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

PRESENT: MELVIN L. SCHWEITZER PART 45
Justice

GETTY PROPERTIES CORP, ET ANO.,

Plaintiffs,

-vs-

GETTY PETROLEUM MARKETING INC., ET AL.,

Defendants.

INDEX NO. 651762/12

MOTION DATE _____

MOTION SEQ. NO. 015

MOTION CAL. NO. _____

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

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ Yes ☐ No

Upon the foregoing papers, it is ordered that this motion is decided in accordance with the attached Decision and Order.

Dated: June 13, 2013

MELVIN L. SCHWEITZER, J.S.C.

MELVIN L. SCHWEITZER

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

Check one: ☐ CASE DISPOSED ☑ NON-FINAL DISPOSITION

Check if appropriate: ☐ GRANTED ☐ DENIED ☐ GRANTED IN PART ☐ OTHER

☐ SETTLE ORDER ☑ SUBMIT ORDER

☐ DO NOT POST ☐ FIDUCIARY APPT. ☐ REFERENCE

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : PART 45

GETTY PROPERTIES CORP. et ano.,	:	
	:	
Plaintiffs,	:	Index No. 651762/12
	:	
-against-	:	DECISION AND ORDER
	:	
	:	Motion Sequence Nos.
GETTY PETROLEUM MARKETING INC., et al.,	:	2, 9, 10, 11 and 15
	:	
Defendants.	:	

MELVIN L. SCHWEITZER, J.:

Plaintiffs Getty Properties Corp. and Gettymart Inc. (collectively, Landlord) have been engaged in a very contentious dispute with defendants, a group of 19 limited liability companies (the LLCs) that are sublessees of gasoline station sites leased from Landlord's immediate lessee Getty Petroleum Marketing Inc. (GPMI), as part of approximately 800 such sites leased from Landlord pursuant to the Consolidated, Amended and Restated Master Lease, dated November 2, 2000, as amended (the Master Lease). On April 30, 2012, after the LLCs Master Lease and subleases were terminated, and after GPMI filed for bankruptcy, the LLCs were ordered to vacate the sites by the Bankruptcy Court (the Master Lease Termination Order). When the 19 LLCs failed to turn over possession of the sites to Landlord, the Landlord initiated this litigation seeking (a) to have them ejected and (b) monetary damages for the LLCs' use and occupancy (U&O) of the sites, and other relief.

In motion sequence numbers 2 and 11, Landlord seeks sanctions for the LLCs' alleged failure to fully comply with the court's orders to deposit funds with the court relating to U&O damages.

In motion sequence numbers 9 and 10, the LLCs seek to vacate or modify the court's orders relating to U&O damages and ejectment of the LLCs. The court concludes these two motions are now incorporated in and seek substantially the same relief as motion sequence number 15, in which the LLCs seek summary judgment. In motion sequence 15, the LLCs move for an order (1) for summary judgment dismissing the complaint, (2) awarding one of the LLCs, 69 BK Street, judgment on its counterclaim for costs and sanctions, (3) awarding the remaining LLCs judgment on their counterclaims, (4) directing the Clerk of the Court to return to certain LLCs the amount of $134, 990.10 of the $260,657.08 deposited with the Clerk of the Court, (5) transferring to the Supreme Court, Nassau County, the action previously transferred to this court, and (6) vacating the court's order granting Landlord a preliminary injunction and vacating the judgment in Landlord's favor entered on August 2, 2012. Also in motion sequence number 15, Landlord cross-moves for an order (a) granting summary judgment on liability on each of its five causes of action asserted in the complaint, and (b) setting the matter down for a hearing, if need be, on the amount of Landlord's damages. Landlord also moves for an order dismissing the LLCs' counterclaims.

