

Wing Yip Realty Corp. v Chun Er Pan

2014 NY Slip Op 30445(U)

February 24, 2014

Supreme Court, New York County

Docket Number: 600203/2009

Judge: Carol R. Edmead

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 35

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WING YIP REALTY CORP.,

Index No. 600203/2009
Motion Seq. 009

Plaintiff,

-against-

CHUN ER PAN a/k/a SUSANNA PAN and RED BLUE
INTERNATIONAL ART FRAMING CORP.,

Defendants.

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HON. CAROL R. EDMEAD, J.S.C.

MEMORANDUM DECISION

In this action to recover possession of a certain premises, defendant Chun Er Pan a/k/a Susanna Pan (“defendant” or “Pan”) moves to reargue the portion of the Court’s September 17, 2013 order which struck her answer.

In response, plaintiff Wing Yip Realty Corp (“plaintiff”) cross moves for an order entering judgment in its favor and against defendant on its first, third, fourth, seventh causes of action, and now seeks judgment on the eighth cause of action for trespass.

Factual Background

By order dated October 12, 2012 , the Court denied plaintiff’s motion for summary judgment on, *inter alia*, its first (declare the subject lease fraudulent by forgery), third (ejectment), fourth (use and occupancy), and seventh (fraud) causes of action against Pan as “unwarranted” based on the record before the Court (p. 11).¹ The Court granted plaintiff summary judgment against Red Blue International Art Framing Corp. (“Red Blue”) for failure to pay rent, and declared Red Bull’s lease terminated.

¹ No relief was sought on plaintiff’s eighth cause of action for trespass against Pan.

Upon plaintiff's motion to reargue, the Court adhered to its October 2012 determination to deny plaintiff summary judgment against Pan, and reinstated the fifth cause of action against Red Bull so as to grant plaintiff a judgment of eviction on such claim (see, the February 13, 2013 Order, hereinafter, the "February 2013 order"). However, the issue of the amount due and owing from Pan for the basement was referred to Hon. Ira Gammerman to hear and determine, who, at a subsequent hearing on June 27, 2013, recommended \$3,000 per month for the basement (see order entered July 8, 2013) (the "U&O Order").

Thereafter, plaintiff moved by order to show cause against defendant and Red Blue for, *inter alia*, (1) a judgment ejecting Pan from the basement at the premises, (2) striking Pan's answer for noncompliance with the Court's February 2013 order² and the U&O order by failing to pay use and occupancy for July and August 2013, and (3) a money judgment of \$6,000 for unpaid use and occupancy.

After *oral argument* on September 17, 2013, the Court issued an order dated the same date granting plaintiff a judgment of ejectment against Pan concerning the basement, struck "Pan's Answer for failure to comply with this court's Order dated February 14, 2013 and the Order of Hon. Ira Gammerman, J.H.O. dated July 8, 2013. . ."; and granted plaintiff a money judgment against Pan for \$9,000 for unpaid use and occupancy.

In support of reargument, defendant contends that there was a lack of clarity as to whether the Gammerman's U&O order covered only the portion of the basement vacated by Red Blue or whether she was obligated to pay the entire amount even if she only occupied the rear of the

² In that motion, plaintiff contended that the Court directed Pan to pay use and occupancy based on her insistence that her lease included the basement (Plaintiff's Affirmation ¶14).

basement. Defendant contends that neither the February 2012 nor the U&O orders specified the date that payments from defendant were due.

Therefore, defendant hoped to receive clarification at the September 17, 2013 Hearing. At the September 17, 2013 Hearing, the Court clarified that defendant had to pay \$3000 per month for the entire basement regardless of whether she occupied the entire basement, and held that defendant violated the determination by failing to pay such amount and struck her answer. Defendant did not intend to disobey the court order, and paid the amount due soon thereafter. Also, there was no indication during the Hearing that defendant's answer would be stricken since plaintiff's counsel stated that he was only seeking possession of the first floor. Defendant argues that the court erred by failing to give defendant time to comply with the use and occupancy determination.

