

Kisner v Morasha Realty Corp.
2022 NY Slip Op 34365(U)
December 15, 2022
Supreme Court, Kings County
Docket Number: Index No. 511411/2021
Judge: Peter P. Sweeney
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF KINGS: PART 73

Index No. 511411/2021
Motion Date: 6-6-22
Mot. Seq. No.: 1

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JOSEPH KISNER, Y&B TRADING INC. d/b/a
BRICK BORO REALTY,

Plaintiffs,

-against-

DECISION/ORDER

MORASHA REALTY CORP., TEHILA S. ROZ
as TRUSTEE of SHEINFIL FAMILY
IRREVOCABLE TRUST, ABRAHAM LOWE,
YESHIVA ATERET YISRAEL INC.,
SHLOMO KOLODNY, SINAI PASKES,
ABRAHAM LANDAU, J & S RESOURCES CORP.,
JACOG GUTMAN, ABRAHAM TAMBOR,
ISRAEL GUTTMAN, SARA GUTTMAN,
SECURED BENEFITS INC., NUTA BLUMENBERG,
ISSAC HERSKO,

Defendants.

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Upon the following e-filed documents, listed by NYSCEF as item numbers 8-15, 20-26 ,
the motion is decided as follows:

In this breach of contract action, plaintiffs JOSEPH KISNER and Y&B TRADING INC.
d/b/a BRICK BORO REALTY move for an Order pursuant to CPLR 3211(b) striking the
second through ninth affirmative defenses of defendants MORASHA REALTY CORP.
(hereinafter "Morasha") and TEHILA S. ROZ AS TRUSTEE OF SHEINFIL FAMILY
IRREVOCABLE TRUST'S (hereinafter "Roz"), for lack of merit; and 2) for such other and
further relief as may be just and proper. Defendants Morasha and Roz oppose the motion.

Plaintiff's Contentions

In the complaint, plaintiffs claim they are lawful tenants at the property and seek to be
restored to the premises located at 4608/4610 1st Avenue, Brooklyn, New York. Plaintiffs also
seek an award of damages for an alleged illegal ouster, and damages for alleged tortious
interference.

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On or about June 1, 2016, Kisner and Brick Boro as Tenants entered into a lease with Morasha as Landlord to rent the first floor at the premises for an initial five-year term, through May 31, 2021, with the right to an additional five-year extension ("Lease"). At the time the Lease was executed, Morasha agreed that plaintiffs would be entitled to divide the premises into individual offices to be sublet. Plaintiffs allege they expended over \$100,000 in construction costs so they could erect offices to sublet in the property.¹ Following the completion of construction, plaintiffs rented office spaces to defendants "John" Lowe, Yeshiva Ateret Yisrael Inc., Shlomo Kolodny, Sinai Paskes, Abraham Landau, J & S Resources Corp., Jacou Gutman, Abraham Tambor, Israel Guttman, Sara Guttman, Secured Benefits Inc., Nuta Blumenberg, and Issac Hersko. Plaintiffs claim that in May 2020, Morasha and/or Roz embarked on a pattern of harassment threatening plaintiffs' tenants with being thrown out if they did not pay the rents directly to them. Plaintiffs maintain that in June 2020, Morasha illegally ousted and/or constructively evicted plaintiffs from possession and began collecting rents directly from the tenants, retaining in excess of the lease amount and that such violates the terms of the June 2016 Lease.²

Defendant's Challenged Affirmative defenses:

Defendants' challenged affirmative defenses are as follows: "To the extent Plaintiffs have incurred damages as a result of any alleged breach contract on the part of Defendants, which breach is expressly denied, Plaintiffs failed to mitigate such damages" (Second Affirmative Defense); "Plaintiffs' claims are barred by the doctrines of estoppel, ratification, laches, and waiver" (Third Affirmative Defense); "Plaintiffs' claims are barred by the doctrine of Unclean Hands" (Fourth Affirmative Defense); "Plaintiffs abandoned the property and has thereby waived and relinquished all rights pursuant to the contract" (Fifth Affirmative Defense); "

¹ Plaintiffs allege that in or about December 2019, Morasha transferred title to the subject property located at 4608 13th Avenue, Brooklyn, NY to Roz for no consideration.

² A commercial holdover proceeding is pending in the NYC Civil Court, Kings County to evict Brick Boro (index # LT-307902-20/KI) on the basis that Brick Boro violated the terms of the Lease and since the term of Brick Boro's tenancy expired on November 19, 2020.

Documentary evidence provides Defendants with a complete defense to Plaintiffs' claims as set forth in the Complaint as a matter of law pursuant to New York CPLR §3211(a)(1)" (Sixth Affirmative Defense); "Plaintiffs have failed to state a claim or cause of action" (Seventh Affirmative Defense); "Plaintiffs' claims should be abated due to a prior action pending involving the same parties and subject matter, entitled *Mosasha Realty v. Brick Borō Realty*, Index No. 307902/20, pending in New York City Civil Court" (Eighth Affirmative Defense); and "Plaintiffs' claims are barred by the statute of frauds" (Ninth Affirmative Defense).

