

Todd Rotwein, D.P. M., P.C., v Nader Enterprises, LLC
2011 NY Slip Op 32577(U)
September 22, 2011
Supreme Court, Nassau County
Docket Number: 454-08
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

-----X **TRIAL/IAS PART: 20**
TODD ROTWEIN, D.P.M., P.C.,
Plaintiff,
NASSAU COUNTY

-against-

Index No: 454-08
Motion Seq. No: 7
Submission Date: 8/29/11

NADER ENTERPRISES, LLC AND REZA
NABAVINEJAD a/k/a REZA NABAVI,

Defendants.
-----X

Papers Read on this Motion:

Notice of Motion, Affirmation in Support, Affidavit in Support and Exhibits....X
Memorandum of Law.....X
Affirmation in Opposition and Exhibits.....X
Memorandum of Law in Opposition.....X
Reply Affirmation and Exhibits.....X
Reply Memorandum of Law.....X

This matter is before the court on the motion by Plaintiff Todd Rotwein, D.P.M., P.C. ("Rotwein" or "Plaintiff") filed July 8, 2011 and submitted on August 29, 2011. For the reasons set forth below, the Court denies Plaintiff's motion.

BACKGROUND

A. Relief Sought

Plaintiff moves for an Order granting Plaintiff leave to file an amended complaint asserting a cause of action for actual partial eviction.

Defendants oppose Plaintiff's motion.

B. The Parties History

This action has been the subject of prior decisions by the Court, including a decision dated March 3, 2011 ("2011 Decision") in which the Court denied Defendants' motion for summary judgment. The Court incorporates the 2011 Decision herein by reference.

As outlined in the 2011 Decision, this action involves Plaintiff's breach of lease claim against Defendants with respect to property located at 131 Fulton Avenue, Hempstead, New York. Plaintiff filed its Amended Verified Complaint on or about March 7, 2008 which contains allegations regarding Defendants' alleged breach of the parties' lease agreement by, *inter alia*, failing to provide heat and elevator service. The Complaint contains six (6) causes of action: 1) breach of the lease contract against the LLC, 2) constructive eviction against the LLC, 3) breach of the warranty of quiet enjoyment against the LLC, 4) creation of a nuisance against the LLC, 5) fraudulent inducement against Reza based on his alleged misrepresentations that he was using his own money to modernize the Premises and fill its vacant tenancies on which Plaintiff relied to its detriment, and 6) for a permanent injunction against the LLC requiring specific performance under the applicable lease and rider until Plaintiff is able to remove its business from the Premises.

Defendant LLC has asserted counterclaims against Plaintiff, based on its claims that Plaintiff was in default of the Lease in light of his failure to pay the required rent and obtain the required general liability insurance policy. Defendants submit that the Lease terminated on December 31, 2007 and Plaintiff's continued use and occupancy of the Premises is as a holdover tenant. Defendants allege that the LLC has suffered damage as a result of Plaintiff's withholding of the Premises. Defendants seek a judgment on the counterclaim 1) awarding possession of the Premises to the LLC; 2) excluding Plaintiff from possession of the Premises; 3) issuing a warrant removing Plaintiff from possession of the Premises; 4) awarding the LLC rent arrears; 5) dismissing Plaintiff's action; 6) setting off any damages due to Plaintiff in consideration of Plaintiff's negligence; and 7) awarding counsel fees to Defendants.

In support of Plaintiff's motion to amend, Plaintiff's counsel affirms that the relief sought in the sixth cause of action, seeking injunctive relief under the lease, is now moot in light of the fact that Plaintiff has moved out of the Premises. Plaintiff provides a copy of the proposed

amended complaint ("Proposed Complaint") (Ex. B to Scott Aff. in Supp.) it is requesting permission to file. The Proposed Complaint contains a new sixth cause of action alleging actual partial eviction based on Defendants' alleged failure to provide adequate elevator service at the Premises. Plaintiff seeks compensatory and punitive damages, as well as a permanent injunction requiring specific performance of repairs and maintenance related to, *inter alia*, the central heating system, oil tank and elevators.

Plaintiff's counsel submits that Defendants' failure to provide adequate elevator service at the Premises has been an issue throughout this litigation, and provides submissions related to prior motions before the Court that have addressed this issue. Plaintiff also provides records from the Village of Hempstead Building Department (*id.* at Ex. E), which Plaintiff attached as exhibits to its submission on a prior motion, reflecting problems with the elevators at the Premises between 2004 and 2008.

In opposition, Defendants' counsel affirms that Plaintiff has filed its Note of Issue, and the trial of this action is scheduled to commence on November 1, 2011. Defendants submits that Plaintiff has had ample opportunity to plead the additional cause of action he now seeks to add, and the Court should not permit the amendment at this late stage of the proceedings.

C. The Parties' Positions

Plaintiff submits that the Court should permit the requested amendment, given that 1) the proposed amendment asserts no new facts, but merely asserts a new legal theory of recovery; 2) the proposed amendment is meritorious, as Defendants' alleged failure to provide elevator service may constitute an actual partial eviction; and 3) in light of the fact that the condition of the elevator has been raised in prior motions before the Court, there is no prejudice to Defendants.