Background

At the initiation of this case on June 11, 2012, Landlord moved by order to show cause to obtain an order requiring the LLCs to pay Landlord U&O damages *pendente lite*, without prejudice to seek a higher amount arising out of the LLCs' leasing of the sites from GPMI. On June 11 , 2012, the court issued a temporary restraining order requiring the LLCs to place into court the monies that they had collected or were to collect from the Operators by June 12, 2012 (the TRO). On July 2, 2012, at a hearing, counsel for the LLCs, Robert G. Del Gadio

(Mr. Del Gadio), challenged the amount of U&O that was to be paid into court, and the court directed that the amount of $434,233.80 for U&O be paid into court by July 3, 2012 (the U&O Order).

When the LLCs failed to comply with the court's July 2, 2012 U&O Order, Landlord sought to enforce the U&O Order and at hearings on July 26, 2012 and on August 2, 2012, the court granted Landlord's request for a preliminary injunction giving Landlord possession and a money damages award. The court issued an order and judgment directing the LLCs to pay Landlord $434,233.80. At the July 26, 2012 hearing, however, the court permitted the LLCs to seek an offset against the $434, 233.80 judgment which, if granted, would be a separate judgment in their favor reducing the amount of the judgment the court granted Landlord, and the court issued a supplemental order to that effect. The LLCs appealed and (with one minor exception relating to one of the LLCs not relevant here) the court's order and judgment was affirmed by the Appellate Division, First Department on May 2, 2013 (the AD Order).

The court believes it makes sense to first address the parties' respective motions for summary judgment in motion sequence number 15, and, in particular, Landlord's cross-motion for summary judgment. Initially, the court notes that the LLCs' motion for summary judgment was filed prior to the AD Order and the court finds most of the relief sought by the LLCs in their motion to be precluded under the law of the case doctrine by that decision. In turn, a large part of the relief sought by Landlord's cross-motion for summary judgment, is mandated by the AD Order.

In its complaint Landlord pleads five causes of action: a claim for ejection of the LLCs from sites in issue, a claim for U&O damages for each of the 19 sites, contractual

indemnification for expenses and attorneys' fees and breach of personal guarantees by defendants Mr. Del Gadio and Frank Mascolo (Mr. Mascolo) .

Discussion

"Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of factual issues." *Birnbaum v Hyman*, 43 AD3d 374, 375 (1st Dept 2007). The burden is on the moving party to demonstrate that, on the facts presented, it is entitled to the judgment as a matter of law. *Helen v GTE Sylvania Inc.*, 182 AD2d 446 (1992). To defeat the motion, the non-moving party must show that there is a material issue of fact that requires a trial. *CitiFinancial v McKinney*, 27 AD3d 224, 226 (1st Dept 2006). The court views all the evidence in a light most favorable to the non-moving party. *Makai v Metropolitan Transportation Authority*, 18 AD3d 625 (2d Dept 2005). Conclusory statements, unsubstantiated allegations and expressions of hope, however, are not treated as an evidentiary proof. *Zuckerman v City of New York*, 49 NY2d 557, 562 (1980).

First Cause of Action - Ejectment

Landlord moves for summary judgment on its first cause of action for ejectment claiming that the LLCs should be evicted from the sites. Based upon their obtaining a judgment of possession, which was affirmed by the AD Order, the ejectment order is now "law of the case" (*see Carmona v Mathisson*, 92 AD3d 492, 492-93 [1st Dept 2012]). Thus, Landlord has demonstrated that it is entitled to such relief as matter of law. The LLCs' argument that Landlord cannot evict them because they were not in physical possession has no merit because the First Department in its AD Order rejected this argument. AD Order, pp. 2-3.

Thus, Landlord is entitled to summary judgment on its ejectment cause of action.