In opposition, plaintiff argues that defendant's motion is untimely as it was not filed within 30 days after service of the notice of entry of the Court's order. Further, Pan has no defense to the claims asserted and she improperly raises new arguments and fail to show how the Court misconstrued or misapprehended the facts or law. Defendant's argument that she was not required to remit use and occupancy for the basement was not raised in the prior motion. In any event, defendant knew (and even admitted at the U&O Hearing) that once Red Blue was evicted from the basement, defendant was required to remit use and occupancy payments. And, defendant never previously argued that the U&O Order was unclear or requested additional time to make payments. During the U&O Hearing, defendant's counsel admitted that Pan was required to pay use and occupancy for the basement (p. 5).

In support of plaintiff's cross-motion for judgment against defendant on its first, third,

fourth, seventh, *and eighth* cause of action for trespass, plaintiff argues that defendant's answer was stricken and thus, she has no defenses to the claims. Further, defendant failed to pay use and occupancy for the first floor from June 2008 through December 2008, as previously directed by the Court in August 2009, thereby entitling plaintiff to \$63,000 (at \$9,000 per month). As to the seventh and eighth causes of action for fraud and trespass, judgment should be granted and an inquest ordered on the issue of damages.

In opposition to plaintiff's cross-motion, defendant contends that plaintiff's cross-motion would be moot if the Court granted defendant's motion and reinstated the answer.

However, in the event defendant's motion is denied, then the judgment plaintiff seeks should not be entered in the absence of an inquest, especially as to the first, seventh, and eighth causes of action. Defendant argues that plaintiff failed to establish its entitlement to any judgment that defendant "forged Lew's name to the Fraudulent Lease." The fourth cause of action for fair market use and occupancy has already been determined by the Court as \$9,000 per month, and thus, there is no basis for plaintiff to seek a higher amount. And, the eighth cause of action for trespass is meritless, and not even mentioned in plaintiff's prior motion for summary judgment.

Defendant also contends that she timely filed a notice of appeal, and thus the Court has discretion to hear an untimely motion to reargue. As stated in reargument, the prior orders did not specify a date by which use and occupancy must be paid, and thus, defendant had a good faith basis to question whether she should pay \$3,000 for the entire basement since she was only using a small space located in the rear portion of the basement as storage. Soon after the September 17th Hearing, defendant paid the amount ordered by the Court, before the judgment was even

issued. Such payment demonstrated the lack of any intent by defendant to disobey the Court's order.

In reply in further support of its cross-motion, plaintiff argues that defendant submitted no authority to permit the Court to exercise discretion to consider an untimely motion to reargue. Defendant also cites no excuse for its delay in moving to reargue. In any event, plaintiff does not point to anything the Court allegedly misconstrued or misapprehended. And, defendant's claim that the Orders were unclear for failing to specify the date by which payments were to be made, was not raised by defendant in the underlying motion or during oral argument. Thus, reargument must be denied. Moreover, defendant's basis for failing to pay rent was not due to her lack of knowledge as to when such payments were due, but was premised on her claim that the use and occupancy she was paying for the first floor included the rear portion of the basement, which the Court rejected. Defendant never before claimed that the U&O order was unclear. Defendant's belated payment does not cure her contempt.

There is no need for an inquest before issuing a declaration as to defendant's forgery and where plaintiff met its prima facie burden to which defendant has no defense. An inquest is unnecessary to grant the remaining request for relief. However, any inquest should be limited to the narrow issue of whether defendant forged the signature on the lease.

Discussion

It is undisputed that as relevant herein, a motion for leave to reargue "shall be made within thirty days after service of a copy of the order determining the prior motion and written notice of its entry" (CPLR 2221(d)(3)). However, a court may consider an untimely motion to reargue because "every court retains continuing jurisdiction to reconsider its prior interlocutory

orders during the pendency of the action” (*Profita v Diaz*, 100 AD3d 481, 954 NYS2d 40 [1st Dept 2012] citing *Liss v Trans Auto Sys.*, 68 NY2d 15, 20, 505 NYS2d 831, 496 NE2d 851 [1986]; see also *Kleinser v Astarita*, 61 AD3d 597, 598, 878 NYS2d 28 [1st Dept 2009]).

