

<b>Wolf Props. Assoc., L.P. v Castle Restoration , LLC</b>
2016 NY Slip Op 32859(U)
May 12, 2016
Supreme Court, Queens County
Docket Number: 16740/2013
Judge: Robert J. McDonald
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SHORT FORM ORDER

SUPREME COURT - STATE OF NEW YORK  
CIVIL TERM - IAS PART 34 - QUEENS COUNTY  
25-10 COURT SQUARE, LONG ISLAND CITY, N.Y. 11101

P R E S E N T : HON. ROBERT J. MCDONALD  
Justice

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WOLF PROPERTIES ASSOCIATES, L.P.,  
Plaintiff,  
  
- against -

Index No.: 16740/2013  
Motion Date: 4/5/16  
Motion No.: 186  
Motion Seq.: 3

CASTLE RESTORATION, LLC,  
Defendant.

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The following papers numbered 1 to 12 read on this motion by plaintiff for an Order striking defendant's answer and affirmative defenses, granting plaintiff summary judgment, and upon granting summary judgment to plaintiff, setting the matter down for a hearing on reasonable attorney's fees:

Papers  
Numbered

Notice of Motion-Affidavits-Exhibits.....	1 - 5
Affidavit in Opposition-Exhibits-Memo. of Law.....	6 - 9
Reply Affidavit-Exhibits.....	10 - 12

This is an action to recover damages arising out of an alleged breach of a lease agreement. The verified complaint alleges breach of contract for failure to pay rental obligations pursuant to the lease and for leaving the subject premises in a state of disrepair and leaving debris, garbage and other items for plaintiff to remove. Defendant interposed an answer asserting affirmative defenses including fraud; that the premises was not the square footage represented in the lease; unclean hands; offset; that the leased premises contained various chemicals, noxious materials, and environmentally dangerous materials that made it unsafe to occupy; and that the landlord continued to occupy a portion of the leased premises. The first affirmative defense alleging fraud was dismissed by this Court's Order dated July 3, 2014.

**FILED**  
MAY 23 2016  
COUNTY CLERK  
QUEENS COUNTY

Plaintiff now moves to strike defendant's answer and affirmative defenses on the ground that defendant has failed to respond to plaintiff's demands for discovery and for a verified bill of particulars. Plaintiff also moves for summary judgment.

In support of the motion, plaintiff submits an affirmation from counsel, M. Brian Conk, Esq.; an affidavit from Robert Castaldi, the principal of plaintiff; copies of the pleadings; copies of the demand for a verified bill of particulars, combined demands, notice for discovery and inspection, demand pursuant to CPLR 3101, demand for expert information, demand for addresses of witnesses and statements of plaintiff, and a notice to take deposition upon oral examination; a copy of the Preliminary Conference Order; a copy of the Short Form Order dated July 3, 2014; a copy of a Stipulation dated August 17, 2015; a copy of an e-mail between counselors dated November 18, 2015; a copy of the lease agreement; and a copy of a contractor's receipts regarding the removal of debris from the premises.

Mr. Castaldi affirms that on or about March 15, 2012, plaintiff leased to defendant the premises for a term of May 1, 2012 through April 30, 2014. Defendant took possession, but failed to pay any rent from the initiation of the lease. Mr. Castaldi also affirms that plaintiff was forced to incur costs to clean and clear debris after defendant vacated the premises.

The proponent of a summary judgment motion must tender evidentiary proof in admissible form eliminating any material issues of fact from the case. If the proponent succeeds, the burden shifts to the party opposing the motion, who then must show the existence of material issues of fact by producing evidentiary proof in admissible form in support of his or her position (see Zuckerman v. City of New York, 49 NY2d 557[1980]). "A court deciding a motion for summary judgment is required to view the evidence presented in the light most favorable to the party opposing the motion and to draw every reasonable inference from the pleadings and proof submitted by the parties in favor of the opponent to the motion" (see Myers v Fir Cab Corp., 64 NY2d 806 [1985]).

Based upon the affidavit of Mr. Castaldi and the leased, plaintiff demonstrated its prima facie case for breach of contract.

