SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 11

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In the Matter of the Application of
MARIE FLAHERTY,

Petitioner,

-against- Index No. 158612/13

MIDTOWN MOVING & STORAGE, INC.

Respondent.

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JOAN A. MADDEN, J.:

Motion sequence numbers 001, 003 and 004 are consolidated for disposition.

In this hybrid special proceeding/civil action, petitioner Marie Flaherty (Flaherty) seeks an order declaring null and void the notice of auction scheduled for January 28, 2014 and warehouseman's lien claimed by respondent Midtown Moving & Storage, Inc. (Midtown), and ordering the return of her household goods and personal property held by Midtown. Flaherty also seeks damages in connection with Midtown's removal and alleged destruction of her property. Flaherty, who is an attorney, is appearing pro se.

Background

This hybrid proceeding has a convoluted history which, unfortunately, neither of the parties has presented to the court with clarity or with a complete recitation of the events or presentation of the documentary record setting forth that history. The court has attempted to reconstruct the chronology

of this dispute, as well as possible, to the extent necessary to resolve these motions.

Flaherty previously resided in Peter Cooper Village/ Stuyvesant Town, at 1 Stuyvesant Oval, Apartment 12G, New York, NY. At some time in 2010, Flaherty's landlord initiated eviction proceedings against her for nonpayment of rent. On or about November 18, 2011, a money judgment for rent owed in the amount of $42,441.31 and judgment of eviction were issued against Flaherty by the New York City Housing Court. *ST Owner LP v Flaherty,* Civ Ct, NY County, index No. 8234/2010. It appears that Flaherty unsuccessfully appealed that decision to the Supreme Court, Appellate Term, since on January 26, 2012, she moved for reargument or for leave to appeal to the Appellate Division or for a stay of the warrant of eviction. On April 2, 2012, the Supreme Court, Appellate Term, denied her motion. *See ST Owner LP v Flaherty,* Civ Ct, NY County, App Term, 1st Dept 2012, index No. 571046/10.

Apparently the landlord took possession of Flaherty's apartment on or about April 20, 2012. According to Flaherty, at some time between April 20, 2012 and April 30, 2012, Midtown participated in the execution of the warrant for eviction.

Flaherty contends that at the time of her eviction, she was living in the apartment under a valid lease with her landlord, ST Owner L.P., for a two-year term commencing on November 1, 2010

and ending on October 31, 2012. According to Flaherty, no warrant for eviction has been issued in connection with the 2010-2012 lease. Flaherty argues that the warrant of eviction based upon her prior lease was, therefore, unlawful.

Flaherty further contends that, as a result of unrelated litigation against the prior owner of Peter Cooper Village/Stuyvesant Town, Tishman Speyer Properties (*Roberts v Tishman Speyer Props., LP,* 13 NY3d 270 [2009]) and bankruptcy proceeding in federal court (*Bank of America, N.A. v PCV ST Owner, L.P. ST Owner LP* [10 civ 1178 SD NY]), her landlord under the lease which was the subject of the eviction proceeding was barred from pursuing any rights to the Peter Cooper Village/Stuyvesant Town property. According to Flaherty, the eviction proceeding was illegal for this reason as well, as was the removal of her property by Midtown. As noted above, however, the order of eviction was upheld by the Supreme Court, Appellate Term. *ST Owner LP v Flaherty, supra.*

According to Flaherty, when the warrant of eviction was executed on April 20, 2012 and her apartment and possessions were turned over to her landlord, the inventory of her possessions issued by the office of the City Marshal indicated that her possessions were in good condition. Flaherty alleges that, without her authorization, Midtown entered her apartment on and between April 20 and 30, 2012, and damaged, destroyed and/or

removed her personal and household property and legal files. She further alleges that Midtown failed to provide her with an inventory of her property when it was removed, as required by the Uniform Commercial Code (UCC). Rather Midtown subsequently provided an inventory with an undated notice of auction, indicating that all of her goods were broken.