A motion for leave to reargue under CPLR 2221, “is addressed to the sound discretion of the court and may be granted only upon a showing ‘that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision’” (*William P. Pahl Equipment Corp. v Kassis*, 182 AD2d 22 [1st Dept 1992] *lv denied and dismissed* 80 NY2d 1005, 592 NYS2d 665 [1992], *rearg. denied* 81 NY2d 782, 594 NYS2d 714 [1993]). On reargument the court’s attention must be drawn to any controlling fact or applicable principle of law which was misconstrued or overlooked (see *Macklowe v Browning School*, 80 AD2d 790, 437 NYS2d 11 [1st Dept 1981]).

Based on the claims that the Court overlooked the fact that it was unclear whether the U&O order covered only the portion of the basement vacated by Red Blue or whether she was obligated to pay the entire amount, and that neither the February 2012 nor the U&O orders specified the date that payments from defendant were due, reargument is granted. However, upon reargument, the Court adheres to its earlier determination.

At the U&O Hearing in June 2013, when the Gammerman confirmed that the “only issue that has to be resolved, and on which I will make a recommendation, is what Ms. Pan should pay for use and occupancy of that [basement] space,” defendant’s counsel replied, “Yes. *Going forward.*” (Emphasis added). Therefore, “going forward,” the use and occupancy was set by Gammerman as \$3,000 per month, and as articulated by the Court during the subsequent September 2013 Hearing, defendant’s position has always been, during the litigation, that Pan’s

lease included the basement and that Pan had a right to the space (p. 21). Defendant also conceded that her claim had always been aimed at the entire space, including the basement (p. 29). When defendant claimed that there was no order directing Pan to pay use and occupancy for the back of the basement, the Court pointed out that the use and occupancy directives never acknowledged any such distinction, primarily because defendant had always asserted that her lease included the entire basement. The Court also pointed out that defendant never previously sought clarification as to whether she should pay only for the back of the basement. Based on defendant's legal position, the Court found that the failure of defendant to pay the use and occupancy merited the sanction of striking Pan's answer. The Court also noted at the Hearing that the issue was not whether Pan had an obligation to pay use and occupancy, but rather, the amount. (P. 16).

Therefore, there is no basis for this Court to vacate the portion of the order striking defendant's answer for failing to pay use and occupancy "going forward," *i.e.*, after the Hearing. Defendant's motion on reargument is therefore denied.

As to plaintiff's cross-motion, when a defendant's answer has been stricken, said defendant is "deemed to " 'admit[] all traversable allegations in the complaint, including the basic allegation of liability,' but not damages" (*Ramos v Stern*, 100 A.D.3d 409, 953 N.Y.S.2d 581 [1st Dept 2012]). Therefore, plaintiff is entitled to summary judgment on the issue of liability on its first, third, fourth, seventh causes of action, and now seeks judgment on the eighth cause of action for trespass, and an inquest on damages shall be held accordingly.

Conclusion

Based on the foregoing, it is hereby

ORDERED that the motion by defendant Chun Er Pan a/k/a Susanna Pan to reargue the portion of the Court's September 17, 2013 order which struck her answer is granted as to reargument, however, upon reargument, the Court adheres to its earlier determination; and it is further

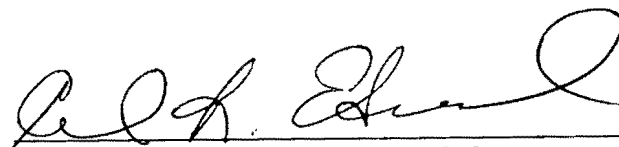
ORDERED that the cross-motion by plaintiff an order entering judgment in its favor and against defendant on its first, third, fourth, seventh, and eighth cause of action is granted solely on liability, and the issue of the amount of damages is hereby referred to Hon. Ira Gammerman to hear and determine; and it is further

ORDERED that counsel for plaintiff shall serve a copy of this order with notice of entry on all parties and the Special Referee Clerk, Room 119M, within 30 days of entry to arrange a date for the reference to a Special Referee; and it is further

ORDERED that the Clerk may enter judgment accordingly.

This constitutes the decision and order of the Court.

Dated: February 24, 2014



Hon. Carol Robinson Edmead, J.S.C.

HON. CAROL EDMEAD