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SHORT FORM ORDER

INDEX No. 10-29206

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART 33 - SUFFOLK COUNTY

COPY

PRESENT:

Hon. THOMAS F. WHELAN
Justice of the Supreme Court

MOTION DATE 8/20/10
ADJ. DATES 10/15/10
Mot. Seq. # 001 - Mot D
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MAC LAND COMPANY, LLC,

Petitioner,

-against-

EAST END CEMENT & STONE, INC.,

Respondent.

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ESSEKS, HEFTER & ANGEL, LLP
Attys. For Petitioner
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Riverhead, NY 11901

MICHAEL G. WALSH, ESQ.
Atty. For Respondent
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Upon the following papers numbered 1 to 11 read on this Petition to recover possessionf commercial real property; Notice of Petition and supporting papers 1 - 3; Notice of Cross Motion and supporting papers ____; Answering Affidavits and supporting papers 4-5; 6-7; Replying Affidavits and supporting papers 8-9; Other 10-11 (demand); (~~and after hearing counsel in support and opposed to the motion~~) it is,

ORDERED that the petition (#001) served and filed in this special proceeding commenced pursuant to RPAPL § 711 to recover possession of commercial real property is adjourned to **December 17, 2010**, at 10:30 a.m., in Part 33, at the courthouse located at 1 Court Street - Annex, Riverhead, New York, for the hearing thereon scheduled below; and it is further

ORDERED that a hearing shall be held on **December 17, 1010**, at which the petitioner shall be afforded the opportunity to adduce evidence in support of its claims to recover possession of the commercial property at issue and the respondent shall be afforded the opportunity to adduce evidence in rebuttal and in support of its THIRD affirmative defense set forth in its answer; and it is further

ORDERED that the FIRST, SECOND, FOURTH, FIFTH, SIXTH, SEVENTH and EIGHTH affirmative defenses set forth in the respondent's answer are, pursuant to CPLR 409(b) and CPLR 3212(g), dismissed.

This special proceeding is the latest in a series of special proceedings and actions commenced by and against the parties hereto that arise out of the respondent's possession of two separate commercial properties under separate leases. At issue in this proceeding is a parcel of vacant land known as 124 Hazelwood Avenue, Westhampton Beach, New York which is used by the respondent to aid its cement making business, which is housed across the street on a separate lot. The vacant parcel was leased by Josephine Carnevale to the respondent pursuant to the terms of written lease dated November 1, 2002, which expired, by its terms

on November 2, 2007 [1]. The petitioner is the successor, title holder-in-interest to Ms. Carnevale under a deed dated August 1, 2003.

The petitioner claims that prior to the respondent's occupation of the subject premises and for the first four years of its possession under the terms of the lease, the property was used for the parking of trucks, equipment storage and dry material storage. This use is alleged to have been expanded by the respondent's use of the premises as a repository for the dumping of wet debris, the storage of concrete forms and the washing of large concrete trucks.

The petitioner first demanded cessation of these activities in November of 2006. These demands allegedly remained unanswered except for the purported digging of a trench to drain the accumulation of water that began puddling, together with concrete dust and debris, which accumulated on the premises. The trench was allegedly aimed at directing the water, waste and concrete dust to the southeast corner of the property so as to avoid spillover onto the public streets and ways. The petitioner contends that the respondent's expanded use of the premises and the alteration of its physical characteristics by the digging of the trench constitute violations of the lease which remain unabated to date.

The petitioner further contends that in March of 2008, the Village of Westhampton issued an order directing the respondent to remedy zoning violations, including use of the subject premises for the manufacture of cement retaining wall blocks and for the washing of trucks. In December of 2009, a second Order to Remedy Violations issued from the Village. Finally, the petitioner contends that in 2009, the respondent again altered the physical characteristics by removing certain portions of the perimeter wall that existed on the southeast corner of the subject premises.

Pursuant to paragraph 19(a) of the lease, the petitioner, by its "Agent and Vice President", issued a notice of default dated July 23, 2010 which contained a five day notice to cure the following defaults under the terms of the lease: 1) improper use of the premises [truck washing; trenching, debris and material storage]; 2) failing to comply with all laws and rules of governmental agencies; and 3) failure to keep the premises clean and neat. The petitioner alleges that the respondent failed to cure these defaults prior to the expiration of the five day cure period on July 31, 2010. The petitioner thus issued a Notice of Termination of Lease dated August 2, 2010 advising that the lease would terminate on August 6, 2010. Since the respondent failed to vacate the premises and continues to holdover in its occupancy thereof, the petitioner demands that it be awarded immediate possession of the subject premises and that a warrant issue for the removal of the respondent and all those claiming under it.

