

**250 W. 41st St. Realty Corp. v Stanford Realty LLC**

2011 NY Slip Op 31880(U)

July 7, 2011

Supreme Court, New York County

Docket Number: 603660/2007

Judge: Saliann Scarpulla

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SCANNED ON 7/11/2011

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

PRESENT: Saliann Scarpulla  
Justice

PART 19

Index Number : 603660/2007  
250 WEST 41ST STREET REALTY  
VS.  
STANFORD REALTY LLC  
SEQUENCE NUMBER : 005  
SUMMARY JUDGMENT

INDEX NO. \_\_\_\_\_  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. \_\_\_\_\_  
MOTION CAL. NO. \_\_\_\_\_

this motion to/for \_\_\_\_\_

**FILED** PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

Answering Affidavits — Exhibits \_\_\_\_\_

JUL 11 2011

Replying Affidavits \_\_\_\_\_

NEW YORK  
COUNTY CLERK'S OFFICE

Cross-Motion:  Yes  No

Upon the foregoing papers, It is ordered that this motion

is determined in accordance with the accompanying decision/order.

Dated: 7/8/11

Saliann Scarpulla  
SALIANN SCARPULLA J.S.C.

Check one:  FINAL DISPOSITION

NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST

REFERENCE

SUBMIT ORDER/ JUDG.

SETTLE ORDER/ JUDG.

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 19

-----X  
250 WEST 41<sup>ST</sup> STREET REALTY CORP.,

Plaintiff,

Index No.: 603660/07  
Submission Date: 4/20/2011

- against -

**DECISION AND ORDER**

STANFORD REALTY LLC,

Defendant.

-----X

For Plaintiff:  
Hankin & Mazel, PLLC  
7 Penn Plaza, Suite 904  
New York, NY 10001

For Defendant:  
Law Office of Leonard A. Sclafani  
2 Wall Street, 5<sup>th</sup> Floor  
New York, NY 10005

**FILED**

Papers considered in review of this motion for summary judgment:

- Notice of Motion ..... 1
- Aff in Opp ..... 2
- Reply ..... 3

**JUL 11 2011**

NEW YORK  
COUNTY CLERK'S OFFICE

**HON. SALIANN SCARPULLA, J.:**

In this action to recover damages for, *inter alia*, breach of contract, defendant Stanford Realty LLC ("Stanford") moves for (1) summary judgment dismissing the complaint; (2) summary judgment on its first, seventh, and eighth counterclaims; (3) partial summary judgment on the issue of liability as to the second, third, fourth, fifth, and sixth counterclaims; and (4) an order setting the matter of damages on the counterclaims down for a trial.

This action arises out of a written Real Estate Sales Contract ("Contract") and a written First Amendment to Real Estate Contract ("First Amendment to Contract") between the parties for the sale of seven commercial condominium units in the building

known as the Stanford Condominium, located at 43-51 East 24<sup>th</sup> Street, New York, New York (the "Property").

On December 17, 2003, Stanford, as Seller, and Leonard Weiss and Israel Suss, the president and secretary of plaintiff, 250 West 41<sup>st</sup> Street Realty Corp. ("250 West"), respectively, as Purchaser, executed the Contract for the sale of the seven condominium units, units 1001 to 1008, in the Property. The seven units were occupied, pursuant to tenant leases, when the parties entered into the Contract.

Thus, article 4.1(h) of the Contract states, in part:

Each Tenant Lease is in full force and effect, the landlord under each Tenant Lease has paid, performed and observed and no tenant has any right of set off, credit or counter claim and no such claims have been asserted, to the best of Seller's knowledge, the tenant under each Tenant Lease has paid, performed and observed all of (and is not in default in the payment, performance or observance of any of) the terms, covenants and conditions on the tenant's part to be paid, performed and observed thereunder; all brokerage, leasing and other commission and all other compensation and fees payable (or which may hereafter become payable) in connection with any Tenant Lease have been fully paid or shall be fully paid by the Seller prior to the Closing Date, or if payable after Closing shall be paid by the Seller when due. Seller shall indemnify, defend and hold Purchaser harmless from any claim against Purchaser and/or the Units for any such commissions and fees.

However, Radio Unica of New York, Inc. ("Radio Unica"), the tenant in units 1003 and 1008, filed for bankruptcy, vacated the two units, and relinquished possession of the units to Seller. As a result, Purchaser terminated the Contract with notice to Seller.

Thereafter, the parties reinstated the Contract and modified its terms in the First Amendment to Contract, dated February 9, 2004. The modified agreement permitted Seller, as tenant, to lease back from Purchaser, as landlord, units 1003 and 1008 under essentially the same terms as the original written lease agreements that Seller had made with Radio Unica. The First Amendment to Contract did, however, alter certain provisions of the original lease agreements, including, *inter alia*, (1) setting the term of the new leases to expire on the last day of the calendar month that is three years from the closing date of the Contract; (2) setting the rent under the new leases at \$200,000 per year; (3) permitting Seller to sublet all or any portion of the units; and (4) permitting Purchaser to recapture the two units leased to Seller. Thus, clause 4 of the First Amendment to Contract states, in part:

(c) Tenant shall have the right to sublet all or any portion of Unit 1003 or Unit 1008, provided that the term of any such sublease shall not extend beyond the term of the Leases. No such sublease shall relieve Tenant of its obligations under the leases ... .

(d) The aggregate base rent payable in respect of the Leases shall be \$200,000 per annum, payable on the first day of each calendar month in the amount of \$16,667.67 ... . In no event shall Landlord ever receive less than \$200,000 base rent. In no event shall Landlord be required to pay any brokerage commission in respect of any of the subleases of the Units, such obligation being solely the Tenant's obligation, which obligation shall survive the termination or earlier expiration of the Leases ... .

(f) Landlord shall have the right at any time during the term of the Leases to require Tenant to assign to Landlord its interest in and to the Leases, but no such assignment shall effectuate a

merger of the estates of Landlord and Tenant. Upon such assignment, Tenant shall be relieved of its obligations thereafter accruing under the Leases

In addition, pursuant to article 4.1(h) of the Contract, Seller remained responsible for all brokerage, leasing, and other commissions and all other compensation with any Tenant Lease.

Also on February 9, 2004, Purchaser assigned its interest in the Contract to 250 West. Stanford reportedly consented to the assignment, and the parties agreed that Stanford would attempt to sublet the units in order to generate more than the base rent prescribed under the First Amendment to Contract.

The transaction closed on March 8, 2004. Thus, pursuant to the First Amendment to Contract, the lease back agreements were set to expire on March 31, 2007.

At the closing, the parties entered into a real estate management agreement, pursuant to which, Stanford, through its managing agent AIB Management, agreed, *inter alia*, to receive all monies and pay all obligations of 250 West in connection with its ownership of the seven condominium units. A subsequent dispute between the parties resulted in 250 West terminating the management agreement and requesting an accounting pertaining to Stanford's property management services.

During the first two years of the lease back arrangement, Stanford made the required monthly rental payments, but was unable to enter into sublease agreements for the units. The circumstances surrounding subsequent efforts by 250 West to find new

tenants, as well as Stanford's rental-obligations, are sharply disputed, giving rise to this action.

250 West asserts that on May 1, 2006, the parties agreed that 250 West would undertake finding tenants for the vacant units with the understanding that Stanford would remain responsible for all commissions, costs, and fees incurred by 250 West in securing new tenants. As such, 250 West entered into a lease agreement to rent unit 1003 to Astrology Boutique, Inc. ("Astrology") for a term of five years, beginning May 15, 2006, and subject to a three-month rent abatement. 250 West also entered into a lease agreement to rent unit 1008 to Jim Mazzeo Agency Corp. ("Mazzeo") for a term of 10 years, beginning on September 1, 2006, subject to a four-month rent abatement. Stanford denies consenting to, or having knowledge of, 250 West's efforts to find new tenants for the vacant units. Stanford also asserts that 250 West did not disclose that it had entered into the new tenant leases until after the tenants had moved into the units.

In any event, 250 West asserts that although the parties' agreements required Stanford to insure base rental payments of \$200,000 per year until the expiration of the lease back arrangement, 250 West received only \$141,040 in rental payments, \$61,643 from Stanford and \$79,397 from the new tenants for the period May 2006 to March 2007. 250 West notes that the rental payments due for that period total \$183,332.37. Thus, 250 West claims that Stanford owes an additional \$42,292 in rental payments. 250 West further asserts that under the parties' agreements, Stanford remains responsible for \$93,389.00 in brokerage and other fees incurred in entering into the new tenant leases.

