

**Rahmanan Trading Co. v 443 Company**

2013 NY Slip Op 31770(U)

August 2, 2013

Sup Ct, New York County

Docket Number: 100310/13

Judge: Carol E. Huff

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This opinion is uncorrected and not selected for official publication.

PRESENT: CAROL E. HUFF  
*Huff*  
Justice

PART 3<sup>2</sup>

Radman  
- v -  
443 Company

INDEX NO. 100310/13  
MOTION DATE \_\_\_\_\_  
MOTION SEQ. NO. 01  
MOTION CAL. NO. \_\_\_\_\_

The following papers, numbered 1 to \_\_\_\_\_ were read on this motion to/for Injunctive Relief

Notice of Motion/ Order to Show Cause - Affidavits - Exhibits ...  
Answering Affidavits - Exhibits \_\_\_\_\_  
Replying Affidavits \_\_\_\_\_

PAPERS NUMBERED

Cross-Motion:  Yes  No

Upon the foregoing papers, it is ordered that this

*motion is decided in accordance  
with accompanying memorandum decision*

**UNFILED JUDGMENT**

This judgment has not been entered by the County Clerk and notice of entry cannot be served based hereon. To obtain entry, counsel or authorized representative must appear in person at the Judgment Clerk's Desk (Room 141B).

Dated: AUG 02 2013

CAROL E. HUFF  
*Huff*

Check one:  FINAL DISPOSITION  NON-FINAL DISPOSITION  
Check if appropriate:  DO NOT POST  REFERENCE  
 SUBMIT ORDER/ JUDG.  SETTLE ORDER/ JUDG.

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

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: PART 32

-----X

Application of RAHMANAN TRADING CO. D/B/A : Index No. 100310/13  
RUGS OF DISTINCTION,

Petitioner, :

For a Judgment Pursuant to CPLR 5239 Determining :  
Adverse Claims,

- against - :

443 COMPANY, :

Respondent. :

-----X

CAROL E. HUFF, J.:

Motions with sequence numbers 001, 002 and 003 are consolidated for disposition.

In this special proceeding brought pursuant to CPLR 5239 (“Proceeding to determine adverse claims”), petitioner, a former tenant of commercial premises located at 36 East 31<sup>st</sup> Street, New York, New York, seeks a judgment (001) that a prior civil court judgment has been satisfied and that inventory property left at the premises belongs to petitioner and that petitioner should have access to the premises in order to recover the property.

In motion 001, respondent cross moves seeking a judgment for either additional sums owed by petitioner in connection with its tenancy, or for fees.

In motion 002, petitioner seeks to add Oz Moving and Storage, Inc., to the proceeding and seeks further declarations with respect to the disposition of the property (essentially this motion is duplicative of the petition).

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In motion 003, respondent seeks an order consolidating the prior motions; permitting respondent to file an answer to the petition or, alternatively, deeming respondent's opposition to the order to show cause commencing the proceeding (001) to be deemed an answer; and dismissing the petition on jurisdictional grounds.

Initially, with respect to respondent's contention (motion 003) that the petition was not served properly, "service of process can be waived by respondent simply by appearing in the proceeding and submitting to the court's jurisdiction." Fry v Village of Tarrytown, 89 NY2d 714, 720 n. 2 (1997). In appearing and seeking leave to file an answer respondent has waived this jurisdictional objection. Respondent's motion, in the alternative, to deem its opposition in motion 001 to be deemed its answer is granted.

The undisputed facts are as follows. Petitioner failed to pay rent pursuant to its lease with respondent starting June 2011. Respondent commenced a nonpayment proceeding in civil court (443 Company v Rahmanan Trading Co. A/K/A Rugs of Distinction, Index No. L&T 79075/2011) and was awarded a judgment, dated March 5, 2012, for \$35,060.65 (the "Civil Court Judgment"). Petitioner held over at the premises and the parties executed a stipulation, dated July 12, 2012, whereby petitioner agreed to pay \$26,000 immediately, and "the balance of the Arrears" totaling \$18,278.54 plus additional rent totaling \$5,377.73 (totaling \$23,655.73) by August 12, 2012. In the event of petitioner's default of its obligations pursuant to the stipulation respondent would be entitled to receive additional payment for additional rents and attorney fees, and to "restore this proceeding to this Court [i.e., the Civil Court of the City of New York]."

Petitioner paid \$26,000 upon execution of the stipulation and failed to make the second payment by August 12, 2012. On November 26, 2012, while continuing to hold over, it made an

additional payment of \$20,000 and was finally evicted from the premises on December 14, 2012.

Upon its eviction petitioner left at the premises its inventory of rugs which it values at more than \$2 million. In motion 001, brought by order to show cause, petitioner sought and obtained a temporary restraining order restraining the City Marshall from selling the rugs in satisfaction of the Civil Court Judgment.

Petitioner first contends that the Civil Court Judgment was satisfied by its payments of \$26,000 and \$20,000. Respondent contends that the second payment of \$20,000 was applied to subsequent rent arrears and that the Civil Court Judgment remains outstanding.

The stipulation provides that the first and second payments would be applied to “the balance of the Arrears,” totaling \$44,278.54, plus “August and additional rent.” The plain language indicates that the Judgment was encompassed within “the Arrears” and was to be satisfied first. In any event, to the extent that the stipulation fails to address the issue specifically, the lease between the parties dated January 19, 2007, provides, “No payment by Tenant . . . of a lesser amount than the monthly rent herein stipulated shall be deemed to be other than on account of the earliest stipulated rent.” Lease at ¶ 25. Accordingly, the Court finds that the Civil Court Judgment has been satisfied and that, pursuant to the stipulation, respondent’s remedy for further holdover amounts and legal fees must be sought in the Civil Court of the City of New York.

In its opposition to the petition respondent clearly indicated that it retained the rugs in order to satisfy the Civil Court Judgment that it claimed was unsatisfied. CPLR 5239 provides that “[p]rior to the application of property . . . to the satisfaction of a judgment” an interested party may commence a proceeding to determine rights in the property. Accordingly, the Court has jurisdiction to determine the ownership of the rugs at issue.

In connection with motion 003, filed May 16, 2012, respondent for the first time proposes a new theory to retain them, citing a provision in the stipulation that property left by petitioner after its eviction was deemed to be abandoned and the landlord may remove and dispose of it. Stipulation, ¶ 11. Petitioner's continued efforts to recover the rugs cannot be considered abandonment. In any event, to the extent that this provision could be interpreted as a liquidated damages provision, the value of the rugs is grossly disproportionate to any amount claimed by respondent. See, e.g., G3-Purves Street, LLC v Thomson Purves, LLC, 101 AD3d 37, 41 (2d Dept 2012) ("If the amount fixed is grossly disproportionate to the amount of actual damages, then the liquidated damages provision amounts to a penalty and will not be enforced."). The Court finds that petitioner is entitled to possession of the rugs.

Accordingly, it is

ORDERED and ADJUDGED that the petition (001) is granted to the extent that it is declared that petitioner has satisfied the Civil Court Judgment and that petitioner is entitled to possession of the rugs, and respondent is directed to allow access to petitioner to retrieve the rugs; and it is further

ORDERED that the cross motion (001) is denied; and it is further

ORDERED that petitioner's motion 002 is denied as moot or duplicative of the relief sought in the petition; and it is further

ORDERED that respondent's motion (003) is granted to the extent that respondent's opposition to the petition is deemed be an answer, and is otherwise denied.

Dated:

AUG 02 2013

  
**CAROL E. HUFF**  
J.S.C.

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