

**Nugent v Hubbard**

2013 NY Slip Op 30812(U)

April 8, 2013

Sup Ct, Suffolk County

Docket Number: 27731-2012

Judge: Emily Pines

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**SUPREME COURT - STATE OF NEW YORK**  
**COMMERCIAL DIVISION, PART 46, SUFFOLK COUNTY**

**COPY**

***Present:*** **HON. EMILY PINES**  
J. S. C.

Original Motion Date: 01-14-2013  
Motion Submit Date: 01-15-2013  
Motion Sequence No.: 002 MOTD

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**MICHAEL T. NUGENT, FRANK  
BUSTAMANTE, and 52 PHOENIX  
MGMT CORP.,**

**Plaintiffs,**

**-against-**

**JOSEPH C. HUBBARD, ASHLEIGH SASSER,  
THOMAS B. LICARDI, DANIEL O'DONNELL,  
BABYLON POINT INC., GOLDLIC LLC and  
JODI GIRL ENTERPRISES, INC.,**

**Defendants.**

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Plaintiffs Michael T. Nugent (“Nugent”), Frank Bustamante (“Bustamante”) and 52 Phoenix Corp. (“Phoenix”) (collectively “Plaintiffs”) commenced this action against defendants Joseph C. Hubbard (“Hubbard”), Ashleigh Sasser (“Sasser”), Thomas B. Licari (“Licari”), Daniel O’Donnell (“O’Donnell”), Babylon Point Inc. (“Babylon Point”), Goldlic LLC and Jodi Girl Enterprises, Inc. (“Jodi Girl”) for breach of contract, conversion, unjust enrichment, an equitable lien, and declaratory relief. Currently before the Court is a motion by defendants Licari and Goldlic pursuant to CPLR 3211 to dismiss the complaint as asserted against them. The Complaint alleges, among other things, that Licari and Goldlic, LLC interfered with and converted Plaintiffs’ interest in tangible property.

*Factual and Procedural Background*

In May 2010, Goldlic, LLC purchased real property located at 16 East Court, Babylon, New York. Licari is a member of Goldlic LLC. At the time of the sale to Goldlic, the property was leased by the former owners to non-party Hi-Hook, Inc. Pursuant to an Amended and Restated Sublease dated May 1, 2008, Hi-Hook had subleased the property to Babylon Point, which operated a restaurant on the premises. In 2008, Babylon Point was owned by Bustmante. From 2004-2008, before the Amended and Restated Sublease with Babylon Point, Hi-Hook subleased the property to plaintiff 52 Phoenix, which had operated a restaurant on the premises.

The Amended and Restated Sublease between Hi-Hook and Babylon Point recites that 52 Phoenix had surrendered its sublease. The Amended and Restated Sublease was assigned to Goldlic in 2010, when it purchased the property. The Amended and Restated Sublease provides, in relevant part:

34. REPAIRS AND MAINTENANCE

\* \* \*

Notwithstanding anything to the contrary set forth above, the heating, ventilating, air-conditioning, electrical and plumbing systems, shall, at all times, remain the property of Sublandlord, including all additions and replacements made thereby by Subtenant.

\* \* \*

Exhibit B

**Alterations:**

\* \* \*

All fixtures and all paneling, partitions, railings and like installations, installed in the premises at any time, either by Tenant or by Owner on Tenant's behalf, shall, upon installation, become the property of the Owner and shall remain upon and be surrendered with the demised premises unless Owner, by notice to Tenant no later than twenty days prior to the date fixed as the termination of this lease, elects to relinquish Owner's right thereto and to have them removed by Tenant, in which event the same shall be removed from the demised premises by Tenant prior to the

expiration of the lease, at tenant's expense. Nothing in this Article shall be construed to give Owner title to or to prevent Tenant's removal of trade fixtures, moveable office furniture and equipment . . . All property permitted or required to be removed by Tenant at the end of the term remaining in the premises after Tenant's removal shall be deemed abandoned and may, at the election of Owner, either be retained as Owner's property or removed from the premises by Owner, at Tenant's expense.

\* \* \*

**End of Term:** 22. Upon the expiration or other termination of the term of this lease, Tenant shall quit and surrender to Owner the demised premises, broom clean, in good order and condition . . . and Tenant shall remove all its property from the demised premises.

<sup>Point</sup>~~Print~~ The Complaint filed by Plaintiffs alleges, among other things, that Babylon ~~Print~~ surrendered the premises to Goldlic in February 2012. In March 2012, Goldlic ✓ entered into a lease for the premises with Jodi Girl and O'Donnell. According to Plaintiffs, Jodi Girl and O'Donnell then began operating a restaurant on the premises using property in which the Plaintiffs had an ownership interest which remained at the premises after surrender by Babylon Point in February 2012. Plaintiffs claim that they never authorized Jodi Girl or O'Donnell to utilize the property in any way and that they have not been compensated for the property by Goldlic, Licari, Jodi Girl or O'Donnell. The second cause of action alleges that Goldlic, Licari, Jodi Girl and O'Donnell converted the property on the premises in which Plaintiffs have a possessory interest. The third cause of action alleges that Goldlic, Licari, Jodi Girl and O'Donnell have been unjustly enriched, at the expense of the Plaintiffs, by their taking and use of Plaintiffs' property. The fourth cause of action seeks the imposition of an equitable lien on the property and an injunction prohibiting the sale, transfer, encumbrance, assignment, removal or disposition of the property. The seventh cause of action seeks a judgment declaring that any and all amounts owed on leases related to the premises are the responsibility of Goldlic and Licari.

Goldlic and Licari move to dismiss the Complaint as asserted against them on numerous grounds, including CPLR 3211(a)(1). Goldlic and Licari argue, among other things, that certain provisions of the Amended and Restated Sublease dated May 1, 2008, conclusively establish that the Plaintiffs do not have any interest in any

of the property remaining at the premises after it was surrendered by Babylon Point to Goldlic in February 2012. In opposition to the motion, Plaintiffs contend, among other things, that in March 2012, the month after Babylon Point had surrendered the premises to Goldlic, Licari refused Nugent access to the premises to remove the property in which Plaintiffs claimed an interest. Plaintiffs claim they never abandoned the property at the premises but were “wrongfully thwarted in their attempt to remove” the property from the premises, “as was their right” under the Amended and Restated Sublease.

#### *Discussion*

“A motion to dismiss a complaint pursuant to CPLR 3211(a)(1) may be granted only where the documentary evidence submitted by the movant utterly refutes the plaintiff’s allegations against it and conclusively establishes a defense as a matter of law” (*Cog-Net Bldg. Corp. v. Travelers Indem. Co.*, 86 AD3d 585 [2d Dept 2011]).

Here, it is undisputed that Babylon Point, and not 52 Phoenix or the individual plaintiffs, was the tenant pursuant to the Amended and Restated Sublease with Goldlic. 52 Phoenix was a tenant pursuant to the prior sublease with Hi-Hook, which is not a party to this action. Thus, it is clear that 52 Phoenix does not have a valid claim against Goldlic as there was never a landlord-tenant relationship between 52 Phoenix and Goldlic. It is also undisputed that Babylon Point surrendered the Amended and Restated Sublease to Goldlic in February 2012. Pursuant to paragraph 22 of Exhibit B to the Amended and Restated Sublease, Babylon Point had the right/obligation to remove its property from the demised premises prior to surrender. Pursuant to paragraph 3 of Exhibit B to the Amended and Restated Sublease, all property remaining in the premises was deemed abandoned and could be retained by the owner. Thus, Goldlic had the right to retain all property remaining at the premises at the time of surrender by Babylon Point. The Plaintiffs’ attempt to remove property from the premises, assuming the Plaintiffs had any rights under the Amended and Restated Sublease, was ineffectual as the premises had already been surrendered.

Notably, Goldlic provides copies of certifications by Gold Coast Abstract in December 2011 and September 2012 which reflect that neither 52 Phoenix nor Babylon Point had filed any UCC financing statements with regard to any of the property in which Plaintiffs claim an interest. Thus, the documentary evidence utterly refutes the Plaintiffs' allegations that they had rights with regard to the property remaining at the premises.

Finally, Goldlic and Licari have not demonstrated an entitlement to an award of attorneys' fees pursuant to an agreement between the parties, statutory authorization, or court rule (*see, Crispino v Greenpoint Mtge. Corp.*, 2 AD3d 478 [2d Dept 2003]). Therefore, the branch of their motion which seeks attorneys' fees is denied. Accordingly, it is

**ORDERED** that the motion (Mot. Seq. 002) by defendants Thomas B. Licari and Goldlic LLC is granted to the extent that the Complaint is dismissed insofar as asserted them and the motion is otherwise denied.

Dated: April 8, 2013  
Riverhead, New York

  
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EMILY PINES  
J. S. C.

FINAL  
 NON FINAL