On August 28, 2007, 250 West sent Stanford a statement of account for rental payments, brokerage commissions, and other fees reportedly owed by Stanford under the Contract and First Amendment to Contract.

Stanford disputed the statement of account and submitted a counter-statement of account, which it claims accurately reflects that no payments were due under the Contract and First Amendment to Contract. Stanford failed to pay the amount requested in 250 West's statement of account, and this action ensued.

In its complaint, 250 West alleges that Stanford breached the Contract and First Amendment to Contract by failing to make rental payments totaling \$42,292 (first cause of action), and failing to pay \$93,389 in brokerage commissions (second cause of action). 250 West also seeks an accounting pertaining to Stanford's property management services (third cause of action).

Stanford answered, generally denying the allegations in the Complaint, and asserting numerous defenses and counterclaims. Specifically, Stanford claimed that 250 West breached the terms of the parties' lease back arrangement in the First Amendment to Contract by entering into new tenant leases with Astrology (first counterclaim) and Mazzeo (third counterclaim) without its knowledge or permission; that 250 West's actions in entering into the new tenant leases constitute trespass (second and fourth counterclaims) and wrongful eviction (fifth and sixth counterclaims); and that 250 West is liable to Stanford in the amount of \$61,643.37, plus interest thereon from May 2006, for rental payments made by Stanford after 250 West entered into the new tenant leases

(seventh and eighth counterclaims). Stanford also claims that it was under no obligation to sublease any portion of units 1003 and 1008 (ninth counterclaim), and that 250 West's claims are barred by the Statute of Frauds (tenth counterclaim). Stanford also advances additional defenses based on a setoff and unclean hands.

Stanford now seeks summary judgment dismissing the Complaint; summary judgment on the first, seventh, and eighth counterclaims; partial summary judgment on the issue of liability as to the second, third, fourth, fifth, and sixth counterclaims; and an order setting the matter of damages on the counterclaims down for trial.

### **Discussion**

It is well settled that the proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. *See Winegrad v New York Univ. Med. Ctr.*, 64 N.Y.2d 851, 853 (1985); *Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980). Once this showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish the existence of material issues of fact which require a trial of the action. Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment. *See Zuckerman v City of New York*, 49 N.Y.2d 557, 562 (1980).

As stated, the Complaint alleges causes of action for breach of the parties' Contract and First Amendment to Contract, and for an accounting pertaining to Stanford's

property management services. 250 West essentially claims that Stanford failed to pay the rents, brokerage commissions, and fees due under the agreements between the parties. 250 West also alleges that Stanford failed to account for all sums collected by its management agent.

In order to prevail on a breach of contract claim, a plaintiff must establish each of the following four elements: (1) existence of a valid contract; (2) plaintiff's performance of the contract; (3) defendant's failure to perform; and (4) damages. *See Flomenbaum v New York Univ.*, 71 A.D.3d 80 (1<sup>st</sup> Dept. 2009) *affd* 14 N.Y.3d 901 (2010).

Here, the parties do not dispute the validity of the agreements between them. Furthermore, the First Amendment to Contract expressly set forth annual rental payments of \$200,000, payable on the first day of each calendar month in the amount of \$16,666.67, until March 31, 2007. However, the evidentiary proof submitted herein reveals a sharp dispute as to the performance of the parties. Specifically, 250 West's statement of account indicates that for the period May 2006 to March 2007, 250 West received only \$141,040.86 of the amount required under the agreement, which was \$183,333.37, leaving a balance due of \$42,292.51.

In seeking summary judgment, Stanford argues that no rental payments or fees are outstanding and that, in fact, it mistakenly made rental payments totaling \$61,643.37, for which it seeks reimbursement. To support its position regarding rental payments, Stanford submits a counter-statement of account, prepared by its accountant, Yasmin Ali, essentially reflecting that no rental payments were outstanding. It is important to note

that attempts to compel Ms. Ali to appear for an examination before trial regarding Stanford's statement of account have proven futile.

Stanford also contends that the actions of 250 West in entering into the new tenant leases without its consent or knowledge constitute breach of the agreements between the parties and wrongful eviction, thereby relieving Stanford from liability for further payments under the parties' agreements.

