

**Alco LLC v Plumbing Today, Inc.**

2023 NY Slip Op 30996(U)

March 30, 2023

Supreme Court, Saratoga County

Docket Number: Index No. EF202114

Judge: Richard A. Kupferman

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This opinion is uncorrected and not selected for official publication.

**ALLCO LLC,**

Plaintiffs,

-against-

**PLUMBING TODAY, INC., TRENCHLESS  
TODAY, LLC, AND MATTHEW WARD,**

Defendants.

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**DECISION & ORDER**

Index No.: EF202114

Appearances:

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*Attorneys for Defendants*

KUPFERMAN, J.,

Plaintiff owned a commercial building located at 860 Hudson River Road, Mechanicville, New York ("Premises").<sup>1</sup> In March 2018, defendants Plumbing Today, Inc. ("Plumbing Today") and Matthew Ward entered into a lease agreement with plaintiff to rent the Premises ("Lease"). Plumbing Today agreed to provide a security deposit in the amount of \$8,200.00 and commenced the payment of regular installments of monthly rent in the amount of \$4,100.00.<sup>2</sup> Plaintiff allege

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<sup>1</sup> This decision addresses defendants' summary judgment motion. The facts set forth herein are therefore viewed in the light most favorable to plaintiff, as the non-moving party.

<sup>2</sup> As clarified by plaintiff's counsel, the complaint due to a typographical error incorrectly references Trenchless Today as the entity that accepted possession and made the initial payments.

that Plumbing Today later subleased the Premises to defendant Trenchless Today, LLC (“Trenchless Today”), without the express written consent or permission of plaintiff, as required. Trenchless Today began making rental payments to plaintiff on behalf of Plumbing Today and, according to the plaintiff’s investigations, Trenchless Today began to permanently occupy the Premises for storing company trucks, equipment, and construction spoils.

Plaintiff alleges that during their occupancy, defendants caused significant damage to the Premises. In late 2019, plaintiff served defendants with notices to pay rent or vacate. Plaintiff also notified defendants that the Lease would not be extended and would terminate on February 29, 2020. Prior to such time, however, plaintiff, Plumbing Today, and Mr. Ward entered into a stipulation effective February 24, 2020 (“Stipulation”) extending the terms of the Lease through May 1, 2020 so long as defendants agreed to refrain from performing any further alterations to the Premises; to return the Premises in broom-swept condition less normal wear and tear; and to remove construction spoils without disturbing any of the underground power and/or fiber optic cables. Mr. Ward executed the Stipulation in both his individual and representative capacity.

Plaintiff alleges that defendants failed to vacate the Premises by the May deadline and failed to remove construction spoils in the back of the Premises in violation of the Stipulation, causing drainage issues that plaintiff had to later remedy at its sole cost. In January 2021, plaintiff commenced this action by way of a summons with notice. The notice specifies that the nature of this action is for breach of contract and that defendants breached the Lease based on their failure to pay plaintiff for services rendered and for damage they caused. The notice specifies that plaintiff seeks monetary damages in this action, specifically \$86,054.54, plus interest, attorneys’ fees, and costs.

In September 2021, after defendants appeared in this action and made a demand for a complaint, plaintiff filed a complaint asserting causes of action for breach of contract, account stated, and forfeiture of security deposit. In November 2021, defendants filed an answer, asserting, among other things, that Trenchless Today was not a contracting party, and that Mr. Ward signed the agreements only as the owner of Plumbing Today and not as a guarantor.

In December 2021, plaintiff served defendants' prior counsel with a notice to take Mr. Ward's deposition, along with a demand for discovery and inspection. In January 2022, after having not received any dates for the deposition, nor any responses to the discovery demand, plaintiff sent a follow-up letter to defendants' prior counsel requesting a status regarding defendants' overdue responses and to schedule Mr. Ward's deposition. Plaintiff also filed an RJI later that month.

