

**Idylwood, NY, LLC v Kyung Sik Kim**

2014 NY Slip Op 30575(U)

March 6, 2014

Supreme Court, New York County

Docket Number: 118055/2009

Judge: Eileen A. Rakower

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SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY

PRESL. T: HON. EILEEN A. RAKOWER  
Justice

PART 15

Index Number : 118055/2009  
IDYLWOOD, NY, LLC.  
vs.  
KIM, KYUNG SIK  
SEQUENCE NUMBER : 005  
DISMISS

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). 1  
Answering Affidavits — Exhibits \_\_\_\_\_ | No(s). 2  
Replying Affidavits \_\_\_\_\_ | No(s). 3

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

**FILED**

MAR 12 2014

NEW YORK  
COUNTY CLERK'S OFFICE

**DECIDED IN ACCORDANCE WITH  
ACCOMPANYING DECISION / ORDER**

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

Dated: 3/6/14



J.S.C.

**HON. EILEEN A. RAKOWER**

- 1. CHECK ONE: .....  CASE DISPOSED  NON-FINAL DISPOSITION
- 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 — NEW YORK COUNTY

PRESENT: Hon. EILEEN A. RAKOWER  
*Justice*

PART 15

IDYLWOOD, NY, LLC,

Plaintiff,

- v -

KYUNG SIK KIM, (THINK SOHO, INC.)

Defendant.

496 BROADWAY REALTY, LLC and  
496 COMMERCIAL REALTY, INC.,

Additional Defendants  
On Counterclaim,

INDEX NO. 118055-2009

MOTION DATE \_\_\_\_\_

MOTION SEQ. NO. 5

MOTION CAL. NO. \_\_\_\_\_

**FILED**

APR 12 2014

NEW YORK  
CLERKS OFFICE

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

PAPERS NUMBERED

Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...

1

Answer — Affidavits — Exhibits \_\_\_\_\_

2

Replying Affidavits \_\_\_\_\_

3

Cross-Motion: Yes  No

This is an action commenced by plaintiff Idylwood, NY, LLC (“Plaintiff”), as landlord, against defendant Kyung Sik Kim (Think Soho Inc.) (“Kyung Sik Kim” or “Defendant”), as former tenants, for monetary damages allegedly suffered as a result of Defendant’s failure to cure certain violations against the demised premises while defendant was in possession of the premises. Defendant Kyung Sik Kim alleges that plaintiff and defendants 496 Broadway Realty, LLC, and 496 Commercial Realty, Inc. (collectively, “496 Defendants”) willfully failed and refused to sign a NYC Landmark’s Commission application necessary for Defendant Kyung Sik Kim to cure the alleged violations. Additionally, Defendant seeks its security deposit.

The Amended Complaint alleges that defendant Kyung Sik Kim was a tenant of commercial premises located at 496 Broadway, New York ("the Premises"), pursuant to a written lease, originally executed on or about December 1, 1999, and as subsequently modified on or about December 11, 2002, between Kyung Sik Kim, as tenant, and Wo Yee Hing Realty Corp. as landlord. The Amended Complaint alleges that the Lease was terminated as of November 6, 2009, would have terminated by its terms December 14, 2009, but that Defendant surrendered possession of the Premises on January 13, 2010.

Defendant Kyung Sik Kim interposed an Answer to Plaintiff's Amended Complaint and asserted Counterclaims against Plaintiff and 496 Defendants for money damages. Defendant alleges that Plaintiff and 496 Defendants are liable for damages on the basis that while 496 Defendants were under contract to sell the building to Plaintiff, the 496 Defendants "unreasonably refused and neglected" to give their consent requested by Defendants for Defendant's application to the NYC Landmark Preservation Commission to perform work and to cure the alleged violations. Additionally, Defendant seeks its security deposit from Plaintiff.

496 Defendants interposed an Answer to Defendant's Counterclaim dated May 13, 2010.

496 Defendants now move for an Order dismissing Defendant's counterclaim pursuant to CPLR §3211(a)(1) and (a)(7). 496 Defendants also move for an Order granting summary judgment in their favor pursuant to CPLR §3212. Defendant opposes.

CPLR §3211 provides, in relevant part:

(a) a party may move for judgment dismissing one or more causes of action asserted against him on the ground that:

(1) a defense is founded upon documentary evidence;

(7) the pleading fails to state a cause of action.

On a motion to dismiss pursuant to CPLR §3211(a)(1), “the court may grant dismissal when documentary evidence submitted conclusively establishes a defense to the asserted claims as a matter of law.” (*Beal Sav. Bank v. Sommer*, 8 NY3d 318, 324 [2007]) (internal citations omitted). A movant is entitled to dismissal under CPLR § 3211 when his or her evidentiary submissions flatly contradict the legal conclusions and factual allegations of the complaint. (*Rivietz v. Wolohojian*, 38 A.D.3d 301 [1st Dept. 2007]) (citation omitted).