Second Cause of Action – U&O

Landlord is entitled to summary judgment on its second cause of action for U&O as a matter of law because the Appellate Division affirmed the U&O Order. Specifically, the Appellate Division held that:

> "The lack of privity of contract between the LLC defendants (the subtenants) and plaintiffs (the over-landlords) does not prevent the court from ordering the LLC defendants to pay use and occupancy to plaintiffs. . . .Nor is such an order prevented by the LLCs defendants' not being in possession of the subject premises (they had sub-subleased the properties to the operators of the gas stations), because their subleases with GPMI provide '[i]n the event of . . . [sub-]sub-letting, or other transfer, . . . Lessee [the relevant LLC defendant] shall continue to remain jointly and severally liable with its transferee to Lessor [GPMI] for the performance of all of Lessees' obligations for the remainder of the Term" (brackets and ellipses in original). AD Order, pp. 2-3.

Accordingly, the LLCs are liable for U&O. The issue now becomes how much is due. The amounts awarded in the U&O Order were based upon the last month's rents that GPMI was paying to Landlord before termination of the Master Lease. Such relief was expressly "without prejudice" to Landlord's seeking higher amounts from the LLCs.

Landlord argues that the amount of U&O damages awarded should be increased based upon the terms of the subleases, pointing out that each of the subleases expressly provides that, if the LLC holds over after the expiration or termination of the subtenancy, that it is liable for "two (2) times the previous month's rent." Accordingly, Landlord may be entitled to a higher amount and the court directs that there be a hearing before a referee to determine the amount due during the holdover period for each of the sites.

Third Cause of Action – Contractual Indemnification

Landlord's third cause of action seeks contractual indemnification from each LLC based upon paragraph 23 or 24 of their respective sublease (Complaint, ¶¶ 78-81), which provides as follows:

> "Lessee shall defend, indemnify and hold harmless lessor, *Getty Properties Corp., Getty Realty Corp.*, and each of their parent and subsidiary companies and affiliates, and each of their officers, directors, shareholders, employees and agents ('Additional Indemnitees') from and against any and all losses, claims, demands, suits, actions, judgments, fines, costs, expenses or payments, environmental or otherwise, for, or in connection with this Sublease, any accident, injury or damage whatsoever caused to any person or property arising, directly or indirectly, from any violation of any law, agency ruling or regulation, or from any act or omission of Lessee or any subtenant and their respective license, servants, agents, customers, employees or contractors, from and against all costs, expenses and liabilities incurred whether or not in connection with any such claim or proceeding brought in connection therewith . . . Lessor's obligations under this Paragraph shall survive in perpetuity any expiration or termination of this Sublease" (emphasis supplied).

Based upon this provision, the LLCs are liable directly to Landlord for "all losses . . . suits, actions, costs . . . expenses or payments, environmental or otherwise, for, or in connection with this Sublease." *Id.*

In Motion 15, LLCs argue that the subleases are not binding "because each of the Subleases that the LLCs had with GPMI was terminated as of April 30, 2012." This argument has already been rejected by the Appellate Division. AD Order, p. 2.

Accordingly, Landlord is entitled to summary judgment on this cause of action and a hearing before a referee will be scheduled to determine the amount of Landlord's damages, if any, in addition to U&O.

Fourth and Fifth Causes of Action – Breach of the Personal Guarantees

Landlord's fourth and fifth causes of action are against Messrs. Del Gadio and Frank Mascolo, respectively (together, the Guarantors) based on a claim that they breached their respective personal Guarantees of the Subleases. Complaint ¶¶ 51, 52, 82-93.

The Guarantors personally guaranteed to Landlord the performance of each of the LLCs' obligations in their subleases, which includes the obligation to indemnify Landlord under each sublease. Each Guaranty provides as follows:

