

**K.Y.W. Enter. Trust v Les 106 Riv, LLC**

2023 NY Slip Op 33329(U)

September 22, 2023

Supreme Court, New York County

Docket Number: Index No. 653071/2017

Judge: Sabrina Kraus

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This opinion is uncorrected and not selected for official publication.

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

PRESENT: HON. SABRINA KRAUS

PART 57TR

*Justice*

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K.Y.W. ENTERPRISE TRUST

INDEX NO. 653071/2017

Plaintiff,

- v -

**DECISION AFTER INQUEST**

LES 106 RIV, LLC,

Defendant.

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**BACKGROUND**

Plaintiff commenced this action for declaratory judgment and the rescission of a lease which Defendant entered into with Plaintiff regarding the leasing of a ground floor commercial space and cellar located at 106 Rivington Street, NY, NY 10002.

In August 2017, Defendant appeared by counsel and filed an answer, with five counterclaims for treble damages for wrongfully evicting Defendants, trespass, loss of business and profits, breach of the covenant of quiet enjoyment, and attorney’s fees.

In October 2022, Plaintiff’s counsel moved to withdraw, which motion was granted on October 28, 2022, wherein the action was stayed for forty (40) days and Defendant was ordered to obtain new counsel. Notice of Entry of the court’s decision and order was filed on November 23, 2022. Plaintiff failed to appear by new counsel.

On March 8, 2023, the court granted Defendant’s motion for a default judgment and dismissed Plaintiff’s claims against Defendant. An inquest was held on August 3, 2023, to determine damages based upon Defendant’s counterclaims. After inquest, Defendant was directed to submit a letter brief in support of the position that lost income maybe proven via

**OTHER ORDER – NON-MOTION**

testimony alone and on Defendant's application to amend the pleadings to include a counterclaim for a declaratory judgment. The brief was received by the court on August 21, 2023, and the court reserved decision.

### **PRIOR PROCEEDING**

At inquest, the court took judicial notice of an illegal lockout proceeding commenced by Defendant against Plaintiff under Index 62190/2017.

In that matter, the parties stipulated on October 5, 2017, to restore Defendant to the Subject Premises, without prejudice to the claims, defenses, and counterclaims of the instant action.

### **INQUEST**

At inquest, Robert Petrosyants (RP) testified on behalf of Defendant. RP testified he is the Director of Operations for Defendant, and in December 2014, Defendant took over a lease from the original tenant of record, Jose Rodriguez. RP described the Subject Premises as in need of many repairs and having many violations. RP testified the obligation under the lease to pay rent did not begin until Plaintiff made the necessary repairs to obtain a certificate of occupancy.

RP described the Subject Premises as two floors of commercial space and two floors of residential space and a basement. RP testified Defendant hired an architect, filed for permits and started construction, which included removing floors, ceilings, stripping walls and electrical work. RP stated that construction stopped when Defendant became locked out of the Subject Premises in 2015, and that after the lockout there was a fire in the Subject Premises. The fire occurred, according to RP, in the back of the building between the second and third floor and RP alleges Plaintiff failed to make necessary repairs after that time.

RP explained Defendant commenced the prior proceeding under Index 62190/2017 in response to the illegal lockout, but despite the stipulation restoring Defendant to possession, Defendant never regained access to the Subject Premises.

Regarding damages, RP testified Defendants spent “more or less” about \$350,000 in construction costs and estimated about \$2.6 to \$2.7 million dollars in gross earnings had the restaurant been able to open. RP stated that would equate to approximately \$650,000 to \$700,00 in net sales per year and estimated that the restaurant would have been operational from April 2016 forward, for a total of \$4.2 to \$4.5 million dollars in lost profits.

The only evidence offered and admitted at inquest were copies of the lease and amendments thereto.

### DISCUSSION

The prior matter under index 62190/2017 did not result in a finding by the Civil Court of an illegal eviction. Rather the Civil Court stated, in a decision that denied the landlord’s motion to dismiss and noted discrepancies in the timing alleged by Defendants as to the alleged wrongful eviction, stating “[t]here are material issues of fact as to when the alleged acts of wrongful eviction took place.” *Les 106 Riv LLC v KYW Enterprise Trust*, 62190/2017, September 7, 2017, (Samuels, J.). In that action the Plaintiff – landlord, alleged that the Defendant failed to meet its obligations under the lease, failed to use or occupy the space, failed to pay money owed under the lease and failed to send notice if its intentions not to abandon the Subject Premises. The Court noted there were questions of fact as to whether Defendant met their obligations under the lease.

