

<b>J.T. Tai &amp; Co. Inc. v Davenport</b>
2022 NY Slip Op 32495(U)
July 27, 2022
Supreme Court, New York County
Docket Number: Index No. 152143/2021
Judge: Mary V. Rosado
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**SUPREME COURT OF THE STATE OF NEW YORK  
NEW YORK COUNTY**

**PRESENT: HON. MARY V. ROSADO PART 33**

*Justice*

-----X

J.T. TAI & CO. INC.

Plaintiff,

- v -

LISA DAVENPORT,

Defendant.

-----X

INDEX NO. 152143/2021

MOTION DATE 07/18/2021

MOTION SEQ. NO. 001

**DECISION + ORDER ON  
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 001) 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 were read on this motion to/for DISMISSAL.

Defendant Lisa L. Davenport (“Tenant”) filed the instant motion to dismiss pursuant to CPLR §3211(5) arguing that Plaintiff J.T. Tai & Co. Inc.’s (“Landlord”) Complaint seeking attorneys’ fees and use and occupancy is barred according to the doctrines of *res judicata* and collateral estoppel. Landlord cross moves for summary judgment pursuant to CPLR §3212 requesting this Court deny Tenant’s motion, strike Tenant’s affirmative defenses, and enter a money judgment for Landlord in the amount of \$31,543.94. Landlord and Tenant’s motions are granted in part and denied in part.

**I. Background**

Landlord served a notice of holdover petition in Housing Part on September 3, 2019. The parties executed a stipulation in J.T. Tai & Co. Inc. v Lisa L. Davenport (L&T Index No.: 65221/2019) (the “Housing Part case”) on January 23, 2020 wherein a final judgment issued to petitioner (NYSCEF Doc. No. 21). The stipulation provided that Tenant would pay use and occupancy of \$2,250.00 commencing February 1, 2020 and \$1,000.00 per month towards the arrears of \$13,620.00 accrued as of January 2020. In exchange, Landlord stayed issuance of a

warrant of eviction (Id.). On or about August 26, 2020, Landlord moved to issue a warrant of eviction due to Tenant's breach of the stipulation (NYSCEF Doc. No. 20). Landlord did not move for any award of attorneys' fees or a money judgment on outstanding use and occupancy (Id.). On December 24, 2020, Hon. Marcia J. Sikowitz, J.H.C., issued a decision finding Tenant to have breached the stipulation and Landlord was granted a warrant of eviction (NYSCEF Doc. No. 21). Despite the issuance of a decision and the warrant to evict, Tenant did not pay use and occupancy and remained in the premises until February 9, 2021 (NYSCEF Docs. No. 13, 14, 23). Landlord now seeks outstanding use and occupancy pursuant to the stipulation as well as attorneys' fees accrued in both Housing Part and this action.

## **II. Tenant's Motion to Dismiss**

### **A. Use and Occupancy**

Tenant contends that Landlord's cause of action seeking unpaid use and occupancy is barred by collateral estoppel as it was already litigated in Housing Part (NYSCEF Docs. Nos. 16-18). Collateral estoppel applies when "(1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and decided, (3) there was a full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits" (Conason v Megan Holding, LLC, 25 NY3d [2015] [internal quotation marks and citation omitted], rearg denied 25 NY3d 1193 [2015]; Ryan v New York Tel. Co., 62 NY2d 494, 500 [1985]).

Collateral estoppel is an equitable doctrine, grounded in the facts and realities of a particular litigation, and is not to be applied rigidly. Buechel v Bain, 97 NY2d 295, 303 [2001]; Lutine Realty Corp v Perry Films, Inc., 4 Misc. 3d 1005(A) at \*4 [Supt Ct, New York County 2004]). "The fundamental inquiry is whether re-litigation should be permitted in a particular case

in light of fairness to the parties, conservation of the resources of the courts and the litigants, and the societal interests in consistent and accurate results.” Buechel at 304. The litigant seeking the benefit of collateral estoppel must show that the decisive issue was necessarily decided in the prior action against a party, or one in privity with a party, while the party to be precluded bears the burden of demonstrating the absence of a full and fair opportunity to contest the prior determination. (Id.).

