Ross v 120 N. James St. Corp.
2015 NY Slip Op 32421(U)
December 21, 2015
City Court of Peekskill, Westchester County
Docket Number: LT-546-15
Judge: Reginald J. Johnson
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[* 1]

PEEKSKILL CITY COURT
COUNTY OF WESTCHESTER: STATE OF NEW YORK
---x
JOHN T. ROSS and MARILYN A. MAYO,
as Co-Partners,

DECISION & ORDER

Petitioners (Landlords),

--against--

Index No. LT-546-15

120 NORTH JAMES ST. CORP.
Tenant of the Premises Located at
120-128 North James Street, Peekskill, NY
10566,

Respondents (Tenants),

Under Section 711 of the Real Property Actions
and Proceedings Law.
---x

REGINALD J. JOHNSON, J.

In this non-payment proceeding commenced by John T. Ross and Marilyn A. Mayo ("Petitioners") against 120 North James St. Corp. ("Respondent") for rental arrears, additional rent, fees and costs, and possession of 120-128 North James Street, Peekskill, New York, ("Premises") Petitioners now move for summary judgment seeking an order to enjoin an attorney from disbursing insurance proceeds from his account pending resolution of this matter; an order to amend the petition to include rent for the months of October and November 2015; an order

to amend the final Wherefore clause in the petition; an order to dismiss Respondent's First through Ninth Affirmative Defenses; and an order granting summary judgment to Petitioners for the relief sought in the petition, as amended. The Respondent opposes the summary judgment motion and cross moves for an order dismissing the petition. The Petitioners are represented by Bernis Nelson, Esq. The Respondent is represented by Carl L. Finger, Esq., from Finger & Finger, a Professional Corporation.

Procedural History

On October 2, 2015, the Petitioners commenced a non-payment proceeding against the Respondent seeking the following:

a) unpaid Rent for the months of August and September 2015 in the amount of Two Thousand Eight Hundred ($2,800.00) Dollars;

b) unpaid Additional Rent for the discharge of tax liens in the amount of $245,463.38 as of August 17, 2015 plus any additional tax liens including interest and penalties until all such amounts are paid in full;

c) unpaid Additional Rent in a yet undetermined amount for unpaid insurance premiums to provide insurance coverage "...for the benefit of the Landlord, general liability policies of insurance in standard forms protecting the Landlord against any liability whatsoever...";

d) unpaid Additional Rent in a yet undetermined amount of unpaid maintenance, general repairs, and structural repairs to the Premises;

e) unpaid Additional Rent in a yet undetermined amount for Petitioners' attorneys' fees and costs to collect the unpaid Rent and Additional Rent, and to enforce Landlord's rights;

f) all of the prospective Rent due and payable for the months of October 2015 through February 2017 at the rate of $1,400.00 per month, for a total of $28,800.00;

g) all of the prospective Additional Rent due and payable through February 2017 including but not limited to real estate taxes, insurance, fuel, oil, gas, electricity, water and sewer, maintenance, general repairs, structural repairs, and attorneys' fees and costs;

h) Any and all Use and Occupancy; and

i) Any and all other Attorneys' Fees and Costs in connection with collecting such Rent, Additional Rent, and Use and Occupancy, including but not limited to the costs and disbursements of this proceeding; and

For a warrant to remove the Respondent and any and all subtenants from the premises.[1]

[1] B. Nelson Reply Affirm, Nonpayment Petition, Exh. A-1.

Index No. LT-546-15

On October 5, 2015, the Respondent filed an Answer with the Court.[2]

On October 6, 2015, the parties were scheduled to make a first appearance in this matter. At that time, the Respondent requested an adjournment to October 27, 2015 for the purpose of obtaining legal representation.

On October 23, 2015, the Court received a letter from Petitioners' attorney requesting permission to make a summary judgment motion.

On October 27, 2015, the parties appeared and the Court granted the Petitioners' request to make a motion for summary judgment. The Court issued a motion schedule as follows: motion for summary judgment must be served no later than November 4, 2015; opposition/cross motion papers must be served no later than November 12, 2015; reply papers, if any, must be served no later than November 17, 2015; the motion and any opposition/cross motion papers would be marked fully submitted on November 24, 2015.

On November 4, 2015, the Petitioners filed a motion for summary judgment with an attorney affirmation[3] and memorandum of law.

On November 17, 2015, the Respondent filed a notice of cross

[2] Id. at Exh. B-1.

motion to dismiss the petition with a supporting and opposing affidavit[4] and a memorandum of law.

