

**W.D.G.R. Prop., LLC v White Poodle Image, Inc.**

2014 NY Slip Op 32619(U)

October 2, 2014

Sup Ct, Kings County

Docket Number: 503747/2013

Judge: David I. Schmidt

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, Part COM-2 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 2<sup>th</sup> day of October, 2014.

P R E S E N T:

HON. DAVID I. SCHMIDT,

Justice.

W.D.G.R. PROPERTIES, LLC,

Plaintiff,

--against--

WHITE POODLE IMAGE, INC. a/k/a WHITE  
POODLE PET AND GROOMING CORP., MIKHAIL  
GOFSHTEYN and MARINA NOVOPRUTSKAYA,

Defendants.

**DECISION & ORDER**

Index No. 503747/2013

Mot. Seq. Nos. 1

Defendants move, pursuant to CPLR 3211 (a)(1)(3) and/or (7), for an order dismissing this action in its entirety and, pursuant to 22 NYCRR 130-1.1, for an award of costs and reasonable attorney's fees.

Plaintiff commenced the instant action by the filing of a summons and complaint on or about July 3, 2013. Plaintiff's single cause of action seeks to recover rent/use and occupancy from the defendants for the period of September 1, 2012 through February 28, 2013. By notice of motion dated January 31, 2014, defendants move to dismiss the complaint arguing, *inter alia*, (1) that plaintiff lacks standing to bring the instant action because defendants written lease originated with the prior fee owner of the premises and there was never a written assignment of that lease, (2) that due to the damages caused by "Superstorm Sandy" defendants are relieved from paying rent based on the "casualty" provisions of the lease, (3) that the claims against MARINA

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NOVOPRUTSKAYA must be dismissed because she did not sign the lease in her personal capacity and the personal guaranty she originally signed was never incorporated into subsequent lease extensions, (4) that the claims against WHITE POODLE PET AND GROOMING CORP must be dismissed because that entity was not a party to the original lease and is currently dissolved, (5) that the lease was never properly extended rendering it unenforceable, and (6) that the claims against WHITE POODLE IMAGE, INC. do not lie because it is a dissolved corporation. Plaintiff opposes the motion by arguing (1) that, pursuant to RPL §223, defendants' lease was assigned to plaintiff by operation of law, (2) that the casualty provision is inapplicable because defendants remained in possession, (3) that defendants' documentary evidence submitted in support of its motion is insufficient to support dismissal of the complaint, and (4) that, with respect to MARINA NOVOPRUTSKAYA, she is personally liable under the terms of the guaranty and the protection of the corporate shield is inapplicable due to the dissolution of the defendant entities. In reply to the opposition and further support of the motion to dismiss, defendants argue (1) that the application of RPL § 223 to the instant set of facts does not apply to the transaction at issue in this case, (2) that, pursuant to RPL §223, plaintiff lacks standing to bring the instant action because it sold its fee interest in the property, (3) that, the casualty provision of the lease is applicable, (4) that defendants terminated its month-to-month tenancy on October 29, 2012, (5) that the additional documentary evidence submitted with its reply establishes that the damage to the premises contradicts plaintiff's position that the damage to the premises was minimal, and (6) that, as already outlined in the moving papers, MARINA NOVOPRUTSKAYA is not personally liable.

Subsequent to the submission of the papers outlined above, on or about June 9, 2014, plaintiff, as a right pursuant to CPLR 3025, duly filed and served an amended verified complaint. The amended verified complaint narrows the scope of the action to a claim for use and occupancy

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based on an oral month-to-month tenancy after the expiration of the written lease. In essence, the amended complaint moots all of the issues defendants' raised concerning the purported improper assignment of the lease. Further, defendants' arguments relating to plaintiff's standing to pursue the rent arrears, during the period that plaintiff owned the property and defendants' occupied the property are belied by the lease addendum executed between plaintiff and defendants, which ratified plaintiff's status as landlord.

After the service of the amended complaint, the court afforded both parties the opportunity to make additional submissions in support of and in opposition to defendants' motion to dismiss. Defendants' argue that, pursuant to Real Property Law § 223, plaintiff never properly obtained the rights to seek rent/use and occupancy and, pursuant to the same provision, lost standing to pursue use and occupancy upon transfer of its ownership rights on or about January 27, 2014. Defendants' supplemental submission also makes reference to a February 13, 2013 Stipulation of Settlement entered into by defendant MARINA NOVOPRUTSKAYA and plaintiff as part of a proceeding in the Landlord-Tenant Part in Kings Civil Court, under index number 55639/2013. Plaintiff's supplemental submission reiterates its arguments relating to standing.

