

<b>Nextel of N.Y., Inc. v 36-40 Gansevoort Realty LLC</b>
2006 NY Slip Op 30769(U)
February 22, 2006
Supreme Court, New York County
Docket Number: 07334/2005
Judge: Judith J. Gische
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Supreme Court of the State of New York  
County of New York: Part 10

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NEXTEL OF NEW YORK, INC.

Plaintiff,

-against-

36-40 GANSEVOORT REALTY LLC and  
40 GANSEVOORT DEVELOPMENT LLC,

Defendants.

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Hon. Judith J. Gische:

Recitation, as required by CPLR 2219[a], of the papers considered in review of these motions:

**Decision/Order**  
Index # 107334 / 2005  
Mot. Seq #s: 001 7 002

<b>Papers</b>	<b>Numbered</b>
Notice of Motion(seq. 002), SS affirm, AS affd., exhibits.....	1
Affrim in opp, exhibits.....	2
Reply affrim, exhibits.....	3
Notice of Motion(seq. 001), RO affirm, exhibits.....	4
BR affirm, exhibits.....	5
RO reply affrim.....	6
Order dated December 2, 2005.....	7
AA affirmation.....	8
RO.....	9

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

Defendants 40 Gansevoort Development LLC ("Development LLC") and 36-40 Gansevoort Realty LLC ("Realty LLC") have each separately moved to dismiss the complaint. By order dated December 2, 2005 this court converted the motions into ones for summary judgment. Additional submissions were permitted and the motions are now ripe for the court to consider whether summary adjudication is appropriate. CPLR § 3211[c].

Many of the material facts underlying this action are not in dispute.

Realty LLC owns the land and building located at 36-40 Gansevoort Street in New York City. On February 4, 2000 plaintiff, Nextel of New York, Inc. ("Nextel") and Realty LLC, entered into a Communications Site Lease ("Communications Lease"). It allowed Nextel to use 200 square feet of space at the building to erect, maintain and operate radio communications facilities, in exchange for a monthly rental fee of \$1,500.

At the time the Communications Lease was entered into, the structure on the land was a two story building. Nextel erected its equipment on the southwest corner of the roof of the existing structure. Insofar as pertinent to this dispute the Communications Lease provides:

"...Lessor may terminate this Agreement if all or a substantial portion of the Building is to be demolished or substantially re-altered or developed. Lessor shall give notice of the termination not less than six (6) months prior to the Termination Date and permit Lessee to remain on the Premises under the terms of the Agreement until Lessor supplies Lessee with a copy of the required permits to demolish, substantially re-alter or develop the building, the foregoing notwithstanding, in the event of less than a total demolition or a substantial re-alteration of the Building, Lessee shall have the option to remain on the Premises, under the same terms and conditions of this Agreement, subject to the rights of any other tenant, relocate Lessee's Facilities to another portion of the Building mutually agreeable to Lessor and Lessee..at Lessee's expense."

On July 31, 2003 Development LLC became the net lessee of the land and building located at 36-40 Gansevoort Street in New York City. That lease was amended in January 2004. The term of the lease was to commence the later of 60 days after execution, or when the landlord delivered possession vacant, broom clean and free of all leases, tenancies, leases, subleases and rights of occupants. At the time the lease was made, Realty LLC did not notify Development LLC about the Communications Lease with Nextel.

Soon after the net lease was made, Development LLC began embarking on a

construction plan for the building. Although the parties dispute whether the work done constitutes a total renovation, a substantial re-alteration or something less,<sup>1</sup> the nature of the proposed work, and what was actually done is beyond dispute. With the exception of two exterior walls, the existing two story structure was removed down to the basement floor slab. The roof where Nextel's radio equipment had previously been no longer exists. A completely new five story steel frame structure is being built at the site. Photographs of the work in progress are part of the record on this motion (see Exhibit B to Handel-Harbour reply affirmation dated September 6, 2005).

