

TM 18 Realty LLC v Copper Wang, Inc.

2021 NY Slip Op 34250(U)

December 23, 2021

Supreme Court, Queens County

Docket Number: Index No. 712653/16

Judge: Carmen R. Velasquez

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This opinion is uncorrected and not selected for official publication.

SHORT FORM ORDER

NEW YORK SUPREME COURT - QUEENS COUNTY

FILED

Present: HONORABLE CARMEN R. VELASQUEZ IAS PART 38
Justice

**3/15/2022
12:12 PM**

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TM 18 REALTY LLC, et al.,

Index No. 712653/16

**COUNTY CLERK
QUEENS COUNTY**

Plaintiff,

Motion

Date: March 15, 2021
(Seq. No. 2)

-against-

April 19, 2021
(Seq. No. 3)

COPPER WANG, INC., et al.,

Defendants.

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The following papers numbered EF 38-106 read on this motion by the defendants for an order amending the summons, for summary judgment on the first, second and ninth affirmative defenses and counterclaims and for summary judgment dismissing the complaint (Seq. No. 2); separate motion by the plaintiffs for an order amending the summons and for summary judgment on the complaint (Seq. No. 3).

PAPERS
NUMBERED

Notice of Motion - Affidavits - Exhibits.....	EF 38-75
Affirmation in Opposition - Exhibits.....	EF 77-89
Replying Affirmation	EF 100-103
Notice of Motion - Affidavits - Exhibits.....	EF 90-99
Affirmation in Opposition - Exhibits.....	EF 104-106

Upon the foregoing papers it is ordered that this motion by the defendants for an order amending the summons, for summary judgment on the first, second and ninth affirmative defenses and counterclaims and for summary judgment dismissing the complaint (Seq. No. 2) and separate motion by the plaintiffs for an order amending the summons and for summary judgment on the complaint (Seq. No. 3) are jointly decided as follows:

At the outset, the court notes that there is no opposition to the branches of the motions to amend the summons. Apparently the amended summons that is on file with the country clerk contains a typographical error inasmuch as it is missing a space

in the name of plaintiff TM18 Realty LLC. Thus, the summons and complaint is amended to correct the name of plaintiff "TM18 Realty LLC" to read as "TM 18 Realty LLC." Thus, the branches of the motions to amend the summons are granted, without opposition, and the caption shall now read as follows:

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF QUEENS

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TM 18 REALTY LLC AND MT 18 REALTY, Index No. 712653/16
LLC,

Plaintiff,

-against-

COPPER WANG, INC. AND RUAN MIN
YING,

Defendants.

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The court also notes that the note of issue was filed in this matter on July 20, 2020, and the motion by the defendants for summary judgment was made on November 23, 2020. Although motions for summary judgment must be made within 120 days after the filing of the note of issue (CPLR 3212[a]), the court will excuse the *de minimis* delay herein and consider the motions on the merits by both parties. CPLR 2004 permits the court to extend the time fixed by any statute, rule or order. No prejudice will arise to either party by the consideration of the motions herein.

The parties entered in to lease on May 14, 2015 for premises located at 130-14 91st Street and 91-01 130th Street in Queens County. The property consisted of two separate but adjacent lots. The defendants, the tenants, intended to use the premises as a scrap metal recycling business. Defendant Ruan Min Ying was a guarantor under the lease. The complaint alleges that the defendants defaulted in the payment of rent, additional rent and other charges under the terms of the lease.

Defendants assert, *inter alia*, that they were unable to obtain a license from the Department of Consumer Affairs for their business because they needed an amended certificate of occupancy for the premises to conduct a scrap metal recycling

business. Defendants state that plaintiffs' representative, Meir Dahan, informed him that he would take care of the problem by obtaining a letter of no objection from the Department of Buildings or an amended certificate of occupancy. Defendants moved into the premises on July 1, 2015, but maintain that plaintiffs made no efforts to obtain the amended certificate of occupancy until after October 31, 2015. Defendants assert that they learned that the Department of Buildings previously denied an application by the plaintiffs to amend the Certificate of Occupancy for one of the lots, Lot 5 and plaintiffs never even filed an application to amend the Certificate of Occupancy for the other Lot, Lot 12. Defendants ultimately stopped paying rent in December 2015 and surrendered the premises and delivered the keys to the plaintiffs on May 25, 2016.

