

**450 7th Ave. Assoc. LLC v Global Economic
Transactions, Inc.**

2012 NY Slip Op 32043(U)

July 31, 2012

Supreme Court, New York County

Docket Number: 105514/09

Judge: Judith J. Gische

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SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. JUDITH J. GISCHE
J.S.C. Justice

PART 10

Index Number : 105514/2009
450 7TH AVENUE ASSOCIATES
vs.
GLOBAL ECONOMIC TRANSACTIONS
SEQUENCE NUMBER : 005
SUMMARY JUDGMENT

INDEX NO. _____
MOTION DATE _____
MOTION SEQ. NO. _____

The following papers, numbered 1 to _____, were read on this motion to/for _____

Notice of Motion/Order to Show Cause — Affidavits — Exhibits _____ | No(s). _____
Answering Affidavits — Exhibits _____ | No(s). _____
Replying Affidavits _____ | No(s). _____

Upon the foregoing papers, it is ordered that this motion is

As did not appear for OPA (Signature)

FILED

AUG 02 2012

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**motion (s) and cross-motion(s)
decided in accordance with
the annexed decision/order
of even date.**

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE
FOR THE FOLLOWING REASON(S):

Dated: 7/31/12

(Signature)
HON. JUDITH J. GISCHE, J.S.C.
J.S.C.

- 1. CHECK ONE: CASE DISPOSED NON-FINAL DISPOSITION
- 2. CHECK AS APPROPRIATE:MOTION IS: GRANTED DENIED GRANTED IN PART OTHER
- 3. CHECK IF APPROPRIATE: SETTLE ORDER SUBMIT ORDER
 DO NOT POST FIDUCIARY APPOINTMENT REFERENCE

Supreme Court of the State of New York
County of New York: IAS 10

-----X
450 7th Ave. Associates LLC.,

Plaintiff,

Decision/Order

-against-

Index # 105514/09
Mot. Seq. # 005

FILED

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Global Economic Transactions, Inc.,
Building East Corp.,
Robert T. Malfi,
Attleboro Crossing Associates, LLC,
Abraham Sebbag,
Professional Tax Solutions, Inc.
Jeffrey H. Pasternack,

Defendants.
-----X

Hon. Judith J. Gische:

Pursuant to CPLR §2219(a) the following numbered papers were considered by the court on this motion:

PAPERS	NUMBERED
Notice of Motion	1
GJW affirm., BR affd., exhibits.....	2
AS answering affd.....	3
GJW affirm. in reply.....	4

Upon the foregoing papers, the decision and order of the court is as follows:

Plaintiff moves for summary judgment on its seventh cause of action against defendants, Attleboro Crossing Associates LLC and Abraham Sebbag (collectively "Attleboro" unless otherwise indicated). The seventh cause of action seeks use and occupancy for unit 3101 ("premises") at the building located at 450 7th Avenue in Manhattan ("building") for the eight month period beginning August 2008 through March 2009. Attleboro opposes the motion. Issue has been joined between plaintiff and

Attleboro. With the exception of Jeffrey H. Pasternick, all of the other named defendants are in default. Jeffrey H. Pasternick originally joined issue. He has since passed away, and the executors of his estate have been substituted in his place and stead (collectively "Pasternack"). The note of issue has been filed and this motion was timely brought thereafter. CPLR §3212; Brill v. City of New York, 2 NY3d 648 (2004). The court, therefore, may consider and decide the motion on the merits.

The following facts are not in dispute:

Plaintiff owns the building. The premises were rented to co-defendants Global Economic Transactions, Inc. and Building East Corp. (collectively "named tenants") pursuant to a written lease made on or about September 12, 2006 ("lease"). The term of the lease commenced October 15, 2006 and was due to end July 31, 2011. The monthly rent reserved in the lease was \$5,636.67. By stipulation, so ordered on January 26, 2012, plaintiff and Attleboro agreed that the monthly market rental value of premises for the period relevant to their dispute was the same as the amount reserved in the lease, or \$5,636.67.

The named tenants failed to the pay rent required under the lease for the period beginning March 2008 through June 2008. Consequently, plaintiff commenced a summary non-payment proceeding (Civ. Ct. NY Co. Index # L & T 73218/08)("summary proceeding"). It obtained a default judgment of possession on July 28, 2008 and a warrant of eviction was issued shortly thereafter.

With an eviction imminent, the named tenants bought an order to show cause in the summary proceeding to vacate the default judgment and warrant of eviction. That application was denied. The named tenants then sought re-argument. That application

also was denied. The named tenants then sought a stay pending appeal, which was granted upon the condition of the named tenants posting an undertaking. No undertaking was posted. The named tenants and all other occupants of the premises thereafter moved out no later than March 26, 2009, which was immediately before the warrant of eviction was due to be executed.

Since the inception of the tenancy, Attleboro occupied a portion of the premises. It had an oral understanding with another subtenant, Pasternack, to pay for the use of a portion of the space. The parties dispute whether this arrangement was with or without plaintiff's consent and/or knowledge. Although there is no documentary proof that Attleboro directly paid Pasternack any of the monthly rent it agreed to during the relevant time, Attleboro claims that it paid Pasternack by paying certain bills directly (including those of the attorney in the non-payment proceeding), and/or loaning Pasternack monies, the repayment of which was to be offset against Attleboro's monthly rent obligation. Regardless of the monies advanced on behalf of the named tenants or Pasternack, and the understanding about whether this was in lieu of any direct payment of rent by Attleboro, no monies were paid to plaintiff for rent beginning March 2008.

