

**Gerald Gardner Wright, P.C. & Assoc. v Champion  
Prop. Mgt., LLC**

2011 NY Slip Op 32291(U)

August 19, 2011

Supreme Court, Nassau County

Docket Number: 4354-08

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**

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**GERALD GARDNER WRIGHT, P.C. &  
ASSOCIATES,**

**Plaintiff,**

**-against-**

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

**Index No: 4354-08  
Motion Seq. No: 7  
Submission Date: 6/23/11**

**CHAMPION PROPERTY MANAGEMENT, LLC and  
2701 ASSOCIATES LLC,**

**Defendants.**

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

- Notice of Motion, Affirmation in Support and Exhibits.....x**
- Memorandum of Law in Support.....x**
- Affirmation in Opposition and Exhibits.....x**
- Reply Affirmation and Exhibits.....x**
- Reply Memorandum of Law.....x**

This matter is before the Court for decision on the motion filed by Defendants Champion Property Management, LLC ("Champion") and 2701 Associates, LLC, as Successor in Interest ("2701 Associates") (collectively "Defendants") on May 20, 2011 and submitted on June 23, 2011. For the reasons set forth below, the Court denies Defendants' motion.

A. Relief Sought

Defendants move for an Order, pursuant to CPLR §§ 3211(a)(1), (5) and (7), dismissing the Amended Complaint (“Complaint”) (Ex. 1 to Ekstein Aff. in Supp.)<sup>1</sup>

Plaintiff Gerald Gardner Wright, P.C. & Associates (“Wright”) opposes Defendants’ motion.

B. The Parties’ History

The Complaint alleges that 2701 Associates is fully liable for all causes of action asserted against Champion, as successors in interest of 50 Clinton Street Associates Management Co. The action arises out of Defendants’ alleged (1) violation of a court order, (2) misrepresentation concerning the amount of space leased pursuant to a lease agreement, and (3) violation of the terms of a lease.

The allegations in the Complaint are substantially similar to those in the Original Complaint. Those allegations were set forth in prior decisions of the Court and, accordingly, will not be set forth at length herein. As noted in those prior decisions, Plaintiff alleges that there have been violations of his lease agreement for the Premises regarding, *inter alia*, parking spaces, repairs and maintenance of the Premises. Plaintiff also alleges that Defendants have failed to comply with the Stipulation that was so-ordered by the Court (Austin, J.) in a prior related action. The Complaint contains four (4) causes of action: 1) fraud, 2) breach of contract regarding the Second Lease Amendment, 3) breach of contract regarding the Stipulation, and 4) actual partial eviction.

In his Affirmation in Support of the instant motion, Barry Ekstein, the manager of Champion, submits that the documentary evidence establishes that Champion never owned the property (“Property”) at issue. At the time of the execution of the Second Amended Lease in 2001, 50 Clinton Street Associates, Inc. (“50 Clinton Associates”) was the landlord and owner of the Property. Subsequently, 50 Clinton Associates transferred the Property to 15<sup>th</sup> Street

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<sup>1</sup> Although the Complaint is titled a “Verified Complaint,” Defendants refer to the Complaint as an “Amended Complaint” because it contains material changes to the allegations contained in an earlier complaint (“Original Complaint”) (Ekstein Aff. in Supp. at n. 1 and Ex.2). Plaintiff disputes that assertion, submitting that the Complaint is, in fact, a verified complaint, as the earlier complaint was asserted only against Champion, and the Court subsequently granted Plaintiff’s motion to join 2701 Associates as a party defendant to the action, and the corresponding amendment of the caption (“Prior Decision”) (Wright Aff. in Opp. at ¶ 6 and Ex. F).

Holdings, LLC (“15<sup>th</sup> Street Holdings”) in March of 2002. In 2003, Plaintiff commenced an action against 15<sup>th</sup> Street Holdings (“Prior Owner Action”). Ekstein submits that the issues raised in the Complaint were before the Court in the Prior Owner Action, which resulted in the Stipulation in 2004.

