

Congregation Beth Shalom of Kingsbay v Yaakov

2025 NY Slip Op 32360(U)

July 3, 2025

Supreme Court, Kings County

Docket Number: Index No. 4652/2009

Judge: Heela D. Capell

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This opinion is uncorrected and not selected for official publication.

At an IAS Term, City Part 19 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse thereof at 360 Adams St., Brooklyn, New York.

PRESENT: HON. HEELA D. CAPELL, J.S.C.

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CONGREGATION BETH SHALOM OF KINGSBAY,

Plaintiff(s),

Index No. 4652/2009

-against-

**DECISION/ORDER
AFTER TRIAL**

LEV BAIS YAAKOV,

Defendant(s).

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After trial, decision and order of the court is as follows:

Congregation Beth Shalom of Kingsbay (“Plaintiff”) commenced this action against Lev Bais Yaakov (“Defendant”) for damages including: the nonpayment of rent^[1], cost for restoring the subject building after Defendant’s alleged construction defect caused floods to the building, and loss of rental income stemming from the floods. Plaintiff owns the building located at 2710 Avenue X, Brooklyn, New York (the “Building”) and Defendant operated a school out of portions of the Building.

The court conducted a bench trial over the course of several weeks and heard from multiple witnesses. Importantly, prior to trial, Plaintiff was granted summary judgment on the issue of rent arrears subject to Defendant’s affirmative defense (see Order, dated May 29, 2019, NYSCEF Doc. 17).

Defendant raised in its answer the affirmative defense of constructive eviction to Plaintiff’s claim for rent arrears. Defendant maintained that it should not be required to pay the rent that accrued from August 1, 2008, through August 30, 2009 as Plaintiff did not provide proper janitorial services or adequate heat to the classrooms within the Building. However, at

trial Plaintiff introduced a lease agreement entered into between the parties in which paragraphs 21 and 22 expressly prohibit the diminution or abatement of rent stemming from Plaintiff's failure to make repairs or provide services to Defendant. (NYSCEF doc. 32). Additionally, Defendant failed to establish that it vacated the premises at any time due to the purported lack of repairs or services, and therefore, the constructive eviction claim cannot lie. (*Barash v Pennsylvania Term. Real Estate Corp.*, 26 NY2d 77, 80-81 [1970]; *Two Rector St. Corp. v Bein*, 226 AD 73, 76 [1st Dept 1929] [a tenant must abandon possession to claim constructive eviction]). Accordingly, Defendant's affirmative defense of constructive eviction is dismissed.

At trial, Plaintiff established that Defendant owed base rent and additional rent pursuant to the lease in the amount of \$72,111.30^[2] for the period of August 1, 2008, through August 30, 2009, plus interest from August 30, 2009. Although Plaintiff seeks an additional \$7,935.93 for excess oil, Plaintiff did not provide proof in support of these charges at trial. Therefore, Plaintiff cannot be awarded said amount, which is severed from the judgment amount.

Plaintiff also seeks a total of \$132,685.00^[2] for the cost to repair the synagogue after a purported structure built by Defendant on the roof of the Building caused two significant leaks to the Building. Plaintiff provided proof that payments in the amount of \$132,685.00 were made to its contractor to repair the Building after the leak, which invoices date through September 15, 2008 (Exhibits 10, 13, 14,15 in evidence). Plaintiff established by a preponderance of evidence that Defendant and/or its contractors built the structure on the roof of the Building, which caused floods to the main floors of the Building. It is clear from the court order in this matter dated May 29, 2019 (NYSCEF doc 17), the multiple witnesses who testified on behalf of Plaintiff, and the lease rider between the parties that an additional structure was built on the roof by Defendant on or about August 2008. The court does not find Defendant's witnesses testimony that they were not aware of this structure to be credible in the face of the evidence adduced at trial. Moreover,

the court is satisfied by evidence adduced in trial that the faulty design and construction of this structure is the cause of the leaks that occurred in September 2008. Accordingly, Defendant is liable for the cost of repairs to the Building; however, this amount is offset by the amount Plaintiff already received from Defendant's insurance company in the amount of \$75,000.00 (Defendant's Exhibit B in evidence). Accordingly, Plaintiff is awarded \$57,685.00 for the cost of repairing damages to the Building, plus interest from September 15, 2008.

Plaintiff also seeks damages in the amount of \$14,700.00 for loss of rental income from its other tenant, a catering company, who allegedly stopped operating out of the Building after the flood. Plaintiff seeks compensation for lost income from the period of September 1, 2008 through December 31, 2008. Plaintiff established that it had an agreement with the catering hall (Plaintiff's Exhibit 18 in evidence). However, Plaintiff did not produce a witness from the catering hall to testify as to why it stopped paying rent. Furthermore, Plaintiff's witness, Gary Abrams, could not recall when the premises were restored for the catering hall to resume services, nor when the catering hall actually resumed services. Accordingly, Plaintiff failed to establish that the catering hall stopped paying rent as a result of the flood and its claim for lost rental income is dismissed.

Plaintiff also seeks as damages the alleged costs it expended in trying to legalize the structure built by the Defendant on the roof on or about August 2008. However, it is clear from the so-ordered stipulation dated May 29, 2019 (NYSCEF Doc 17) that the parties agreed the Defendant would not try to legalize the structure. Plaintiff did not reserve its rights to seek this amount from Defendant and it is undisputed that Plaintiff has not legalized the structure. Plaintiff also failed to call a witness to testify at trial as to the purported measures taken to legalize the structure. Accordingly, Plaintiff is not awarded any of these alleged costs, and these claims are dismissed.

Lastly, Plaintiff seeks attorney fees for the successful prosecution of this action. However, it is clear that absent an attorneys' fees provision in a lease a landlord may not collect legal fees from a tenant. (See *Sage Sys., Inc. v Liss*, 39 NY3d 27, 29 [2022]; *Oink Ink Radio, Inc. v One Destiny Productions, Inc.*, 81 Misc 3d 1001, 1014 [Sup Ct 2023] [A prevailing party in litigation generally may not recover attorney fees from the losing party unless there is clear intent to indemnify each other for attorney fees in an action between them.]) Here, the lease between the parties does not contain an attorney's fees provision and therefore this claim is dismissed.

Accordingly, Plaintiff is awarded \$72,111.30 for unpaid rent pursuant to the lease for the period of August 1, 2008, through August 30, 2009, plus interest from August 30, 2009 and \$57,685.00 for costs to repair damages to the Building, plus interest from September 15, 2008; for a total amount of \$129,796.30 plus interest.

This constitutes the decision and order of the court.

Dated: Brooklyn, New York
July 3, 2025



HON. HEELA D. CAPELL, J.S.C.

HON. HEELA D. CAPELL, J.S.C.

- ¹ Plaintiff initially commenced a nonpayment proceeding for rent arrears in Housing Court, which case was consolidated with this action in an order dated August 24, 2009.
- ² This amount does not reflect an additional charge of \$6000.00 which Plaintiff acknowledged it arbitrarily charged Defendant for use of the roof.
- ³ This amount is the total after Plaintiff removed a charge of \$25,000.00, which they conceded had been paid to the contractor for the roof replacement on August 25, 2008, prior to the floods.