> "In consideration of the Lessor's agreement to enter into the Lease Agreement set forth above with the Lessee and for other good and valuable consideration, the undersigned, who is a manager of the Lessee but is undertaking this guarantee in his personal capacity, does hereby promise and guarantee Lessor full performance by the Lessee of all the terms and conditions of the Lease Agreement, any riders, addenda, exhibits, schedules, modifications, extensions, renewals or amendments thereto, and guarantees the payment to the Lessor of all sums due to the Lessor as rent by virtue of the aforesaid Lease Agreement up to the date that Lessee surrenders possession of the Premises to Lessor. If any sums of money are not paid to the Lessor when due, or if any other default exists, the undersigned shall immediately pay such sums to the Lessor on first written demand and/or cure such default and the Lessor shall be released from any obligation to give notice to or make demand upon, or to pursue any remedy against, the Lessee. It is understood that this shall be a continuing guarantee and shall cover all obligations and indebtedness which the Lessee now has or may incur in the future but limited to all such obligations and indebtedness of Lessor up to the date the Lessee surrenders possession of the Premises to Lessor. . . . For the avoidance of doubt, notwithstanding any limitation of this guarantee as set out above, it is understood and agreed that this guarantee shall not terminate upon Lessee's relinquishment of the Premises. Terms not defined in this guarantee shall have the meaning ascribed to them in the Lease Agreement" (emphasis supplied).

By guaranteeing the "full performance . . . of all of the terms of the Lease Agreement," the LLCs guaranteed to Landlord all of the LLCs' obligations under the Subleases, including the obligation to indemnify Landlord. The Appellate Division has noted that Messrs. Del Gadio and

Marcolo "guaranteed full performance of the lease by the relevant LLC defendant; thus they, too, are bound" by the terms of the Subleases. AD Order, p.2.

LLCs' argument that the Guarantors' personal liability is limited until the time that possession was surrendered (DG Aff., ¶ 36) is without merit because (a) the Appellate Division has already rejected that argument by stating that "no surrender was effected because there was only unilateral action by [him]" (AD Order, p. 3), and (b) the Guarantees expressly state that:

> "For the avoidance of doubt, notwithstanding any limitation of this guarantee as set out above, it is understood and agreed that this guarantee shall not terminate upon Lessee's relinquishment of the Premises." Cross-motion, Ex. C.

The court finds that Messrs. Del Gadio and Mascolo are liable for the amounts due under the subleases and Guarantees of Subleases, which have not been paid to plaintiffs by the LLCs, which amounts are to be determined at a hearing before a referee after any material and necessary discovery is provided.

The LLCs' Counterclaims

Landlord moves for summary judgment dismissing the LLCs' counterclaims set forth in the individual answers of various LLCs for sanctions, tortious interference and unfair competition. The court dismisses each counterclaim for the following reasons.

Most of the LLCs' answers assert a counterclaim for sanctions, claiming that Landlord's ejectment cause of action is frivolous because (a) the LLCs are no longer in possession, or (b) Landlord had no standing to eject the LLCs because Landlord's lease with GPMI had expired before this action was commenced.

These counterclaims have no merit as a matter of law because, as set forth above, Landlord had established its right of possession with respect to all sites when this action was

commenced, except for 69 BK Street LLC, and Landlord withdrew its claim against that LLC early on in the case.

Counterclaims in the answers of Messrs. Del Gadio and Mascolo seek sanctions on the basis that they are not liable to Landlord under their guarantees and Landlord's breach of contract causes of action are frivolous. These counterclaims are dismissed because, as noted, the Appellate Division held that the Guarantors are liable to Landlord because they "guaranteed full performance of the [Sub]lease by the relevant LLC defendant." AD Order, p. 2.

Accordingly, all the counterclaims for sanctions are dismissed.

Tortious Interference with Contract

Several LLCs assert counterclaims alleging, *inter alia*, that they each presently have a lease and gasoline supply agreement with their respective Operators, Landlord knew of these contracts and that Landlord did not name the Operators "in order to cause the defendant to breach its contractual obligations between defendant and its operators."

To establish a cause of action for tortious interference with a contract, the LLCs must plead and prove the following elements:

> "(1) the existence of a contract, enforceable by the plaintiff, (2) the defendant's knowledge of the existence of that contract, (3) the intentional procurement by the defendant of the breach of the contract, and (4) resultant damages to the plaintiff (*Israel v Wood Dolson Co.*, 1 NY2d 116, 120). In the absence of a contract between plaintiff and [a third party], with which the individual defendants could interfere, this cause of action is unavailing."

