

**985 Merrick Realty, LLC v Matt's Station, Inc.**

2011 NY Slip Op 30345(U)

February 1, 2011

Sup Ct, Nassau County

Docket Number: 014907-09

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  
**985 MERRICK REALTY, LLC,**

**Plaintiff,**

**-against-**

**TRIAL/IAS PART: 20  
NASSAU COUNTY**

**Index No: 014907-09  
Motion Seq. No: 2  
Submission Date: 12/20/10**

**MATT'S STATION, INC. and ADNAN KIRISCIUGLU,**

**Defendants.**

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**The following papers have been read on this motion:**

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Affirmation in Support.....x<sup>1</sup>**

This matter is before the Court for decision on the motion filed by Plaintiff on December 8, 2010 and submitted on December 20, 2010. For the reasons set forth below, the Court denies Plaintiff's motion.

**BACKGROUND**

**A. Relief Sought**

Plaintiff 985 Merrick Realty, LLC ("Plaintiff") moves for an Order, pursuant to CPLR § 3212(e), granting summary judgment dismissing the counterclaims ("Counterclaims") of Defendants Matt's Station, Inc. ("Matt's") and Adnan Kiriscioglu ("Adnan") (collectively "Defendants") as contained within Defendants' Amended Verified Answer with Counterclaims dated October 20, 2010.

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<sup>1</sup> Counsel's cover letter and affidavit of service refer to this submission as a "Reply Affirmation," but it is an Affirmation in Opposition.

Defendants oppose Plaintiff's motion.

B. The Parties' History

The Verified Complaint (Ex. A to Rao Aff. in Supp.) alleges as follows:

On or about April 1, 2002, Defendant Matt's, as Lessee or Tenant, and Defendant Adnan, as Guarantor, entered into a Master Lease Agreement ("Lease Agreement") with Milia Hazin ("Hazin"), as Lessor or Landlord for the lease of premises ("Premises") located at 985 Merrick Road, Baldwin, New York. Hazin subsequently conveyed the Premises to Plaintiff and assigned his rights in the Premises to Plaintiff.

Matt's allegedly breached the terms of the Lease Agreement by failing to pay rent and failing to obtain fire and rental value insurance naming Plaintiff as additional insured. In addition, Matt's breached the terms of the Lease Agreement by failing to remit to Plaintiff insurance proceeds ("Proceeds") that Matt's received as compensation for a fire ("Fire") occurring at the Premises on July 10, 2007.

The Complaint contains five (5) causes of action: 1) against Matt's, for breach of the Lease Agreement, for which Plaintiff seeks \$158,683.70 in rental payments and \$106,000 in Proceeds, 2) against Matt's, for breach of the Lease Agreement, for which Plaintiff seeks damages of \$180,000, and such additional sums found to be due for Fire damage sustained to the Premises, 3) against Matt's, on the theory of unjust enrichment, for which Plaintiff seeks damages of \$106,000, 4) against Adnan, for breach of the Lease Agreement by his failure to make payments due pursuant to the Guaranty contained within the Lease Agreement, for which Plaintiff seeks \$158,683.70 in damages, and 5) against Adnan, on the theory of unjust enrichment, for which Plaintiff seeks damages of \$106,000.

Defendants assert two (2) counterclaims (*See* Ex. D to Rao Aff. in Supp.). In the first Counterclaim, Defendants allege that the Lease Agreement, as modified, required Plaintiff to complete a "GSS application" before the Town of Hempstead ("Town"). Plaintiff allegedly failed to complete this application in a timely manner and, on June 8, 2010, the Town Board denied Plaintiff's application for a GSS permit. As a result of that denial, the Premises cannot legally be operated as a gasoline service station and repair shop ("Gas Station"). By virtue of Plaintiff's alleged breach of the Lease Agreement, Matt's has been constructively evicted from

the Premises.

In the second Counterclaim, Defendants allege that Plaintiff breached its obligation, pursuant to the Lease Agreement as modified, to obtain a Certificate of Occupancy for the continued operation of the Premises as a Gas Station. As a result of that alleged breach, Matt's has been constructively evicted from the Premises. Defendants seek damages of no less than \$125,000 with respect to the two Counterclaims.

C. The Parties' Positions

Plaintiff submits that the Counterclaims are barred by language in the Lease Agreement (Ex. C to Rao Aff. in Supp.). Specifically, Paragraph 24 of the Lease Agreement, titled "Waiver of Counterclaim" provides as follows:

The Lessee, for itself, any subtenant of the premises, or any part thereof, its legal representatives, successors in interest by operation of law or otherwise, and their assigns agrees to withhold any claim or counterclaim which they may have in any action or proceeding by the Lessor, its successors or assigns, to recover the rent due or any holdover proceeding, by reason of a default hereunder or the holding over by the occupants in possession, under the terms of this indenture of lease, and it is agreed that any such counterclaim shall be prosecuted in an independent and separate action, and that the bringing of such action shall not delay or defeat any action by the Lessor, its successors or assigns, as hereinbefore referred to in this article.