Discussion:

A party may move for judgment dismissing one or more defenses, on the ground that a defense is not stated or has no merit" (*Mazzei v. Kyriacou*, 98 AD3d 1088, 1088–1089 [2012], quoting CPLR 3211 [b]). "When moving to dismiss or strike an affirmative defense, the plaintiff bears the burden of demonstrating that the affirmative defense is without merit as a matter of law" (*id.*, [internal quotation marks and citations omitted]). "In reviewing a motion to dismiss an affirmative defense, the court must liberally construe the pleadings in favor of the party asserting the defense and give that party the benefit of every reasonable inference" (*id.*, [internal quotation marks and citations omitted]). "However, where affirmative defenses merely plead conclusions of law without any supporting facts, the affirmative defenses should be dismissed pursuant to CPLR 3211(b)" (*Bank of Am., N.A. v. 414 Midland Ave. Assoc., LLC*, 78 AD3d 746, 750 [2010], quoting *Fireman's Fund Ins. Co. v. Farrell*, 57 AD3d 721, 723 [2008], see also, *Robbins v. Growney*, 229 A.D.2d 356, 358, 645 N.Y.S.2d 791 [1996]; *Carlyle, LLC v. Beekman Garage LLC*, 133 A.D.3d 510, 511, 19 N.Y.S.3d 520, 521 [2015]).

- Here, the second, third, fourth and ninth affirmative defenses alleged in the answer interposed by Morasha and Roz are bereft of any supporting facts and merely consist of bare legal conclusions. These defenses are therefore dismissed.

That branch of the motion seeking to dismiss the defendants' fifth affirmative defense is denied. Plaintiffs' counsel contends that plaintiff may sue for damages for interference arising out of breach of contract even if one abandons a space. While this may be true, if a plaintiff abandons a space, his or her entitlement to damages may be effected. Further, plaintiffs' claim that the defense of abandonment is barred by judicial estoppel is without merit. While

defendants claim in Civil Court, Kings County under index ##307902/2020 that Plaintiffs are in possession of the premises, no proof has been submitted that the defendants obtained a judgment in the Civil Court action by adopting that position. Generally, judicial estoppel will only be applied where a party to an action has secured a judgment in its favor in a prior action by adopting a certain position and then has sought to assume a contrary position in the second action simply because its interests have changed (*see, Anonymous v. Anonymous*, 137 A.D.2d 739, 524 N.Y.S.2d 823; *see also, Northern Metro. Residential Health Care Facility v. Ledri Realty Assocs.*, 179 A.D.2d 133, 137, 582 N.Y.S.2d 521; *Hinman, Straub, Pigors & Manning v. Broder*, 124 A.D.2d 392, 393, 507 N.Y.S.2d 761).

That branch of the motion seeking to dismiss the defendants' sixth affirmative defense is granted. A defense founded on documentary evidence is not by itself an affirmative defense, but merely one way in which a defense may be raised or proven (*see Sotomayor v. Princeton Ski Outlet Corp.*, 199 A.D.2d 197, 197, 605 N.Y.S.2d 296, 296).

That branch of the motion seeking to dismiss the defendants' seventh affirmative defense of failure to state a cause of action is granted. Whether a complaint states a cause of action sufficient to withstand a motion to dismiss pursuant to CPLR 3211(a)(7), the pleading is to be liberally construed, the facts alleged in the complaint accepted as true, and the plaintiff accorded the benefit of every favorable inference (*see Leon v. Martinez*, 84 N.Y.2d 83, 87, 614 N.Y.S.2d 972, 638 N.E.2d 511). Applying these principles, the complaint clearly states valid causes of action.

That branch of the motion seeking to dismiss the defendants' eight affirmative defense that "Plaintiff's claims should be abated due to a prior action pending involving the same parties and subject matter, entitled *Morasha Realty v Brick Boro Realty*, Index #307902/2020 pending in New York City Civil Court" is denied. The action pending in the Civil Court is a summary holdover proceeding and has been brought in a court of limited jurisdiction. None of the claims proffered by Plaintiffs in this action are a part of that case. Indeed, it is well settled that the commercial part 52 of the Civil Court lacks the subject jurisdiction to hear the majority of the claims pled herein such as Intentional Interference with Prospective Advantage, tortious conduct

lost profits, Conversion, the Intentional Interference with Contractual Relationship, Breach of Implied Covenant or Good Faith Fair Dealing business damage claims.

Accordingly, it is hereby

ORDERED, the motion is decided as set forth above.

This constitutes the decision and order of the Court.

Dated: December 15, 2022

PPS

PETER P. SWEENEY, J.S.C.

Note: This signature was generated electronically pursuant to Administrative Order 86/20 dated April 20, 2020

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