Hansen & Co., Inc. v Everlast World's Boxing Headquarters Corp., 296 AD2d 103, 111-112 (1st Dept 2002). The LLCs must also prove that the contract would not have been breached but

for the defendant's conduct. *Cantor Fitzgerald Assocs. v Tradition N. Am.*, 299 AD2d 204, *lv denied* 99 NY2d 508 (2003); *Lana & Samer, Inc. v Goldfine*, 7 AD3d 300, 301 (1st Dept 2004).

The LLCs cannot prevail on their counterclaims. First, they cannot establish an existing contract giving them the right to remain in possession because the Master Lease, the subleases and the sub-subleases terminated pursuant to the Master Lease termination order. *Sun Gold Corp. v Stillman*, 28 Misc 3d 1213(A) (Sup Ct. N.Y. Co. 2010), *affd* 95 AD3d 668, 946 NYS2d 24 (1st Dept 2012).

Second, since there were no existing contracts, Landlord obviously could not have interfered with and caused a breach of a non-existent contract. As a result, neither the LLC, nor the Operators, could have breached their purported (non-existing) agreement(s). In any event, no breach has even been alleged.

Unfair Competition

The second and last counterclaim pursuant to which several of the LLCs seek damages is based upon the claim of "unfair competition" because, *inter alia*, Landlord "attempts to profit by the work and money expended" by the Five LLCs "without justification or excuse."

To establish a claim for unfair competition, the LLCs must allege and demonstrate that Landlord "misappropriated the . . . labors, skills, expenditures, or good will [of the defendant] and displayed some element of bad faith in doing so." *Abe's Rooms, Inc. v Space Hunters, Inc.*, 38 AD3d 690, 692 (2d Dept 2007) (emphasis supplied). *See also Bongo Apparel, Inc. v Iconix Brand Group, Inc.*, 18 Misc 3d 1108(A), 2008 WL 41341 at *13 (Sup. Ct. N.Y. Co.) ("under New York law, the essence of an unfair competition claim is that one may not act in bad faith to misappropriate the skill, expenditures, and labor of another").

This counterclaim fails because the LLCs have not alleged that Landlord acted in bad faith. *Rinos Foods, Inc. v Vintage Food Corp.*, 30 AD3d 332 (1st Dept 2006); *Camelot Assocs. Corp. v Camelot Design & Dev. LLC*, 298 AD2d 799 (3d Dept 2002).

Finally, the LLCs seek to reduce the amount of U&O damages for which they are liable pursuant to RPAPL § 601. That provision states as follows:

> "In an action to recover the possession of real property, the plaintiff may recover damages for withholding the property, including the rents and profits or the value of the use and occupation of the property for a term not exceeding six years; but the damages shall not include the value of the use of any improvements made by the defendant or those under whom he claims. Where permanent improvements have been made in good faith by the defendant or those under whom he claims, while holding, under color of title, adversely to the plaintiff, the value thereof must be allowed to the defendant in reduction of the damages of the plaintiff, but not beyond the amount of those damages."

The LLCs cannot reduce the amounts awarded in the U&O Order and judgment because the purported improvements (Tanks, Improvements and Property) have not "been made. . . by defendant," but by non-parties – affiliates of Mr. Del Gadio's. As a result, this statute is inapplicable with respect to Tanks, Improvements and Property at all sites (except with respect to only some improvements allegedly made by defendant 49-25 Van Dam Street LLC).[1]

Landlord's Requests for Sanctions

In motion sequence numbers 2 and 11 and in motion sequence no. 15, Landlord seeks sanctions against the LLCs and/or Mr. Del Gadio, including enjoining Mr. Del Gadio from engaging in further litigation against Landlord. The court now addresses these requests, starting

[1]At the referee's hearing ordered by the court, defendant 49-25 Van Dam LLC may assert a claim for the amount of any proven improvements after any material and necessary discovery has been provided.

with motion sequence no. 2 in which Landlord seeks sanctions for the LLCs' and Mr. Del Gadio's failure to comply with the court's TRO.