Plaintiff now seeks to recover use and occupancy in the amount of \$46,486.64 representing the time the Attleboro was occupying the premises after the lease had been terminated by the summary proceeding (from August 2008) through the time Attleboro actually vacated the premises (March 2009).

Attleboro claims that it is not responsible to pay use and occupancy because: [1] it was not served in the summary proceeding; [2] all of the defendants named in this

action were in possession of the premises following the entry of the judgment of possession in the summary proceeding until just before the warrant was executed; [3] it paid its share of rent (and more) by loaning money to Pasternack and directly paying bills and [4] plaintiff had the legal right to evict it sooner, so that it should not pay for any forbearance by plaintiff.

DISCUSSION

On a motion for summary judgment, it is the movant's burden to set forth evidentiary facts to prove its prima facie case that would entitle it to judgment in its favor, without the need for a trial Zuckerman v. City of New York, 49 N.Y.2d 557, 562 (1980). The party opposing the motion must demonstrate, by admissible evidence, the existence of a factual issue requiring a trial of the action, or tender an acceptable excuse for his/her/its failure so to do Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986).

Upon the termination of a lease, the tenant is obligated to remove a subtenant. A wrongful holdover by a subtenant is deemed the same as a wrongful holding over of the prime tenant/sublessor. Radin v. Arthur Holding Co., Inc., 149 AD2d 576 (2nd dept. 1989), Stahl Associates v. Mapes, 111 AD2d 626 (1st dept. 1985). This is true regardless of whether or not the owner consented to the sublease in the first place. Stahl Associates v. Mapes, supra. An owner is entitled to use and occupancy for the period of time the holdover continues. Radin v. Arthur Holding Co., Inc. The absence of privity between an owner and the occupier of property does not bar a claim for use and occupancy, which claim is predicated on a theory of quantum meruit. It is an obligation imposed by law for the purpose of bringing about justice without reference to the intention of the parties. Eighteen Associates v. Nanjim Leasing Corp., 257 AD2d

559 (2nd dept. 1999).

It is undisputed that the lease terminated on July 28, 2008, when a judgment of possession was issued in the summary proceeding. At that time whatever right Attleboro may have had to remain in the premises ceased. Since Attleboro remained in possession of the premises following the termination of the lease, it is responsible to pay use and occupancy for the period of time beginning August 1, 2008 through March 26, 2008, when it finally vacated. Whether Attleboro was served with process or not in the summary proceeding is a moot point, because the judgment severing the landlord tenant relationship remains in place since July 28, 2008, notwithstanding the legal challenges thereafter. Nor need the court consider the issue of whether the plaintiff could have executed its warrant of eviction sooner. Once the judgment was entered, Attleboro could and should have left the premises without the need for a Marshal's eviction. Since it remained in possession, deriving benefit from the use of the premises, it is obligated to pay for that privilege.

The issue of payments to Pasternack and/or on Pasternack's behalf are a red herring because Mr. Pasternack was not the tenant of record. Rather he was a subtenant himself. Therefore, any monies paid to him in whatever form provide no basis for a set off for the use of plaintiff's premises following the termination of the lease. Likewise, the payments made to the named tenants' attorneys have no bearing on the issue of use and occupancy due plaintiff. The payments were made in connection with efforts to open up the default in the summary proceeding. There is simply no contemporaneous documentation offered that this was made on account of any rent due under the sublease arrangement between the defendants. It also bears

noting that the work done on behalf of the named tenants in the summary proceeding directly benefitted Attleboro by delaying the ultimate eviction in that matter. There is no basis to absolve Attleboro from its obligation to compensate plaintiff for using the premises just it paid an attorney to represent the named tenants of record in an effort to delay its own eviction.

The court, therefore, finds that Attleboro is entitled to summary judgment on the issue of liability on the seventh cause of action. Attleboro is responsible to pay plaintiff use and occupancy for its use of the premises for the eight month period beginning August 1, 2008 and ending March 27, 2009.

Notwithstanding that the court finds that there is an obligation to pay use and occupancy, the court finds that there is an issue of fact concerning what amount of use and occupancy should be paid. Although the parties agreed on the rental value for the entire premises, they do not agree what Attleboro's share should be. Plaintiff claims that Attleboro should be responsible for the full value of the premises because its actions prevented plaintiff from re-letting the premises. Attleboro, however, has raised factual disputes about which other defendant may have also been using the premises after the termination of the lease and during the relevant period. Attleboro also claims that it used only a small fraction of the premises to conduct its particular business. These issues cannot be decided without a testimonial hearing.¹

¹Although the parties stipulated to the value of the entire premises to avoid having to retain an expert, given the dispute about the value of the limited and shared use of the space by Attleboro, the court advises the parties that these alternate values asserted by Attleboro may require expert testimony.

CONCLUSION

In accordance herewith, it is hereby:

ORDERED that plaintiff's motion for summary judgment on the seventh cause of action against Attleboro Crossing Associates, LLC and Abraham Sebbag, is granted on the issue of liability only, and it is further

ORDERED that plaintiff's motion for summary judgment on the seventh cause of action against Attleboro Crossing Associates, LLC and Abraham Sebbag is otherwise denied, and it is further

ORDERED that this case is otherwise ready for trial and inquest, and it is further


ORDERED that plaintiff is directed to file a copy of this decision and order with the office of trial support so that the case may be calendared fo trial, and it is further

ORDERED that any requested relief not expressly granted hereIn Is denied, and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: New York, NY
July 31, 2012

SO ORDERED:



J.G. J.S.C.

FILED

AUG 02 2012

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