The complaint alleges causes of action for breach of contract, an account stated and unjust enrichment. Defendants served an Answer with affirmative defenses and counterclaims. As relevant herein, the first affirmative defense and counterclaim seeks to declare the lease an illegal contract that is unenforceable and void. The second affirmative defense and counterclaim alleges unjust enrichment. The ninth affirmative defense and counterclaim seeks the return of the defendants' security deposit. The parties now move, separately, for summary judgment.

The proponent of a summary judgment motion must make a prima facie showing of entitlement to judgment as a matter of law, tendering sufficient evidence to demonstrate the absence of any material issues of fact. (*Ayotte v Gervasio*, 81 NY2d 1062, 1063 [1993].) Once a prima facie showing has been made, the burden shifts to the party opposing the motion for summary judgment to produce evidentiary proof in admissible form sufficient to establish material issues of fact which require a trial of the action. (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980].) Summary judgment is a drastic remedy and should not be granted where there is any doubt as to the existence of a triable issue. (*Peerless Ins. Co. v Allied Bldg. Prods. Corp.*, 15 AD3d 373, 374 [2d Dept 2005].)

The ninth affirmative defense and counterclaim seeks the return of the defendants' security deposit in the amount of \$24,000.00. Defendants contend that the plaintiffs commingled the security deposit with its own funds in violation of General Obligations Law § 7-103(1). General Obligations Law § 7-103(1) provides that "[w]henever money shall be deposited or advanced on a contract or license agreement for the use or rental of real property as security for performance of the contract or agreement

or to be applied to payments upon such contract or agreement when due, such money, with interest accruing thereon, if any, until repaid or so applied, shall continue to be the money of the person making such deposit or advance and shall be held in trust by the person with whom such deposit or advance shall be made and shall not be mingled with the personal moneys or become an asset of the person receiving the same."

At bar, the plaintiffs do not deny that the security deposit was commingled with its own funds, even if done inadvertently. Thus, plaintiffs, as landlords, forfeited their right to avail themselves "of the deposit for any purpose, and defendants had an immediate right to return of the funds," even if the defendants had breached the lease. (see *Gihon, LLC v 501 Second St., LLC*, 103 AD3d 840, 842 [2d Dept 2013]; *Paterno v Carroll*, 75 AD3d 625, 628 [2d Dept 2010].) Thus, defendants are entitled to summary judgment on the ninth affirmative defense and counterclaim.

The first cause of action of the complaint sounds in breach of contract. Defendants' first affirmative defense and counterclaim seek to declare the lease void. To maintain an action for breach of contract, a party must establish the existence of a contract, plaintiff's performance pursuant to the contract, the defendant's breach of that contract and damages. (*Legum v Russo*, 133 AD3d 638, 639 [2d Dept 2015]; *Kuzma v Protective Ins. Co.*, 104 AD3d 820, 821 [2d Dept 2013]; *Harris v Seward Park Hous. Corp.*, 79 AD3d 425, 426 [1st Dept 2010].)

While it is clear that under the lease, the premises was intended to be used solely as a scrap metal business, defendants were unable to obtain the requisite certificate of occupancy. In his affidavit, defendant's President, Deming Wang, avers that he relied on the promises of the Meir Dahan that defendants would be able to obtain the amended certificate of occupancy. Mr. Wang avers that he was never told about any possible difficulties he might encounter in obtaining a license or certificate of occupancy for his business. According to Mr. Wang, the principal of Aberdeen Recycling Co., the company previously operating on the site, never informed him that there might be any such issues.