In opposition, defendant submits an affidavit from Anthony Colao, the sole member of defendant; photographs of the premises allegedly depicting the extent to which Castle Restoration & Construction, plaintiff's prior tenant, remained in the premises, and a memorandum of law from counsel Matthew F. Didora, Esq.

Mr. Colao affirms that the prior tenant, Castle Restoration & Construction, left garbage, debris, large construction equipment, and files spread throughout the entirety of the leased space. The prior tenant continued to base its controller, Dilip S. Jadav, in an office at the leased premises after commencement of the lease term. Mr. Jadav never performed services for defendant at any time and never paid any rent to defendant. Additionally, plaintiff never disposed of or removed large drums of toxic chemicals that were left on the premises despite repeated demands to remove them. Due to the amount of materials left behind by the prior tenant, Mr. Colao affirms that he could not move office furniture and equipment into the space because there was no place to put it, and he could not effectively operate defendant's business.

Defendant's counsel contends that plaintiff's conduct in permitting its prior tenant to effectively remain in the leased premises resulted in a partial actual eviction, and as such, defendant properly withheld the entire rent (citing Barash v Pa. Terminal Real Estate Corp., 26 NY2d 77 [1970]; Fifth Ave. Bldg. Co. v Kernochan, 221 NY 370 [1917]).

In reply, Mr. Castaldi submits a copy of a consulting agreement between defendant and himself, which Mr. Castaldi contends permitted him to have an office at the subject premises. He also submits an asset sales agreement between him and defendant. Mr. Castaldi contends that all of the items which defendant alleges caused him to be evicted from the premises belonged to defendant pursuant to the asset sales agreement.

Viewing the evidence in the light most favorable to the non-moving party and affording defendant the benefit of every favorable inference that can be drawn from the evidence, this Court finds that issues of fact exist regarding, inter alia, whether the prior tenant occupied the premises in contravention of the lease provisions. Additionally, the differences in the parties' affidavits regarding the agreements and the state of the premises create issues of fact and credibility, which preclude summary judgment (see Sillman v Twentieth Century Fox F. Corp., 3 NY2d 395, 404 [1957]; Malak v Wynder, 56 AD3d 622, 623-24 [2d Dept. 2008]; Kolivas v Kirchoff, 14 AD3d 493 [2d Dept. 2005]).

Regarding the branch of the motion to strike defendant's answer, striking an answer is a drastic remedy that is inappropriate absent a clear showing that the failure to comply with the discovery demands was willful, contumacious, or in bad faith (see Harris v City of New York, 211 AD2d 663 [2d Dept. 1995]). Here, this Court finds that plaintiff has failed to show

that defendant's actions were in bad faith. However, it appears that this matter is not ready for trial as discovery has not been completed.

Accordingly, and based on the above reasons, it is hereby

ORDERED, that the branch of plaintiff's motion for summary judgment is denied; and it is further

ORDERED, that plaintiff's branch of its motion to strike the answer is granted to the extent that the answer shall be stricken unless the following items of discovery and inspection are supplied by June 17, 2016:

- (1) defendant's response to plaintiff's demand for verified bill of particulars dated 1/8/14;
- (2) defendant's response to plaintiff's combined demands dated 1/8/14;
- (3) defendant's response to plaintiff's notice for discovery and inspection dated 1/8/14;
- (4) defendant's response to plaintiff's demand pursuant to CPLR 3101(i) and (h) dated 1/8/14;
- (5) defendant's response to plaintiff's demand for expert information pursuant to CPLR 3101(d) dated 1/8/14; and
- (6) defendant's response to plaintiff's demand for address of witnesses and statements of the plaintiff dated 1/8/14;

and it is further

ORDERED, that all examinations before trial shall be conducted by October 31, 2016; and it is further

ORDERED, that as discovery has not been completed, the Note of Issue is vacated, and plaintiff shall file a new Note of Issue by December 31, 2016.

Dated: May 12, 2016  
Long Island City, N.Y.

ROBERT J. McDONALD  
J.S.C.

**FILED**  
MAY 23 2016  
COUNTY CLERK  
QUEENS COUNTY