On November 17, 2015, the Petitioners filed an affirmation and memorandum of law in further support of motion for summary judgment and in reply to Respondent's opposition papers, and in opposition to the Respondent's cross motion to dismiss the petition.

Factual Background

On or about January 22, 2001, Petitioners[5]entered into a written Lease[6] agreement with the Respondent for the use and occupancy of the Premises commencing February 1, 2001 through January 31, 2011.[7] The parties extended the Lease term to January 31, 2012.[8] The parties dispute whether the Respondent, through certain actions, extended the Lease term or continued in possession as a month-to-month tenant until the premises were allegedly surrendered.[9]

On February 12, 2012, the Respondent entered into a sublease with

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[3] Affirmation of Bernis Nelson, Esq.

[4] A combined Affidavit in Opposition to Motion for Summary Judgment and Affidavit in Support of the Cross Motion for Summary Judgment from Carrie E. Hilpert, President of the Respondent.

[5] Richard T. Mayo died on August 14, 2012 [See, B. Nelson Reply Affirm, Exh. C-1(b)]. Petitioners allege that upon the death of Mr. Mayo, his wife, Marilyn A. Mayo, succeeded to his interest in the partnership with John T. Ross which owns the Premises. [Id., ¶¶ 6-8; see also, Partnership Agreement, Id. at Exh. E-1(a)].

[6] See, B. Nelson Reply Affirm., Exh. A-1(a).

[7] Id. Carrie E. Hilpert signed the Lease as President of the Respondent and both Carrie E. Hilpert and Edward J. Suydam, Jr. signed as Guarantors on the Lease.

[8] Id.

[9] B. Nelson Reply Affirm, ¶ 13; C. Hilpert Affid. ¶¶ 21 and 26.

Index No. LT-546-15

Carry All Vest Covers d/b/a Attiqua for the use and occupancy of the second floor of the Premises for an initial five (5) year term commencing on March 1, 2012 through February 28, 2017, with an option to extend for an additional five (5) year term through February 28, 2022.[10]

On or about February 10, 2015, the Premises sustained water damage due to defective water sprinklers. Thereafter, the Respondent filed an insurance claim for damage to the Premises and received insurance proceeds in the sum of $81,492.00.[11]

On July 17, 2015, the Petitioners were informed by the Hilpert Law Offices that it was holding approximately $34,000.00 of the remaining insurance proceeds in an escrow account on behalf of the Respondent. The principal of the Hilpert Law Offices is the father of Carrie E. Hilpert.[12]

On August 14, 2015, the Petitioners received a check for rent in the sum of $4,200.00[13] written on an attorney escrow account from the Hilpert Law Offices for the months of June, July, and August 2015.[14]

On August 24, 2015, the Petitioners served the Respondent with a

[10] B. Nelson Reply Affirm, Exh. A-1(b).
[11] B. Nelson Affirm, ¶ 3, Exh. A.
[12] Id. at ¶¶ 4 and 5.
[13] See, B. Nelson Affirm. Exh. B.
[14] Petitioners argue that the Respondent did not pay rent for the month of May 2015 so that the three (3) checks were really for the May, June and July, not June, July and August. See, B. Nelson Affirm. ¶ 5.

Notice of Default for rent and additional rent.[15]

On August 26, 2015, Petitioners' counsel alleges that she received a telephone call from Robert J. Hilpert, Esq. and Carrie E. Hilpert. According to counsel, Mr. Hilpert stated that approximately $30,000.00 of the insurance proceeds remained in his account and that he would be disbursing that amount to the Respondent.[16] From this alleged statement, Petitioners' counsel concluded that the Respondent evinced no intention to use the insurance proceeds to repair the Premises.[17]

On or about September 29, 2015, the Respondent emailed and mailed a letter to the Petitioners purporting to surrender the premises effective immediately.[18]

On October 1, 2015, the Petitioners commenced the within nonpayment proceeding against the Respondents for rental arrears, additional rent, and injunctive relief.[19]

On October 27, 2015, the Court granted the Petitioners and Respondent permission to file motions.

On November 4, 2015, the Petitioners filed a motion for summary judgment with an attorney affirmation[20] and memorandum of law.

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[15] See, B. Nelson Reply Affirm., Notice of Default, Exh. A-1(e).
[16] See, B. Nelson Affirm. ¶ 7.
[17] Id. at ¶ 8.
[18] C. Hilpert Affid. In Opp., Exh. A.
[19] B. Nelson Reply Affirm, Nonpayment Petition, Exh. A-1.
[20] Affirmation of Bernis Nelson, Esq.

