

**Spaeth Design, Inc. v Friedland**

2010 NY Slip Op 31592(U)

June 16, 2010

Supreme Court, New York County

Docket Number: 101859-2009

Judge: Judith J. Gische

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

HON. JUDITH J. GISCHE

PART 10

Index Number : 101859/2009

SPAETH DESIGN

vs

FRIEDLAND, LAWRENCE

Sequence Number : 001

SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. \_\_\_\_\_

MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for \_\_\_\_\_

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

**FILED**

JUN 22 2010

NEW YORK  
COUNTY CLERK'S OFFICE

**MOTION IS DECIDED IN ACCORDANCE WITH  
THE ACCOMPANYING MEMORANDUM DECISION.**

JUN 16 2010

Dated: \_\_\_\_\_

  
HON. JUDITH J. GISCHE 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 10**

-----X

Spaeth Design, Inc.,  
Plaintiff (s),

***-against-***

Lawrence Friedland and Melvin Friedland d/b/a  
Friedland Properties, Inc.,

Defendant (s).

-----X

Recitation, as required by CPLR § 2219 [a] of the papers considered in the review of this (these) motion(s):

<b>Papers</b>	<b>Numbered</b>
Defs' n/m (3212) w/JIA affirm, PG, AH affids, exhs .....	1
Pltf's opp w/FLS affirm, SS affid, exhs .....	2
Defs' reply w/PG affid, exhs .....	3

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*Upon the foregoing papers, the decision and order of the court is as follows:*

**GISCHE J.:**

This is an action alleging the breach of a commercial lease ("1<sup>st</sup> cause of action") and of quiet enjoyment of the demised premises ("2<sup>nd</sup> cause of action"). Issue has been joined and defendants have moved for summary judgment before plaintiff has filed the note of the issue. Since issue has been joined, summary judgment relief is available (CPLR 3212[a]; Myung Chun v. North American Mortgage Co., 285 A.D.2d 42 [1<sup>st</sup> Dept 2001]).

The court's decision and order on this motion is as follows:

**Arguments presented**

Plaintiff is the commercial tenant ("tenant") of the individually named defendants ("landlord") who own the building located at 629 West 54<sup>th</sup> Street, New York, New York

("building"). The tenant leases the entire 6<sup>th</sup> floor ("premises") pursuant to a written loft law lease made November 3, 2003 between "Spaeth Design, Inc." as tenant and "Lawrence Friedland and Melvin Friedland" as owner ("lease"); defendant "Friedland Properties, Inc." is not a party to the lease. The lease consists of a printed form lease ("printed lease") and an attached rider ("rider").

Tenant contends that landlord failed to provide elevator services and heat, as required under the lease, and it seeks monetary damages consisting of a rent allowance and reimbursement for items such as thermal underwear it bought for its employees. Tenant is in the business of fabricating display windows it claims that landlord did not provide heat during the months of October, November and December 2008, which encompass the busy Christmas season.

Sandy Spaeth, tenant's principal, provides his sworn stating that the temperature at the premises was sometimes "below freezing" and that twice he notified the landlord the space was unusable. His first letter to the landlord is dated December 3, 2008, requesting a rent reduction of 50%. The second letter is dated January 14, 2009. In his first letter, Spaeth stated that the 6<sup>th</sup> floor was heated some days during the month of December 2008. The problem with the heat was apparently resolved at the end of December 2008 or very beginning of January 2009. Tenant contends the premises were uninhabitable without heat, but that it had no choice but to continue working at the premises because of time constraints and the need fill its clients' orders. It is undisputed that there was a problem with a gas line and Con Ed eventually got involved in restoring heat to the premises. According to the tenant, the passenger elevator was frequently out of order.

Tenant alleges the landlord was "grossly negligent" in getting the heating problem fixed, and allowing it to escalate as it did, to the point of getting Con Ed involved.

Tenant alleges the landlord knew there was a serious problem at the building starting in September 2008, but it delayed in getting the problem fixed. Tenant provides a copy of bill indicating the landlord hired a plumber to investigate the problem with heat. The plumber repaired part of the problem and provided the landlord with an estimate to complete the repair. The estimate was generated in October 2008. According to tenant, the landlord did not act right away, which is why Con Ed had to intervene.

