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Short Form Order

NEW YORK SUPREME COURT - QUEENS COUNTY

PRESENT: HON. TIMOTHY J. DUFFICY **PART 35**
Justice

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LIU L. XUI,

Plaintiff,

Index No.: 4714/11
Mot. Date: 10/30/12
Mot. Cal. No. 129
Mot. Seq. 2

-against-

IRON CITY PROPERTIES, INC.,
TEDDY LI and GOLDEN RAINBOW SPA,

Defendants.

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The following papers numbered 1 to 21 read on this motion by defendants for an order pursuant to CPLR 3212 granting summary judgement in their favor and dismissing the complaint; and the cross motion by plaintiff for an order pursuant to CPLR 3212 granting summary judgement in his favor and for an order denying the defendants' motion for summary judgment.

	Papers Numbered
Notice of Motion - Affidavits - Exhibits.....	1 - 9
Notice of Cross Motion - Affidavits-Exhibits	10 - 14
Answering Affidavits - Exhibits	15 - 16
Reply Affidavits	17 - 21

Upon the foregoing papers it is ordered that the motion and cross motion are decided as follows:

The plaintiff in this action, *inter alia*, wrongful eviction action, asserts a cause of action against defendants Iron City Properties, Inc. (Iron City), Teddy Li and Golden Rainbow Spa for wrongful eviction and seeks restitution and restoration of possession of the commercial premises. The plaintiff also asserts a second cause of action against Li and Iron City for wrongful eviction and seeks treble damages. The defendants submit that the plaintiff defaulted under a purchase agreement and abandoned the premises. The defendants also

submit that the plaintiff was not in quiet possession of the premises at the time that Li and Iron City re-entered and re-let the premises. For these reasons, the defendants seek summary judgment in their favor dismissing the complaint. The plaintiff opposes the motion and cross-moves for summary judgment in his favor. The cross-otion is opposed by the defendants.

In May, 2007, the plaintiff entered into a contract (the "Purchase Agreement") with Iron City for the purchase of commercial premises within a building owned by Iron City, located at 41-28 Haight Street (premises or "the building"). Upon execution of the Purchase Agreement, the plaintiff was obligated to make a down payment and permitted to take possession of the Premises, subject to his payment of installments of the remainder of the purchase price. At the same time, the plaintiff executed a purchase money mortgage, mortgage note and escrow agreement. The mortgage note required that $200,000 be paid on or before December 31, 2007, $150,000 be paid on or before June 30, 2008, $200,000 be paid on or before December 31, 2008, and $176,000 be paid on or before June 30, 2009. The escrow agreement stated that the deed to the premises would be held in escrow until the aggregate repayment of the principal of the purchase money mortgage amounted to $320,000. An Amendment to the Purchase Agreement further clarified that the deed "would not be recorded until the aggregate repayment on the principal amounts to $320,000.

In May, 2007, the plaintiff took possession of the premises. In April, 2008, the plaintiff closed his business. In September, 2008, the plaintiff was involved in an automobile accident and, thereafter, never did not return to the premises. Although obligated to do so, the plaintiff did not make any further payment on the account of the Premises. The plaintiff also failed to communicate his intentions regarding the premises to Li or Iron City. Thus, for a period of over two years, the plaintiff did not answer or return Li's telephone calls. Iron City sent default notices to plaintiff on January 2, 2008, and again on November 18, 2008, but received no response. On December 16, 2008, Iron City sent the plaintiff a final notice of default and again did not receive a response. As a result, the deed to the premises was

never delivered to the plaintiff nor recorded. The December 16th notice explained that if the default was not cured within thirty days, the Purchase Agreement would be cancelled pursuant to paragraph 24 of the Agreement.

During the winter of 2008-2009, the super of the building heard the sound of running water inside the premises. The super notified Li, who attempted to contact the plaintiff without success. Unable to locate the plaintiff, Li entered the premises and discovered water up to his knees. Upon entry, Li also found the premises damages by water and mold. After cleaning up the premises and discarding the debris, including some equipment owned by the plaintiff, in June, 2010, Iron City leased the premises to Golden Rainbow. In February 2011, Iron City received a communication from Xui proposing a new deal for the premises. Iron City did not respond. The plaintiff thereupon commenced the instant action.