Defendants oppose Plaintiff's motion on the grounds that 1) Defendants will be prejudiced by the proposed amendment, given the history of this litigation and its trial-ready posture; 2) the proposed amendment is insufficient as a matter of law; and 3) Plaintiff has failed to explain its delay in seeking leave to amend.

With respect to the merits of the proposed amendment, Defendants note that the deposition transcript of Plaintiff (Ex. B to Weinberger Aff. in Opp.) does not contain the words

“expel” or “expulsion” because the focus of the deposition of Plaintiff was on constructive eviction, as pleaded in the Complaint, not actual eviction. Defendants submit that if the Complaint had pleaded actual eviction, they would have questioned Plaintiff about the alleged expulsion, and other issues relevant to that cause of action.

Defendants also argue that they would be prejudiced by the proposed amendment because they would be deprived of the opportunity to seek dispositive relief, noting that their prior motion for summary judgment addressed only constructive eviction. Defendants submit that such a dispositive motion would be successful, given Plaintiff’s failure to allege a sufficient interference with his tenancy to support a partial actual eviction, and the fact that the proposed cause of action is time-barred, as the statute of limitations is one year and Plaintiff has not requested that the amendment be granted *nunc pro tunc*. Defendants argue further that the Court should deny Plaintiff’s motion, in light of Plaintiff’s failure to explain its delay in requesting the proposed amendment.

RULING OF THE COURT

A. Leave to Amend

Leave to amend is to be freely given, absent prejudice or surprise directly resulting from the delay in seeking leave, unless the proposed amendment is palpably insufficient or patently devoid of merit. *Aurora Loan Services, LLC v. Thomas*, 70 A.D.3d 986, 987 (2d Dept. 2010), citing CLR § 3025(b) and *Lucido v. Mancuso*, 49 A.D.3d 220, 222 (2d Dept. 2008).

Where a motion for leave to amend a complaint is made long after the case is certified for trial, however, judicial discretion in allowing the amendment should be discrete, circumspect, prudent and cautious, and where the motion is made on the eve of trial, judicial discretion should be exercised sparingly. *Tesser v. Allboro Equipment Co.*, 73 A.D.3d 1023, 1026 (2d Dept. 2010), quoting *Morris v. Queens Long Is. Med. Group, P.C.*, 49 A.D.3d 827, 828 (2d Dept. 2008). If a grant of leave to amend under such circumstances causes prejudice or surprise, the grant of leave constitutes an improvident exercise of discretion, especially in cases where there is no reasonable excuse offered for the delay in seeking leave to amend. *Id.*, citing *Countrywide Funding Corp. v. Reynolds*, 41 A.D.3d 524, 525 (2d Dept. 2007) and *Velez v. South Nine Realty Corp.*, 57 A.D.3d 889, 892 (2d Dept. 2008).

B. Actual Partial Eviction

An actual eviction occurs when a landlord wrongfully ousts a tenant from physical possession of the demised premises. *Whaling Willie's Roadhouse Grill, Inc. v. Sea Gulls Partners, Inc.*, 17 A.D.3d 453 (2d Dept. 2005), citing, *inter alia*, *Barash v. Pennsylvania Term. Real Estate Corp.*, 26 N.Y.2d 77, 82-83 (1970). Where the tenant is ousted from only a portion of the demised premises, the eviction may still be considered actual, if only partial, and suspend the tenant's obligation to pay rent. *Id.*, citing, *inter alia*, *Barash* at 83-84. Partial actual eviction requires that the tenant be physically prevented from using a portion of the leased premises. *Pacific Coast Silks, LLC v. 247 Realty, LLC*, 76 A.D.3d 167, 172 (1st Dept. 2010), citing *Barash*, *supra*, at 83. See *Universal Communications Network, Inc. v. 229 West 28th Owner, LLC*, 85 A.D.3d 668 (1st Dept. 2011) (plaintiff failed to allege actual eviction because it did not plead that it was wrongfully ousted from physical possession of the leased premises).

The Court denies Plaintiff's motion based on 1) the trial-ready posture of this action, 2) the prejudice to Defendants of the proposed amendment, given that they have conducted discovery, including the deposition of Plaintiff, based on the causes of action in the Complaint, and 3) the absence of a reasonable explanation for Plaintiff's delay in seeking the amendment.

All matters not decided herein are hereby denied.

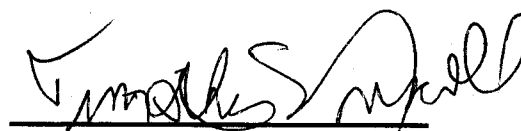
This constitutes the decision and order of the Court.

The Court reminds counsel for the parties of their required appearance before the Court for a Pre-trial Conference on October 21, 2011 at 9:30 a.m.

ENTER

DATED: Mineola, NY

September 22, 2011



HON. TIMOTHY S. DRISCOLL

J.S.C.

ENTERED

SEP 30 2011

**NASSAU COUNTY
COUNTY CLERK'S OFFICE**