

**33rd St. Acquisition LLC v Feng**

2025 NY Slip Op 32790(U)

July 29, 2025

Supreme Court, New York County

Docket Number: Index No. 158102/2024

Judge: Arthur F. Engoron

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SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. ARTHUR F. ENGORON PART 37

Justice

INDEX NO. 158102/2024
MOTION DATE 02/25/2025
MOTION SEQ. NO. 004

33RD STREET ACQUISITION LLC,
Plaintiff,

- v -

ANNIE FENG,
Defendant.

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 004) 77, 78, 79, 80, 81, 82, 93, 94, 95, 97, 98, 99, 101, 104, 107, 110, 113, 114, 115, 119, 121, 123, 125, 127, 129, 131, 133, 134, 135, 138, 140, 142, 144, 146, 148, 151, 153, 154, 156, 158, 159, 160,

were read on this motion for CONTEMPT

Upon the foregoing documents, and for the reasons stated hereinbelow, plaintiff's motion for contempt is denied, and that portion of defendant's cross-motion seeking to strike plaintiff's Amended Complaint is granted.

Background

On September 3, 2025, plaintiff, 33rd Street Acquisition LLC, commenced this action against pro se defendant, Annie Feng, asserting a single cause of action, breach of lease, seeking arrears of at least \$68,161.11. NYSCEF Doc. No. 1. Defendant is a Rent Stabilized tenant who occupies Apartment 2W of 343 East 33rd Street, New York, New York, a building that plaintiff owns.

On January 4, 2025, plaintiff filed, without leave, an Amended Complaint, adding a second cause of action, ejectment, based on defendant's nonpayment of rent. NYSCEF Doc. No. 32.

In a Decision and Order dated January 14, 2025, this Court denied defendant's motion to dismiss plaintiff's complaint and granted plaintiff's cross-motion for Use and Occupancy, directing defendant "to pay her monthly rent [i.e. use and occupancy] of \$1,625.59" during the pendency of the instant action ("the U&O Order"). NYSCEF Doc. No. 39.

On January 24, 2025, defendant filed the first of four documents denoted "Answer" on NYSCEF. NYSCEF Doc. No. 50. On February 11, 2025, defendant filed an answer with various counterclaims. NYSCEF Doc. No. 69.

Plaintiff now moves for an order holding defendant in contempt of court for failing to pay her monthly rent and "for an order punishing such contempt by striking Defendant's answer,

granting a judgment of ejectment against Defendant, and ordering the immediate issuance of a writ of assistance for Defendant's eviction forthwith." NYSCEF Doc. No. 77.

Defendant now cross-moves, inter alia, to strike plaintiff's Amended Complaint as untimely. NYSCEF Doc. No. 97.

### Discussion

#### *Contempt Notice*

An application to punish for a contempt punishable civilly may be commenced by notice of motion ... The application *shall contain on its face* a notice that the purpose of the hearing is to punish the accused for a contempt of court, and that such punishment may consist of fine or imprisonment, or both ...

Judiciary Law § 756 (emphasis added).

Although plaintiff's notice of motion for contempt included the language required by Judiciary Law § 756 ("**WARNING: YOUR FAILURE TO APPEAR IN COURT MAY RESULT IN YOUR IMMEDIATE ARREST AND IMPRISONMENT FOR CONTEMPT OF COURT.**") that language was included on the *second page* of the notice of motion, not on its *face*.<sup>1</sup> Stevens Plumbing Supply Co., Inc. v Bi-County Plumbing & Heating Co., Inc., 94 Misc 2d 456, 458 (Sup Ct 1978) ("although the mandated notice that the punishment may consist of fine or imprisonment or both is set forth on the fourth page of the plaintiff's supporting affidavits, it is not placed on the face of the application where it would immediately come to the defendant's attention as intended by the statute."). It is well settled that an "application to punish for contempt that does not contain the requisite warnings provided in Judiciary Law § 756 must be denied as the requirements are jurisdictional." Body Glove IP Holdings LP v On Five Corp., 217 AD3d 561 (1st Dept 2023) citing Matter of Devine, 126 AD2d 491, 495 (1st Dept 1987) ("The absence of such a warning was fatal since Section 756 requirements are jurisdictional."). Accordingly, plaintiff's motion for contempt must be denied, without prejudice.