On August 9, 2004, Realty LLC sent Nextel a Notice of Termination which stated that the landlord elected to terminate Nextel's tenancy as of February 28, 2005. It further stated that:

"This notice is being served upon you pursuant to the provision of paragraph (13)[c] of the communication site Lease Agreement dated February 14, 2000 which provides that:...'Lessor may terminate this Agreement if all or a substantial portion of the Building is to be demolished or substantially re-altered or developed."

The notice also stated that if Nextel fails to remove itself from the premises by the date provided, the Landlord would commence a summary holdover proceeding. In early February 2005 Nextel was provided with copies the filed demolition plans.

Nextel challenged Realty LLC's Termination Notice and asserted its right to remain at the building. It did not voluntarily remove itself from the building on or before the date indicated in the Termination Notice. Realty LLC did not commence a summary proceeding.

Defendants admit that sometime prior to March 1, 2005 the roof was demolished

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<sup>1</sup>This dispute will be addresses later in the decision.

and Nextel's equipment was removed from the roof top. Development LLC claims that the equipment was returned to Nextel in good condition. Nextel claims that on February 27, 2005, its equipment was removed by defendants from the roof top and left at the curb. The divergent factual assertions made by the parties are all contained in affirmations by attorneys, who do not appear to have any personal knowledge of the underlying facts.

This action ensued. Nextel asserts eight causes of action. The first four causes of action seek declaratory judgment (on four legal arguments) that the August 9, 2004 Notice of Termination was legally insufficient to terminate the Communications Lease.

The fifth cause of action seeks monetary damages for wrongful eviction. The sixth cause of action seeks punitive damages. The seventh and eighth causes of action seek monetary damages for conspiracy to breach a contract and tortious interference with contract. They appear to be asserted against Development LLC only.

For the reasons that follow, the court grants each of the defendants' motions for summary judgment dismissing the complaint as to the first, second, third, fourth, seventh and eighth causes of action. The fifth cause of action is dismissed in part. In all other respects the motions are denied.

## DISCUSSION

Since the court has, on notice, converted the pending motions into ones for summary judgment, the standard of review is that applicable to summary judgment motions. In this regard the court looks to see whether the movant has made out a prima facie case. In this case the court looks to see whether the defendants have made out a case to warrant dismissal of the action. If they meet their burden, then the party opposing

the motion had the burden of showing the court, through admissible evidence, that there are unresolved material issues of fact that preclude summary judgment. Alvarez v. Propect Hospital, 68 NY2d 320 (1986); Ayotte v. Gervasio, 81 NY2d 1062 (1993). If there are issues of law in dispute between the parties, then the court should resolve them on a dispositive motion. MBL Life Assur. Corp. V. 555 Realty Co., 240 AD2d 375 (2<sup>nd</sup> dept. 1997).

### 1. Sufficiency of Termination Notice

Although denominated as four separate causes of action, the first four claims in the complaint all refer to the sufficiency of the Notice of Termination.

The court finds that the Notice of termination was sufficient. It apprised Nextel that the landlord was terminating the Communication Lease on a particular date. It adequately identified the premises, provided the reason for terminating the lease and referenced the particular lease provision relied upon.

The court rejects Nextel's argument, asserted in the first cause of action, that the Notice of Termination is ambiguous and/or that Nextel could not determine what its rights and remedies were under the lease when it received the Termination Notice. The first cause of action is, therefore, dismissed.

The second cause of action alleges that the Notice of Termination is defective because it fails to precisely articulate the extent of the demolition. Nextel argues that it could not therefore determine if it had the right to exercise its option to remain upon the premises, albeit in a different location. In fact the Notice of Termination expressly states that the premises were going to be totally demolished or substantially re-altered. Under the Communications Lease these are the precise two circumstances that preclude Nextel

from remaining on the premises. Assuming Nextel was actually concerned about whether the landlord was being candid about the nature of the work being done, this argument does not go to the sufficiency of the Notice.<sup>2</sup> Significantly, under the Commercial Lease, Nextel did have a right to receive the filed plans before it actually had to vacate the premises. The plans were provided to Nextel prior to the termination date in the Notice. These issues, however, do not go to the sufficiency of the Notice itself. Since the second cause of action only seeks a declaration on the sufficiency of the Notice it must be dismissed.