In an affirmation submitted in support of Midtown's motion for a protective order, counsel for Midtown, William A. Gogel (Gogel), asserts that on May 3, 2012, a notice of auction and notices required pursuant to UCC 7-210 and the General Business Law were sent to Flaherty, notifying her that her property would be sold at auction on July 10, 2012. *See* Affirmation of William A. Gogel, dated October 10, 2013 ¶ 15.[1]

According to Gogel, on June 19, 2012, the landlord's attorneys advised Midtown's attorneys that Flaherty had commenced a civil action against the landlord, the landlord's attorneys and others, and asked Midtown's attorneys to cancel the scheduled auction pending resolution of that civil action. Apparently at

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[1] The court notes that Gogol's affirmation contains discrepancies with respect to the dates that the notices were allegedly sent to Flaherty which may be the result of typographic errors and that no documents are submitted by Midtown establishing that such notices were in fact sent or what the notices consisted of. Rather, Gogel merely asserts that notices were sent which satisfy the requirements of the UCC. It is fundamental, however, that the affirmation of an attorney who has no personal knowledge of the facts lacks evidentiary value. *Zuckerman v City of New York,* 49 NY2d 557, 563 (1980).

that time, counsel for the landlord also instructed Midtown not to "discard or release the furniture/contents from the Marie Flaherty eviction." *See* Letter from Gina N. Diaz to Elane, dated June 19, 2012, verified amended petition, exhibit C. The auction was, therefore, cancelled. Flaherty's civil action against the landlord and others was dismissed on January 29, 2013. *Flaherty v CW Capital Asset Management, LLC,* Sup Ct, NY County, January 29, 2013, Singh, J., index No. 107310/11.

According to Gogol, after Flaherty's civil action was dismissed, Midtown was advised by the landlord's attorneys to proceed with the auction of Flaherty's possessions. On or about March 1, 2013, Midtown sent a new notice of auction to Flaherty, notifying her that if its claim for storage of her property, in the amount of $12,500.00 was not satisfied, her property would be sold at auction on April 9, 2013.

On or about April 9, 2013, Flaherty filed a civil action against Midtown and 100 John Does, alleging violations of the Racketeer Influenced and Corrupt Organizations Act (RICO) (18 USC § 1962) and various common-law causes of action, and obtained a temporary stay of the sale pending a hearing. *Flaherty v Midtown Moving & Storage*, Sup Ct, NY County, April 9, 2013, Edmead, J., index No. 651260/13. On May 2, 2013, a nonfinal decision was rendered in that case ordering Midtown to "withdraw the lien that is the subject of this complaint," dismissing all the causes of

action related to the warehouseman's lien, and directing Flaherty to serve an amended complaint by June 2, 2013. *Id.*, May 2, 2013.

On or about May 6, 2013, Midtown sent a new notice of auction to Flaherty stating that her property would be sold at auction on June 11, 2013, if she did not pay the storage costs, which had risen to $15,000.00. Rather than filing an amended complaint, on or about May 20, 2013, Flaherty initiated a new hybrid special proceeding challenging Midtown's warehouseman's lien and alleging several common-law causes of action for damages.

Without specifying the reason, Gogol states that Midtown's counsel advised Midtown not to conduct the June 11, 2013 auction. *See* email to Marie Flaherty from Maritza Montesdeoca, Agulneck & Gogel, LLC dated June 11, 2013, annexed to Verified Amended Petition, Exhibit M.

On August 15, 2013, Flaherty's hybrid proceeding was dismissed for lack of personal jurisdiction. *Flaherty v Midtown Moving & Storage,* Sup Ct, NY County, Edmead, J. August 18, 2013, index No. 154718/13.

Midtown apparently sent a new notice of auction to Flaherty, on or about September 4, 2013, which stated that the sale of her property would occur on October 8, 2013, if she did not pay the storage costs in the amount of $18,750.00, and on or about September 19, 2013, Flaherty initiated this hybrid proceeding

challenging that notice of auction and seeking damages. On October 8, 2013, this court signed an order to show cause restraining sale of Flaherty's property pending a hearing on her motion for for a preliminary injunction. *Flaherty v Midtown Moving & Storage,* Sup Ct, NY County, Madden, J., index No. 158612/13.

According to Gogol, on the advice of counsel that the notices sent to Flaherty regarding the October 8, 2013 sale were inadequate, Midtown canceled the October 8, 2013 auction and sent Flaherty a new date. According to Gogol, on September 27, 2013, Midtown served Flaherty with a new notice of auction to be held on November 12, 2013, accompanied by an inventory of her possessions.