2701 Associates purchased the Property in February of 2006 and continues to own the Property, as reflected by the deed provided (Ex. 8 to Ekstein Aff. in Supp.). 2701 Associates then retained Champion’s services to manage the Property. Plaintiff continued to pay rent until 2008, as reflected by the checks provided (*id.* at Ex. 9) and, notably, paid rent in March of 2008, the same month that he filed the Original Complaint against Champion.

In early 2008, Plaintiff refused to pay approximately \$12,000 in addition rent. Champion initiated a non-payment proceeding (“Non-Payment Proceeding”) against Plaintiff. On the advice of Champion’s counsel, the Non-Payment Proceeding named Champion, the management company, and not 2701 Associates, the owner, as the plaintiff in that Proceeding. Subsequently, Plaintiff filed the Original Complaint but, notwithstanding his knowledge that 2701 Associates was the true owner of the Property, did not name 2701 Associates as a defendant.

Ekstein disputes Plaintiff’s assertion in the Complaint that Champion is the successor-in-interest to 50 Clinton Associates, calling that allegation “absurd” (Eckstein Aff. in Supp. at ¶ 26) given that 1) Champion never purchased the Property; and 2) neither Defendant ever purchased the Property from 50 Clinton Associates; rather, 50 Clinton Associates sold the Property to 15<sup>th</sup> Street Holdings in 2002.

In opposition, Wright submits that Champion “participated in this action as agent and representative of the Landlord and Owner of the building” (Wright Aff. in Opp. at ¶ 8). In support, Wright provides a copy of the petition (“Petitioner”) in the Non-Payment Proceeding dated February 28, 2008 (Ex. C to Wright Aff. in Opp.). In the caption of the Petition, Champion describes itself as the “Petitioner-Landlord.” Champion requests “final judgment awarding possession of the premises to Petitioner-Landlord, issuance of a warrant to remove Respondent from possession thereof” and judgment for rent in arrears (Petition at ¶ 7).

Wright affirms that, at the proceedings regarding the Non-Payment Proceeding, the owner of Champion or its agent was present, and never advised the Court that Champion was not the owner of the Property. Instead, Defendants, through counsel, participated in numerous

proceedings in Supreme Court in which they led the Court to believe that Champion was the owner of the Property. In support, Wright provides a copy of a printout of the New York State Unified Court System (Ex. D to Wright Aff. in Opp.) reflecting numerous court appearances on the above-captioned matter from March of 2008 through June of 2011, first before the Honorable Leonard B. Austin and later before this Court.

### C. The Parties' Positions

Defendants dispute Plaintiff's assertion that Champion is the "successor in interest" to 50 Clinton Associates and, therefore, is subject to the Stipulation. Defendants argue that 1) Plaintiff has not asserted facts to support such a claim; 2) the documentary evidence establishes that Champion never owned the Property and, therefore, cannot be a successor in interest; 3) the Complaint makes only bare allegations regarding 2701 Associates and, in particular, the cause of action for fraud lacks adequate particularity regarding the alleged misrepresentations and reliance; and 4) assuming *arguendo* the sufficiency of the Complaint, Defendants have defenses to Plaintiff's claims based on the statute of limitations, estoppel and *res judicata*.

Plaintiff opposes Defendants' motion, submitting that Defendants are now taking an inconsistent position by stating that its designation as owner/landlord of the Property in the Non-Payment Proceeding was erroneous, and attributable to its former counsel. Plaintiff argues that Defendants' motion should be denied pursuant to the doctrine of judicial estoppel.

## RULING OF THE COURT

### A. Standards of Dismissal

A complaint may be dismissed based upon documentary evidence pursuant to CPLR § 3211(a)(1) only if the factual allegations contained therein are definitively contradicted by the evidence submitted or a defense is conclusively established thereby. *Yew Prospect, LLC v. Szulman*, 305 A.D.2d 588 (2d Dept. 2003); *Sta-Bright Services, Inc. v. Sutton*, 17 A.D.3d 570 (2d Dept. 2005).

