

151 Mulberry St. Corp. v Italian Am. Museum

2013 NY Slip Op 30300(U)

January 22, 2013

Sup Ct, New York County

Docket Number: 651017/10

Judge: Barbara R. Kapnick

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: BARBARA L. KAPNICK
Justice

PART 39

Index Number : 651017/2010
151 MULBERRY STREET CORP.
vs.
ITALIAN AMERICAN MUSEUM,
SEQUENCE NUMBER : 004
DISMISS DEFENSE

INDEX NO. _____

MOTION DATE _____

MOTION SEQ. NO. _____

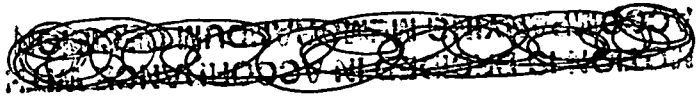
The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____

Answering Affidavits — Exhibits _____ | No(s). _____

Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is




MOTION IS DECIDED IN ACCORDANCE WITH
ACCOMPANYING MEMORANDUM DECISION

Settle Order

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

Dated: 1/22/13


_____, J.S.C.
BARBARA L. KAPNICK

- 1. CHECK ONE: CASE DISPOSED
- 2. CHECK AS APPROPRIATE: MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
- DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

**SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IA PART 39**

-----x
151 MULBERRY STREET CORP. d/b/a
IL PALAZZO,

Plaintiff,

-against-

ITALIAN AMERICAN MUSEUM, ITALIAN
AMERICAN MUSEUM REAL ESTATE HOLDINGS,
LLC, JEROME G. STABILE III REALTY LLC
f/k/a STABILE BROTHERS, LLC, JOSEPH
V. SCELISA, RONALD MANNINO and
MICHAEL RICATTO,

Defendants.

-----x
ITALIAN AMERICAN MUSEUM,

Petitioner-Landlord,

-against-

151 MULBERRY STREET CORP. d/b/a IL
PALAZZO,

Respondent-Tenant,

ABC CORP. and XYZ INC.,

Respondents-Undertenants.

-----x
BARBARA R. KAPNICK, J.:

The following facts are taken from defendants' Statement of
Material Facts, unless otherwise noted.

Plaintiff 151 Mulberry Street Corp. d/b/a Il Palazzo ("151
Mulberry" or "plaintiff") is the former month-to-month tenant of
the ground floor and second story store and basements of 151

Mulberry Street, New York, New York and 185 Grand Street, 187 Grand Street, 189 Grand Street (the "Premises").

Defendant Italian American Museum (the "Museum") is a non-profit institution and museum, located at 155 Mulberry Street. Defendant Italian American Museum Real Estate Holdings, LLC ("IAMREH") is the owner of the buildings located at and commonly known as 151 Mulberry Street and 185, 187 and 189 Grand Street (collectively the "Buildings"). The Museum, at all relevant times, was and is the net lessee of the Buildings, having entered into a net lease with IAMREH for the Buildings in or around January 2009 (the "Net Lease").

According to the Museum, plaintiff stopped paying rent after the Museum became the net lessee of the Buildings. The Museum subsequently commenced a non-payment proceeding and a holdover proceeding in Civil Court, both of which were dismissed on procedural grounds.

On or about March 31, 2010, plaintiff was served with a Thirty (30) Day Notice of Termination. The Notice of Termination notified plaintiff that the Museum elected to terminate plaintiff's month-to-month tenancy, and that unless it vacated the Premises on April 30, 2010, the day on which the month-to-month tenancy expired,

defendant would commence summary proceedings to remove plaintiff from the Premises. Despite this Notice and the expiration of the month-to-month tenancy on April 30, 2010, plaintiff failed to vacate the Premises.

The Museum then commenced another holdover proceeding (the "Second Holdover Proceeding"), which plaintiff moved to dismiss. The motion was denied by Decision/Order of the Hon. Arlene P. Bluth dated June 9, 2010.¹

Plaintiff then commenced the instant action and simultaneously filed a Notice of Pendency against the Building.

By Decision/Order dated November 19, 2010, this Court granted plaintiff's motion to consolidate the Second Holdover Proceeding with the instant action.

All of the defendants herein moved to dismiss all but one of plaintiff's causes of action (the fourth cause of action for unjust enrichment) in the Amended Complaint.

¹ According to defendants, plaintiff interposed an answer containing an "unauthorized" third-party complaint in contravention of the CPLR, a request for a declaratory judgment and frivolous counterclaims. Defendant then moved to dismiss plaintiff's affirmative defenses, to sever the counterclaims and third-party claims and for partial summary judgment.

By Decision/Order dated September 12, 2011, this Court granted the motion to dismiss all causes of action except the third cause of action for money had and received and the fourth cause of action for unjust enrichment, both of which are asserted only against the Museum, and neither of which concern possession of or title to the Premises.²

The Museum thereafter served its Verified Answer to plaintiff's Amended Complaint which contained several affirmative defenses and a counterclaim for possession of the Premises based upon the termination of plaintiff's month-to-month tenancy.³

Plaintiff then served a "Reply to Counterclaim," which asserts an affirmative defense claiming that plaintiff's tenancy of the Premises continues because a proper Notice of Termination of the month-to-month tenancy was never served.

The Museum now moves for an order:

- (1) pursuant to CPLR 3211(b), striking plaintiff's affirmative defense in its reply to the Museum's counterclaim;

² That decision was affirmed by the Appellate Division, First Department on January 3, 2013 (2013 WL 28269).

³ This claim was also asserted in the petition in the Second Holdover Proceeding.

- (2) pursuant to CPLR 3212, granting the Museum summary judgment against plaintiff on its first counterclaim in its Verified Answer;
- (3) granting the Museum a writ of assistance to restore defendant to possession of the subject premises and directing the New York County Sheriff or New York City Marshall to remove and eject plaintiff therefrom; or, in the alternative, granting the Museum a final judgment of possession of the Premises with the issuance of a warrant of eviction forthwith to remove plaintiff therefrom;
- (4) granting the Museum a judgment for any and all rent and use and occupancy arrears and setting the matter down for a hearing on the fair value of use and occupancy for the Premises;⁴ and
- (5) cancelling the Notice of Pendency filed by plaintiff in this matter and directing the County Clerk of New York County to vacate and cancel the Notice of Pendency as of record.⁵

⁴ Plaintiff is currently paying \$10,000.00 per month in use and occupancy for the Premises. Defendant contends the fair market value of the premises is actually \$30,000.00 per month. The Court notes that the Museum has moved by Order to Show Cause (motion sequence 006) to modify the amount of use and occupancy being paid, which motion is currently returnable on February 14, 2013.

⁵ This issue is now moot, having been granted without opposition by Order of this Court dated October 23, 2012.

Plaintiff cross-moves for an order granting it leave to file an Amended Reply to Counterclaim, in the form annexed to the Cross-Motion as Exhibit B.⁶

DISCUSSION

The Museum first argues that plaintiff's affirmative defense/reply to the Museum's counterclaim for possession, which states that "[n]o proper Notice of Termination was ever served on Plaintiff[,]" must be dismissed because it is fatally conclusory and lacks merit, and because it was waived when not raised either in 151 Mulberry's pre-answer motion to dismiss the Petition in the Second Holdover Proceeding or its Answer to the Second Holdover Proceeding. The Museum reasons that by not raising the issue of service, plaintiff effectively consented to personal jurisdiction in the Second Holdover Proceeding and cannot now assert that it was never properly served with a Notice of Termination.⁷ In any event, the Museum contends that the Notice of Termination was properly served on plaintiff's manager and is effective.

⁶ The Court notes that the Proposed Amended Reply to Counterclaim asserts proposed defenses that mirror the arguments it asserts in opposition to the instant motion.

⁷ The Museum also argues that plaintiff effectively waived any service and/or personal jurisdiction issues and consented to the personal jurisdiction of this Court when it asserted unrelated counterclaims in the Second Holdover Proceeding and sought to remove the Second Holdover Proceeding from Civil Court and consolidate it with this action it had commenced in Supreme Court.

Plaintiff argues that the Affidavit of Service of the Thirty Day Notice of Termination states that it was served on 151 Mulberry Street Corp d/b/a Il Palazzo Restaurant on March 31, 2010 by personally leaving a copy with "Juan Czea, manager." Additional copies were also mailed to Annette Sabatino, plaintiff's President, and to plaintiff's counsel. According to the affidavit of Ms. Sabatino, at no time was there ever an officer, director, cashier, manager or anyone authorized to accept service of papers on behalf of 151 Mulberry Street Corp. named Juan Czea.

