

| |
|--|
| 169 Bowery LLC v Collective Hardware LLC |
| 2016 NY Slip Op 33114(U) |
| April 4, 2016 |
| Supreme Court, New York County |
| Docket Number: 116120/09 |
| Judge: Debra A. James |
| Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op <u>30001</u> (U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service. |
| 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

169 BOWERY LLC,

Index No.: 116120/09

Plaintiff,

- v -

Motion Seq. No.: 005

COLLECTIVE HARDWARE LLC, RONALD RIVELINI,
MONSTER STUDIO, TATE STEINSIEK,
Individually and d/b/a MONSTER STUDIO,
ILL WILLED PRODUCTIONS LLC, PETER VANCEK,
Individually and d/b/a THE PETER VANCEK
SALON, STUART BRAUNSTEIN, ANDY KELLEY,
RONNIE CUTRONE, ERIK FOSSE PAUL SEVIGNY,
SHAUN O'ROURKE, DANIEL PINCHBACK, LILY
GULDEN, KEVIN TOOLEY, Individually and dba
as CONCEPT STUDIOS, DANIEL YAGHOUBI,
Individually and dba THE GARDEN, BENTON
BAINBRIDGE, Individually and dba GLOWING
PICTURES, VISHWANATH OWEN BUSH, Individually
and dba GLOWING PICTURES, ANNE APPARU,
Individually and dba HOMEGROWN KITCHEN,
RACHEL CROCKER, CHRIS KOULOURIS
Individually and dba SCALLYWAG & VAGABOND

FILED
APR 04 2016
COUNTY CLERK'S OFFICE
NEW YORK
RECEIVED
GENERAL CLERK'S OFFICE
SUPREME COURT - CIVIL
TRIAL - GENERAL

Defendants.

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

The following papers, numbered 1 to 3 were read on this motion to modify referee report.

| | | |
|--|----------|---|
| Notice of Motion/Order to Show Cause -Affidavits -Exhibits | No (s) . | 1 |
| Answering Affidavits - Exhibits | No (s) . | 2 |
| Replying Affidavits - Exhibits | No (s) . | 3 |

Cross-Motion: Yes No

Upon the foregoing papers,

Plaintiff brings this motion pursuant to CPLR 4403 as to the Report of the Special Referee filed January 29, 2014, seeking to modify the amount of use and occupancy determined therein and as

- 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

so modified confirm the report. Defendant Ronald Rivellini, now appearing pro se, opposes the motion and asks the court to reject the Special Referee's determination.

The court shall grant plaintiff's motion to the extent of confirming the Special Referee's report without modification and shall direct the entry of judgment thereon in accordance with this court's order of January 23, 2012, which granted plaintiff's motion for partial summary judgment on the first cause of action as asserted against defendants Collective Hardware, LLC and Ronald Rivelini.

Plaintiff argues that the Special Referee should have awarded an amount of use and occupancy testified to by its appraisal expert based upon the renovations which were contemplated under the lease between plaintiff and Bowery Development. However, the court notes that the Special Referee in the report specifically considered that testimony and the same argument that plaintiff makes here and rejected plaintiff's measure of damages based upon precedent as to the calculation of damages for trespass. Thus the Referee correctly cited to Salesian Soc., Inc. v Vil. of Ellenville (121 AD2d 823, 825 [3d Dept 1986] [citation omitted]) wherein it was stated "[t]he measure of damages in a trespass action is the diminution in the rental or usable value of the premises caused by the trespass, taking the property as is . . . The rental value having been

evidenced by the lease in effect, the award . . . cannot be said to be improper.”

As the testimony before the Referee was that the renovations contemplated by the lease were never completed, the Referee was correct in disregarding the testimony of plaintiff’s expert to the extent that it was based upon the hypothetical condition of the premises rather than considering the premises as is. On this basis, the Referee’s conclusion that the rent set forth in the lease was the best measure of use and occupancy damages is proper and the court declines to disturb that finding.

The court further finds that defendant pro se’s arguments against confirmation of the report fail to raise any legally cognizable argument in this damages context as the court has previously granted partial summary judgment and to the extent defendant’s arguments could be interpreted to raise any issue it is as to the court’s prior order and not the current application.

Therefore, the court shall confirm the Special Referee’s report. Accordingly, it is

ORDERED that pursuant to CPLR 4403 upon plaintiff’s motion the Report of the Special Referee filed January 29, 2014, is hereby CONFIRMED; and it is further

ORDERED and ADJUDGED that upon the Report of the Special Referee, the Clerk is hereby directed to enter judgment in favor of the plaintiff against defendants COLLECTIVE HARDWARE LLC, and

RONALD RIVELINI, in the amount of \$843,127.98, with pre-judgment interest at the statutory rate from July 28, 2008, and punitive damages in the amount of \$100,000.

This is the decision and order of the court.

Dated: APR 04 2016

ENTER:

Debra A. James
J.S.C.

DEBRA A. JAMES