

**Jean Yu v Kaplan**

2014 NY Slip Op 32584(U)

October 2, 2014

Supreme Court, New York County

Docket Number: 154074/2013

Judge: Debra A. James

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: DEBRA A. JAMES
Justice

PART 59

JEAN YU,
Plaintiff,

Index No.: 154074/2013

Motion Date: 02/14/14

- v -

Motion Seq. No.: 001

ROBERTA KAPLAN and 37 CROSBY REALTY LLC,
Defendants.

The following papers, numbered 1 to 4 were read on this motion to dismiss

Table with 2 columns: Document Name and No(s). Rows include Notice of Motion/Order to Show Cause -Affidavits -Exhibits (1), Answering Affidavits - Exhibits (2), and Replying Affidavits - Exhibits (3, 4).

Cross-Motion: [ ] Yes [x] No

Upon the foregoing papers, it is ordered that this motion shall be denied on the merits.

Plaintiff-tenant brings this action alleging that on May 4, 2010 she suffered property damage arising out of a fire that occurred at the building known as 37 Crosby Street, New York, New York (building) as a result of the negligence of defendant-landlord Robert H. Kahn (Kahn), and alleging that her personal property was converted as a result of the wrongful discarding of her property from the building by defendant-

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

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

landlord 37 Crosby Realty LLC (37 Crosby). Plaintiff-tenant operated a store located in commercial premises on the first floor of the building under her Lease dated December 20, 2002 with defendant Kahn (the Lease).

Defendant 37 Crosby Realty LLC moves to dismiss the complaint pursuant CPLR § 3211(a)(1) based on the deed, which shows that Kahn did not convey the building to 37 Crosby Realty LLC until January 31, 2012, almost two years after the fire. By affidavit, Terrence Lowenberg, a member of 37 Crosby, states "Nor did 37 Crosby, its employees, assigns, contractors and/or subcontractors discard, remove and/or damage Plaintiff's property after purchasing the Building on January 31, 2012".

Defendant Kahn moves to dismiss the complaint pursuant to CPLR 3211(a)(3) arguing that plaintiff does not have standing to commence and/or maintain this action, and that the claim belongs to the corporate tenant Atelier Jean Yu, Inc. He asserts that the Lease was for a three year term with an additional three year option which ran through December 31, 2006, and that the store operated by plaintiff continued in occupancy "for several additional years", through and including May 4, 2010. He argues that pursuant to the terms of the Lease, plaintiff had the right

to assign the Lease to a corporation in which she was a principal stockholder. He states that plaintiff in fact incorporated on or about December 20, 2012, in the name of Atelier Jean Yu, Inc., and asserts that such entity became the tenant of the Lease. He adds that plaintiff dissolved the corporate entity "by proclamation or annulment of authority of proclamation" on October 27, 2010, a few months after the fire.

Alternatively, defendants move for leave to serve a pleading responsive to the causes of action for a period of ten (10) days after service of notice of entry of an order denying defendants' motion.

Plaintiff opposes Kahn's motion arguing that it is untimely because his time to move or answer expired almost two months before he filed such motion. She opposes 37 Crosby's motion and argues that it also should be denied on procedural grounds as plaintiff only extended the time of 37 Crosby to answer and provided no extension of time for 37 Crosby to make a pre-joinder motion. Plaintiff asserts that she has standing as no assignment of the lease to the corporate tenant was ever made. She alleges that whether it was Kahn's negligence that caused the fire raises a question of fact, which may not be resolved on a motion

directed at the pleadings. With respect to 37 Crosby's motion, she argues that she was still in occupancy of the building after the deed that conveyed title to 37 Crosby, so that the deed does not irrefutably establish 37 Crosby's defense.

The court shall grant defendants' motion to extent that it seeks leave to serve and file an answer within ten days of service of this order with notice of entry. Such relief is surplusage under CPLR 3211(f), as the court agrees with defendants that they both timely moved pursuant to CPLR § 3211(e). See Siegel, *Supplementary Practice Commentaries, McKinney's Cons Law of NY, Book 7B, C3211:54.*

The court shall deny defendants' motion to dismiss. Defendant Kahn has not come forward with a copy of an assignment of the Lease, which copy was required to be delivered to the Landlord under IV of the Amendment to the Lease (see Goldman Sachs Group, Inc. v Almah, LLC, 85 AD3d 424 [1<sup>st</sup> Dept 2011]), so defendant Kahn has not irrefutably established that the plaintiff lacks standing in connection with her claim.

Nor is it a matter of law that 37 Crosby had no responsibility with respect to maintaining the property of

plaintiff as there are questions of fact including but not limited to whether plaintiff remained in possession after 37 Crosby had title to the building and whether any of its employees or agents wrongfully discarded the property of plaintiff.

Accordingly, it is hereby

ORDERED that the motion of defendants to dismiss the complaint of plaintiff is denied; and it is further

ORDERED that the time for defendants to serve and file and answer is extended for ten days from service of a copy of this order with notice of entry; and it is further

ORDERED that the parties shall appear for a preliminary conference in IAS Part 59, 71 Thomas Street, Room 103, New York, New York, on November 6, 2014, 9:30 AM.

This is the decision and order of the court.

**Dated:** October 2, 2014

ENTER:

*Debra A. James*  
**DEBRA A. JAMES** J.S.C.