Pursuant to CPLR § 3211(a)(5), a party may move for judgment dismissing one or more causes of action asserted against him on the ground that the cause of action may not be maintained because of arbitration and award, collateral estoppel, discharge in bankruptcy, infancy or other disability of the moving party, payment, release, *res judicata*, statute of limitations, or statute of frauds.

A motion interposed pursuant to CPLR § 3211 (a)(7), which seeks to dismiss a complaint for failure to state a cause of action, must be denied if the factual allegations contained in the complaint constitute a cause of action cognizable at law. *Guggenheimer v. Ginzburg*, 43 N.Y.2d 268 (1977); *511 W. 232<sup>nd</sup> Owners Corp. v. Jennifer Realty Co.*, 98 N.Y.2d 144 (2002). When entertaining such an application, the Court must liberally construe the pleading. In so doing, the Court must accept the facts alleged as true and accord to the Beechwood every favorable inference which may be drawn therefrom. *Leon v. Martinez*, 84 N.Y.2d 83 (1994). On such a motion, however, the Court will not presume as true bare legal conclusions and factual claims which are flatly contradicted by the evidence. *Palazzolo v. Herrick, Feinstein*, 298 A.D.2d 372 (2d Dept. 2002).

#### B. Judicial Estoppel

The doctrine of estoppel against inconsistent positions precludes a party from framing his pleadings in a manner inconsistent with a position taken in a prior judicial proceeding. *Kimco of New York, Inc. v. Devon*, 163 A.D.2d 573, 574 (2d Dept. 1990). It is to be distinguished from collateral estoppel which assumes a full and fair opportunity to litigate the issue in the prior action. *Id.*, citing *Kaufman v. Lilly & Co.*, 65 N.Y.2d 449, 455 (1985). The doctrine rests upon the principle that a litigant should not be permitted to lead a court to find a fact one way and then contend in another judicial proceeding that the same fact should be found otherwise. The policies underlying preclusion of inconsistent positions are general considerations of the orderly administration of justice and regard for the dignity of judicial proceedings. *Id.*, quoting *Environmental Concern v. Larchwood Constr. Corp.*, 101 A.D.2d 591, 593 (2d Dept. 1984). The doctrine will be applied where a party to an action has secured a judgment in his or her favor by adopting a certain position and then has sought to assume a contrary position in another action simply because his interests have changed. *Id.* at 575, quoting *Anonymous v. Anonymous*, 137 A.D.2d 739, 741 (2d Dept. 1988). The doctrine is invoked to estop parties from adopting such contrary positions because the judicial system cannot tolerate this “playing fast and loose with the courts.” *Id.*, citing *Environmental Concern, supra*, at 594, quoting *Scarano v. Central R. R. Co.*, 203 F.2d 510, 513 (3d Cir. 1953).

C. Application of these Principles to the Instant Action

The Court denies Defendants' motion based on the Court's conclusion that, pursuant to the doctrine of judicial estoppel, Defendants are foreclosed from seeking dismissal of the Complaint on the grounds that Champion was never the owner of the Property. The Court reaches that conclusion in light of Champion's prosecution of the Non-Payment Proceeding in a manner that suggested that they were agents or representatives of the owner of the Property, and Defendants' lengthy participation in the instant action in a manner designed to communicate, and which in fact communicated, that Champion was acting on behalf of the owner of the Property.

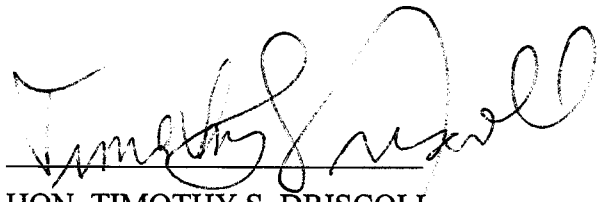
All matters not decided herein are hereby denied.

This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Preliminary Conference on September 15, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY  
August 19, 2011



HON. TIMOTHY S. DRISCOLL  
J.S.C.

**ENTERED**  
AUG 23 2011  
NASSAU COUNTY  
COUNTY CLERK'S OFFICE