Landlord denies it breached the lease or that the tenant was constructively evicted. According to the landlord, although the rider (paragraph 53) requires the landlord to provide heat, the printed lease only requires the landlord to do so "when required by law..." (paragraph 31). Landlord contends there is no law requiring a landlord to heat non-residential premises. The landlord acknowledges the passenger elevator was not always available, but points out the tenant could and should have availed itself of the freight elevator which was running. The landlord states that the premises could not be heated because there was a mechanical problem which took some time to fix. Defendant contends that tenant is not entitled to a rent reduction or credit because the lease (paragraph 20) specifically addresses situations where (as here) a tenant is inconvenienced because of repairs that are needed.

The corporate defendant seeks the dismissal of the complaint against it, on the basis that individuals cannot "do business as" a corporation.

Paragraphs 31, 53, 41 and 20 are of particular importance to the parties' dispute. Paragraph 31 of the printed lease provides in relevant part that:

“Elevators, Heat, Cleaning: 31. As long as Tenant is not in default under any covenants of the lease . . . Owner shall: (a) provide necessary passenger elevator facilities on business days from 8 a.m. to 6 p.m. and on Saturdays from 8 a.m. to 1 p.m.; (b) if freight elevator service is provided, same shall be provided only on regular business days, Monday through Friday, inclusive, and on those days only between the hours of 9 a.m. and 12 noon and between 1 p.m. and 5 p.m.; (c) furnish heat, water and other services supplied by Owner to the demises premises, when and as required by law . . .”

Paragraph 53 of the rider provides in relevant part that:

“Owner will furnish heat to the demises premises, as well as heat for Tenant’s hot water, through the existing building equipment. The cost for heat is included in the base annual rent. Tenant shall pay for hot water pursuant to the provisions of Article 52. Owner shall have the right, upon notice to Tenant, to install heating equipment servicing the demises premises only, in which event Tenant shall thereafter maintain said heating equipment in good order and condition.”

Paragraph 41 of the rider states that: “the provisions of this rider to the Lease (“the Rider”) shall prevail in all instances where same conflict with the printed form of the lease.”

Pursuant to paragraph 20 of the printed lease, the owner has the right to make repairs or alteration to the building and there shall be “no allowance to Tenant for diminution of rental value and no liability on the part of Owner by reason of inconvenience, annoyance, or injury to business arising from Owner or other Tenant making any repairs in the building or any such alterations, additions and improvements...”

### **Law Applicable to a Motion for Summary Judgment**

A movant seeking summary judgment in its favor must make a prima facie

showing of entitlement to judgment as a matter of law, tendering sufficient evidence to eliminate any material issues of fact from the case" (Winegrad v. New York Univ. Med. Ctr., 64 N.Y.2d 851, 853 [1985]). The evidentiary proof tendered, however, must be in admissible form (Friends of Animals v. Assoc. Fur Manufacturers, 46 N.Y.2d 1065 [1979]). Once met, this burden shifts to the opposing party who must then demonstrate the existence of a triable issue of fact (Alvarez v. Prospect Hosp., 68 N.Y.2d 320, 324 [1986]; Zuckerman v. City of New York, 49 N.Y.2d 557 [1980]; Forrest v. Jewish Guild for the Blind, 309 A.D.2d 546 [1<sup>st</sup> Dept 2003]).

On a motion for summary judgment, it is for the court to decide any issues of law that are raised (Hindes v. Weisz, 303 A.D.2d 459 [2<sup>nd</sup> Dept 2003]).

### Discussion

A commercial tenant may be relieved of its obligation to pay the full amount of rent due where it has been actually or constructively evicted from the whole or a part of the leasehold (Barash v. Pennsylvania Terminal Real Estate Corp., 26 N.Y.2d 77 [1970]). A constructive eviction occurs where the landlord's wrongful acts substantially and materially deprive the tenant of the beneficial use and enjoyment of the premises (Barash v. Pennsylvania Term. Real Estate Corp., *supra* at 83). The failure to provide heat can, in the appropriate circumstances, substantially and materially deprive a tenant of its beneficial use and enjoyment of the premises, sustaining a constructive eviction claim (Johnson v. Cabrera, 246 A.D.2d 578 [2<sup>nd</sup> Dept 1998]).