The third and fourth casus of action are interrelated. They both rely on the fact that it was Realty LLC that had the landlord tenant relationship with Nextel, but that it was Development LLC that was planning the construction work at the building. Nextel argues that the Notice of Termination is defective because it was served by Realty LLC, which had no intention to do the work itself. They further argue that because Development LLC, which was going to do the work, it could not legally terminate the Communications Lease because it had was not Nextel's landlord under the lease.

Reading together Nextel's arguments, it contends that the Commercial Lease provision that permits termination in the event of total demolition or substantial re-alteration only exists if it is Realty LLC that is actually doing the work. The language of the Commercial Lease provision, however, is not so limited and is applicable whenever there is a total demolition or substantial re-alteration at the building, no matter who does it. It also defies common sense for Nextel to argue that Realty LLC derives no benefit from the construction work done by a third party, in this case the net lessee. Since the net lessee

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<sup>2</sup>The bona fides of whether defendants did totally demolish or substantially re-alter the building is addressed later in this decision.

could not renovate the building to such a substantial degree without the owner's consent, it is reasonable to assume that the net lease rents reflect such right. Moreover, at the end of the lease term, the owner will have a newer structure. Since the Notice is in accordance with the Commercial Lease, the third and Fourth casus of action are dismissed.

## 2. Wrongful Eviction and Punitive Damages

Nextel's claim for wrongful eviction is based upon a number of claims.

First it claims that under the lease unless there was a total demolition, it had the right to relocate to another portion of the building. Its claim for wrongful eviction also includes a claim that defendants failed to restore them to the premises.

Under the actual terms of the Commercial Lease the right to relocate does not exist where there has been a "total demolition" or a "substantial re-alteration" of the building. Here there really can be no factual dispute that the work done constituted, at the very least, a substantial re-alteration of the building. The building was gutted. While two existing walls and the basement slab were not altered, everything else was demolished and rebuilt. The existing structure that is being rebuilt has four additional floors. Nextel has not raised any plausible argument or factual basis on which anyone could conclude that the construction work undertaken at the building is something less than a substantial re-alteration.

Under the circumstances it is clear that Realty LLC had the right to terminate the lease. Thus, no damages can accrue for the failure to restore Nextel to the premises. See: 110-45 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc., 265 AD2d 415 (2<sup>nd</sup> dept. 1999).

Nextel's other arguments revolve around the "self help" aspect of the eviction and the fact that it took place on February 27, 2005, a day before the predicate Notice



purported to terminate its lease. It is undisputed that Realty LLC did not commence a summary proceeding, notwithstanding that the predicate notice indicated that the tenant's failure to quit would result in the landlord commencing a summary holdover proceeding. There is also no dispute that the Commercial Lease did not retain any right to retake the demised space by self help.

In general there is a recognized common law right for landlord's to peaceably regain possession of a commercial premises where a tenant is in default. This right, however, usually applies when it is reserved in the terms of the lease. *Estis & Robbins, Self-Help Eviction, The Allure is Real, But Be Aware of the Risks*, NYLJ February 6, 2002 p5 (col. 2); see also: West Broadway Glass Company v. Namaskar of Soho, Inc., 2005 WL 1118049 (NYC Civ. Ct.)(nor). Moreover, in resorting to self-help, the landlord bears the risk that it can establish a right to possession in the first place and that the acts constituting the eviction were, in fact, peaceful. Bozewicz v. Nash Metalware Co. Inc., 284 AD2d 288 (2<sup>nd</sup> dept. 2001).

