

Ogbolu v 125 Prop. Masters, Inc.

2023 NY Slip Op 31558(U)

May 9, 2023

Supreme Court, New York County

Docket Number: Index No. 158881/2021

Judge: Paul A. Goetz

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various New York State and local government sources, including the New York State Unified Court System's eCourts Service.

This opinion is uncorrected and not selected for official publication.

**SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY**

PRESENT: HON. PAUL A. GOETZ PART 47

Justice

-----X

COLLINS OGBOLU,

Plaintiff,

- v -

125 PROPERTY MASTERS, INC., LENOX DENTAL &
MEDICAL ARTS, MANHATTAN ESTHETICS
SPECIALISTS, LENOX LASER & ESTHETICS
SPECIALISTS, DMITRIY MILOSLAVSKIY, SHAUL
HUBSCHER, SANFORD JACOBY, JOHN DOES

Defendants.

-----X

INDEX NO. 158881/2021
MOTION DATE N/A
MOTION SEQ. NO. 003

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 135, 136, 137, 138, 139, 140, 141, 142

were read on this motion to/for CONTEMPT.

In this real property ejectment action, plaintiff Collins Ogbolu, owner of the premises located at 335-337 Lenox Avenue, New York, New York 10027 is suing defendant-tenant 125 Property Masters, Inc. and defendant-guarantors Dmitriy Miloslavskiy, Shaul Hubscher, and Sanford Jacoby for ejectment and breach of contract based on various violations of the lease. By decision and order dated June 28, 2022 (June 28 order) plaintiff’s cross-motion was granted for retrospective use and occupancy and prospective use and occupancy in the amount of \$32,658.71 per month, and the posting of a bond in the amount of \$735,807.25 by July 25, 2022 (NYSCEF Doc No 70). By decision and order dated December 23, 2022, defendants’ motion to reargue was denied (NYSCEF Doc No 108). Defendants have not posted the bond nor made use and occupancy payments for January and February 2023 (Ogbolu Aff, ¶ 6, NYSCEF Doc No 113).

Plaintiff now moves by order to show cause to hold defendants in civil contempt for failure to comply with the June 28 order (motion seq no 003). Defendants cross-move to set an

evidentiary hearing before a referee to determine the value of improvements defendants allegedly made to the premises for the benefit of plaintiff and stay determination of the order to show cause pending the outcome of the hearing.

Pursuant to Judiciary Law § 753 (A) (3), a party may be held in civil contempt for disobedience of a lawful mandate of court. In order to prevail on a motion for contempt, the moving party must demonstrate: (1) a lawful order of the court clearly expressing an unequivocal mandate was in effect; (2) with reasonable certainty that the order has been disobeyed; (3) the party to be held in contempt had knowledge of the court's order; and (4) prejudice to the right of a party to the litigation (*El-Dehdan v El-Dehdan*, 26 NY3d 19, 29 [2015]). The movant has the burden to establish contempt by clear and convincing evidence (*id.* at 19).

Here, all of the elements for contempt are met. As to the first element, the June 28 order stating that defendants are to commence paying use and occupancy in the amount of \$32,658.71 beginning in July 2022 and to obtain a bond in the amount of \$735,807.25 within 20 days of service of the order is clear and unequivocal (NYSCEF Doc No 70). As to the second element, plaintiff has established that defendants disobeyed the June 28 order by submitting an affidavit detailing the months defendants have not paid use and occupancy (NYSCEF Doc No 113, ¶ 25) as well as emails from defendants' attorney conveying that defendants have not obtained a bond (NYSCEF Doc Nos 124-128). As to the third element, defendants demonstrated their knowledge of the order in multiple ways: by paying use and occupancy for the months of July through December 2022 (NYSCEF Doc No 113, ¶ 25), moving to reargue seeking a hearing to lower the amount of use and occupancy (NYSCEF Doc No 80), and allegedly attempting to obtain a bond (Defendants' Memorandum of Law, p 3, NYSCEF Doc No 142 [“Defendants represent that they have attempted to comply with the Court's Order . . . , but they have been repeatedly denied the