That matter resulted in the parties stipulating to restore Defendant to possession, reserving the parties’ rights to the claims and defenses in this action. At inquest, Defendant

produced no further evidence in support of a finding of wrongful eviction, trespass, or breach of covenant of quiet enjoyment. The only evidence offered at inquest was the uncorroborated testimony of RB and copies of leases.

Even assuming *arguendo*, the court were to find an illegal eviction took place, Defendant did not provide proof of any actual damages. Defendant failed to produce receipts for construction costs, proof of the alleged permits obtained or architectural costs. RB also offered no explanation as to why Defendant has not sought to enforce the October 2017 stipulation in the prior proceeding restoring them to possession.

Defendant remaining counterclaim is one for loss of business and profits. Again, the only evidence offered at inquest was the testimony of RB. Although Defendant argues in their letter brief that a party may establish lost income “through his own testimony” the cases relied on by Defendant are inapposite to the instant action.

In *Gore v Cardany*, 167 AD 3d 851 (2<sup>nd</sup> Dept 2018), the plaintiff supported testimony with the production of W-2 forms. In *Ferguson v City of New York*, 73 AD 3d 649 (1<sup>st</sup> Dept 2010), the testimony offered involved prior payments of \$50 a month rent. In *Lantigua v v 700 W. 178<sup>th</sup> Street Assoc LLC*, 27 A.D. 3d 266 (1<sup>st</sup> Dept 2006), the plaintiff testified to the amount of income she made prior to the accident.

In the instant action RB testified based upon speculation of what might have been made had the restaurant ever opened. Here, the restaurant never existed so there was never any past income to base any potential lost future income on. RB was not offered as an expert in restaurant management, so his opinion was self-serving.

Although loss of profits may be an element of recovery in a wrongful eviction action (*see, Snow v. Pulitzer*, 142 N.Y. 263; *Smith v. Feigin*, 276 App.Div. 531, 96 N.Y.S.2d 123; *O’Toole v. Crane & Clark*, 245 App.Div. 824, 281 N.Y.S. 1, *affd.* 270 N.Y. 559, 200 N.E. 317; *Peerless Candy Co., Inc. v. Halbreich*, 125

Misc. 889, 211 N.Y.S. 676), the loss must be ascertainable with a reasonable degree of certainty and may not be based on conjecture (*Bromberger v. Empire Flashlight Co., Inc.*, 138 Misc. 754, 246 N.Y.S. 67; *Wolff v. Hyass*, 11 Misc. 561, 32 N.Y.S. 798, *affd.* 159 N.Y. 551, 54 N.E. 1095; *see also, Schiffman v. Deluxe Caterers of Shelter Rock*, 100 A.D.2d 846, 474 N.Y.S.2d 87; *R & I Electronics v. Neuman*, 66 A.D.2d 836, 411 N.Y.S.2d 401).

*Long Island Airports Limousine Service Corp. v Northwest Airlines*, 124 AD 2d 223 (2<sup>nd</sup> Dept 1986).

Defendant has failed to establish entitlement to damages based upon the counterclaims of wrongfully eviction, trespass, loss of business and profits, and breach of the covenant of quiet enjoyment.

At the conclusion of the inquest, Defendant made an application to amend the answer to include a counterclaim for a declaratory judgment that Defendant has a valid lease and is authorized to take possession of the Subject Premises.

CPLR 3025 (c) provides, “The court may permit pleadings to be amended before or after judgment to conform them to the evidence, upon such terms as may be just including the granting of costs and continuances.”

Under the specific circumstances and history of this action the court declines to allow Defendant to amend the answer to include a claim for declaratory judgment without proper notice to Plaintiff and an opportunity to be heard.

WHEREFOR it is hereby

ORDERED after inquest Defendant’s counterclaims are dismissed; and it is further

ORDERED that any and all other requested relief has been considered and is denied; and it is further

ORDERED that, within 20 days from entry of this order, Defendant shall serve a copy of this order with notice of entry on Plaintiff and the Clerk of the General Clerk’s Office (60 Centre Street, Room 119); and it is further

ORDERED that such service upon the Clerk shall be made in accordance with the procedures set forth in the Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases (accessible at the “E-Filing” page on the court’s website at the address [www.nycourts.gov/supctmanh](http://www.nycourts.gov/supctmanh)).

This constitutes the decision and order of the court.



SABRINA KRAUS, JSC

DATE: 9/22/2023

Check One:

Case Disposed

Non-Final Disposition

Check if Appropriate:

Other (Specify \_\_\_\_\_ )