SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF DUTCHESS

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NEWBUY, INC.,

Plaintiff,

-against-

LILY LOGAN'S, INC., DENISE KELLY, f/k/a DENISE ROONEY and GENE ROONEY,

Defendants.

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DECISION AND ORDER

Index No. 6073/12

FORMAN, J., Acting Supreme Court Justice

The Court read and considered the following documents upon this application:

	PAPERS NUMBERED
ORDER TO SHOW CAUSE	**1-2**
AFFIRMATION IN SUPPORT	**1-7**
EXHIBITS	**A-C**
AFFIRMATION IN OPPOSITION	**1-3**

This is a commercial lease dispute following the surrender of the premises. A related action is pending in the Small Claims Part of the City of Poughkeepsie City Court. By Order to Show Cause, Plaintiff seeks an Order removing the small claims case from the City Court, and consolidating it with this action in the New York State Supreme Court. For the reasons stated herein, Plaintiff's motion for removal of the small claims case from the City Court to the Supreme Court is granted. Plaintiff's motion for consolidation of the small claims action with the Supreme Court action is denied. However, the small claims action will be joined with the Supreme Court action for purposes of trial.

BACKGROUND

Plaintiff Newbuy, Inc. ("Landlord") owns improved real property located at 2026 Route 9D, Wappingers Falls, New York, 12590 (the "Premises"). Landlord alleges that it entered into a commercial lease with Defendants in February of 2002, for purposes of using the Premises as a restaurant/bar. The original lease was executed on February 26, 2002, and provided for a ten (10) year term, subject to an additional five (5) year option running in favor of the tenant. Landlord and Defendant Lily Logan, Inc., entered into a lease amendment on November 15, 2005 (the original lease and the lease amendment are referred to herein, collectively, as the "Lease").

Defendants elected not to exercise their five year option, and surrendered the Premises to Landlord on February 28, 2012. Defendants gave Landlord a $6,000 security deposit during the term of the Lease. Landlord has refused to return that security deposit following Defendants' surrender of the Premises.

On or about August 20, 2012, Defendant Denise Kelly ("Kelly") commenced an action against Landlord in the Small Claims Part of the City of Poughkeepsie City Court. According to the Summons issued by the Small Claims Part, Kelly seeks judgment in the City Court in the amount of $5,000, based on Landlord's refusal to return the security deposit.[1]

On or about October 4, 2012, Landlord commenced this action by filing a Summons and Verified Complaint with the Dutchess County Clerk. The Verified Complaint alleges that Defendants failed to pay rent of $3,000 for the month of February, 2012. The Verified Complaint also alleges that Defendants failed to pay cost-of-living adjustments ("COLA") totaling $1,131.00, as required by the Lease.

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[1] Although the total amount of the security deposit is $6,000, the monetary jurisdiction of the Small Claims Part for the City Court is limited to $5,000. [Uniform City Court Act §1801].

The Verified Complaint also alleges that Defendants violated their obligations under the Lease to perform certain maintenance and repairs, including plumbing, landscaping, fencing and roofing maintenance and repair. The Verified Complaint also alleges that Defendants violated their Lease obligations by removing certain fixtures from the Premises, including fixtures that Defendants installed during their tenancy, and fixtures that pre-existed their tenancy. Finally the Verified Complaint alleges that Defendants failed to comply with their Lease obligations to keep the Premises in good order and repair, and to return the Premises to Landlord in the same good condition as it was at the beginning of the Lease term, reasonable wear and tear excepted. Landlord claims that is suffered damages totaling $63,280.20 as a result of these alleged Lease violations.

On October 5, 2012, Kelly and the Landlord engaged in mandatory mediation in the City Court. When that mediation proved unsuccessful, Landlord's counsel made an oral application for removal of the small claims action from City Court, and consolidation with the Supreme Court action. That oral application was denied by the City Court, and a trial was scheduled for November 19, 2012.

By Order to Show Cause dated November 15, 2012, this Court directed Defendants to show cause why the small claims case should not be removed from the City Court, and consolidated with the Supreme Court action. This Court also stayed the trial of the small claims action pending the determination of this motion.

In support of this application, Landlord argues that removal and consolidation is appropriate because the actions involve common questions of law and fact. Landlord also argues that removal and consolidation will serve the interests of judicial economy. Finally, Landlord

argues that the consolidation must occur in the Supreme Court, since the amount of Landlord's claim far exceeds the jurisdictional limits of the Small Claims Part.

In opposition, Kelly concedes that her request in the Small Claims Part for the return of the security deposit should be removed and consolidated, because it involves common questions of law and fact with the Supreme Court action. However, Kelly asserts that her small claims action also seeks to recover the cost of a water pump that Defendant Lily Logan's installed at the Premises for the benefit of Landlord. In support of her argument that the water pump claim should not be removed and consolidated, Kelly asserts that the purpose of the Small Claims Part is to allow parties to seek swift redress for disputes over limited amounts of money, without incurring the expenses associated with full-blown litigation. For instance, although Kelly has retained counsel to defend the Supreme Court action, she has sought to prosecute the small claims action herself, without incurring the expense of hiring an attorney. Kelly also argues that the motion for removal and consolidation should be denied because the City Court previously denied Landlord's oral application seeking this same relief. Accordingly, Kelly argues that the motion to remove and consolidate should be denied, at least as it relates to her water pump claim.

