SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: **HON. LOUIS L. NOCK** **PART** **IAS MOTION 38EFM**

Justice

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LOWER FIFTH REALTY CORP.,

Plaintiff,

- v -

ITRIA VENTURES LLC,

Defendant.

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INDEX NO. 157262/2018

MOTION DATE 01/02/2020, 01/10/2020

MOTION SEQ. NO. 002 003

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 002) 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 52, 54, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

The following e-filed documents, listed by NYSCEF document number (Motion 003) 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 53, 55, 70, 71, 72, 73, 74, 75

were read on this motion to/for SUMMARY JUDGMENT(AFTER JOINDER).

Upon the foregoing documents, the motion of plaintiff Lower Fifth Realty Corp. ("Plaintiff") for summary judgment (Motion Seq. 002) is denied and the motion of defendant Itria Ventures, LLC ("Defendant") for summary judgment (Motion Seq. 003) is granted, in accord with the following memorandum decision. The motions are consolidated for decision.

Background

Plaintiff is the owner of real property located at 178/180 Fifth Avenue, New York, New York (the "Premises"). On July 2, 1996, Plaintiff entered into a commercial lease agreement with non-party Phuman Singh ("Tenant") for use of the Premises as a gourmet delicatessen (Radmin 1/2/20 aff in support, exhibit C). The lease agreement was later modified pursuant to a modification agreement dated June 24, 2008 (*id.*, exhibit D). On July 26, 2017, Tenant entered into an agreement with Defendant whereby Defendant purchased future receivables of Tenant, as

secured by a lien on certain property of Tenant, including property located at the Premises (the "Property") (Awan 3/5/20 aff in opp, exhibit F). Defendant perfected its lien by filing a UCC-1 Financing Statement on July 31, 2017 (*id.*, exhibit G).

In May 2018, Tenant was evicted from the Premises under New York County Housing Court Index No. 62903/17 (Radmin 1/2/20 aff ¶ 8). On May 17, 2018, Shujah A. Awan, Associate General Counsel to Defendant, sent a letter to Plaintiff notifying Plaintiff of Defendant's intention to enforce its rights and remedies under the New York Uniform Commercial Code (the "UCC") and to exercise its right to take possession of the Property in order to satisfy the secured debt owed to Defendant. In relevant part, the May 17, 2018 letter advised that "I, on behalf of [Defendant], direct you, as the landlord of the Premises, to refrain from disposing of, or transferring in any way, the Property without the express prior authorization from [Defendant]," and advised that Defendant would coordinate with a moving company to effect possession of the Property (Radmin 1/2/20 aff, exhibit E; Awan 3/5/20 aff, exhibit H).

After notifying Plaintiff of its security interest, Defendant sought to recover the Property pursuant to UCC 9-609 (b)(2) and UCC 9-604 (d). Defendant did not take any steps through a judicial process to enforce its security interest or otherwise take legal title to the Property. Beginning in June 2018, Defendant sought to arrange a time with Plaintiff to take possession of the Property (Awan 3/5/20 aff ¶ 22). Ultimately, Plaintiff agreed to allow Defendant's mover to remove the Property from the Premises on June 28, 2018 (*id.* ¶ 23). Nevertheless, when the movers arrived at the Premises on June 28, 2018, Joel Radmin ("Radmin"), an officer of Plaintiff, requested that the movers provide an insurance certificate, but was unsatisfied with the certificate of self-insurance that they provided and refused to allow the movers to remove the

Property (Awan 3/5/20 aff ¶ 25). Radmin asserts that the insurance certificate was fraudulent, and cites this as the reason for his refusal (Radmin 1/2/20 aff ¶¶ 12-15). Later that day, counsel for Defendant sent an email to Radmin in which he advised that Defendant had retained new movers to remove the Property on July 6, 2017 and advised, *inter alia*, "[t]o the extent you must transfer the property for safekeeping between now and July 6, please let us know exactly where you intend to store the property and we will work with you" (Awan 3/5/20 aff, exhibit I). In an email response, Radmin advised his belief that he holds a superior UCC lien and of his intention to commence this proceeding (Awan 3/5/20 aff, exhibit J).

Plaintiff commenced this action on August 3, 2018 by filing a summons and complaint (the "Complaint"). By its Complaint, Plaintiff asserts causes of action seeking a declaratory judgment (1) to determine the amount of bond Defendant must obtain in order to remove the Property from the Premises, (2) that Plaintiff will not be liable for conversion should it remove the items from the Premises and move them to a storage facility, and (3) seeking the payment of use and occupancy ("U&O") at the rate of $37,607.70 per month, based on the rent fixed in the lease agreement, for Defendant's "failure to remove its items," which Plaintiff asserts has prevented it from reletting the Premises. On August 28, 2018, Defendant appeared by filing an answer (the "Answer"), which asserts ten affirmative defenses and no counterclaims.

During the course of the litigation, there were apparent discussions between Plaintiff and Tenant regarding removal of the Property from the Premises (Awan 3/5/20 aff, ¶ 36). Various counsel to the parties also engaged in a protracted series of communications regarding removal of the Property from the Premises. The substance of these communications is not recounted in full here because these details are not relevant to the present motion. However, the court does note that in the course of these communications Defendant advised Plaintiff that it should release

the Property to Tenant. Attorneys for Plaintiff essentially responded that Tenant or Defendant would have to pay its arrears in order to gain access to the Property, stating that "[a]s far as access, if any is to be provided, you will have to deal with . . . the over $300,000 in arrears," "And what about the money my client is owed?", and, finally, "my client is looking to get paid" (Awan 3/5/20 aff, exhibit L). Ultimately, Defendant advised Plaintiff that it should release the Property to Tenant, and Plaintiff removed the Property from the Premises.[1] The current whereabouts of the Property are not evident in either party's submissions.

Standard of Review

"The proponent of a motion for summary judgment must demonstrate that there are no material issues of fact in dispute, and that it is entitled to judgment as a matter of law" (*Dallas-Stephenson v Waisman*, 39 AD3d 303, 306 [1st Dept 2007], citing *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]). "Failure to make such showing requires denial of the motion, regardless of the sufficiency of the opposing papers" (*Winegrad*, 64 NY2d at 853). Upon proffer of evidence establishing a prima facie case by the movant, the party opposing a motion for summary judgment bears the burden of producing evidentiary proof in admissible form sufficient to require a trial of material questions of fact (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). In considering a summary judgment motion, evidence should be "viewed in the light most favorable to the opponent of the motion" (*Marine Midland Bank v Dino & Artie's Automatic Transmission Co.*, 168 AD2d 610 [1990]).

Discussion

Plaintiff moves for summary judgment on its third cause of action for an award of U&O in the amount of $225,346.20 for the time from February through October 2018, during which it

[1] Because the Property has already been removed from the Premises, Plaintiff's first and second causes of action are moot.

alleges that it was prevented from reletting the Premises due to Defendant's purported failure to remove the Property from the Premises. Plaintiff also takes the position that Defendant's May 17, 2018 letter prevented it from removing the Property from the Premises or that Defendant took constructive possession of the Property by virtue of the letter. Defendant opposes the motion and moves for summary judgment in its favor on the grounds that Plaintiff prevented removal of the Property, that Defendant is not liable for U&O because it does not own the Property, and because Plaintiff has not demonstrated that Defendant's actions prevented Plaintiff from reletting the Property.

Pursuant to New York Real Property Law ("RPL") § 220, a landlord "may recover a reasonable compensation for the use and occupation of real property, by any person, under an agreement, not made by deed; and a parol lease or other agreement may be used as evidence of the amount to which he is entitled." Generally, a "landlord-tenant relationship is the *sine qua non* for this remedy" (*El Gallo Meat Mkt. v Gallo Mkt.*, 286 AD2d 255, 256 [1st Dept 2001]). Nevertheless, courts have held that other property occupants, such as holdover tenants or subtenants (*Hudson-Spring Partnership, L.P. v P+M Design Consultants, Inc.*, 112 AD3d 419 [1st Dept 2013]), may be liable for U&O. Plaintiff correctly notes that absence of privity is not a bar to obtaining U&O, but only a party that actually occupies the subject property can be liable for U&O. In the present instance, Defendant did not occupy the Premises because it does not, and did not at any time, own or possess the Property.