In February 2022, plaintiff submitted a proposed Preliminary Conference Stipulation and Order to defendants for counsel's review and comment. In July 2022, after hearing nothing in return from defendants, plaintiff's counsel requested a court conference. In August 2022, plaintiff's counsel once again reached out to defendants' former counsel requesting responses to the outstanding discovery demands and to schedule the deposition. In August 2022, defendants' former counsel finally reached out to the Court and to plaintiff's counsel apologizing for not having moved the case forward. In August 2022, plaintiff's and defendants' counsel jointly filed a preliminary conference stipulation and order with the Court.

In September 2022, defendants filed a consent to change attorney. In October 2022, defendants finally served responses to plaintiff's outstanding discovery demands consisting of general objections and producing only one document (a black and white photo of a room). In

October 2022, plaintiff's counsel objected to the defendants' discovery responses and served additional deposition notices upon defendants' counsel.

Plaintiff asserts that defendants did not respond to the deficiency letter, produce any additional discovery information, or schedule a time for the depositions requested. Rather, in November 2022, Trenchless Today and Mr. Ward filed a motion seek summary judgment dismissing the complaint as against them, pursuant to CPLR 3212. These defendants essentially contend that they lack privity of contract with plaintiff and are therefore not liable to the plaintiff for any of the alleged damages.

“A party should be afforded a reasonable opportunity to conduct discovery prior to the determination of a motion for summary judgment” (Amico v Melville Volunteer Fire Co. Inc., 39 AD 3d 784, 785 [2d Dept 2007]). CPLR 3212(f) permits a party opposing a motion for summary judgment to obtain further discovery when it appears that “facts essential to justify opposition may exist but cannot then be stated[.]” Further, when it appears that the relevant evidence the plaintiff needs to oppose the motion is within the exclusive knowledge of the party bringing the motion and the plaintiff did not have a reasonable opportunity for disclosure prior to the motion, summary judgment is inappropriate (see CPLR 3212[f]; Jones v Town of Delaware, 251 AD2d 876, 876 [3d Dept 1998]; De Vito v Silvermail, 239 AD2d 824, 825-826 [3d Dept 1997]). “In addition, a court should not consider the motion for summary judgment of a party who has failed to comply with his opponent's legitimate discovery demands” (Levy v Board of Educ. of City of Yonkers, 232 AD2d 377, 378 [2d Dept 1996]; see Jones, 251 AD2d at 876).

Here, defendants' factual proof on the motion is loose and equivocal. It mostly consists of a two-page affidavit from Mr. Ward and copies of the Lease and Stipulation.<sup>3</sup> While Mr. Ward's affidavit baldly asserts that the moving defendants lacked contractual privity, it is otherwise silent on several material issues, including what transpired during the lease term and thereafter, and who, if anyone, damaged the Premises. Aside from the lack of details provided, the moving defendants also failed to disclose relevant information during discovery. Indeed, they provided only one document during discovery and otherwise ignored plaintiff's deposition requests. Defendants, moreover, appear to be in exclusive possession of the knowledge regarding their contractual intent, what transpired during the lease term and thereafter, and who, if anyone, damaged the Premises. Considering the circumstances, summary judgment is inappropriate (see Jones, 251 AD2d at 876).

Indeed, given the limited record presented, the Court cannot rule out that Mr. Ward and Trenchless Today have no liability based on their alleged use and occupancy of the Premises. For example, even assuming for the sake of argument that the moving defendants lacked privity of contract and privity of estate, their negligent or willful damage to the property could constitute grounds for plaintiff to seek a monetary judgment against them under tort law (see e.g. Kazarinov v L.B. Kaye Associates, 111 Misc 2d 944, 952 [Sup Ct, New York County 1981] ["if the subtenant should damage the apartment, the subtenant (although not in privity with the landlord) would nevertheless be liable under common-law concepts for negligent or willful damage to property"]<sup>4</sup>).

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<sup>3</sup> The supporting attorney affirmation is not based on any personal knowledge and therefore lacks any probative value (see Firth v State, 306 AD2d 666, 667-668 [3d Dept 2003]).