Apparently the November 12, 2013 auction was not held, because on October 11, 2013, Flaherty's motion for a preliminary injunction was denied by this court as moot, as the auction had been rescheduled for January 28, 2014. *Id.*, October 11, 2013. On or about October 28, 2013, Flaherty filed an amended petition challenging the rescheduled auction. In Flaherty's 47-page hybrid petition, which is the subject of these motions, she asserts nine causes of action which she labels counts as follows: 1) first cause of action pursuant to the UCC 7-211 challenging the validity of the warehouseman's lien as not applicable to household goods under New York law and seeking compensatory and

punitive damages; 2) second cause of action seeking a preliminary and permanent injunction; 3) third cause of action for conversion; 4) fourth cause of action for criminal mischief; 5) fifth cause of action for theft of property; 5) fifth cause of action for theft of property; 6) sixth cause of action for extortion; 7) seventh cause of action for interference with contract; 8) eighth cause of action for intentional infliction of emotional distress; and 9) ninth cause of action for negligent infliction of emotional distress.

On October 28, 2013, Flaherty also sent an email to Midtown requesting access to and a full inventory of her possessions.

On or about November 15, 2013, Midtown answered the amended petition and asserted a counterclaim for storage charges due and owing assessed at the rate of $1,250.00 per month for a total amount of $21,250.00 through November 30, 2013.

Motion Sequence Number 001

Motion sequence number 001 consists of Flaherty's amended petition, Midtown's answer and counterclaim for storage and warehouse handling charges in the amount of $21,250.00, with additional charges accruing on a monthly basis, and Flaherty's reply which asserts 36 affirmative defenses in opposition to the counterclaim.

Flaherty's 47-page amended petition mixes purported assertions of fact and law. Her first two causes of action seek

to have Midtown's warehouseman's lien declared invalid and enjoined pursuant to UCC 7-211 and seeks compensatory and punitive damages. Her third through ninth causes of action seek damages for alleged common-law violations by Midtown.

In connection with her first two causes of action, Flaherty cites *Matter of Young v Warehouse No. 2* (143 Misc 2d 350 [Civ Ct, Richmond County 1989]), arguing that warehouseman's liens are not applicable to a tenant whose possessions are seized by a landlord after an eviction and turned over to a warehouse by the landlord. The court in *Matter of Young* held that, in an eviction case, under UCC 7-209 et seq., the warehouseman could only look to the landlord to pay the storage charges. The court stayed the sale of the sale of the tenant's possessions so that she could reclaim them, but also stated that if she did not remove them from the warehouse, the goods could be sold, but the proceeds must be held by the warehouseman for the benefit of the tenant.

In response to *Matter of Young* (143 Misc 2d 350), Midtown merely contends that "upon information and belief, hundreds of thousands of evictions wherein an evicted Tenant's household goods and possessions were removed have been subject to warehouseman's lien pursuant to U.C.C. § 7-210 and the General Business Law." Gogol affirmation, ¶ 19.

Although there are surprisingly few cases analyzing warehouseman's liens in the context of an eviction proceeding,

the holding in *Young*, is consistent with the relevant provisions of the Uniform Commercial Code. *See also*, *Moore v. Republic Moving and Storage, Inc.*, 548 NE2d 11211 (Ct of Appeals Ind., 2d Dist. 1990)(holding that warehouseman did not acquire a valid lien on evicted tenants personal property which was turned over to warehouseman by constable since tenants never consented to the storage of their property). Section 7-209 (1) states that " [a] warehouseman has a lien against the bailor on the goods covered by a warehouse receipt or on the proceeds thereof in his possession for charges for storage or transportation." UCC 7-209 (1). Here, of course, the bailor is the landlord, not Flaherty, the evicted tenant. *See* Frisch, Commentary, 7B Anderson UCC § 7-210:9 (3d ed. Sept. 2013) (noting that "only the warehouseman's customer is liable for the charges of the warehouseman"); Anzivino, UCC Transaction Guide § 25:28 (August 2013)(stating that "[a] valid warehouseman's lien against the owner of the property is created only if the owner of the property acts as a bailor or authorizes another to so act). Subsection 3 of section 7-209 which states "[a] warehouseman's lien for charges and expenses under subsection (1) ... is also effective against any person who so entrusted the bailor with possession of the goods that a pledge of them by him to a good faith purchaser for value would have been valid" also fails to provide a remedy against the tenant, for the tenant did not "entrust" her goods to her

landlord. Rather, her landlord took possession of those goods pursuant to an order of eviction. That order of eviction does not, however, operate as a legal surrender of Flaherty's right to possession of her personal property. *See Gale v Morgan & Bro. Manhattan Stor. Co.*, 65 AD2d 529, 529 (1st Dept 1978).

On or about May 3, 2012, Midtown initially notified Flaherty of its intent to sell her goods at auction on July 10, 2012, although Flaherty contends that and subsequent notifications failed to comply with the requirements of UCC 7-210. That auction was, however, cancelled at the direction of the landlord. Flaherty was again notified when the auction was rescheduled. In response, Flaherty initiated a special proceeding to challenge Midtown's warehouseman's lien.

