL CORPORATION,

Plaintiff,

- against -

200 ELMONT ROAD LLC,

Defendant.

**TRIAL/IAS PART: 22
NASSAU COUNTY**

**Index No: 025915-09
Motion Seq. Nos: 1 & 2
Submission Date: 5/3/10**

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The following papers have been read on the Order to Show Cause and Cross Motion:

- Order to Show Cause, Affidavit in Support and Exhibits.....X**
- Plaintiff's Memorandum of Law and Exhibits.....X**
- Notice of Cross Motion, Affidavit in Opposition/Support and Exhibits.....X**
- Affirmation in Opposition and Exhibit.....X**

This matter is before the Court for decision on 1) the Order to Show Cause filed by Plaintiff on December 18, 2009, and 2) the Cross Motion filed by Defendant on April 26, 2010, both of which were submitted on May 3, 2010. For the reasons set forth below, the Court 1) denies Plaintiff's motion for a preliminary injunction; and 2) denies Defendant's Cross Motion, with leave to renew after Plaintiff files a complaint, and directs Plaintiff to file and serve a complaint within thirty days of this decision.

BACKGROUND

A. Relief Sought

Plaintiff Matphil Corporation ("Matphil" or "Plaintiff") moves for an Order staying any action on the part of Defendant 200 Elmont Road LLC ("Landlord" or "Defendant") to terminate

Plaintiff's lease ("Lease") for the premises known as 200 Elmont Road, Elmont, New York 11003 ("Premises") and/or evicting Plaintiff from same during the pendency of this action.

Defendant cross moves for an Order, pursuant to CPLR § 3211(a), dismissing this action on the grounds that 1) the cause of action may not be maintained because Landlord has withdrawn the notice of termination dated December 14, 2009; and 2) Plaintiff has no valid cause of action against Landlord.

B. The Parties' History

Matphil is an automobile repair facility. It is a tenant of a gasoline station located at the Premises pursuant to a Lease Agreement with Landlord dated April 1, 2006 ("Lease Agreement"). Pursuant to the Lease Agreement (Ex. A to OSC and Ex. A to Cross Motion), Matphil leases the repair bays, one-half of the front office and the area of the property north of the repair bays. According to the Lease Agreement, as well as James Lettieri ("Lettieri"), the manager for Landlord, the balance of the Premises, consisting of the other half of the office, the gasoline pumps and the area south of the repair bays, is leased separately to another tenant.

The Lease Agreement between Matphil and Elmont provides, in pertinent part, as follows:

4. USE:
 - (a) Tenant shall use and occupy the Premises for any legal use in conformance with the Certificate of Occupancy or equivalent, and all applicable laws, rules and regulations of each and every governmental agency having jurisdiction thereof, now or hereafter enacted.
 - (b) Under no circumstances shall the Tenant discontinue a use under the existing Certificate of Occupancy if such discontinuance would result in the loss of legality of such use under the Certificate of Occupancy and applicable zoning laws, except upon the prior written consent of the Landlord.
 - (c) It shall be deemed the material breach of this lease if Tenant violates any restriction on use contained in this paragraph or it in any way interferes with the operation of the sale of gasoline at the station.
 - (d) Tenant shall not interfere and shall cooperate with the Tenant utilizing the balance of the premises for the sale of gasoline.

* * *

10. ASSIGNMENT/SUBLEASE:

Neither Tenant nor any assignee of this lease, nor Tenant’s legal representatives or successors in interest, by operation of law or otherwise, shall assign this lease, sublet the whole or any part of the Premises, or suffer a transfer of any portion of its common stock or cause the issuance of any additional common stock without the prior written consent of Landlord in each instance.***

Sam T. John, the President of Matphil, signed the Lease Agreement on behalf of Matphil and Robert Del Gadio signed the Lease Agreement in his capacity as Manager of Landlord. Mr. Del Gadio is also the named attorney for the Landlord in this action.

On May 12, 2009, the Town of Hempstead (“Town”) issued a Notice of Violation (Ex. B to D’s Memorandum of Law) to an entity called Montgomery Distributors, LLC (“Montgomery”) with respect to the Premises. Montgomery is a company that is affiliated with the Defendant Landlord but does not own the Premises. The Notice of Violation directed Montgomery to immediately cease and desist from illegal storage of masonry equipment and stated that Montgomery’s failure to comply would result in the issuance of a summons for an appearance in court.

