

Marano v Galante

2010 NY Slip Op 32754(U)

October 1, 2010

Sup Ct, NY County

Docket Number: 113578/09

Judge: Judith J. Gische

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

PRESENT: HON. JUDITH J. GISCHF

PART 10

Index Number : 113578/2009
MARANO, SCOTT
vs.
GALANTE, DOMENICK
SEQUENCE NUMBER : 002
PARTIAL SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____
MOTION CAL. NO. _____

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

FILED
OCT 05 2010
COUNTY CLERK'S OFFICE
NEW YORK

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

Status conf 11/10/10 @ 9:30 am

Dated: 10/1/10

J. GisCHF
HON. JUDITH J. GISCHF 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

Scott Marano,

Plaintiff (s),

-against-

Domenick Galante,

Defendant (s).

-----X

DECISION/ ORDER
Index No.: 113578/09
Seq. No.: 001

PRESENT:
Hon. Judith J. Gische
J.S.C.

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

Papers	Numbered
Def's n/m (3212 etc) w/DG, EF, OK affids, JH affirm (2), exhs	2
Pltff's n/m (3212) w/SM affid, GM affirm, exhs	3
Def's reply w/DG, EF affids, JH affirm, exhs	4
Pltff's further opp w/SM affid, exhs	5
Def's response w/DG, EF affids, JH affirm, exhs	6
Transcript 7/8/10	
JH corresp 7/22/10 re: reply accepted	

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NEW YORK

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

GISCHE J.:

This is an action by plaintiff Scott Marano ("tenant") for a declaration that the Notice of Default served by defendant Domenick Galanty ("landlord") dated August 31, 2009 is invalid, a permanent injunction preventing the landlord from terminating the tenancy based upon that Notice to Cure and a declaration that the landlord's refusal to consent to a sublease was unreasonable. Issue has been joined and the landlord now moves, pre-note of issue, for partial summary judgment on his second counterclaim for

an order and judgment of ejectment and possession. The tenant cross moves for summary judgment dismissing the counterclaim. 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 [1st Dept 2001]). The court's decision and order on this motion and cross motion is as follows:

Arguments

The landlord entered into a standard store lease with the tenant for the ground floor store in the building located at 54 MacDougal Street, New York, New York ("store"). The lease, for a 6 year term, commenced on October 1, 2005 and ended September 30, 2011 ("lease"). Pursuant to the lease, the tenant assumed the responsibility of taking the necessary steps of evicting the tenant then in possession of the store. Paragraph 6 of the rider to the lease allows the tenant to assign the lease to a corporation or company of which Scott Marano is a majority shareholder or owner.

There are numerous allegations by the landlord, who is 92 years old, and his daughters who are his attorneys in fact, that the tenant obtained a preferential rent from him through certain unsavory maneuvers and that once he obtained possession of the store, the did not actually move in and quickly stopped paying rent. The parties also disagree whether the landlord reasonably withheld his approval to a sublease and whether the landlord could and should have accepted checks written against a corporate account. Notwithstanding those factual disputes however, other facts are either proved, or unrefuted:

On September 3, 2009, the landlord served the tenant with a Notice of Default dated August 31, 2009. In the Notice of Default, the landlord identified five (5) defaults

under the lease, including the tenant's failure to obtain and/or continuously maintain general public liability insurance for the landlord's benefit, a breach of paragraph 8 of the lease and a failure to move into and/or conduct business at the premises, a breach of paragraphs 2 and 17 thereof. Under the lease, the tenant had fifteen (15) days to cure these defaults. The period to cure expired on September 18, 2009.

On September 24, 2009, the landlord served tenant with a Notice of Termination and an undated Notice of Cancellation, notifying tenant that his lease had been terminated and that he was to surrender the premises within five (5) days. On September 29, 2009, the tenant brought a motion for a "Yellowstone" injunction which this court denied for reasons set forth in the stenographic minutes and short form order of October 8, 2009.