In opposition, 250 West asserts that Stanford specifically requested assistance from 250 West to find new tenants for the two units. 250 West relies, in part, on excerpts from the EBT of its principal, Leonard Weiss, who testified that Stanford, through its managing member Arun Bhatia, sought help from 250 West. 250 West also relies on the EBT testimony of Arun Bhatia that he was aware of and consented to 250 West seeking new tenants for the two units. 250 West further relies on clause 4(f) of the First Amendment to Contract, which authorizes 250 West to require Stanford to assign its interest in the leases.

On review of the submissions, the Court concludes that the conflicting evidence presented as to whether 250 West entered into the new tenant leases without Stanford's consent, as well as the express language of the parties' agreement, create triable issues of fact which preclude summary judgment dismissing the first cause of action.

Article 4(h) of the Contract expressly required Stanford to pay all brokerage, leasing and other commission and all other compensation and fees in connection with the seven leases sold to 250 West. In addition, clause 4(d) of the First Amendment to

Contract required Stanford to pay brokerage commissions in connection with the units that Stanford leased back from 250 West. Thus, Stanford's conclusory assertion that the agreements between the parties do not require it to pay brokerage commissions and fees is simply insufficient to establish entitlement to summary judgment dismissing the second cause of action.

The third cause of action for an accounting states that Stanford, through its managing agent, contracted to perform property management services on behalf of 250 West and was required to account to 250 West for the monies it collected and/or disbursed on 250 West's behalf. Stanford offers no evidence to meet its burden of establishing entitlement to summary judgment dismissing this claim. Thus, the request for summary judgment dismissing the claim for an accounting must be denied. Therefore, the branch of the motion that seeks summary judgment dismissing the Complaint is denied.

Stanford also seeks summary judgment on its counterclaims for breach of the parties' lease back agreement with respect to the Astrology lease, and recovery of \$61,643.37, plus interest thereon from May 2006, for rental payments mistakenly made by Stanford after 250 West entered into the new tenant lease.

As stated, triable issues of fact exist as to whether 250 West entered into a new tenant lease with Astrology without Stanford's consent or knowledge. Thus, Stanford does not establish entitlement to summary judgment on its first counterclaim for breach of contract.

Furthermore, Stanford's efforts to establish entitlement to summary judgment on its claim for recovery of certain rental payments, is insufficient given the competing statements of account and the failure of Stanford's accountant to appear for examination.

Stanford also seeks summary judgment on the issue of liability as to the second through sixth counterclaims, as well as an order setting the issue of damages down for a trial. Stanford bases its allegations in the second through sixth counterclaims on the assertion that 250 West entered into the new tenant leases without its consent or knowledge, and that it did not voluntarily grant possession and occupancy of the units to 250 West or the new tenant. Specifically, the third counterclaim seeks damages for breach of contract based on the alleged actions of 250 West in entering into a new tenant lease with Mazzeo, the second and fourth counterclaims seek damages for trespass, and the fifth and sixth counterclaims seek damages for wrongful eviction.

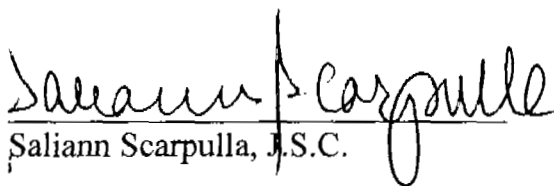
A claim for trespass requires an affirmative act constituting or resulting in an intentional intrusion upon plaintiff's property. *See Congregation B'Nai Jehuda v. Hiye Realty Corp.*, 35 A.D.3d 311 (1<sup>st</sup> Dept. 2006). Real Property Actions and Proceedings law (RPAPL) §853 provides a statutory basis for a wrongful eviction claim, stating that if a person is ejected from real property in a forcible or unlawful manner, such person is entitled to recover damages in an action against the wrongdoer. Here, the existence of triable issues of fact as to whether Stanford consented to and/or knew of 250 West's efforts to lease the two units preclude summary judgment on the second through sixth counterclaims.

In accordance with the foregoing, it is hereby  
ORDERED that defendant Stanford Realty LLC's motion for summary judgment  
is denied.

This constitutes the decision and order of the Court.

Dated: New York, New York  
July 7, 2011

ENTER:

  
Saliann Scarpulla, J.S.C.

**FILED**

JUL 11 2011

NEW YORK  
COUNTY CLERK'S OFFICE