The Town subsequently issued an Appearance Ticket dated September 30, 2009 (Ex. B to OSC) to Montgomery directing its appearance in the District Court of Nassau County (“District Court”) on November 10, 2009 in connection with alleged offenses committed at the Premises. The Appearance Ticket listed the date of offense as September 30, 2009 and described the offense as storage of masonry equipment and commercial vehicles on the Premises without a permit.

The Appearance Ticket prompted Landlord to advise Plaintiff of the five-day notice of termination of the Lease Agreement. By letter dated December 14, 2009 (Ex. C to OSC), Lettieri advised Plaintiff that the letter served as a five-day notice of the termination of its lease term in accordance with paragraph 20 of the Lease Agreement which is titled “Defaults and Termination.” The letter also made reference to a November 18, 2009 letter (Ex. D to P’s Memorandum of Law) in which Landlord gave Plaintiff written notice of its default under the terms and conditions of the Lease Agreement and the violations to which the Appearance Ticket referred.

Plaintiff commenced this action by filing a Summons with Notice on December 18, 2009 (Ex. A to Arber Aff. in Opp.). The Summons with Notice describes the nature of the action as breach of contract, fraud, misrepresentation and conspiracy.

On December 22, 2009, the parties appeared before this Court on Plaintiff's application for a temporary restraining order ("TRO") that would stay any action by Defendant to terminate Plaintiff's lease and/or evict Plaintiff from the Premises pending the hearing and determination of this matter. At that proceeding, the transcript of which is attached as Exhibit C to Defendants' Cross Motion, counsel for Defendant advised the Court that some of the violations alleged by the Town may have been attributable to the subtenant of the Plaintiff in connection with the portion of the Premises leased to the subtenant (Tr. at p. 5).

Counsel for Defendant also advised the Court that, based on counsel's conversations with the building inspector, Defendant would be substituted for Montgomery as the proper defendant in the District Court proceeding. Counsel for Matphil affirms in his Affirmation in Opposition to the Cross Motion that on the return date of Plaintiff's Order to Show Cause, which was the date on which the Court addressed the appropriateness of the TRO, he offered to have Matphil substituted as the defendant in the pending District Court matter. Plaintiff's attorney affirms that Defendant accepted his proposal and Lettieri confirms that on February 25, 2010, he appeared in District Court with Plaintiff's counsel at which time Matphil was substituted for Montgomery in the District Court proceeding. Lettieri further affirms that, in light of the substitution of Matphil for Montgomery, Defendant has withdrawn its notice of termination and requested that Plaintiff discontinue this action. Plaintiff's counsel does not dispute this assertion.

C. The Parties' Positions

Plaintiff's counsel concedes that, while this substitution does not resolve the litigation itself, it does resolve Plaintiff's application for injunctive relief (Arber Aff. at ¶ 8). Plaintiff's counsel submits, however, that certain zoning matters are still pending, and that Plaintiff still possesses valid claims against Defendant for monetary damages for Defendant's allegedly improper attempt to terminate the Lease Agreement. Moreover, with respect to Defendant's references to Plaintiff's filing of a summons but not a complaint, Plaintiff's counsel affirms that he has never received a notice of appearance from Defendant's counsel or a demand for a

complaint.

Defendant's counsel submits that dismissal of this action is warranted on the grounds that 1) Plaintiff has not alleged any recognizable cause of action or claims; 2) no eviction proceeding has ever been initiated; and 3) in light of the notice of termination, there is no longer an issue with respect to Plaintiff's continued occupancy of the Premises.

RULING OF THE COURT

In light of Plaintiff's concession that the substitution of Matphil for Montgomery in the District Court proceeding obviates the need for injunctive relief, the Court denies Plaintiff's Order to Show Cause.

The Court denies Defendant's Cross Motion, with leave to renew after Plaintiff files a complaint, and directs Plaintiff to file and serve a complaint within thirty days of this decision.

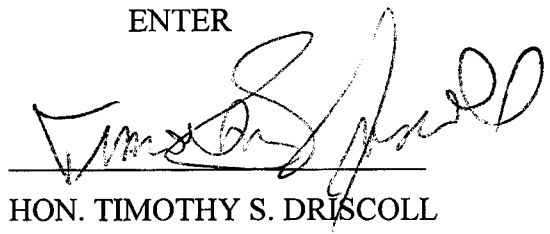
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court directs counsel to appear before the Court for a Preliminary Conference on August 18, 2010 at 9:30 a.m.

DATED: Mineola, NY
June 10, 2010

ENTER



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

JUN 14 2010

NASSAU COUNTY
COUNTY CLERK'S OFFICE