The respondent appeared herein by answer and therein raised several affirmative defenses. The respondent also served a separate demand for a hearing on the issues raised by the pleadings. The petitioner objects to the scheduling of a hearing without determination of the necessity therefor due to the existence of issues of fact. The court finds that the answer of the respondent, including the allegations of fact which are set forth in the THIRD affirmative defense, raise material issues of fact which should be determined after a hearing. For the reasons stated below, however, the court further finds that the respondent's FIRST SECOND, FOURTH, FIFTH, SIXTH, SEVENTH, and EIGHTH affirmative defenses are, as a matter of law, without merit and each are thus dismissed.

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[1] In a separate declaratory action pending before this court, the respondent claims, among other things, that this lease was renewed.

By its FIRST affirmative defense, the respondent claims that the petitioner's "Notice of Default and Notice of Lease Termination are defective" in that they were not accompanied by proof of the signer's authority to bind the landlord. This defense is without is merit. Although the November 1, 2002 lease was signed by Josephine Carnevale, then the owner of the subject premises, she conveyed the premises to the petitioner by deed dated August 1, 2003. As such, it succeeded to all of the rights, title and interests of the original landlord under the terms of the lease. Moreover, it is not disputed that the respondent knew the agent who issued the subject notices as it was advised in writing of the agent's identity and authority some nine months prior to the issuance of the subject notices. These factors, coupled with the absence of any provision in the lease requiring that notices issued by the landlord or a specified agent thereof, renders the respondent's FIRST affirmative defense unmeritorious.

The SECOND affirmative defense is also lacking in merit. Therein, the respondent asserts the petitioner is without capacity or standing to bring this proceeding because it is not the landlord on the lease and no assignment of the lease has been presented. However, the plaintiff's right to prosecute the claims interposed herein is derived from its status as a successor-in-interest to the title of the original landlord. Pursuant to RPL § 223, the purchaser succeeding to all title and right of the original landlord becomes the landlord by operation of law, with all the rights and remedies of the original landlord. In addition, the subject lease provides in paragraph 27, entitled "Successors" that the lease is binding on all parties who lawfully succeed to the rights or take the place of the original parties to the lease. Under these circumstances, the court finds no merit in the respondent's SECOND affirmative defense.

Also lacking in merit are the FOURTH, FIFTH, SIXTH, SEVENTH and EIGHTH affirmative defenses. The equitable defense of laches is no bar to the plaintiff's maintenance of its demands for recovery of possession of the subject premises since such demands are predicated upon the Notices of Default and Cure and the Notice of Termination of Lease, all of which issued in July and August of this year. The respondent's waiver defense lacks merit due to the existence of the no waiver clause contained in the lease (*see* ***Bethpage Theatre Co. Inc. v Shekel***, 133 AD2d 62, 518 NYS2d 408 [2d Dept 1987]).

Equally unavailing is the asserted defense of "election of remedies". The election of remedies doctrine precludes inconsistent, alternative or mutually exclusive remedies not consistent and/or cumulative remedies (*see* ***Flickinger v Glass***, 222 NY 404 [1918]). Where a demand for a remedy is based upon a claim that is separate and distinct from another claim, there is no election of remedies (*see* ***Corvetti v Town of Lake Pleasant***, 227 AD2d 821, 642 NYS2d 420 [3d Dept 1996]). While it is not disputed that the petitioner previously commenced three proceedings to recover possession of the subject premises in the local justice court in 2007, those proceedings were premised upon claims that the lease was no longer in existence.

Here, it is alleged that the lease terminated in August of 2010 pursuant to the petitioner's termination notice which issued after the respondent failed to cure the defaults identified in the Notice of Defaults and Cure, all of which warrant the respondent's eviction from the premises. Neither the petitioner's demand for preliminary injunctive relief nor its counterclaim for general damages purportedly incurred by reason of long standing lease violations, which were asserted in response to the complaint served by the respondent in the prior commenced declaratory action pending before this court between the parties, preclude the petitioner's maintenance of this proceeding under the election of the remedies doctrine. A remedy which is precluded by jurisdictional limitations imposed upon the forum court or other statutory limitations imposed upon the claim cannot be lost under the election of remedies doctrine. Only money damages associated with non-payment of rent or those attributable to a holdover's use and occupancy are recoverable in RPAPL § 711 proceedings (*see* RPAPL § 741[5]). The petitioner's demands for general damages and preliminary

injunctive relief restraining the continuing harm to the premises by reason of the respondent's purported misuse thereof constitute separate and distinct causes of action from that asserted herein and are not the proper subject of a summary holdover proceeding.