The branch of the motion seeking summary judgment dismissing the first cause of action, which is for restitution of the premises and damages, is granted.

Although eviction through legal process is undoubtedly the most secure method, it is well established that a landlord may, under certain circumstances, utilize self-help to regain possession of demised commercial premises (*Zendani v Morrina Realty Corp.,* NYLJ, March 11, 1999, at 28, col. 3 [App. Term, 1st Dept.]; *see Liberty Indus. Park Corp. v Protective Packaging Corp.,* 43 A.D.2d 1020, 351 N.Y.S.2d 944 [1974], *affg.* 71 Misc.2d 116, 335 N.Y.S.2d 333 [1972]). In particular, a commercial landlord may utilize self-help where (1) the subject lease specifically reserves the landlord's right to reenter and regain the premises upon tenant's breach of its obligation to pay rent, (2) prior to reentry, landlord serves upon tenant a valid rent demand, (3) reentry was effected peaceably, and (4) tenant is in fact in default in its obligation to pay rent (*see Bozewicz v Nash Metalware Co.,* 284 AD2d 288 [2001]; *Matter of 110–45 Queens Blvd. Garage, Inc. v Park Briar Owners, Inc.,* 265 AD2d 415 [1999]; *Matter of Jovana Spaghetti House, Inc. v Heritage Co. of Massena,* 189 AD2d 1041 [1993]; *see also Matter of Lee v Park,* 16 AD3d 986 [2005]; *North Main St. Bagel Corp. v Duncan,* 6 AD3d 590 [2004]; 2 Dolan, Rasch's New York Landlord and

Tenant–Summary Proceedings, §§ 29:1, 29:11 [4th ed.]). Here the relevant clauses of paragraph 24 reserved Iron City's right to reenter and regain the demised premises upon Xui's breach of his obligation to pay rent. Further, Paragraph 2 of the Amendment to the Purchase Agreement states: "Purchaser agrees to surrender possession upon 30 days' written notice of default in payment from Seller. Indeed, courts have concluded that commercial landlords have sufficiently reserved their rights of reentry through lease provisions containing language substantially similar to the language employed in the lease herein (*see Matter of Jovana Spaghetti House, Inc., supra; see also 542 Holding Corp. v Prince Fashions, Inc.,* 46 AD3d 309 [2007]; *Matter of 110–45 Queens Blvd. Garage, Inc., supra*).

Furthermore, it appears from this record that restoring the plaintiff to possession would be futile, because the defendants would prevail in a summary proceeding to evict the plaintiff (*see Matter of 110-45 Queens Boulevard Garage v Park Briar Owners,* 265 AD2d415 [1999]; *Wagman v Smith,* 161 AD2d 704 [1990]; *Bressler v Amsterdam Operating Corp.,* 194 Misc 76). The plaintiff, if he be so advised, may move in the Civil Court to assert a claim to recover damages for forcible reentry. In the event the application is granted and the plaintiff prevails on his claim that the reentry was forcible his relief, if any, would be limited to damages (*see,* RPAPL 853).

The branch of the motion seeking to dismiss count two of the complaint, which seeks treble damages for wrongful eviction, is granted. RPAPL 853 is the statutory basis for a cause of action to recover treble damages for forcible or unlawful entry. The statute, as last amended in 1981, provides, as follows:

> 853. Action for forcible or unlawful entry or detainer; treble damages
>
> If a person is disseized, ejected, or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer.

Whether dispossession is lawful depends on a variety of factors, including the occupant's status as tenant or licensee (*see e.g., P&A Bros. v City of New York Dept of Parks & Recreation,* 184 AD2d 267 [1992]), the manner in which the dispossession occurs (*e.g., Bozewicz v Nash Metalware Co.,* 284 AD2d 288 [2001]*)*, and whether the occupant was in fact in peaceable possession at the time of the ouster (*Gulish v Johnson*, 206 App Div 625 [1923]). While treble damages for wrongful eviction are provided for in the statute, it is in the court's discretion whether such damages should be awarded (*Lyke v Anderson*, 147 AD2d 18 [1989]); *see also, Rental & Mgt Assoc. v Hartford Ins. Co.*, 155 Misc2d 547 [1992]).