The court will not repeat the detailed history of notices and resulting special proceedings set forth above. Suffice it to say, over a period of nearly two years, Midtown repeatedly noticed auctions and withdrew its notices, either on the instruction of the landlord-bailor or of its own counsel, and Flaherty repeatedly challenged those notices by filing special proceedings or hybrid proceedings, at least one of which was dismissed for lack of jurisdiction. Over that period of time, storage charges continued to accumulate, but that accumulation was due, at least in part, to the instructions of the landlord and/or to apparent errors made by Midtown which resulted in the

withdrawal of at least some of the notices and postponement of the sale.

Like the court in *Matter of Young*, this court concludes that UCC 7-210 does not provide for a warehouseman's lien against a tenant whose property was seized by a landlord. Thus, Flaherty is entitled to the return of her goods, without the obligation to pay Midtown for the storage charges. This does not leave Midtown without remedy, since it may turn to the party with whom it presumably made the storage contract, the landlord-bailor.

For these reasons, the relief requested by Flaherty in her first and second causes of action is granted to the extent that the sale of her possessions is stayed and she is given 30 days from the efiling of this order, with notice of entry, to retrieve her possessions from Midtown, and Midtown is directed to release Flaherty's possessions to her without any payment by her. To the extent that Flaherty seeks damages in connection with her first cause of action, that claim must be pursued along with the claims in her third through ninth causes of action.

Motion Sequence Number 003

In motion sequence number 003, Midtown seeks a protective order or, alternatively, an order striking petitioner's first request for admissions, dated October 7, 2013, which contains 207 individual requests. Midtown objects to the requests as premature on the basis that issue has not been joined. Since it

filed its motion, however, Midtown answered the petition, thus the request for admissions can no longer be considered premature.

Midtown also generally contends that the requests for admissions are unreasonable, overbroad, requests information irrelevant to the litigation and are being used to harass respondent.

For example, Midtown lists 19 specific requests (nos. 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, and 23) which, with minor distinctions, request an admission that there is no written storage agreement between Flaherty and Midtown.

Perhaps because Midtown filed its motion for a protective order before issue was joined in this matter, it appears that the only good faith effort made by counsel for Midtown to resolve any disputes between the parties concerning the request for admissions related to the timing, rather than the substance, of the requests.

CPLR 3123 (a) provides that a party may serve a notice to admit:

> "the genuineness of any papers or documents, or the correctness or fairness of representation of any photographs, described in and served with the request, or of the truth of any matters of fact set forth in the request, as to which the party requesting the admission reasonably believes there can be no substantial dispute at the trial and which are within the knowledge of such other party or can be ascertained by him upon reasonable inquiry."

A notice to admit "is to be used only for disposing of

uncontroverted questions of fact or those that are easily provable, and not for the purpose of compelling admission of fundamental material issues or ultimate facts that can only be resolved after a full trial." *Hawthorne Group v RRE Ventures,* 7 AD3d 320, 324 (1st Dept 2004); *see also New Image Constr., Inc. v TDR Enters. Inc.,* 74 AD3d 680, 681 (1st Dept 2010). "Rather, the purpose of a notice to admit is to crystallize issues and to eliminate from trial those that are easily provable or not really in dispute." *Hodes v City of New York,* 165 AD2d 168, 170 (1st Dept 1991).

Although Midtown has noted the 19 separate requests which relate to the one uncontested fact, that there is no written storage agreement between Flaherty and Midtown, it has not indicated its specific objections to the other 188 requests. It is not the responsibility of the court to figure out what those specific objections are, or to prune the request for admissions. *See Lerner v 300 W. 17th St. Hous. Dev. Fund Corp.,* 232 AD2d 249, 250 (1st Dept 1996). A quick perusal by the court of Flaherty's 207 requests for admissions, however, demonstrates that many of those requests are clearly inappropriate, as they are seeking contested and not easily provable facts, and/or ultimate facts which can only be resolved after a full trial. Midtown's request for a protective order or striking the request for admissions is, therefore, granted and the request for admissions is vacated.

Should Flaherty wish to redraft her request for admissions she should do so in a manner that will comply with the statute without duplicate requests and with particular regard for the principle that requests for admissions are not to be used for controverted and/or ultimate questions of fact. Furthermore, counsel for the parties should make a good faith effort to resolve any disputes they might have with respect to the substance of any redrafted requests.