Tenant has not met its burden in showing the decisive issue, namely a money judgment awarding Landlord unpaid use and occupancy accrued after the stipulation was entered, was decided in the Housing Part. Therefore, collateral estoppel is inapplicable to Landlord’s cause of action seeking a money judgment for unpaid use and occupancy. The Court finds that there was no final judgment issued on damages Tenant owed Landlord due to Tenant’s failure to pay use and occupancy pursuant to the stipulation entered in Housing Part. Rather, the only judgments issued were the amount of use and occupancy to be paid each month to stay the issuance of the warrant to evict, and the issuance of said warrant to evict because Tenant breached the stipulation. No judgment was entered ordering Tenant to pay use and occupancy accrued due to her breach of the stipulation. Landlord’s claim for unpaid use and occupancy survives Tenant’s motion to dismiss.

### **B. Attorneys’ Fees**

New York’s prohibition against the splitting of causes of action requires that attorneys’ fees be sought within the action in which they are incurred, and not in a subsequent action. (O’Connell v 1205-15 First Ave. Associates, LLC, 28 AD3d 233, 234 [1st Dept 2006]; Wavertree Corp. v 136 Waverly Associates, 258 AD2d 392, 392 [1st Dept 1999]). Therefore, Landlord’s failure to seek attorneys’ fees in the prior holdover proceeding bars it from seeking attorneys’ fees related to that proceeding in this action. The part of Landlord’s Complaint seeking attorneys’ fees

is dismissed to the extent it seeks to recoup fees from the Housing Part case. To the extent Landlord has expended fees in this Court to collect unpaid use and occupancy accrued after entering the stipulation, Landlord's cause of action survives Tenant's motion to dismiss.

### **III. Landlord's Cross Motion**

#### **A. Tenant's Affirmative Defenses**

Landlord moves to dismiss each of Tenant's affirmative defenses. Tenant pleaded three affirmative defenses (1) *res judicata*, (2) collateral estoppel and (3) Landlord's legal fees constituting splitting a cause of action. For the reasons listed in Sections II (A) and (B), Landlord's motion to dismiss Tenant's affirmative defenses is granted in part and denied in part.

As to Tenant's pleaded "set-off" seeking a deduction of any amount owed due to the alleged breach of warranty of habitability, that portion of Tenant's Answer is dismissed. In the absence of notice of the alleged defective condition to the landlord, dismissal of a warranty of habitability defense is appropriate. (Moskowitz v Jorden, 72 AD3d 305, 306 [1st Dept 2006]). Here, the pleaded defense does not state what the defective condition was, nor does it detail when and how notice was given (NYSCEF Doc. No. 2; 70 W. Vill. Assocs. v G&E Realty, Inc., 56 AD3d 372, 372-373 [1st Dept 2008] [tenant's challenged affirmative defenses which pleaded conclusions of law without supporting facts were properly stricken as insufficient]). In opposition to Landlord's cross motion, Tenant failed to produce any evidentiary proof of Landlord's notice of the alleged defective condition. Because Tenant has not sufficiently pled breach of the warranty of habitability, this affirmative defense must be dismissed.

#### **B. Summary Judgment**

When seeking summary judgment, the moving party bears the burden of proving, by competent, admissible evidence, that no material and triable issues of fact exist (See e.g., Winegrad

v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]; Sokolow, Dunaud, Mercadier & Carreras v Lacher, 299 AD2d 64, 70 [1<sup>st</sup> Dept 2002]). Once this showing is made, the burden shifts to the party opposing the motion to produce evidentiary proof, in admissible form, sufficient to establish the existence of material issues of fact which require a trial! See e.g., Zuckerman v City of New York, 49 NY2d 557, 562 [1980]; Pemberton v New York City Tr. Auth., 304 AD2d 340, 342 [1<sup>st</sup> Dept 2003]. Mere conclusions of law or fact are insufficient to defeat a motion for summary judgment (see Banco Popular North Am. v Victory Taxi Mgt., Inc., 1 NY3d 381 [2004]; Alvarez v Prospect Hospital, 68 NY2d 320, 324 [1986]). To sustain a cause of action for breach of contract, Plaintiff must prove the existence of a contract, Plaintiff's performance, Defendant's breach, and damages (see Markov v Katt, 176 AD3d 401, 402 [1st Dept 2019]; Harris v Seward Park Hous. Corp., 79 AD3d 425, 426 [1st Dept 2010])