Plaintiff also cites Paragraph 66 of the Lease Agreement, titled "Good Guy Guaranty," which includes the following language:

This guaranty [by Adnan] shall not be affected by any accommodations granted to the Lessee, nor any delays in the Lessor's enforcement of its rights, nor by any modifications, extensions or renewals of the terms of the Lease and its provisions; it being understood and agreed that this guaranty shall be unconditional and irrevocable and shall be deemed a primary obligation of the Guarantor.

Plaintiff submits that the provision in the Lease Agreement precluding Defendants from imposing counterclaims ("Waiver Provision") in this nonpayment proceeding is enforceable, and requires Defendants to asset their cause of action in a separate plenary action. Plaintiff contends, further, that the exception to this rule in the context of counterclaims for breach of the warranty of habitability has not been extended to commercial property.

Defendants oppose Plaintiff's motion, arguing that the Waiver Provision applies only

when the complaint is limited to the recovery of rent. The Complaint at issue, however, includes causes of action against the corporate tenant for damages unrelated to rent. Moreover, even assuming that the Complaint were deemed solely an action for rent, the Counterclaims are inextricably intertwined with the claim for rent and, therefore, the Waiver is unenforceable. Finally, Defendants argue that the Waiver Provision is inapplicable to Adnan as Guarantor.

Defendants also ask that the Court direct Plaintiff to respond to Defendants' discovery demands related to the Counterclaims, and to extend the trial date to allow for additional discovery. Defendants affirm that they advised Plaintiff no later than August of 2010 that Defendants intended to interpose counterclaims.

### RULING OF THE COURT

#### A. Summary Judgment Standards

Pursuant to CPLR § 3212(e), summary judgment may be granted as to one or more causes of action, or part thereof, in favor of any one or more parties, to the extent warranted, on such terms as may be just. The court may also direct 1) that the cause of action as to which summary judgment is granted shall be severed from any remaining cause of action; or 2) that the entry of the summary judgment shall be held in abeyance pending the determination of any remaining cause of action.

To grant summary judgment, the court must find that there are no material, triable issues of fact, that the movant has established his cause of action or defense sufficiently to warrant the court, as a matter of law, directing judgment in his favor, and that the proof tendered is in admissible form. *Menekou v. Crean*, 222 A.D.2d 418, 419-420 (2d Dept 1995). If the movant tenders sufficient admissible evidence to show that there are no material issues of fact, the burden then shifts to the opponent to produce admissible proof establishing a material issue of fact. *Id.* at 420. Summary judgment is a drastic remedy that should not be granted where there is any doubt regarding the existence of a triable issue of fact. *Id.*

#### B. Assertion of Counterclaims

The determination of most counterclaims in a summary proceeding is relegated to a plenary action, preserving the summary proceeding as a vehicle for the efficient resolution of landlord-tenant disputes. *Ring v. Arts International, Inc.*, 7 Misc. 3d 869, 880 (Civ. Ct., N.Y. Cty. 2004), citing, *inter alia*, *Titleserv, Inc. v. Zenobio*, 210 A.D.2d 310, 311 (2d Dept. 1994).

Therefore, lease conditions precluding tenants from interposing counterclaims in summary proceedings are enforceable. *Id.*, citing, *inter alia*, *LRHC Flatbush, N.Y. v. Aftor T. Realty*, 282 A.D.2d 577, 578 (2d Dept. 2001). The only exception is a counterclaim so “inextricably intertwined” with the initial claims that joint resolution of the claims will expedite disposition of the entire controversy, avoid multiplicity of other lawsuits between the parties to accomplish the same result, do speedy justice for all and eliminate greater delay and expense. *Id.*, quoting *Haskell v. Surita*, 109 Misc. 2d 409, 414 (Civ. Ct., N.Y. Cty. 1981). The principal example of a counterclaim within this exception in a commercial nonpayment proceeding is a counterclaim of actual or constructive eviction, to offset the obligation to pay rent, because the claim is inextricably entwined with the nonpayment of rent. *Id.*, citing *Johnson v. Cabrera*, 246 A.D.2d 578, 579 (2d Dept. 1998).

C. Application of these Principles to the Instant Action

The Court denies Plaintiff’s motion in light of its conclusion that 1) the Waiver Provision does not bar the instant Counterclaims because the Complaint is not limited to causes of action for the recovery of rent; and 2) the Counterclaims are inextricably intertwined with some of the allegations in the Complaint.

All matters not decided herein are hereby denied.

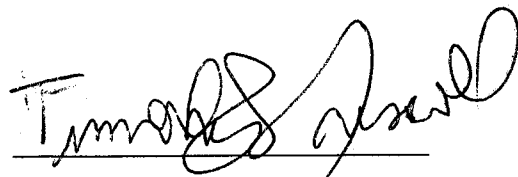
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court on February 7, 2011 at 9:30 a.m., at which time the Court will set a discovery schedule with respect to the Counterclaims, schedule the matter for trial and direct the filing of a Note of Issue.

ENTER

DATED: Mineola, NY

February 1, 2011



HON. TIMOTHY S. DRISCOLL

**ENTERED**

FEB 04 2011

**NASSAU COUNTY  
COUNTY CLERK'S OFFICE**