In *Lyke v Anderson*, supra, the court explained the requirement of possession as a component of wrongful eviction. To establish possession, a plaintiff must show some intent to occupy and not abandon the premises (*Lyke*, 147 AD2d at 25). While physical occupancy is not required in the case of tenants who have a legal right to enjoy use of the premises, this is not the case where a tenant has ceased paying rent or thus had no right of possession (Id). The required element of possession is defeated in cases where a plaintiff abandoned the premises, whether a tenant or not (Id). Here, as Xui had no legal right to possession after he defaulted under the Purchase Agreement (see paragraph 24), his claim for wrongful eviction must depend upon actual possession. As Xui's actions indicate abandonment of the premises, Xui has not shown possession.

Several factors are relevant in determining whether abandonment of commercial property has occurred. For example, in *Ritz Entertainment Org v Unity Gallega of U.S.*, 166 AD2d 186 [1990]), the court found that abandonment of commercial premises had occurred when the occupant stopped paying rent, discontinued utilities, and relocated its business leaving the premises in a state of disrepair. In *Salem v U.S. Bank N.A.*, 82 AD3d 865 [2011]), abandonment was found to have occurred where the plaintiff admitted to having removed her furniture and discontinued her utilities several months before her locks were changed. Such abandonment defeated the element of possession necessary to sustain a claim for wrongful eviction Overall, it appears that the failure to pay rent, long-term absence from

the premises and leaving the premises in a state of disrepair are factors that indicate abandonment. In the instant case, these factors are all present. While Xui was not required to pay "rent", his failure to pay any of the required installments pursuant to the Purchase Agreement is analogous. Xui testified that he had not returned to the premises after September 2008, and that he was not sure if anyone else had. Iron City unsuccessfully attempted to contact Xui for two years. Xui does not claim that he performed any acts during that time which would even suggest that Xui had not abandoned the premises. Finally, Xui's neglect led to a flood and consequent damages to the premises.

Xui's only claim of possession involves his occupancy upon execution of the Purchase Agreement. That occupancy ended, at the latest, in September 2008. Xui did not take any action after that time to support a claim of occupancy or possession. Li's re-entry and subsequent re-letting of the Premises was not wrongful self-help. Rather, it appears Li acted to mitigate damages and protect the premises after Xui's departure. Xui was not in possession of the Premises at the time Li re-entered and, therefore, Xui cannot maintain a claim for wrongful eviction.

The cross motion by Xui for summary judgment in his favor is denied. It is well settled that in order "to obtain summary judgment, it is necessary that the movant establish his or her cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment' in his or her favor (CPLR 3212[b]), and he or she must do so by tender of evidentiary proof in admissible form" (*Friends of Animals, Inc. v Associated Fur Mfrs., Inc.,* 46 N.Y.2d 1065, 1067 [1979].) Bare conclusory allegations, expressions of hope or unsubstantiated assertions are insufficient. (*Zuckerman v City of New York,* 49 NY2d 557, 562 [1980]). Here, the plaintiff's merely asserts that he did not receive notice that he was in default and did not abandon the premises. The plaintiff does not address the fact that the default notices were also sent to plaintiff's attorney and the plaintiff acknowledged that the fax number for Mr. Tung (plaintiff's then attorney) where the notices were sent, was correct. The plaintiff also failed to eliminate all triable issues of fact as to whether he abandoned the

premises. In short, plaintiff's submissions are insufficient to demonstrate entitlement to judgment as a matter of law (*see generally Fernbach, LLC v Calleo*, 92 AD3d 831 [2012]).

Accordingly, the cross motion for summary judgment in his favor is denied.

Dated: June 4, 2013

TIMOTHY J. DUFFICY, J.S.C.