At bar, the eviction involved the removal of Nextel's equipment from the roof, admittedly accomplished through self-help. There is no reservation of the right to use self help in the commercial Lease. The use of self-help was also directly contrary to the Notice of Termination that expressly notified Nextel if it did not comply with the Notice and remained at the premises. There is a dispute about when the eviction took place, whether before or after the termination date in the Notice of Termination. There is also a dispute about whether the eviction was peaceful or not. There are differing accounts about how and where to the equipment was removed.

Nextel has failed to state a cause of action related to damages for failure to restore

it to the premises. It has, however, stated a cause of action for wrongful eviction and raised sufficient facts to defeat any summary judgment on this cause of action.

The sixth cause of action is for punitive damages under RPAPL § 853 in the event of a forcible or unlawful eviction. Since Nextel's cause of action for wrongful eviction survives dismissal, so too does the cause of action for statutory treble damages.

### 3. Conspiracy to Breach Contract

There is no independent tort of conspiracy. Rather, the actionable wrong lies in the commission of a tortious act, or a legal one by wrongful means. Hoag v. Chancellor, Inc. 246 AD2d 224 (1<sup>st</sup> dept.): Cucker Indus v. Crow construction Co., 6 AD2d 415 (1<sup>st</sup> dept. 1958).

Nextel claims that the underlying bad act is a breach of contract. There are no facts, however, supporting any breach of contract. The Commercial Lease was terminated in accordance with its provisions. The only surviving claim to be adjudicated between the parties is for wrongful eviction. Such claim sounds in tort and not breach of contract. Spodek v. Liberty Mutual Ins. Co., 155 AD2d 439 (2<sup>nd</sup> dept 1989); West Broadway Glass company v. Namaskaar of Soho, Inc., *supra*.

Consequently the cause of action for conspiracy to breach contract must be dismissed.

### 4. Tortious Interference with Contract

For much the same reason, the eighth cause of action, for tortious interference with contract, must be dismissed. The elements of a cause of action for the tort of interference with contract are: [1] the existence of a valid contract; [2] defendant's knowledge of that contract; [3] defendant's intentional procuring of the breach of the contract; and [4]

damages. Lama Holding Company v. Smith Barney Inc. 88 NY2d 413 (1996). There must be a breach of the contract in order to state a cause of action for interference with contract. NBT Bancorp Inc., v. Fleet Norstar Financial Group Inc. 87 NY2d 614 (1996). Since Nextel cannot establish any breach of the commercial lease, it cannot sustain any cause of action for intentional interference with contract, The eighth cause of action must therefore be dismissed.

### Conclusion

In accordance with this decision it is hereby:

ORDERED that defendant Development LLC's motion is granted in part and denied in part, and it is further

ORDERED that defendant Realty LLC's motion is granted in part and denied in part, and it is further

ORDERED that summary judgment dismissing the first, second, third, fourth, seventh and eighth causes of action is granted and that such causes of action are hereby severed and the clerk is directed to enter a judgment dismissing same, and it is further

ORDERED that summary judgment dismissing the fifth cause of action is granted only to the extent that plaintiff is seeking damages based upon right to remain or relocate at the premises past the termination date in the Notice of Termination and in all other respects it is denied, and it is further

ORDERED that summary judgment dismissing the sixth cause of action is denied, and it is further

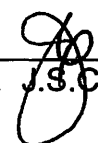
ORDERED that a preliminary conference on the remaining fifth and sixth causes of action is hereby scheduled for **March 23, 2006 at 9:30 am at 80 Center Street, New York, NY, Part 10, Room 122**, and it is further

ORDERED that any relief requested but not expressly granted herein is denied, and it is further

ORDERED that this shall constitute the decision and order of the court.

Dated: New York, New York  
February 22, 2006

So Ordered:

  
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J.G. J.S.C.

**FILED**  
**MAR - 1 2006**  
**NEW YORK**  
**COUNTY CLERK'S OFFICE**