On November 17, 2015, the Respondent filed a notice of cross motion to dismiss the petition with a supporting and opposing affidavit[21] and a memorandum of law.

On November 17, 2015, the Petitioners filed an affirmation and memorandum of law in further support of motion for summary judgment and in reply to Respondent's opposition papers, and in opposition to the Respondent's cross motion to dismiss the petition.

Discussion and Legal Analysis

I. Summary Judgment

It is well settled that summary judgment is a drastic remedy that is reserved only for those cases that fail to evince any genuine issues of material fact thereby authorizing the court to enter a judgment as a matter of law. Ugarriza v. Schmieder, 46 N.Y.2d 471 (1979); see also, Vega v. Restani Constr. Corp., 18 N.Y.3d 499, 503 (2012) [holding that [s]ummary judgment is a drastic remedy to be granted only where the moving party has tendered sufficient evidence to demonstrate the absence of any material issues of fact" (internal quotation marks and citations omitted)]; Alvarez v. Prospect Hosp., 68 N.Y.2d 320 (1986); Winegrad v. New York Univ. Med. Center, 64 N.Y.2d 851(1985).

On a motion for summary judgment, the facts must be viewed "in

[21] A combined Affidavit in Opposition to Motion for Summary Judgment and Affidavit in Support of the

the light most favorable to the non-moving party." Ortiz v. Varsity Holdings, LLC, 18 N.Y.3d 335, 339 (2011). Further, if the Court has any doubt as to the existence of any material issues of fact, it should deny the motion for summary judgment. See, Sillman v. Twentieth Century-Fox Film Corp., 3 N.Y.2d 395, 404 (1957). Since the moving party always carries the initial burden of establishing its entitlement to summary judgment as a matter of law [see, Lopez v. New York Life Ins. Co., 934 N.Y.S.2d 136 (1st Dept. 2011); Blackwell v. Mikevin Management III, LLC, 931 N.Y.S.2d 116 (2d Dept. 2011)], if it fails to do so the Court should deny the motion regardless of the insufficiency of the opposition papers. See, JMD Holding Corp. v. Congress Financial Corp., 4 N.Y3d 373 (2005); Torres v. Industrial Container, 305 A.D.2d 136 (1st Dept. 2003); Colombini v. Westchester County Healthcare Corp., 24 A.D.3d 712 (2d Dept. 2005).

It has been held that "[t]he function of summary judgment is issue finding, not issue determination." Sillman v. Twentieth Century -Fox Film Corp, 2 N.Y3d at 395. See, generally Practice Commentaries 3212:2 and 3212:4 under N.Y. C.P.L.R.[22] 3212 in McKinney's Consolidated Laws of New York, Book 7b. "A motion for summary judgment shall be supported by affidavit, by a copy of the pleadings and

Index No. LT-546-15

by other proof, such as depositions and written admissions." See, C.P.L.R. 3212(b); See, generally, Practice Commentary 3212:15 under N.Y. C.P.L.R. 3212 in McKinney's Consolidated Laws of New York, Book 7B. An affidavit supporting a summary judgment motion "shall be by a person having [personal] knowledge of the facts...." N.Y. C.P.L.R. 3212(b). In general, an attorney affirmation is "without evidentiary value and thus unavailing" in supporting or opposing a motion for summary judgment. See, Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Iacone v. Passanisi, 89 A.D.3d 991 (2d Dept. 2011) (summary judgment affirmation of party's attorney has no probative value). That said, an attorney affirmation can serve as a vehicle for annexing documentary evidence, rather than affidavits of fact on personal knowledge. See, Alvarez v. Prospect Hospital, 68 N.Y.2d at 325; Rozina v. Casa 74th Development LLC., 29 Misc.3d 675, 907 N.Y.S.2d 603 (Sup. Ct. New York County 2010).

It has been held that "[w]here a party fails to comply with the statutory mandate that a summary judgment motion be supported by copies of the pleadings (see, N.Y. C.P.L.R. 3212(b)), summary judgment should be denied." Dupuy v. Carrier Corp., 204 A.D.2d 977 (4th Dept. 1994)(citations and omission omitted); Weinstein v. Gindi, 92 A.D.3d

[22] The acronym C.P.L.R. stands for Civil Practice Law and Rules.