As noted, on June 11, 2012, Landlord moved by Order to Show Cause (motion seq. no. 1) to obtain an order requiring the LLCs to pay U&O *pendente lite*. The OSC contained a temporary restraining order requiring the LLC to, *inter alia*, place into escrow with the court by June 12, 2012 certain rents collected from the LLCs' retail operators to which the LLCs had sub sub-leased the gas station properties. Mr. Del Gadio, as the Manager for each of the LLCs with ultimate responsibility for its day-to-day operations, immediately and knowingly violated the TRO by failing to timely deposit the rents into court and Landlord moved for contempt (motion sequence no. 2, which request for relief was made again in motion sequence number 011). After the June 12, 2012 deadline, some rents were deposited but Mr. Del Gadio failed to deposit almost $90,000 in rents which were collected per his own accounting, as required.

As noted, Landlord's preliminary injunction motion for U&O damages was granted by court Order, dated July 2, 2012, and pursuant thereto the LLC's were required to pay to Landlord interim U &O in the total amount of $434,233.80 by July 3, 2012. This U&O order also was violated by the LLCs, and on July 13, 2012 Landlord submitted a second motion for contempt and sanctions by Order to Show Cause.

During a conference in Chambers on July 17, 2012, Mr. Del Gadio, on behalf of the LLCs acknowledged that the U&O Order was violated by admitting that the money had not been fully deposited. The court gave Mr. Del Gadio an opportunity to explain why the money was not paid, and more specifically, where was the money that the LLCs ostensibly had collected from the gas station operators. Mr. Del Gadio's response to the court was that he did not know. On appeal,

the Appellate Division, in affirming the court's TRO and preliminary injunction order and explaining why defendants have not had a speedy trial, noted the LLCs' "failure to obey the TRO and preliminary injunction." AD Order, p. 4.

For violating two court orders requiring the LLCs to timely deposit into court rents representing U&O payments and for Mr. Del Gadio's failure to provide a satisfactory explanation for the failure of the LLCs of which he was the manager to so deposit such funds, the court hereby assesses a sanctions penalty against the LLCs and Mr. Del Gadio jointly in the aggregate amount of $10,000 ($5000 for the violation of each of the court's two orders as described above).

In conclusion, it is hereby

ORDERED that plaintiffs' motion for sanctions (motion sequence no. 2) is granted to the extent set forth above; and it is further

ORDERED that LLC defendants' motion to vacate or modify the court's order entered on July 6, 2012 (motion sequence no. 9) is denied; and it is further

ORDERED that LLC defendants' motion to vacate the judgment entered on August 2, 2012 and for summary judgment (motion sequence no. 10) is denied; and it is further

ORDERED that plaintiffs' motion for sanctions (motion sequence no. 11) is granted to the extent set forth above; and it is further

ORDERED that the Clerk of the Court is ordered and directed to pay out of court and to release to plaintiffs the $260,657.58 paid in escrow, plus any interest earned thereon; and it is further

ORDERED that LLCs defendants' motion for summary judgment (motion sequence no. 15) is denied; and it is further

ORDERED that plaintiffs' cross-motion for summary judgment is granted and plaintiffs are directed to submit an order and judgment; and it is further

ORDERED that LLCs defendants' counterclaims are dismissed; and it is further

ORDERED that the parties are to appear for a conference on July 18, 2013 at 10 a.m. to arrive at a scheduling order for providing any material and necessary discovery in preparation for a referee's hearing with respect to plaintiffs' claims for expenses, including attorneys' fees, and damages.

Dated: June 13, 2013

ENTER:

J.S.C.

MELVIN L. SCHWEITZER