In the meantime, the landlord had also served the tenant with a Three Day Rent Demand on September 5, 2009. Thereafter, on September 25, 2009, the landlord brought a nonpayment proceeding against the tenant in Civil Court of the City of New York (Index No. 86854/09). That summary proceeding was eventually dismissed by the court on December 10, 2009, after the tenant paid all the arrears and the landlord accepted payment.

Presently, the landlord seeks partial summary judgment on its second counterclaim for an order and judgment of possession and ejectment based upon the Notice of Termination which the landlord claims terminated the lease. The landlord argues that the tenant did not cure the defaults alleged within the time period afforded under the lease and although the tenant now (apparently) has insurance for the property, he was required to maintain such insurance "continuously" which he did not do.

Although the landlord acknowledges that he accepted rent for the month of September 2009, he argues that because the lease was terminated on September 29, 2010, the acceptance of rent "for a single day" did not reinstate the lease.

The tenant opposes the landlord's motion and argues that the counterclaim for ejectment and possession should be dismissed because by demanding and accepting the payment of rent by him, the landlord reinstated the tenancy. Alternatively, the tenant denies that any of the Notices were properly served.

A separate branch of landlord's motion is for discovery sanctions. Landlord contends that tenant has refused to respond to his discovery demands in order to delay this case. He seeks a conditional order of preclusion, or any other sanction the court deems appropriate.

Law Applicable to Motions 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 [1st 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 [2nd Dept 2003]).

Discussion

The landlord's acceptance of tenant's rent after his tenancy was terminated, and before commencement of the holdover proceeding, vitiates the notice of termination (Witkoff v. Shopwell, Inc., 112 A.D.2d 295 [2nd Dept 1985]; Mushlam Inc. v. Razor, 14 Misc.3d 1219 [A] [Civ Ct N.Y. 2007]). Here, landlord did not simply accept the rent that came due and should have been paid by the tenant before the lease was terminated (i.e. the rent for September 2009), the landlord demanded payment of the October 2009 rent as well (Witkoff v. Shopwell, Inc., supra). Demanding rent payments for a period of time *after* the lease was terminated is inconsistent with the landlord's position that the Notice of Termination terminated the lease, thereby severing the landlord/tenant relationship and any obligation that the tenant had to pay rent. Therefore, the cross motion by the tenant for summary judgment severing and dismissing the landlord's cross claims for ejectment and possession is granted, because there is no predicate notice for the relief demanded. Landlord's motion for partial summary judgment on his second counterclaim and for an order of eviction and ejectment is, therefore, denied.

Although the parties extensively argue the reasonableness of the landlord's denial of the tenant's request to sublease the premises, neither side has moved for summary judgment on the complaint. Therefore, that issue is not before the court to decide. Furthermore, although the parties also disagree whether Scott Marano properly assigned his lease to a corporation and whether the landlord could accept rent from that corporation, neither of these issues have any bearing on whether the lease is presently effective.

The other branch of landlord's motion is for an order of preclusion based upon the

tenant not having provided documents or responses to interrogatories. Tenant has now done so and states he is ready to be deposed. Since the landlord makes no claim that the responses are insufficient, but attacks the veracity of statements made therein, this branch of the motion has been resolved and it is denied without prejudice.

Conclusion

The note of issue has not yet been filed, but this case was adjourned without a forward date. The case will appear on Part 10's calendar for a status conference on November 10, 2010 at 9:30.a.m.

In accordance with the foregoing,

It is hereby:

ORDERED that plaintiff Scott Marano's cross motion for summary judgment dismissing the counterclaims is hereby granted and the counterclaims of defendant Domenick Galante are hereby severed and dismissed; and it is further

ORDERED that defendant Domenick Galante's motion for partial summary judgment on his ejection and eviction counterclaim is denied; and it is further

ORDERED that defendant Domenick Galante's motion for an order imposing discovery sanctions against plaintiff is denied, without prejudice; and it is further

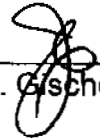
ORDERED that any relief not expressly addressed is hereby denied; and it is further

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

Dated: New York, New York
October 1, 2010

So Ordered:

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OCT 05 2010
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NEW YORK



Hon. Judith J. Gische, J.S.C.