526 (1st Dept. 2012). However, it has also been held that where a party fails to annex complete copies of the pleadings to its summary judgment motion, the motion need not be denied where the record is "complete" for purposes of deciding the motion. Reyes v. Sanchez-Pena, 117 A.D.3d 621 (1st Dept. 2014); Avalon Gardens Rehabilitation & Health Care Center, LLC v. Morsello, 97 A.D.3d 611 (2d Dept. 2012) (holding that movant can annex missing pleading to its reply affirmation where there is no prejudice to opposing party); Crossett v. Winged Farm, Inc., 79 A.D.3d 1334 (3d Dept. 2010) (holding that defendants' failure to annex pleadings to their motion for summary judgment can be excused by plaintiff's submission of the missing pleadings in opposition).

A. Petitioners' Motion for Summary Judgment

I. Motion to Prevent Waste of Premises

The Petitioners' motion for an order enjoining the Hilpert Law Offices from disbursing certain insurance proceeds is DENIED. Uniform City Court Act (U.C.C.A.) §209(b)(2) ("Injunction or restraining order") says, "pursuant to §211 of the Real Property Actions and Proceedings Law, in conjunction with the prevention of waste," a court is empowered to issue an injunction. As a general rule, injunctive relief is not available in a summary proceeding. See, North Waterside Redevelopment Co. v. Febbraro, 256 A.D.2d 261 (1st Dept. 1998). The Court's authority to issue

an injunction or restraining order is confined to those instances in which a party seeking to obtain title or possession to real property seeks to enjoin another from committing waste or damage to the premises. See, Waxman v. Patabbe, 42 Misc.3d 142(A), App. Term 2d, 11th & 13th Jud. Dists. (2014). See, Real Property Actions and Proceedings Law §211 ("If, during the pendency of an action to recover a judgment affecting title to, or the possession...of real property, a party commits waste upon, or does any damage to, the property in question, the court may grant...an order restraining him from the commission of any further waste upon or damage to the property.").

Further, the Respondent avers that the insurance proceeds held in the escrow account of the Hilpert Law Offices were disbursed to the Respondent prior to the commencement of the within proceedings thereby rendering moot the Petitioners' application for an injunction.[23] The veracity of this representation cannot be decided on a motion for summary judgment and must await the completion of discovery.

II. Motion to Amend the Final Wherefore Clause of the Petition and to Dismiss Respondent's First Affirmative Defense

Petitioners' motion to amend the final wherefore clause of the Petition and to dismiss Respondent's First Affirmative Defense is

[23] See, C. Hilpert Affid., ¶18

GRANTED. As correctly argued by the Petitioners, the subtenants of the Premises are "proper" but not "necessary" parties to the Petitioners' nonpayment proceeding and the failure to name them in the Petition was not fatal. See, Triborough Bridge and Tunnel Authority v. Wimpfheimer, 165 Misc.2d 584 App. Term (1st Dept. 1995).

III. Petitioners' Motion to Dismiss Second Affirmative Defense

The Petitioners' motion to dismiss the Respondent's second affirmative defense that the Court lacks subject matter jurisdiction because the Respondent surrendered the premises to the Petitioner on or about September 29, 2015 is DENIED subject to renewal. A tenant's return of the keys to the landlord in and of itself does not constitute a surrender by operation of law, but rather a factual issue to be determined by the court. See, Ford Coyle Props, Inc. v. 3029 Ave V. Realty, LLC, 63 A.D.3d 782 (2d Dept. 2009). The affidavit of John T. Ross[24] controverts the affidavit of Carrie E. Hilpert[25] on the issue of whether a tender of the premises was actually made by the Respondent and accepted by the Petitioner.

IV. Petitioners' Motion to Amend Petition to Include Rent for October and November 2015

Petitioners' motion to amend the Petition to include rent for

[24] See, B. Nelson Reply Affirm., Exh. E-1.; C. Hilpert, Affid. In Opp., Exh. A.

October and November 2015 is DENIED subject to renewal. There is an issue of fact as to whether the Respondent surrendered the premises on or about September 29, 2015. See, Paragraph III supra.

V. Petitioners' Motion to Dismiss Third, Fourth, Fifth, Sixth, Seventh, Eighth, and Ninth Affirmative Defenses

Petitioners' motion to dismiss the third, fourth, fifth, sixth, seventh, eighth, and ninth affirmative defenses is DENIED subject to renewal. The Petitioners have failed to meet their burden of "demonstrat[ing] the absence of any material issues of fact" regarding these affirmative defenses. Alvarez, 68 N.Y.2d at 324.