DISCUSSION

"When an action is pending in the supreme court it may, upon motion, remove to itself an action pending in another court and consolidate it or have it tried together with that in the supreme court." [CPLR §602(b)]. "It is well settled that consolidation is generally favored by the courts in the interest of judicial economy and ease of decision making where there are common questions of law and fact, unless the party opposing the motion demonstrates that consolidation

will prejudice a substantial right." [***Amtorg Trading Co. v. Broadway & 56th Street Associates***, 191 A.D.2d 212, 213 (1st Dept. 1993). *See also* ***43rd Street Deli v. Paramount Leasehold, L.P.***, 89 A.D.3d 573, 573-74 (1st Dept. 2011); ***DeCastro v. Bhokari***, 201 A.D.2d 382, 382-83 (1 st Dept. 1994)]. "The mere fact that a case may be somewhat delayed by such consolidation will not suffice to bar it." [***id***. *See also* ***Plot Realty, LLC v. DeSilva,*** 45 A..3d 312, 313 (1st Dept. 2007); ***Moretti v. 860 West Tower, Inc.***, 221 A.D.2d 191, 192 (1st Dept. 1995)]. Where only one court is capable of providing all of the relief requested by the parties, removal and consolidation in the one court that possesses the requisite authority is appropriate. [***Genovese Drug Stores, Inc., v. Willian Floyd Plaza, LLC***, 63 A.D.3d 1102, 1104 (2d Dept. 2009); ***Kally v. Mount Sinai Hospital***, 44 A.D.3d 1010, 1011 (2d Dept. 2007)].

Removal of the small claims action from City Court is appropriate under these circumstances. Kelly has conceded that her demand for the return of the security deposit shares common questions of law and fact with the claims that have been asserted in the Supreme Court action. Although Kelly does not make the same concession with respect to her water pump claim, the Verified Complaint asserts causes of action relying on paragraphs 9 and 11 of the Lease. [Verified Complaint, ¶¶ 18, 20]. Paragraph 9 of the Lease requires Defendants to "make all necessary repairs and replacements to the Leased Premises, including the repair and replacement of pipes, electrical wiring, heating and plumbing systems, fixtures and all other systems and appliances and appurtenances." Paragraph 11 states that "all alterations, additions, and improvements made and fixtures installed by tenant shall become landlord's property at the end of the lease/term." Therefore, the Supreme Court action and Kelly's claim seeking to recover the cost of the water pump clearly involve common questions of law and fact.

Removal and consolidation will also serve the interests of judicial economy. There is no reason to litigate these claims before two different courts, as the security deposit and water pump claims are inextricably intertwined with the claims raised in the Supreme Court action. The Court also notes that the small claims action did not include Lily Logan's Inc. or Gene Rooney as the other signatories to the Lease. Since these parties have been named as defendants in the Supreme Court action, litigating these claims in the Supreme Court action will also serve the interests of judicial economy because it will eliminate any issue that may have existed regarding Kelly's failure to join all necessary parties in the small claims action. Similarly, the Court notes that the small claims summons only identifies a security deposit claim, and does not identify a water pump claim. Therefore, litigating these claims in the Supreme Court action will also serve the interests of judicial economy because it will eliminate any issue regarding whether the small claims summons gave the City Court jurisdiction over the water pump claim.

Removal of the small claims action to the Supreme Court is also appropriate because the City Court does not possess the monetary jurisdiction necessary to grant the full relief requested by the parties. Any delay that may be occasioned by such removal does not suffice to bar it.

Finally, Landlord's motion for consolidation of the small claims action and the Supreme Court action must be denied because consolidation is not available when the same party would be identified as both a plaintiff and a defendant in the consolidated action. Under these circumstances, the appropriate remedy is to order a joint trial. [***Geneva Temps, Inc. V. New World Communities, Inc.***, 24 A.D.3d 332 (1st Dept. 2005); ***Matter of Schneider***, 88 A.D.2d 619 (2d Dept. 1982)]. It is therefore

ORDERED, that the action entitled *Denise Kelly v. Newbuy, Inc., Index No. SC-002262-12/PO*, now pending in the Small Claims Part of the City of Poughkeepsie City Court, County of Dutchess, be removed to this Court, and it is further

ORDERED, that the action now pending in the Small Claims Part of the City of Poughkeepsie City Court, be and the same is hereby joined for trial with the above-entitled action now pending in this Court, and it is further

ORDERED, that the Clerk of the City of Poughkeepsie City Court, upon filing with him a certified copy of this Order, be and is hereby directed to forthwith deliver to the Clerk of the Supreme Court all papers and records in the action now pending in the Small Claims Part of the City of Poughkeepsie City Court, and it is further

ORDERED, that the pleadings in the action now pending in the Small Claims Part of the City of Poughkeepsie City Court, and the pleadings in the above entitled action now pending in this Court, stand as the pleadings in the joined action, and that the Plaintiff Newbuy, Inc., shall be deemed to have entered a general denial to the allegations contained in the small claims summons; and it is further

ORDERED, that the Dutchess County Clerk be and is hereby directed and authorized to join the file of the action now pending in the Small Claims Part of the City of Poughkeepsie City Court, and the file of the above-entitled action now pending in this Court; and it is further

ORDERED, that the costs of the action now pending in the Small Claims Part of the City of Poughkeepsie City Court up to the date of this Order shall be chargeable as costs in the joint action for trial; and it is further

ORDERED, that counsel for all parties shall appear before this Court for a preliminary conference on February 27, 2013 at 9:30 a.m.

Dated: Poughkeepsie, New York
January 28, 2013

ENTER

Peter M. Forman

HON. PETER M. FORMAN, A.J.S.C.

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