With respect to the waiver argument, plaintiff contends that its defense to defendant's counterclaim for possession was not waived because the Counterclaim in the Answer served on September 20, 2011 was not "identical" or "verbatim" to the one previously pled in the Civil Court Petition, although it is, in all material respects, the same.

Real Property Law ("RPL") § 232-a ("Notice to terminate monthly tenancy or tenancy from month to month in the city of New York") provides that a notice to terminate must be served ". . . in the same manner in which a notice of petition in summary proceedings is now allowed to be served by law"

Real Property Actions and Proceedings Law ("RPAPL") § 735

governs the service of a notice of petition in summary proceedings, and provides in relevant part:

1. Service of the notice of petition and petition shall be made by personally delivering them to the respondent, **or by delivering to and leaving personally with a person of suitable age and discretion who resides or is employed at the property sought to be recovered,** a copy of the notice of petition and petition, if upon reasonable application admittance can be obtained and such person found who will receive it; . . . and in addition, within one day after such delivering to such suitable person . . . by mailing to the respondent both by registered or certified mail and by regular first class mail,

(emphasis added).

It is well settled that

[t]he RPAPL substitute service provision reflects the legislative determination that due process notice requirements for service on a corporation in an eviction proceeding are satisfied by service on an ordinary employee, as opposed to a CPLR 311(1) corporate representative, who is of "suitable age and discretion." Notwithstanding this general legislative determination, when a particular service is challenged, a court must evaluate the validity of that service under the constitutional standard of whether the service "is one 'reasonably calculated, under all the circumstances, to apprise [the] interested part[y] of the pendency of the action.'"

Thus, in determining the validity of substitute service on a respondent under RPAPL 735, the test is whether the delivery of the papers to the given employee, "objectively viewed, is calculated to adequately and fairly apprise the respondent of an impending lawsuit."

Manhattan Embassy Co. v. Embassy Parking Corp., 164 Misc.2d 977, 980 (1995) (internal citations omitted).

According to the Affidavit of Service, the Thirty Day Notice of Termination was served upon plaintiff "by gaining admittance to said property and delivering to and leaving a true copy thereof for each respondent by personally leaving with **Juan Czea, manager**[,] a person of suitable age and discretion, who was willing to receive same and employed at said property[.]" Plaintiff's sole objection to the service upon Juan Czea rests on the assertion that there was never an officer, director, cashier or manager of 151 Mulberry Street Corp. by that name, nor was there anyone by that name who was authorized by the corporation to accept service on its behalf. (Sabatino Aff. ¶ 5.)

This objection is insufficient to invalidate service. "In order to qualify as a person of suitable age and discretion, . . . the employee who is served *need not be* a corporate official or an agent authorized by the corporation to accept service." *Manhattan Embassy*, 164 Misc.2d at 981 (emphasis added). Here, plaintiffs do not dispute that Mr. Czea was an employee of suitable age and discretion, and, therefore, substituted service upon him, pursuant to RPAPL 735, was not improper. Moreover, it is clear from the fact that plaintiff answered the Second Holdover Proceeding that it

was apprised of the pendency of the action.

With respect to the Notice of Termination, the only remaining issue is whether the Museum was entitled to serve a Notice of Termination on March 31, 2010, when a lease executed by the parties on or about December 17, 2009 (the "Proposed Lease") was awaiting Bank approval when the Notice of Termination was served. However, this Court has already found, in its Decision/Order dated September 12, 2011, which was affirmed by the Appellate Division at AD3d, 2013 WL 282269 (Jan. 3, 2013), that the Proposed Lease is unenforceable. Therefore, plaintiff's argument that it bars service of the Notice of Termination is without merit.


Accordingly, the Museum's motion to strike plaintiff's affirmative defense, as pled in its Reply to Counterclaim, is granted and plaintiff's cross-motion for leave to serve and file an Amended Reply to Counterclaim is denied. As a result, the Museum is entitled to summary judgment on its first counterclaim for possession, pled in its Verified Answer. Defendants shall settle an order providing for a writ of assistance to restore defendant to possession or a final judgment of possession.

The issue of the amount due for use and occupancy, if any, shall be dealt with by this Court in conjunction with the hearing

already scheduled on February 14, 2013 on motion seq. no. 006.

This constitutes the decision of this Court.

Dated: January 22, 2013



BARBARA R. KAPNICK
J.S.C.

BARBARA R. KAPNICK
J.S.C.