

**Yottoy Prods., Inc. v Majestic Realty Assoc. LLC**

2016 NY Slip Op 30586(U)

April 6, 2016

Supreme Court, New York County

Docket Number: 651147/2016

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 2

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YOTTOY PRODUCTIONS, INC.,

Plaintiff,

**DECISION/ORDER**

-against-

Index No. 651147/2016  
Mot. Seq. No. 001

MAJESTIC REALTY ASSOCIATES LLC  
and CHALLENGER PROPERTIES LLC,

Defendants.

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**KATHRYN E. FREED, J.S.C.:**

RECITATION, AS REQUIRED BY CPLR 2219 (a), OF THE PAPERS CONSIDERED IN THE REVIEW OF THIS MOTION:

Seq. No. 001

PAPERS	NUMBERED
ORDER TO SHOW CAUSE	1
AFF. IS SUPPORT AND EXHIBITS	2 (Exs. 1-5)
MEMO. OF LAW IN SUPPORT	3
AFF. IN OPP., MEMO. OF LAW IN OPP. AND EXHIBITS	4, 5 (Exs. A-C)

UPON THE FORGOING CITED PAPERS, THIS DECISION/ORDER OF THE MOTION IS AS FOLLOWS:

In this action for negligence and breach of contract, plaintiff moves, by order to show cause, pursuant to CPLR 325 (b), 326 (a), and 602 (b) to stay, remove and join for trial with the captioned action a pending non-payment proceeding commenced against it by defendant Majestic Realty Associates LLC in the Civil Court of the City of New York, New York County (hereinafter Civil

Court).<sup>1</sup> Defendants submit written opposition. After oral argument and a review of the parties' papers and the relevant case law, **the motion is denied.**

### **FACTUAL AND PROCEDURAL BACKGROUND:**

Plaintiff is a corporation in the business of designing, manufacturing and selling stuffed animals. In August 2013, plaintiff entered into a lease with defendant Challenger Properties LLC and, in November 2013, commenced occupancy of commercial space located at 226 E. 54th Street, 9th Floor, New York, NY 10022. According to the complaint, the roof of the premises leaked throughout the tenancy, causing "extreme dampness, high humidity, visible mold, and moldy, mildewy or otherwise unpleasant odors." Plaintiff claims that, as a result, it "was unable to hold meetings or bring buyers into its offices, . . . [s]tuffed animals were damaged and [it] received customer complaints about [its] product smelling musty." It further claims that it "suffered lost profits by reason of reputation damages directly tied to the damaged inventory and the inability to conduct business with buyers in a well-appointed and dry office." Plaintiff also alleges that, from July 2015 to August 2015 and in various days in September, there was no elevator service in the building, and plaintiff's employees and customers were forced to climb nine flights of stairs to get to the premises. (Ex 1 to Mazner Aff.).

In June 2014, Majestic commenced a non-payment proceeding against plaintiff in Civil Court under Index Number L & T 68393/2014. The parties concede that the Civil Court non-payment

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<sup>1</sup> As an initial matter, contrary to plaintiff's characterization, since plaintiff here is the defendant in the Civil Court proceeding, this motion is for removal and a joint trial rather than for true consolidation, which contemplates bringing multiple actions together under a single caption. See *Rogin v Rogin*, 90 AD3d 507, 508 n (1st Dept 2011); *Bass v France*, 70 AD2d 849, 849-850 (1st Dept 1979).

proceeding is scheduled for trial on April 11, 2016. In March 2016, plaintiff commenced this action for breach of contract and negligence. On March 17, 2016, plaintiff brought the instant motion by order to show cause, which this Court signed on March 18, 2016. In the order to show cause, plaintiff also sought a stay of the Civil Court proceeding pending resolution of the motion, which relief this Court denied. The parties appeared for oral argument on April 4, 2016.

### **POSITIONS OF THE PARTIES:**

Plaintiff contends that the Court should remove the Civil Court proceeding and join it for trial with the instant action, arguing that there are substantial common questions of law and fact shared by both. Specifically, plaintiff points to the fact that it has pleaded as affirmative defenses in the Civil Court proceeding entitlement to an abatement based on defendants' failure to keep the roof from leaking and to keep an elevator in working order. It argues that the question of whether it will prevail on its causes of action for negligence and breach of contract before this Court will turn, in large part, on the same legal and factual issues that will determine whether it is entitled to an abatement in the Civil Court proceeding. In support of the motion, plaintiff submits as exhibits its complaint and numerous photos of the damage caused by the leaks (Ex 1), a copy of the Civil Court notice of petition and petition (Ex 2), a copy of its amended verified answer thereto (Ex 3), a copy of an order of the Civil Court (Katz, J.), dated November 9, 2015, granting it leave to amend its answer (Ex 4), and a copy of the lease and rider (Ex 5).