Here, plaintiff has established that the owner is obligated to provide heat (428 Camera Corp. v. Tandy Corp., 272 A.D.2d 72 [1<sup>st</sup> Dept 2000]). It is also unrefuted that it

is the landlord's duty to repair the heating system. Despite tenant's argument to the contrary, there is no proof of tenant's claim, that the landlord engaged in "wrongful acts," that "materially deprived" the tenant of its "beneficial use and enjoyment" of the premises. The landlord took initial steps to fix the heating problem in September 2008, before it got cold. Tenant's own temperature chart shows the temperature in October was in the 50's and 60's, for the most part. In October the landlord obtained an estimate to have further work done and the heating problem was repaired by the end of December 2008. When the tenant wrote to complain at the beginning of December 2008, the landlord responded by getting space heaters for the tenant. The tenant's claim that the landlord ignored the problem, acted in a grossly negligent manner or in bad faith are completely without any support in this record.

Though tenant contends it did not have peaceable and quiet enjoyment of the premises, an eviction –actual or constructive –is necessary to constitute a breach of this covenant (Dave Herstein Co. v. Columbia Pictures Corp., 4 NY2d 117 [1958]). Here, tenant was not physically expelled or excluded from the premises, nor did it actually abandon them (428 Camera Corp. v. Tandy Corp., *supra*). Thus, tenant does not have a cause of action against the landlord for a constructive eviction.

Tenant's claims about the passenger elevator are that it was not always running and there were prolonged service outages. As with the heating system, repairs of the passenger elevator are the landlord's responsibility. The blunderbuss claims about the passenger elevator outages do not support tenant's claim for damages because the freight elevator was available.

On this motion the landlord has met its burden of proving that any service

interruptions to the heating system and passenger elevators were due to necessary repairs. Even if the tenant was inconvenienced by the landlord's repairs, tenant is not entitled to a rent reduction or allowance for reduced services (paragraph 20, printed lease). Nor has the tenant shown that it was constructively evicted. The tenant chose to stay in the premises and did not abandon them.

Disagreements about whether the rider or printed language dictate when the landlord has to provide heat are besides the point under the particular facts of this case since the landlord endeavored to make the necessary repairs to provide heat. Landlord contacted a plumber to replace the broken gas regulator in September 2008, obtained a repair estimate in October 2008, and then the problem was fixed by beginning of 2009, if not the end of December 2008. The landlord also provided the tenant with space heaters once the tenant sent its first complaint letter.

Defendants have also proved that "Friedland Properties, Inc." is not a party to the lease. There are no facts to support the claims asserted against the corporate defendant. Although a "person" (whether a natural person or corporation) can do business under an assumed name, a natural person cannot "do business as" a corporation, but must incorporate (GBL § 130; Worthy v. NYCHA, 21 AD3d 284 [1<sup>st</sup> Dept 2005]).

Finally, tenant's claim, that this motion is premature, is not persuasive. Where a party opposed to summary judgment contends that discovery is incomplete, the court may consider whether the motion is premature because the information necessary to fully oppose the motion remains under the control of the proponent of the motion (CPLR

\* 9] § 3212 [f]; Lewis v. Safety Disposal System of Pennsylvania, Inc., 12 AD3d 324 [1<sup>st</sup> Dept. 2004]). Tenant has made no showing that there is information within defendant's control that would allow plaintiff to present a better defense to defendant's motion for summary judgment.

Based upon the foregoing, defendants' motion for summary judgment is hereby granted and this action is hereby dismissed.

**Conclusion**

In accordance with the foregoing,

*It is hereby*

**ORDERED** that defendants' motion for summary judgment is granted in its entirety; and it is further

**ORDERED** that the clerk shall enter judgment in favor of defendants Lawrence Friedland, Melvin Friedland and Friedland Properties, Inc., against plaintiff Spaeth Design, Inc., dismissing the complaint and this action is dismissed with costs and disbursements to defendants as taxed by the Clerk upon the submission of an appropriate bill of costs; and it is further

**ORDERED** that any relief requested not expressly addressed is hereby denied; and it is further

**ORDERED** that this constitutes the decision and order of the court.

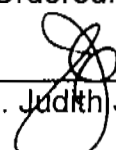
Dated: New York, New York  
June 16, 2010

**FILED**

JUN 22 2010

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So Ordered:

  
\_\_\_\_\_  
Hon. Judith J. Gische, JSC