The court also rejects the respondent's SEVENTH affirmative defense based on principles of res judicata and/or collateral estoppel. These defenses arise out of the three summary proceedings which the petitioner commenced in 2007 and in 2008 in the local justice court. By issuance of a single order dated January 4, 2008, (Kooperstein, J), the first proceeding was dismissed by reason of an improper return date and the second was dismissed by virtue of the pendency of the first. The third proceeding was dismissed by order dated October 8, 2008 (Kooperstein, J), on the grounds that the respondent's declaratory judgment action, which was then pending before this court, was a prior action pending within the contemplation of CPLR 3211(a)(4). Its is thus apparent that all three proceedings were dismissed without any adjudication of the merits and without any express direction that the dismissals were with prejudice

The doctrine of res judicata, or claim preclusion, bars future litigation between the same parties on the same cause of action where the previous action was concluded by an adjudication on the merits and the claims asserted in the subsequent action were or could have been raised in the prior action (*see* ***Parker v Blauvelt***, 93 NY2d 343, 690 NYS2d 478 [1999]). The doctrine is inapplicable here because the determinations dismissing each of the three prior summary proceedings were not adjudications on the merits but, instead, were dismissals predicated upon perceived "jurisdictional" defects (*see* ***Van Hof v Town of Warwick,*** 249 AD2d 382,671 NYS2d 144 [2d Dept 1998]; ***Kokel Etsos v Semon,*** 176 AD2d 786, 575 NYS2d 116 [2d Dept 1991]; ***Searles v Main Tavern, Inc.***, 28 AD2d 1136, 284 NYS2d 652 [2d Dept 1967]). Moreover, the claims interposed here do not involve the same transactions at issue in the prior proceedings. While there is some overlap in this proceeding and the prior proceedings with respect to the petitioner's allegations of long standing violations of both the terms of the lease and local zoning restrictions, the gravamen of the petitioner's demands for relief here are its claims of entitlement to possession due to the respondent's failure to cure the defaults after notice thereof and to vacate upon the termination of the lease on the date specified in the petitioner's August 2, 2010 Notice of Lease Termination. The court thus finds that the doctrine of res judicata does not preclude the petitioner's maintenance of the claims interposed in this proceeding.

Nor does the doctrine of collateral estoppel have any preclusive effect on the petitioner's claims. That doctrine precludes only re-litigation of those issues which were actually determined in the prior proceeding (***see Pellegrino v Ofganoudakis***, 282 AD2d 728, 724 NYS2d 339 [2d Dept 2001]). The Village Justice did not decide the claims interposed here. Although the January 4, 2008 order dismissing the first and second proceedings contained references to the absence of the petitioner's name as landlord on the lease and non-production of an assignment, such references constitute pure dicta which cannot serve as a basis for application of the doctrine of collateral estoppel (*see* ***Pollicino v Roemer and Feathstonehaugh, PC***, 277 AD2d 666, 716 NYS2d 416 [3d Dept 2000]; ***Allstate Ins. Co. v Edery***, 225 AD2d 571, 639 NYS2d 444 [2d Dept 1996]).

Lastly, the court finds no basis for dismissal of this action due to the pendency of the declaratory judgment action commenced by the respondent against the petitioner herein. Dismissal of a subsequent action is contemplated, but not mandated by CPLR 3211(a)(4), where there is another action pending for the same cause of action. If, however, it appears that the relief sought is different because it is premised upon new and/or different acts which give rise to new and different demands for relief, the two actions may be maintained (*see* ***City Line Auto Mall, Inc. v Citicorp Leasing, Inc.***, 45 AD3d 717, 847 NYS2d 102 [2d

Dept 2007]). In the declaratory judgment action, the respondent seeks a determination that the lease was renewed. Those claims and the counterclaims interposed therein by the petitioner are entirely different from those asserted in this summary proceeding. The respondent's demands for dismissal of this action pursuant to CPLR 3211(a)(4) are thus rejected an unmeritorious.

In view of the foregoing, the court shall hear proof in support of its claims to recover possession of the commercial property at issue and hear the respondent in rebuttal and in support of its THIRD affirmative defense set forth in its answer at the hearing scheduled herein for **December 17, 2010**, at 10:30 a.m., in Part 33, at the courthouse located at 1 Court Street - Annex, Riverhead, New York. Counsel are directed to then appear ready for the hearing as contemplated by this order.

DATED: 11/8/10

THOMAS F. WHELAN, J.S.C.