Motion Sequence 004

Midtown moves, pursuant to CPLR 3211 (a) (7), to dismiss the amended petition for failure to state a cause of action, or in the alternative, pursuant to CPLR 3024 (b), to strike objectionable material.

By affirmation of its counsel, Midtown asserts, among other things, that it was retained by Flaherty's landlord to move her possessions from her apartment and to store them, that Midtown's crew removed her possessions from her apartment, prepared a full and complete inventory of her possessions noting the condition of the larger items and that it duly sent her the inventory and all other requested notices with a notice of auction to be held on January 28, 2014. No documents establishing any of those assertions are annexed to counsel's affirmation, nor is an affidavit of a person with direct knowledge of those facts provided to the court. Gogol's statement that "[i]t is the

Respondent's position that it has fully complied with the provisions of UCC 7-210, that it has a valid warehouseman's lien" (Gogol affirmation, ¶ 15) is inadequate to support a motion to dismiss the first and second causes of action which address the validity of the warehouseman's lien, much less the third through ninth causes of action.

Midtown fails to provide a meaningful response to the case of *Matter of Young* (143 Misc 2d 350) relied on by Flaherty, in which a warehouseman received a tenant's possessions from a landlord after a tenant was evicted, and the court held that "[t]he warehouseman may look only to the landlord for the payment of the warehouse charges." *Id.* at 352. Rather, Midtown merely contends "upon information and belief, hundreds of thousands of evictions wherein an evicted Tenant's household goods and possessions were removed have been subject to warehouseman's lien pursuant to U.C.C. § 7-210 and the General Business Law." Gogol affirmation, ¶ 19. Once again, this is inadequate to support a motion to dismiss.

Finally, Midtown argues that Flaherty's various causes of action for damages are improperly pleaded as part of this special proceeding challenging the validity of the warehouseman's lien pursuant to UCC 7-210. While there well may be valid bases for seeking dismissal of some or all of the third through ninth causes of action, hybrid proceedings, which include claims which

are normally part of a special proceeding with claims which are normally part of a civil action, are not unusual and may properly be brought. *See e.g. Matter of Rosenberg v New York State Off. of Parks, Recreation, & Historic Preserv.*, 94 AD3d 1006, 1008 (2d Dept 2012); *Lipp v Zigman*, 18 Misc 3d 1127(A), 2008 NY Slip Op 50215(U) (Sup Ct, Nassau County 2008).

Midtown also seeks to have stricken as prejudicial and/or irrelevant all of the allegations that allege purported conspiracies in and among nonparty individuals and entities including the landlord, the landlord's attorneys, Midtown and others. Midtown contends that all of those allegations are basically precluded as a result of the dismissal by Justice Singh of *Flaherty v CW Capital Mgt., LLC, supra*.

"In reviewing a motion pursuant to CPLR 3024 (b) the inquiry is whether the purportedly scandalous or prejudicial allegations are relevant to a cause of action." *Soumayah v Minnelli*, 41 AD3d 390, 392 (1st Dept 2007). Since Midtown has not addressed the substance of causes of action three through nine, or the individual allegations that Midtown seeks to have stricken, this court is not prepared to prune the amended petition on the basis of Midtown's general request.

For these reasons, Midtown's motion to dismiss is denied.

Accordingly, it is hereby

ORDERED in connection with motion sequence number 001 that

the sale of petitioner Marie Flaherty's property by respondent Midtown Moving & Storage, Inc., which was most recently scheduled for January 28, 2014, is hereby stayed; and it is further

ORDERED that petitioner Marie Flaherty has 30 days from the efiling of this order with notice of entry in which to retrieve her possessions from respondent Midtown Moving & Storage, Inc., without payment of any fees; and it is further

ORDERED that should petitioner Marie Flaherty fail to retrieve her possessions within that period of time, that respondent Midtown Moving & Storage, Inc., may sell that property, and the proceeds, if any, must be held for the benefit of petitioner Flaherty; and it is further

ORDERED in connection with motion sequence number 003 by respondent Midtown Moving & Storage, Inc., that the motion for a protective order is granted as set forth above; and it is further

ORDERED in connection with motion sequence number 004 by respondent Midtown Moving & Storage, Inc., that the motion to dismiss is denied; and it is further

ORDERED that the parties shall appear for a preliminary conference on June 19, 2014, 9:30 am in Part 11, room 351, 60 Centre Street, New York, NY.

Dated: April 24, 2014

J.S.C. HON. JOAN A. MADDEN J.S.C.