Defendants counter that the Civil Court is the proper forum for the adjudication of the non-payment proceeding. They further contend that the parties' lease required plaintiff to bring a separate action for damages rather than an abatement of rent for injuries arising from an alleged

breach of the lease. In opposition to the motion, defendants submit a copy of the lease and rider (Ex A), a copy of the Civil Court notice of petition and petition (Ex B), and a copy of the amended verified answer to the petition (Ex C).

### **CONCLUSIONS OF LAW:**

CPLR 602 (b) provides that, “[w]here an action is pending in . . . [S]upreme [C]ourt[, the court] may, upon motion, remove to itself an action pending in [another] court in the county and consolidate [the actions] or have [them] tried together.” A motion for removal and joinder should be granted where an action in Supreme Court and a proceeding in Civil Court “share a substantial common question of law or fact” (*Rogin v Rogin*, 90 AD3d 507, 508 [1st Dept 2011]; see CPLR 602 [a], [b]) and there is no “showing of prejudice to a substantial right by the party opposing the motion.” *Hae Sheng Wang v Pao-Mei Wang*, 96 AD3d 1005, 1009 (2d Dept 2012). However, “[e]ven where there are common questions of law or fact, [a motion for removal and joinder] is properly denied if the actions are at markedly different procedural stages and [joinder] would result in undue delay in the resolution of either matter.” *Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d 118, 119 (1st Dept 2003); see *Ambac Assur. Corp. v Countrywide Home Loans, Inc.*, 94 AD3d 455, 456 (1st Dept 2012); *Ahmed v C.D. Kobsons, Inc.*, 73 AD3d 440, 441 (1st Dept 2010); *Barnes v Cathers & Dembrosky*, 5 AD3d 122 (1st Dept 2004). Finally, the decision whether to order removal and a joint trial is discretionary with the Court. See *Ahmed v C.D. Kobsons, Inc.*, 73 AD3d at 441; *Abrams v Port Auth. Trans-Hudson Corp.*, 1 AD3d at 119.

Here, this Court, in its discretion, denies the motion to remove and join the Civil Court proceeding with the captioned action. The Civil Court proceeding has been pending for nearly two

years and is scheduled for imminent trial. On the other hand, the instant action was commenced last month. Removal and joinder of the Civil Court proceeding would substantially delay its resolution. Further, the Court notes that, should it grant plaintiff's motion, the result would be the very thing plaintiff says it wishes to avoid, namely duplication of Court efforts. Plaintiff's own motion papers reveal that the Civil Court has ruled on at least one discovery motion in connection with that proceeding. Finally, it is hard to argue that joinder would not be prejudicial to defendants given the fact that they have already expended time, effort, and incurred legal fees in the Civil Court matter, which, had a motion for joinder been made earlier, they would not have incurred. In short, this Court declines to disturb the non-payment proceeding where it is so close to completion and the captioned action is merely in its nascent stage.

During oral argument, plaintiff requested that this Court temporarily stay the Civil Court proceeding in the event that its motion was denied, to permit it time to seek an appeal. No request for such relief appears in its motion papers. Pursuant to CPLR 326 (a), this Court is empowered to stay proceedings in the Civil Court pending the resolution of a motion for removal to this Court. *See generally* 1 Carmody-Wait 2d § 2:250. As this Court has denied the motion to remove the proceeding, however, it is unaware of any authority within CPLR 326 to permit it to grant an application for a temporary stay of the Civil Court proceeding for the purpose of seeking an appeal of its denied motion. *Compare 952 Assoc., LLC v Palmer*, 52 AD3d 236, 237 (1st Dept 2008). Plaintiff has alerted it to no such authority. The power to stay a proceeding pursuant to CPLR 2201 is also inapplicable, as it refers to a court's power to stay proceedings pending before it. *See generally Concord Assoc., L.P. v EPT Concord, LLC*, 101 AD3d 1574, 1575 (3d Dept 2012). The only alternative remedy would lie in this Court's equity jurisdiction, but would be inappropriate

where, as here, plaintiff has not formally moved for such relief and adequately supported it. *See generally* CPLR article 63; *Doe v Axelrod*, 73 NY2d 748, 750-751 (1988).

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that plaintiff's motion seeking removal and joinder of the summary proceeding commenced against it in the Civil Court of the City of New York, New York County under Index Number L & T 68393/2014 with the captioned action is denied; and it is further,

ORDERED that this constitutes the decision and order of this Court.

DATED: April 6, 2016

ENTER:



HON. KATHRYN E. FREED, J.S.C.  
**HON. KATHRYN FREED**  
**JUSTICE OF SUPREME COURT**