bond.”)]. And defendants do not deny their knowledge to the June 28 order. As to the fourth element, plaintiff has established prejudice by his affidavit detailing financial impairment due to defendants’ repeated delays (NYSCEF Doc No 113, ¶ 31). Therefore, plaintiff has demonstrated by clear and convincing evidence that defendants are in contempt of the June 28 order. Accordingly, plaintiff’s motion to hold defendants in civil contempt for disobeying the June 28 order will be granted.

In light of this civil contempt determination, the court is required to impose a penalty that is remedial in nature and effect and that is the least possible exercise of the court’s power to achieve the proposed end of compliance with its orders (*McCain v Dinkins*, 84 NY2d 216, 229 [1994]). An appropriate penalty under the circumstance is striking defendants’ answer and counterclaims (*see Socialistic Co-op. Publ. Assn. v Kuhn*, 51 AD 583, 583 [1st Dept 1900] [“There is no doubt that the court has the power, by way of punishment, to strike out an answer of a defendant for a contempt of court.”]), awarding plaintiff his costs, expenses and attorneys’ fees incurred in connection with bringing the contempt motion and in responding to defendants’ cross-motion (*People ex rel. Stearns v Marr*, 181 NY 463, 470 [1905] [the imposition of costs in a proceeding to punish for a civil contempt is authorized]), increasing the bond amount to \$1,343,480.21, and increasing the use and occupancy payments on May 1, 2023 to \$33,978.12 to reflect the amount set forth in the lease.

Defendants’ argument that they should be granted an evidentiary hearing to determine the proper amount of use and occupancy was already considered and rejected in motion seq no 001 (NYSCEF Doc No 70) and re-argument was denied on motion seq no 002 (NYSCEF Doc No 108; *see Rubinstein v Goldman*, 225 AD2d 328, 329 [1st Dept 1996] [internal citations and quotations omitted] [“Re-argument does not provide a party an opportunity to advance

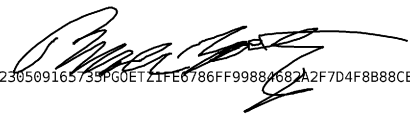
arguments different from those tendered on the original application and renewal is not a second chance freely given to parties who have not exercised due diligence in making their first factual presentation”]). Accordingly, defendant’s cross-motion will be denied.

Based on the foregoing it is hereby

ORDERED that plaintiff’s motion to hold defendants in civil contempt of court for failing to comply with the June 28 order (motion seq no 003) is granted to the extent that defendants’ answer and counterclaims are stricken, defendants must post a bond in the amount of \$1,343,480.21, defendants must pay plaintiff monthly use and occupancy beginning May 1, 2023 in the amount of \$33,978.12, and plaintiff is awarded his attorneys’ fees and costs incurred in bringing this motion and responding to defendants’ cross-motion; and it is further

ORDERED that within twenty days of entry of this order, plaintiff shall submit the amount of attorneys’ fees and costs incurred by prosecuting the contempt motion and in responding to defendants’ cross-motion; within fifteen days thereafter defendants are to submit any objections to the fees and costs sought by plaintiff; submissions shall be submitted via NYSCEF and emailed to bweisman@nycourts.gov; and it is further

ORDERED that defendants’ cross-motion is denied.


20230509165733PG0ETZIFE6786FF99884682A2F7D4F8888CE97E

5/9/2023
DATE

PAUL A. GOETZ, J.S.C.

CHECK ONE:	<input type="checkbox"/> CASE DISPOSED	<input checked="" type="checkbox"/> NON-FINAL DISPOSITION
	<input type="checkbox"/> GRANTED <input type="checkbox"/> DENIED	<input checked="" type="checkbox"/> GRANTED IN PART <input type="checkbox"/> OTHER
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