The proponent of a motion for summary judgment must make a prima facie showing of entitlement to judgment as a matter of law. That party must produce sufficient evidence in admissible form to eliminate any material issue of fact from the case. Where the proponent makes such a showing, the burden shifts to the party opposing the motion to demonstrate by admissible evidence that a factual issue remains requiring the trier of fact to determine the issue. The affirmation of counsel alone is not sufficient to satisfy this requirement. (*Zuckerman v. City of New York*, 49 N.Y.2d 557 [1980]). In addition, bald, conclusory allegations, even if believable, are not enough. (*Ehrlich v. American Moninger Greenhouse Mfg. Corp.*, 26 N.Y.2d 255 [1970]).

496 Defendants submit the attorney affirmation of Mark D. Mermel. Mermel states that 496 Defendants were prior owners of the Premises, had purchased the Premises subject to Kyung Sik Kim’s lease with the former owner/landlord, and subsequently sold the Premises to Plaintiff subject to Defendant’s lease.

496 Defendants submit as documentary evidence a copy of the Lease entered between Wo Yee Hing Realty Corp., as landlord, and Kyung Sik Kim, as tenants, which states in Paragraph 14:

If Tenant requires Landlord’s consent to any act and such consent is not given, Tenant’s only right is to ask the Court to force the Landlord to give consent. Tenant agrees not to make any claim against Landlord for money or subtract any sum from the rent because such consent was not given.

[\* 5]

Defendant states that discovery is not complete, and that 496 Defendants have not appeared for their depositions. Defendant further contends that Paragraph 14 of the Lease does not apply, or, alternatively, should not be enforced under public policy grounds.

Pursuant to the Lease and Extension of Lease, at paragraph 30, "[t]his Lease is binding on all parties who lawfully succeed to the rights or take the place of the Landlord or Tenant." The 496 Defendants succeeded Wo Yee Hing Realty Corp. as of the transfer of the property on May 27, 2007. Additionally, Idylwood succeeded to the 496 Defendants by transfer of deed dated August 28, 2008.

Paragraph 14 of the Lease and Extension of Lease clearly limits Tenant's recourse as against Landlord to an action in Court for equitable relief.

Plaintiff relies on paragraphs 9 and 20 of the Lease and Extension of Lease in seeking money damages for Tenant's failure to cure violations issued to the premises during the tenancy. Defendant urges that the 496 Defendants and Idylwood, working together during a contemplated transition of ownership, prevented such performance.

It is the general rule that a party to a contract cannot rely on the failure of another to perform when he or she has frustrated or prevented the performance. Thus, Defendant asserts claims as against the 496 Defendants for their part in that frustration of performance. However, pursuant to paragraph 20, the actions of the 496 Defendants in frustrating Defendant's performance are attributable to Idylwood.

The Defendant claims that the contract of sale as between the 496 Defendants and Idylwood was signed in October 2007, but did not close until August 2008. During that period from October 2007 until August 2008, the 496 Defendants owned, controlled and managed the property, and proceeded in their efforts to terminate Defendant's tenancy. Emails appended to the papers evidence communications between the attorneys for the 496 Defendants and Idylwood regarding the summary proceedings and the proposed application to cure the

violations. Importantly, the communications purport to show that they were working together, and the 496 Defendants were accepting instructions on how to proceed from Idylwood. Those summary proceeding resulted in a dismissal on January 23, 2008.

To the extent that Idylwood and the 496 Defendants shared a common interest in terminating the tenancy of Defendant, and Defendant intends to defend this action based on their joint frustration of performance, Defendant pleads that defense as against Plaintiff. Defendant urges that summary judgment is premature because depositions of the 496 Defendants are outstanding. Nevertheless, the motion pursuant to CPLR 3211 must be granted dismissing the counterclaim on the basis that paragraph 14 of the Lease and Extension of Lease flatly contradicts a claim for money damages.

Wherefore, it is hereby,

ORDERED that defendants 496 Broadway Realty, LLC, and 496 Commercial Realty, LLC's motion to dismiss the first counterclaim is granted, and the action is severed and dismissed as against 496 Broadway Realty, LLC, and 496 Commercial Realty, LLC; and it is further

ORDERED that the remainder of the action shall continue

**FILED**

This constitutes the decision and order of the court. MAR 12 2014

Dated: MARCH 6, 2014

NEW YORK  
COUNTY CLERK'S OFFICE



HON. EILEEN A. RAKOW **S.C.**

Check one: FINAL DISPOSITION     NON-FINAL DISPOSITION

Check if appropriate:  DO NOT POST     REFERENCE