<sup>4</sup> The fact that the complaint may not presently plead the correct cause of action or all the potential causes of action against the moving defendants is not critical, especially at this early stage of the proceedings (see CPLR 3212[f]; 3025; 3026).

Similarly, the complaint also alleges that Trenchless Today began paying rent and occupying the Premises at some point during the lease term, and that it continued to remain in possession throughout the remainder of the term. The actual scope of such use and the accompanying details nevertheless remain vague and could, upon further clarity from discovery, potentially render Trenchless Today directly liable for the rent, depending on the circumstances (see e.g. New Amsterdam Casualty Co. v National Union Fire Ins. Co., 266 NY 254 [1935]; Mann v Munch Brewing Co., 225 NY 189 [1919]; Lupoli v Venus Labs., 252 AD2d 544 [2d Dept 1998]; 4 NY Practice Guide: Real Estate § 28.01 [Bender 2023]).

In addition, Trenchless Today and Mr. Ward were also allegedly in possession of the Premises after the lease term expired. Yet, they have failed to cite any legal authority for their position that the mere existence of the contract (whose rental term had already expired and under which they claim no rights) shields them from any liability for their alleged continued use, possession, and damage of the property. Mr. Ward's affidavit also does not address any facts necessary to determine whether Trenchless Today may be liable for Plumbing Today's obligations under an alter ego theory of liability. Nor have defendants provided plaintiff with any discovery on these issues. At the very least, plaintiff should be afforded the opportunity to obtain the evidence it requires to oppose the summary judgment motion (see CPLR 3212[f]).

Further, even without any additional discovery, issues of fact exist on this record regarding Mr. Ward's and Trenchless Today's liability for their alleged use of the Premises after the lease term expired and for the damage they allegedly caused. Critically, as the parties moving for summary judgment, these defendants have not come close to satisfying their initial burden on this issue. In addition, issues of fact exist regarding Mr. Ward's alleged contractual privity with plaintiff. He is named as a tenant in the Lease and his signature on the Lease does not clearly

indicate whether he signed in his individual or representative capacity, or both. Plaintiff avers that the parties intended for him to be personally liable, and he clearly signed the Stipulation in both his individual and representative capacity (see e.g. Keter Publishing, Ltd. v Shapolsky, 189 AD2d 591 [1st Dept 1993]; JP Morgan Chase Bank, N.A. v Cellpoint Inc., 54 AD3d 366 [2d Dept 2008] [holding that the agreement was ambiguous as to the capacity in which a party signed it and that extrinsic evidence could therefore be considered on the issue]; 1 NY Practice Guide: Business and Commercial § 6.14 [4] [Bender 2023] [Personal Liability of Officers]).

Accordingly, based on defendants' failure to comply with their discovery obligations, as well as the deficiencies in their proof, the Court denies the motion, without prejudice to defendants' right to renew the motion after the completion of discovery.

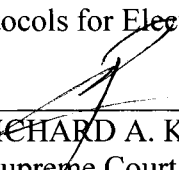
It is therefore,

**ORDERED**, that the motion seeking summary judgment dismissing the complaint, pursuant to CPLR 3212, is **DENIED**, without prejudice; and it is further

**ORDERED**, that the parties are directed to complete paper discovery and Matthew Ward's deposition within the next 60 days. The parties and their attorneys shall appear for an in-person compliance/settlement conference at the Saratoga County Supreme Court, 30 McMaster Street, Ballston Spa, New York 12020, on **June 14, 2023, at 2:00 p.m.**

This shall constitute the Decision & Order of the Court. No costs are awarded to any party. The Court is hereby uploading the original Decision & Order into the NYSCEF system for filing and entry by the County Clerk. Counsel is still responsible for serving notice of entry of this Decision and Order in accordance with the Local Protocols for Electronic Filing.

Dated: March 30, 2023  
at Ballston Spa, New York

  
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HON. RICHARD A. KUPFERMAN  
Justice Supreme Court