

169 Bowery, LLC v Collective Hardware

2012 NY Slip Op 30182(U)

January 23, 2012

Sup Ct, NY County

Docket Number: 116120/09

Judge: Debra A. James

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

PRESENT: DEBRA A. JAMES
Justice

PART 59

169 BOWERY, LLC,,
Plaintiff,

- v -

COLLECTIVE HARDWARE, RONALD RIVELINI,
MONSTER STUDIO, TATE STEINSIEK,
Individually and d/b/a MONSTER STUDIO,
ILL WILLED PRODUCTIONS, LLC, PETER
VANCEK, Individually and d/b/a THE
PETER VANCEK SALON, STUART BRAUNSTEIN,
ANDY KELLEY, RONNIE CUTRONE, ERIK FOSSE,
PAUL SEVIGNY, SHAUN O'ROURKE, DANIEL
PINCHBACK, LILY GULDEN, KEVIN TOOLEY,
Individually and d/b/a CONCEPT STUDIOS,
DANIEL YAGHOUBI, Individually and d/b/a
THE GARDEN, RORY ANDREW, Individually
and d/b/a THE GARDEN, BENTON-C
BAINBRIDGE, Individually and d/b/a
GLOWING PICTURES, VISHWANATH OWEN BUSH,
Individually and d/b/a GLOWING PICTURES,
ANNE APPARU, Individually and d/b/a
HOMEGROWN KITCHEN, RACHEL CROCKER, CHRIS
KOULOURIS, Individually and d/b/a
SCALLYWAG & VAGABOND,

Defendants.

Index No.: 116120/09

Motion Date: 10/18/11

Motion Seq. No.: 03

Motion Cal. No.: _____

FILED

JAN 25 2012

NEW YORK
COUNTY CLERK'S OFFICE

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

The following papers, numbered 1 to 3 were read on this motion for summary judgment.

Notice of Motion/Order to Show Cause -Affidavits -Exhibits _____
Answering Affidavits - Exhibits _____
Replying Affidavits - Exhibits _____

| PAPERS NUMBERED | |
|-----------------|---|
| _____ | 1 |
| _____ | 2 |
| _____ | 3 |

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff moves, pursuant to CPLR 3212, for partial summary

Check One: FINAL DISPOSITION NON-FINAL DISPOSITION

Check If appropriate: DO NOT POST REFERENCE

SETTLE/SUBMIT ORDER/JUDG.

judgment on the issue of liability on its first cause of action asserted as against defendants Collective Hardware, LLC (Collective Hardware) and Ronald Rivelini (Rivelini)¹ (together, responding defendants). All defendants in this action, except for the responding defendants, have defaulted.

According to the complaint, plaintiff is the fee owner and landlord of the entire premises known as 169 Bowery, New York, New York. On or about August 1, 2007, plaintiff entered into a net lease for the premises with Bowery Development Group LLC (Bowery Development), for a period of 10 years. Pursuant to the terms of the net lease, Bowery Development is prohibited from transferring, pledging, hypothecating or assigning the lease or any portion of the lease without first obtaining the written consent of plaintiff. The lease also provided a list of tenants for whom plaintiff was required to provide the appropriate written consent, as well as a list of tenant for whom plaintiff agreed not to withhold consent unreasonably. In addition, the net lease required that any sublease entered into by Bowery Development would be subordinated to the net lease. Further, the premises were required to be developed for mixed commercial and residential use, but the premises were not to be used, in whole

¹This defendant's name appears as "Rivelini" in the caption on the Summons but as "Rivellini" in the Affidavit in Opposition to the motion. For the purposes of this decision, the court is using "Rivelini" to conform with the caption which has not been amended.

or in part, as a nightclub, cabaret, adult entertainment center, or any other type of business that would require a license from the State Liquor Authority, without plaintiff's prior written consent.

Plaintiff alleges that on or about December 2008, Bowery Development stopped making the required rent payments and, on or about June 2009, plaintiff served Bowery Development with a 10-day notice of termination. A summary proceeding was commenced against Bowery Development in July 2009.

The complaint alleges that, upon information and belief, on or about July 2008, Bowery Development subleased or assigned the entire premises to Collective Hardware, and at no time did Bowery Development obtain the consent, written or otherwise, of plaintiff for such assignment or sublease. Collective Hardware does not appear in the net lease as one of the entities for which plaintiff agreed to provide consent.

Rivelini is a member of both Bowery Development and Collective Hardware, and is alleged to have negotiated the net lease on behalf of Bowery Development. Plaintiff asserts that it first learned of Collective Hardware's presence at the premises on or about October 7, 2009, when it was notified of a fire at the property. The complaint alleges that Collective Hardware, without the knowledge or consent of plaintiff, sublet portions of the premises to the other named defendants in this action, and

that portions of the premises are used for the sale and consumption of alcoholic beverages, without any license for such use having been issued by the State Liquor Authority.

Additionally, the complaint alleges that portions of the premises are being used for purposes prohibited by the terms of the net lease.

The first cause of action asserted by plaintiff is for trespass.

At his examination before trial (EBT), Rivelini testified that Collective Hardware is solely owned by Bowery Development. Rivelini stated that he is a member of both Bowery Development and Collective Hardware and that he negotiated the net lease on behalf of Bowery Development. Rivelini attested to the fact that he was aware that the net lease contained certain restrictions regarding the use of the premises and contained a list of tenants for whom plaintiff was required to provide consent to assign or sublease. Specifically, Rivelini was aware that the net lease prohibited using the premises for the sale of alcohol and in fact plaintiff had rejected a potential sublessee on those grounds.

Rivelini stated that Bowery Development uses Collective Hardware as a "doing business as" designation, and that a certificate to that effect has been filed in New York. Rivelini also said that Collective Hardware, as a separate legal entity

formed in Delaware, has never been in possession of the premises and that he has never conducted any business at the premises individually. However, Rivelini said that a sign indicating "Collective Hardware" was placed on the premises, but he contends that this was just noting the presence of Bowery Development d/b/a Collective Hardware.

According to Rivelini, after the market crashed in 2008, Bowery Development had to abandon its original plans for the development of the premises, which was when Collective Hardware was formed. Rivelini admitted that he personally gave access to the premises to the other named defendants. In addition, Rivelini testified that physical changes were made to the premises, such as removing walls, installing electric panels, soundproofing, and so forth. Rivelini said that Bowery Development and Collective Hardware jointly maintained liability insurance for the premises.

According to plaintiff, it first became aware of Collective Hardware's presence after a fire at the building when plaintiff's principal went to inspect the damage.

In support of its motion, plaintiff has provided, among other exhibits, the following: (1) the above-referenced EBT of Rivelini; (2) the sworn affidavit of Gordon Lau, plaintiff's principal, which attests to the facts discussed above; (3) a sublease entered into between Bowery Development and Retro Bagutta, LLC; (4) photographs of construction done at the

premises; (5) documentation of Department of Buildings construction violations and penalties imposed thereon; (6) printouts from Collective Hardware's website indicating that Collective Hardware took control the subject premises; (7) an agreement between Anonymous Gallery, Inc. and its president, Joseph Henrikson, and Collective Hardware for the use of part of the premises as an art gallery; and (8) a release signed by Rivelini so that he could retrieve personal possessions after plaintiff prevailed in the summary proceeding against Bowery Development, in which he states that he had occupied the premises as an individual, that he has no landlord-tenant relationship with the owner [plaintiff], and that he had no permission from plaintiff to enter onto the premises.

In opposition to the instant motion, Rivelini avers that Collective Hardware, although a separate legal entity formed under the laws of the state of Delaware, is simply a brand name for Bowery Development, and that Bowery Development has filed an assumed name certificate with the Department of State to that effect. The Court notes that the assumed name certificate provided by responding defendants indicates that it was filed on February 2, 2010, after the initiation of the present lawsuit.

Rivelini maintains that Collective Hardware, as a separate entity, was never in possession of the premises. Further, Rivelini says that plaintiff had to be aware of the Collective

Hardware sign before the fire because, at his deposition, Gordon Lau testified that he lives in the neighborhood and passed the property several times each week. In addition, Rivelini asserts that he was only at the premises as an agent for Collective Hardware, not acting as Collective Hardware.

It is responding defendants' position that plaintiff's motion should be denied because plaintiff, while showing its ownership of the land, has not conclusively demonstrated that Collective Hardware or Rivelini wrongfully entered the land. Further, according to responding defendants, plaintiff's evidence does not refute Rivelini's testimony that Collective Hardware was merely the assumed name of Bowery Development.

In reply, plaintiff argues that responding defendants have failed to provide any evidence in admissible form that, prior to the institution of this lawsuit, Collective Hardware was only the trade name or brand for Bowery Development, nor do they refute that the other named defendants were occupying the premises, pursuant to agreements with responding defendants, without plaintiff's consent, in contravention of the net lease. Moreover, plaintiff contends that Rivelini's statement that he was only on the property as an agent for Collective Hardware is specious in light of the fact that he is one of only two members of Collective Hardware.

"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 eliminate any material issues of fact from the case [internal quotation marks and citation omitted]." Santiago v Filstein, 35 AD3d 184, 185-186 (1st Dept 2006). The burden then shifts to the motion's opponent to "present evidentiary facts in admissible form sufficient to raise a genuine, triable issue of fact." Mazurek v Metropolitan Museum of Art, 27 AD3d 227, 228 (1st Dept 2006); see Zuckerman v City of New York, 49 NY2d 557, 562 (1980). If there is any doubt as to the existence of a triable fact, the motion for summary judgment must be denied. See Rotuba Extruders, Inc. v Ceppos, 46 NY2d 223, 231 (1978).

"Entering upon the land of another without permission, even if innocently or by mistake, constitutes trespass." Curwin v Verizon Communications (LEC), 35 AD3d 645, 645 (2d Dept 2006). "While physical entry by the trespasser upon another's land is not necessary, the trespasser must have at least caused or directed another person to trespass." Golonka v Plaza at Latham, L.L.C., 270 AD2d 667, 669 (3d Dept 2000); Spellburg v South Bay Realty, LLC, 49 AD3d 1001 (3d Dept 2008).

In the case at bar, plaintiff has established a prima facie right to the relief sought by proving that it is the owner of the property and that Collective Hardware and Rivelini entered upon

the property without plaintiff's permission and/or allowed others to trespass on the property. In opposition, responding defendants have failed to demonstrate that they had a right to enter the land by contract, easement or right of way. Baiting Hollow Properties, LLC v Knolls of Baiting Hollow, LLC, 89 AD3d 776 (2d Dept 2011).

Rivelini's admission, in the above-mentioned release, that he had no landlord-tenant relationship with plaintiff and that he was on the property in his individual capacity without plaintiff's permission, substantiates plaintiff's trespass claim asserted as against Rivelini individually. Burger v Singh, 28 AD3d 695 (2d Dept 2006). Responding defendants have not provided any evidence to contradict this release.

With respect to the portion of plaintiff's motion asserted as against Collective Hardware, all of the evidence demonstrates that Collective Hardware is a separate legal entity from Bowery Development and, despite Rivelini's testimony, the evidence establishes that it was not acting as Bowery Development's assumed name in New York until after the present lawsuit was filed. Further, the agreement signed by Anonymous Gallery, Inc. and Joseph Henrikson with Collective Hardware shows that Collective Hardware leased a portion of the premises, and permitted access thereto, without plaintiff's permission. It is noted that this sublease does not identify Collective Hardware as

having any relationship to Bowery Development. Moreover, responding defendants never dispute that Collective Hardware was on the premises, but only argue that it was there in name only as the assumed name for Bowery Development. Bare allegations unsupported by evidentiary proof in admissible form are insufficient to defeat a motion for summary judgment. Greenberg v Coronet Properties Co., 167 AD2d 291 (1st Dept 1990).

In addition, even though the court agrees with responding defendants that an individual does not need a legal or equitable interest in property to have an insurable interest thereon (Weissman v Galway Construction Corp., 239 AD2d 410 [2d Dept 1997]), responding defendants have failed to provide any argument as to what insurable interest Collective Hardware would have in the property if it was only the assumed name of Bowery Development.

As a consequence of the forgoing, the court finds that responding defendants have failed to provide any evidence in admissible form that raises a question of fact so as to defeat plaintiff's motion for partial summary judgment.

Based on the foregoing, it is hereby

ORDERED that plaintiff's motion seeking partial summary judgment on the issue of liability on its first cause of action for trespass asserted as against Collective Hardware, LLC and Ronald Rivelini is granted; and it is further

ORDERED that the issue of damages on plaintiff's first cause of action asserted as against Collective Hardware, LLC and Ronald Rivelini is referred to the Special Referee Clerk (Room 119M, 646-386-3028 or spref@courts.state.ny.us) for placement at the earliest possible date upon the calendar of the Special Referees Part (Part SRP), which, in accordance with the Rules of the Part (which are posted on the website of this court at www.nycourts.gov/supctmanh at the "References" link under "Courthouse Procedures), shall assign this matter to an available JHO/Special Referee to hear and report as specified above; and it is further ORDERED that the plaintiff shall, within 60 days from the date of this order, serve upon defendants Collective Hardware, LLC and Ronald Rivelini, and file, a copy of this order with notice of entry, together with a completed Information Sheet² and proof of service, with the Special Referee Clerk in the Motion Support Office (Room 119M), who is directed to place this matter on the calendar of the Special Referee's Part for the earliest convenient date.

²Copies are available in Rm. 119M at 60 Centre Street and on the Court's website at www.nycourts.gov/supctmanh under the "References" section of the "Courthouse Procedures" link.

This is the decision and order of the court.

Dated: January 23, 2012

ENTER:


DEBRA A. JAMES J.S.C.

FILED

JAN 25 2012

**NEW YORK
COUNTY CLERK'S OFFICE**