Although a secured creditor obtains certain rights over collateral, it is elementary that it does not take *ownership* of that collateral by the mere existence of a security agreement. On the contrary, unless otherwise provided for in the security agreement, a secured creditor does not have a possessory right to the collateral until after a default. UCC § 9-609 provides that, after a

default, a secured party may take possession of collateral either pursuant to a judicial process or by taking possession of the property by means of "self-help" (UCC § 9-609 [b]). Where a secured party proceeds through a judicial process, it may obtain legal title to the property and thereafter take possession by judicial decree. In this case, Defendant did not proceed through a judicial process and instead sought to obtain possession of the Property by means of self-help. *Rand Prods. Co v Mintz* (69 Misc2d 1055 [Civ Ct, NY County 1972], *affd Rand Prods. Co v Mintz*, 72 Misc2d, 621 [App Term, 1st Dept 1973]) and the other cases cited by Plaintiff all involve situations where a secured creditor proceeded through a judicial process and took legal title to the property in question, and are, therefore, inapplicable to the present circumstances.

Where a creditor opts to proceed by self-help, it "may take possession of collateral either by removing it or by rendering it unusable or disposing of it on the debtor's premises" (*Industrial Equip. Credit Corp. v Green*, 62 NY2d 903 [1984] [interpreting prior version of UCC § 9-609] [cited in *Maina v Rapid Funding NYC LLC*, 148 AD3d 596 [1st Dept 2017]). Though the term "possession" is not specifically defined by the UCC; read in context, it is evident that the term means *physical* possession, and courts have interpreted it in this manner (*see*, *Industrial Equip.*, 62 NY2d at 906). As demonstrated by the affidavits and documentary evidence presented by both parties, the Plaintiff prevented Defendant from taking possession of the Property because it was dissatisfied with the insurance certificate presented by the movers hired by Defendant.[2]

Plaintiff's assertion that it could not remove the Property from the Premises because the May 17, 2018 attorney's letter directed it to "refrain from disposing of, or transferring in any way, the Property without the express prior authorization from [Defendant]," is unpersuasive.

[2] While not making a determination on this motion regarding the propriety of Plaintiff's actions, it should be noted that courts have found landlords liable for conversion where they refused permission to a secured creditor to remove collateral and the secured creditor complied with UCC § 9-604(d) (*see Leban Store Fixture Co. v August Props*, 117 AD2d 782, 784 [2d Dept 1986]).

Plaintiff persisted in its refusal to allow Defendant to take possession of the Property even after Defendant expressed its consent to Plaintiff moving the Property. As stated in Defendant's June 28, 2018 email, "[t]o the extent you must transfer the property for safekeeping between now and July 6, please let us know exactly where you intend to store the property and we will work with you" (within NYSCEF Doc. No. 67 email communications thread).

To the extent that Plaintiff argues Defendant took constructive possession of the Property by virtue of its May 17, 2018 letter, the court is equally unpersuaded. The UCC does not provide for this type of constructive possession, nor could Plaintiff be said to have obtained it without control or dominion of the Property (*see Industrial Equip.*, 62 NY2d at 906). Moreover, UCC 9-604 and UCC 9-609 give a secured creditor the *right* to take possession of collateral, but not the obligation. As such, Defendant did not have an obligation to remove the Tenant's Property from the Premises. Therefore, because Defendant did not own or possess the Property, or have an obligation to remove the Property, it did not have use or occupancy of the Premises.

Accordingly, it is hereby

ORDERED that Plaintiff's motion for summary judgment (Motion Seq. 002) is denied, and Defendant's motion for summary judgment (Motion Seq. 003) is granted; and it is further

ORDERED that the case is dismissed with prejudice.

Louis L. Nock

8/21/2020
DATE

LOUIS L. NOCK, J.S.C.

CHECK ONE:	[X]	**CASE DISPOSED**		[ ]	**NON-FINAL DISPOSITION**		
	[ ]	**GRANTED**	[ ] **DENIED**	[ ]	**GRANTED IN PART**	[X]	**OTHER**
APPLICATION:	[ ]	**SETTLE ORDER**		[ ]	**SUBMIT ORDER**		
CHECK IF APPROPRIATE:	[ ]	**INCLUDES TRANSFER/REASSIGN**		[ ]	**FIDUCIARY APPOINTMENT**	[ ]	**REFERENCE**