It is axiomatic that when determining a motion pursuant to CPLR 3211(a)(7), a court must "liberally construe the complaint ... and accept as true the facts alleged in the complaint and any submissions in opposition to the dismissal motion." 511 W. 232nd Owners Corp., 98 N.Y.2d at 152, 746 N.Y.S.2d 131, 773 N.E.2d 496 (2002). The court must also "accord [a] plaintiff the benefit of every possible favorable inference." id. at 152. "The motion must be denied if from the pleadings' four corners factual allegations are discerned which taken together manifest any cause of action cognizable at law." id. at 152, quoting Polonetsky v. Better Homes Depot, Inc., 97 N.Y.2d at 54, 735 N.Y.S.2d 479, 760 N.E.2d 1274 (2001).

When a party seeks an order dismissing a complaint pursuant to CPLR 3211(a)(1) based on documentary evidence, the application may be granted if the documentary evidence utterly refutes material allegations in the complaint and establishes a defense as a matter of law. Goshen v. Mutual Life Ins. Co. of N.Y., 98 N.Y.2d 314, 326, 746 N.Y.S.2d 858, 774 N.E.2d 1190 (2002); Xia-Ping Wang v. Diamond Hill Realty, LLC, 116 A.D.3d 767, 984 N.Y.S.2d 76 (2<sup>nd</sup> Dept. 2014).


Here, the documentary evidence submitted by defendants does not establish a right to dismissal of the amended complaint as a matter of law. The complaint sufficiently avers a claim for monetary damages based on the allegation that, pursuant to an oral agreement, defendants' maintained legal possession of the premises after the expiration of the written lease by virtue of a month-to-month tenancy, until February of 2013 when defendants returned the keys. Plaintiff further states that defendants failed to pay for said occupancy from September 1, 2012 through the return of possession. Defendants' assertions, supra, that the space was rendered unusable by virtue of the alleged destruction caused by "Superstorm Sandy" are unsupported by the documentation in the record before the court on the instant motion. The environmental report, submitted in support of defendants' argument that the premises was rendered unusable by Superstorm Sandy, makes no reference to any of the defendants and it is unclear if the report is applicable to the premises at issue in this action. Also, defendants admit that they owe some rent inasmuch as they do not deny that they failed to pay for their use and occupancy prior to the issues purportedly caused by the storm. Defendants reliance on Real Property Law § 223 is misplaced for the proposition that on a sale of real property the rents that have accrued prior to the transfer of title pass with the conveyance of title. Real Property Law § 223 applies to rent accruing subsequent to a transfer of the owner's fee interest and not for rents accrued prior. Getty Realty Corp. v. 2 East Sixty-First Street Corp., 171 Misc. 101, 11 N.Y.S.2d 730 (N.Y. Sup. 1939). The rent at issue in

the present action accrued prior to the plaintiff's sale of the property. Although the parties do not agree on the actual termination date of the defendants' tenancy, they do agree that the termination and turnover of possession occurred prior to plaintiff's sale of the property. Finally, the documentary evidence in the record before the court does not resolve the issue of MARINA NOVOPRUTSKAYA liability for the use and occupancy at issue in this case. The entity that initially executed the written lease, and all the subsequent documents extending the term of the lease, WHITE POODLE IMAGE, INC., was allegedly an inactive corporation during the entire period that the documents were executed by MARINA NOVOPRUTSKAYA. Therefore, MARINA NOVOPRUTSKAYA may be personally liable for the debt of the corporation, unless she brings the debt of the corporation present. Brandes Meat Corp. v. Cromer, 146 A.D.2d 666, 537 N.Y.S.2d 177 (2<sup>nd</sup> Dept.1989). Therefore defendants' motion to dismiss the complaint is denied in its entirety.

All parties shall appear for a preliminary conference in the COM-2 part, room 541 on December 17, 2014.

This constitutes the decision and order of the court.

E N T E R,

  
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J. S. C.

**HON. DAVID I. SCHMIDT**