It is undisputed that a stipulation was entered into wherein Tenant would pay use and occupancy in the amount of \$2,250.00 on the first day of each month commencing February 1, 2020 (NYSCEF Docs. Nos. 7, 9). Landlord has shown Tenant breached the stipulation and did not vacate until February of 2021 (NYSCEF Docs. Nos. 9, 14, 23); Thor Gallery at South Dekalb, LLC v Reliance Mediaworks (USA) Inc., 143 AD3d 498 [1st Dept 2016] [existence of agreement, failure to pay sums owed under agreement, and calculation of amounts due through affidavit by landlord's agent established prima facie case]). Landlord has shown it was damaged by not receiving use and occupancy. Tenant has failed to raise a material issue of fact other than those already addressed in the preceding sections. Tenant only provided unsupported factual allegations in Tenant's counsel's affidavit and unsupported factual allegations in an affidavit from Tenant signed September 16, 2020, used in Housing Part, with attached undecipherable photos and an

illegible report (See NYSCEF Docs. Nos. 26, 28). Landlord is entitled to a money judgment for use and occupancy.

### **C. Attorneys' Fees and Disbursements**

While Landlord is not entitled to attorneys' fees and disbursements from the preceding matter, Landlord is entitled to attorneys' fees expended in this Court. Section 17(c)(3) of the lease agreed to by Landlord and Tenant entitles the Landlord to collect expenses for attorneys' fees related to Tenant's default, including failure to pay use and occupancy (NYSCEF Doc. 15). Paragraph 9 of the stipulation entered into also states that Landlord reserves the right to seek all attorneys' fees in this case. (NYSCEF Docs. Nos. 7, 13). Since the terms of the lease and stipulation provide for collection of attorneys' fees in the event of default, Landlord may collect attorneys' fees.

"The evaluation of what constitutes reasonable counsel fees has consistently been held to be a matter within the sound discretion of the Court" (Matter of Spingarn, 164 Misc. 2d 891, 894 [Sup Ct, New York County 1995]). Counsel fees are determined based on time and labor required, difficulty of the case, ability and reputation, customary fees, results obtained, and responsibility involved. (In re Freeman's Estate, 34 NY2d 1 [1974]). A party is entitled to fees incurred in obtaining attorneys' fees. (Katz Park Ave. Corp. v Jagger, 98 AD3d 921 [1st Dept 2012]).

Landlord's attorney has provided a legal fee invoice. (NYSCEF Doc. 24). The sole invoice is dated July 26, 2021 which billed 5 hours to draft and revise an opposition to Tenant's motion to dismiss and prepare a cross motion for summary judgment, 1.5 hours for reviewing and revising said motion papers, and .25 hours for e-filing. These were all charged at an hourly rate of \$475.00. Landlord also seeks \$45 for a motion fee.

Landlord's attorney states he is "a seasoned landlord/tenant attorney, practicing for over 40 years" (NYSCEF Doc. 13). Due to Landlord's attorney's 40 years of experience and expertise, the Court finds the rate of \$475.00 to be reasonable. Because Landlord had to defend a motion to dismiss and move for summary judgment, the Court finds the fees sought to be reasonable. Landlord is entitled to \$3251.25 in attorneys' fees and disbursements.

Accordingly, it is hereby

ORDERED that Landlord's cause of action seeking Legal Fees related to the Housing Part matter is dismissed without prejudice to it being sought in Housing Part; and it is further

ORDERED that Landlord's motion to strike Tenant's affirmative defenses is granted in part and denied in part; and it is further

ORDERED that Landlord is awarded a money judgment in the amount of \$18,750.00<sup>1</sup> for use and occupancy owed from May 2020 through February 2021; and it is further

ORDERED that Landlord is awarded \$3251.21 in attorneys' fees and disbursements in connection with the instant action; and it is further

Ordered that the clerk of the Court enter judgment accordingly.

This constitutes the decision and order of the Court.

7/27/2022  
DATE

Mary V Rosado  
HON. MARY V. ROSADO, J.S.C.

CHECK ONE:

CASE DISPOSED  
GRANTED  DENIED  
SETTLE ORDER  
INCLUDES TRANSFER/REASSIGN

NON-FINAL DISPOSITION  
GRANTED IN PART  
SUBMIT ORDER  
FIDUCIARY APPOINTMENT

OTHER  
REFERENCE

APPLICATION:

CHECK IF APPROPRIATE:

<sup>1</sup> Landlord has shown that \$21,000.00 was owed in use and occupancy, which was set off by \$2,250, the Tenant's security deposit (NYSCEF Doc. No. 23).