Mr. Dahan avers in his affidavit that defendants were conducting their scrap metal business from the time they entered the premises until they surrendered the keys. He avers that he saw trucks going in and out of the premises and defendants even purchased scrap metal from him. Mr. Dahan further avers that defendants advised him that they would continue to operate the business under Aberdeen's license. He contends that the issue of the certificate of occupancy only became a problem in 2016 when

the defendants wanted to incorporate an import export component into their business. In addition, Mr. Dahan states that although defendants state they stopped paying rent in November 2015, they did continue to pay the rent, although the check was returned for insufficient funds. Moreover, Maria Bernard, plaintiffs' office Manager, avers in her affidavit that from July 2015 until January 2016, no one on behalf of the defendants ever mentioned that Copper Wang was unable to conduct its scrap metal business. Ms. Bernard further avers that defendants purchased scrap metal from Mr. Dahan as also noted above. Ms. Bernard, similar to Mr. Dahan, states that the license and the certificate of occupancy, did not become an issue until defendants sought to add an import export business. Thus, there is a triable issue of fact as to whether defendants were able to operate the scrap metal business from the premises, and whether the lease was unenforceable. Based on the facts presented, the court cannot conclude, as matter of law, that defendants breached the contract. Therefore, the motions by defendants for summary judgment the 1st affirmative defense and counterclaim and for summary judgment dismissing the first cause of action for breach of contract are denied. Similarly, the motion by plaintiffs for summary judgment on the first cause of action for breach of contract is denied.

The second cause of action of the complaint is for an account stated. "An account stated is an agreement between parties to an account based upon prior transactions between them with respect to the correctness of the account items and balance due ... By retaining billing statements and failing to object to the account within a reasonable time, the recipient of the bill implies that he or she agrees with the sender regarding the amount owed." (*BRK Props., Inc. v Wagner Ziv Plumbing & Heating Corp.*, 89 AD3d 883, 885 [2d Dept 2011].)

Defendants avers in their annexed affidavits that no bills were ever received by them from the plaintiffs. However, Ms. Bernard avers in her affidavit that she prepared and forwarded a statement of rental payments and property taxes due and owing by the defendants. Thus, there are issues of fact as to the second cause of action for account stated.

The third cause of action and the second affirmative defense and counterclaim allege unjust enrichment. The essential inquiry in any action for unjust enrichment or restitution is whether it is against equity and good conscience to permit the defendant to retain what is sought to be recovered. (*Paramount Film Distrib. Corp. v State of New York*, 30 NY2d 415, 421 [1972].) A plaintiff must show that (1) the other party was enriched, (2) at the plaintiff's expense, and (3) that it is against equity and good

conscience to permit the other party to retain what is sought to be recovered. (*Berkovoits v Berkowvits*, 190 AD3d 911, 917 [2d Dept 2021]; *Alan B. Greenfield, M.D., P.C., v Long Beach Imaging Holdings, LLC*, 114 AD3d 888, 889 [2d Dept 2014].)

In the matter at hand, defendants made a prima facie showing of entitlement to summary judgment dismissing the cause of action for unjust enrichment. There is no admissible evidence that defendants were enriched or are improperly retaining any benefit. Plaintiffs have failed to raise a triable issue of fact in opposition. However, there are triable issues of fact as to whether the plaintiffs were unjustly enriched if it is determined that defendants paid rent while being unable to operate a scrap metal business at the premises.

Accordingly, the branches of the motions to amend the summons are granted as set forth above. (Seq. 2 and 3).

The branch of the motion by defendants for summary judgment on the ninth affirmative defense and counterclaim is granted. (Seq. No. 2).

The ninth affirmative defense and counterclaim are severed, and defendants are given leave to enter judgment against the plaintiffs in the sum of \$24,000.00, with interest from May 21, 2015, together with costs and disbursements to be taxed by the clerk upon submission of an appropriate bill of costs. (Seq. No. 2).

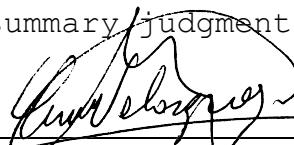
The branch of the motion by defendants for summary judgment on the first affirmative defense and counterclaim is denied. (Seq. No. 2).

The branch of the motion by defendants for summary judgment on the second affirmative defense and counterclaim is denied. (Seq. No. 2).

The branch of the motion by defendants for summary judgment dismissing the complaint is granted to the extent that the third cause of action of the complaint for unjust enrichment is dismissed. The first and second causes of action shall remain. (Seq. No. 2).

The motion by the plaintiffs for summary judgment on the complaint is denied. (Seq. No. 3).

Dated: December 23, 2021



 CARMEN R. VELASQUEZ, J.S.C.

FILED

**3/15/2022
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**COUNTY CLERK
QUEENS COUNTY**