#### *Predicate Notice for Ejectment*

A tenant in a rent stabilized apartment has a perpetual right to renewal of the lease (Rima 106, L.P. v Alvarez, 257 AD2d 201 [1st Dept 1999]), but is prohibited from profiteering from the use of such unit. Id. If a rent-stabilized tenant violates the law or the provisions of the RSL, he or she may be subject to an action for ejectment. Id.; Katz Park Avenue Corp. v Jagger, 46 AD3d 186,

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<sup>1</sup> "face *n.* (13c) 1. The surface of anything, esp. the front, upper, or outer part <the face of a clock>. 2. By extension, the apparent or explicit part of a writing or record <the fraud must appear on the face of the record>. 3. The inscribed side of a document, instrument, or judgment <although the contract appeared valid on its face, the buyer did not have the legal capacity to enter into it>." FACE, Black's Law Dictionary (12th ed. 2024).

843 (1st Dept 2007) aff'd 11 NY3db 314 (2008). However, “when there is a valid landlord-tenant relationship, a predicate notice must be served on the [tenant] before commencement of an ejectment action .... In the absence of the giving of such notice, an ejectment action will not lie [internal quotation marks and citation omitted].” Prana Growth Fund I, L.P. v Lazala, 8 Misc.3d 667, 668 (Sup Ct, NY County 2005).

Garcia v D. Camilleri, LLC, 2011 NY Slip Op 30053[U] (NY Sup County, New York County 2011).

Here, even if the instant motion included the necessary language on its face, the Court would be precluded from granting the ejectment relief sought by plaintiff, as the U&O Order, of which plaintiff alleges defendant is in contempt, did not include any predicate notice that defendant’s failure to comply might result in ejectment, nor does it appear that any predicate notice was given before the commencement of the instant action. Cf. Ali Baba Hotel Corp. v Prose, 2024 NY Slip Op 33224[U], 2 (NY Sup County, New York County 2024) (“given the Prior Order’s express warning that ‘failure to comply with a court-ordered use and occupancy directive will result in ejectment from the premises[.]’ no additional notice is necessary as a predicate to ejectment.”) (internal citations omitted).

#### *Amended Complaint Without Leave of Court*

Finally, pursuant to CPLR 3025(a), a “party may amend his pleading once without leave of court within twenty days after its service, or at any time before the period for responding to it expires, or within twenty days after service of a pleading responding to it.”

Here, plaintiff served the original complaint upon defendant on September 11, 2024 (NYSCEF Doc. No. 6); in a Decision and Order dated October 1, 2024, this Court granted defendant’s motion, on consent, to extend her time to answer to December 1, 2024 (NYSCEF Doc. No. 8); on November 27, 2024, defendant moved by Order to Show Cause, with service via NYSCEF, to dismiss the complaint (NYSCEF Doc. No. 15); and on January 5, 2025, plaintiff filed the First Amended Complaint without leave of this Court (NYSCEF Doc. No. 32).

Plaintiff’s argument that its Amended Complaint was timely because defendant did not answer until January 24, 2025, is unavailing as defendant’s answer, coming after this Court denied defendant’s motion to dismiss, was in response to plaintiff’s Amended Complaint.

Accordingly, as plaintiff filed its Amended Complaint without leave of the Court more than twenty days after service of the first complaint, after the extended time to respond to the original complaint expired, and more than twenty days after defendant’s Order to Show Cause to dismiss was served, plaintiff’s Amended Complaint must be rejected as untimely, without prejudice for plaintiff to move for leave to file a Second Amended Complaint.

The Court has considered the parties remaining arguments and finds them unavailing and/or non-dispositive.

Conclusion

The motion of plaintiff, 33rd Street Acquisition LLC for contempt is hereby denied, without prejudice; that part of pro se defendant Annie Feng's cross-motion seeking to strike plaintiff's Amended Complaint as untimely is granted and is otherwise denied without prejudice; and the Clerk is hereby directed to strike plaintiff's Amended Complaint accordingly.

**HON. ARTHUR F. ENGORON**

7/29/2025

DATE

ARTHUR F. ENGORON, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE