

Dollar Choice Deals, Inc. v Ross & Ross LLC

2020 NY Slip Op 31456(U)

May 19, 2020

Supreme Court, New York County

Docket Number: 151061/2019

Judge: David Benjamin Cohen

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This opinion is uncorrected and not selected for official publication.

NYSCEF DOCECTIVED 9 NYSCEF: 05/20/2020
SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: <u>HON. DAVID BENJAMIN COHEN</u>	PART	IAS MOTION 58EFM
<i>Justice</i>		
-----X	INDEX NO.	<u>151061/2019</u>
DOLLAR CHOICE DEALS, INC.	MOTION DATE	<u>11/13/2019</u>
Plaintiff,	MOTION SEQ. NO.	<u>001</u>
- v -		
ROSS & ROSS LLC,	DECISION + ORDER ON MOTION	
Defendant.		
-----X		

The following e-filed documents, listed by NYSCEF document number (Motion 001) 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47

were read on this motion to/for JUDGMENT - SUMMARY

Upon the foregoing documents:

Plaintiff Dollar Choice Deals, Inc. was the tenant of a commercial premises located at 2156 Third Avenue, New York, New York 10035. Defendant Ross & Ross LLC was the landlord. In early 2018, defendant commenced a summary nonpayment proceeding against plaintiff in the Civil Court of the City of New York, County of New York, under Index Number L&T 51501/18. In March of 2018, the parties entered into a settlement stipulation whereupon plaintiff was permitted to stay in the premises, provided it made certain payments. Plaintiff failed to make the required payments and a notice of eviction was served on plaintiff in early August 2018. On August 27, 2018, the parties entered into another Court stipulation whereupon the eviction was stayed, and plaintiff agreed to make certain payments. After plaintiff again failed to make the required payments, plaintiff was served with another notice of eviction, was evicted by the Marshal, and defendant was given legal possession of the premises. On October 22, 2018, plaintiff's Order to Show Cause seeking to be restored to possession was denied by the

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 Civil Court. However, the Court prohibited defendant from re-renting the premises prior to

November 14, 2018, and, plaintiff was granted daily access until November 13, 2018 to collect and remove plaintiff's property from the premises.

According to the unrefuted affidavit of Derek Cohn, defendant's manager, at no time prior to "November 13, 2018 was I or anyone employed by Ross ever contacted with regard to providing access to the premises. Nor am I aware of a demand made in any manner during the above time period by Dollar Choice to myself, anyone employed by Ross or its attorneys for the release of the property left on the premises."

According to the Complaint and a letter submitted by plaintiff, on November 27, 2018, defendant entered the premises and removed plaintiff's property. Plaintiff commenced this action seeking damages for: (1) negligence based upon defendant's breach of its duty to use reasonable care to protect plaintiff's property; and (2) conversion related to the alleged wrongful refusal to return the property. Plaintiff now moves for summary judgment and defendant cross-moves to dismiss and for summary judgment.

Summary judgment is a drastic remedy that should not be granted where there exists a triable issue of fact (*Integrated Logistics Consultants v Fidata Corp.*, 131 AD2d 338 [1st Dept 1987]; *Ratner v Elovitz*, 198 AD2d 184 [1st Dept 1993]). The moving party must establish a prima facie case showing that it is entitled to judgment as a matter of law (*Alvarez v Prospect Hosp.*, 68 NY2d 320 [1986]). This burden is a heavy one, and all facts must be viewed in a light most favorable to the non-moving party (*Jemack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470 [2013]). The proponent of a summary judgment motion makes a prima facie showing of entitlement to judgment as a matter of law, by tendering sufficient evidence to eliminate any material issues of fact from the case (*Winegrad v New York Univ. Med.*

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Cir., 64 NY2d 851 [1985]). After the moving party has demonstrated its *prima facie* entitlement to summary judgment, the party opposing the motion must demonstrate by admissible evidence the existence of a factual issue requiring a trial (*Jacobsen v New York City Health and Hospitals Corp.*, 22 NY3d 824 [2014]; *Zuckerman v City of New York*, 49 NY2d 557 [1980]).

Plaintiff’s motion for summary judgment is denied and defendant’s cross motion for summary judgment is granted. Under these facts, defendant was permitted to remove plaintiff’s property left behind in the premises. First, there is no dispute, nor even an allegation, that plaintiff ever attempted a timely retrieval of the property at any time prior to defendant removing the property. Plaintiff failed to do so even after the Civil Court’s specifically granting plaintiff nearly three weeks of access. In fact, defendant waited an additional two weeks after the expiration of the court ordered stay before removing the property. Not once did plaintiff attempt to retrieve any items or even contact defendant seeking an arrangement for storage or pickup.

Similarly, although plaintiff’s has never specified the duty that it claimed defendant breached, defendant is not deemed a constructive bailee in this instance since “plaintiff did not, at any time before the date of the execution, make any arrangements whatsoever with its landlord to keep the property in safekeeping for its benefit” (*Funding Assistance Corp. v Mashreq Bank, PSC*, 277 AD2d 127, 128 [1st Dept 2000]). Additionally, the lease provides that “all property required or permitted to be removed by Tenant at the end of the term remaining in the demised premises after Tenant’s removal shall be deemed abandoned and may, at the election of the owner ... be removed ...” Here, defendant waited over 30 days from the time it obtained legal possession before removing the property. This time period was reasonable under these circumstances where plaintiff was given nearly three weeks to retrieve the property remaining in the premises, but failed to take any action whatsoever, not even communicating with defendant.

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Given the language contained in the lease, defendant fulfilled any duty it may have had with respect to any property left behind in the premises. Accordingly, defendant is granted summary judgment dismissing the negligence claim.

For the same reasons, defendant is granted summary judgment on the conversion claim. Conversion is the unauthorized assumption and exercise of the right of ownership over goods belonging to another to the exclusion of the owner's rights," (State of New York v Seventh Regiment Fund, 98 NY2d 249 [2002]). As a required element of conversion, plaintiff must establish "some affirmative act - asportation by the defendant or another person, denial of access to the rightful owner or assertion to the owner of a claim on the goods, sale or other commercial exploitation of the goods by the defendant" (id. at 260). Prior to removal and disposition of the property, there is no claim that plaintiff attempted to contact defendant or obtain the property left behind in the premises. Accordingly, plaintiff cannot claim any legally cognizable interest in the personal property that, as conceded by defendants for present purposes, remained on the premises after the tenant's eviction. Accordingly, the tenant has no cause of action for conversion (8902 Corp. v Helmsley-Spear, Inc., 23 AD3d 316 [1st Dept 2005]). Accordingly, it is hereby

ORDERED that plaintiff's motion for summary judgment is denied, and it is further ORDERED that defendant's cross-motion for summary judgment is granted and this action is dismissed, and the Clerk shall enter judgment accordingly.

5/19/2020
DATE


DAVID BENJAMIN COHEN, J.S.C.

CHECK ONE:	<input checked="" type="checkbox"/> CASE DISPOSED	<input type="checkbox"/> DENIED	<input type="checkbox"/> NON-FINAL DISPOSITION	<input type="checkbox"/> OTHER
	<input type="checkbox"/> GRANTED		<input type="checkbox"/> GRANTED IN PART	
APPLICATION:	<input type="checkbox"/> SETTLE ORDER		<input type="checkbox"/> SUBMIT ORDER	
CHECK IF APPROPRIATE:	<input type="checkbox"/> INCLUDES TRANSFER/REASSIGN	<input type="checkbox"/> FIDUCIARY APPOINTMENT	<input type="checkbox"/> REFERENCE	