VI. Motion to Grant Summary Judgment for the Relief Sought in the Petition, as amended

The Petitioners' move for summary judgment for the following relief:

a) Final Judgment granting immediate possession of the Premises to Petitioners;

b) Money Judgment in favor of Petitioners against Respondent in the amount of:

i) unpaid Rent for the months of August through November 2015 in the amount of $5,600.00;

25

Index No. LT-546-15

ii) unpaid Additional Rent for the discharge of tax liens in the amount of $247,653.99 plus any additional tax liens including interest and penalties until such amounts are paid in full;

iii) unpaid Additional Rent in a yet undetermined amount for unpaid insurance premiums to provide insurance coverage "…for the benefit of the Landlord, general liability policies of insurance in standard forms, protecting the Landlord against any liability whatsoever…;

iv) unpaid Additional rent in a yet undetermined amount for unpaid maintenance, general repairs, and structural repairs to the Premises;

v) unpaid Additional Rent in a yet undetermined amount for Petitioners' attorneys' fees and costs to collect the unpaid Rent and Additional Rent, and to enforce Petitioners' rights as Landlord of the Premises;

vi) all of the prospective Rent due and payable for the months of December 2015 through February 2017 at the rate of $1,400.00 per month, for a total prospective Rent of $21,000.00;

vii) all of the prospective Additional Rent due and payable through February 2017 including but not limited to real estate taxes, insurance, fuel, oil, gas, electricity, water and sewer, maintenance, general repairs, structural repairs, and attorneys' fees and costs;

viii) any and all Use and Occupancy;

ix) any and all other Attorneys' Fees and Costs in connection with collecting such Rent, Additional Rent, and Use and Occupancy, including but not limited to the costs and disbursements of this proceeding; and

x) Warrant to remove Respondent from possession of the Premises.

Petitioners' request for the above relief is DENIED subject to renewal as Petitioners have failed to meet their burden of "demonstrat[ing] the absence of any material issues of fact" regarding these items of relief. Alvarez, 68 N.Y.2d at 324. "If a movant, in preparation of a motion for summary judgment, cannot assemble sufficient proof to dispel all questions of material fact, the motion should simply not be submitted." See, §5:166. Motions for summary judgment under N.Y. C.P.L.R. 3212, p. 9, West McKinney's Forms [2015], by Joseph L. Marino.

Index No. LT-546-15

VII. Indemnification Agreement between the Petitioners and Respondent

The Petitioners' request for summary judgment with regard to the Indemnification Agreement is DENIED subject to renewal. Petitioners have failed to meet their burden of "demonstrat[ing] the absence of any material issues of fact" regarding the Indemnification Agreement. Alvarez, 68 N.Y.2d at 324. The Court notes that the Indemnification Agreement attached as an exhibit to the Petitioners' motion is unsigned and therefore of no probative value on this motion.[26] Although an unsigned contract can be enforceable if there is objective evidence that the parties intended to be bound (see, Geha v. 55 Orchard Street, LLC, 29 A.D.3d 735 [2d Dept. 2006]), in the case at bar, the Respondent argues that the duty to indemnify the Petitioners for unpaid taxes does not arise until the Petitioners actually pay the taxes to the City of Peekskill ("City").[27]

The Petitioners argue that the Respondent has an unconditional and independent duty to pay taxes to the City because "the understanding of the parties was that these items would be paid directly by Respondent and not as reimbursements by Respondent after paid by the

[26] See, B. Nelson Reply Affirm, Exh. A-1(d)

Index No. LT-546-15

Petitioners."[28] Although the Lease[29] does state that the Respondent would pay taxes and other expenses as additional rent, did the Indemnification Agreement modify the Respondent's duty to pay taxes only after the Petitioners' paid the taxes first or suffered a loss as result of the unpaid taxes? Where parties enter into an indemnification or hold harmless agreement, a claim does not accrue until the indemnified party has made a payment or actually suffered a loss. See, McCabe v. Queenboro Farms Products, Inc., 22 N.Y.2d 204 (1968); Hobbs v. Scorse, 59 A.D.2d 1037 (4th Dept. 1977); Relyea v. State, 59 A.D.2d 364 (3d Dept. 1977); Pfizer, Inc. v. Stryker Corp., 348 F. Supp.2d 131 (S.D.N.Y. 2004) (applying New York law). Interestingly, an indemnitee cannot recover damages until he or she has suffered loss by paying the judgment obtained against him or her. Relyea v. State, supra; National City Bank of New York v. Berwin, 240 A.D. 550 (1st Dept. 1934); see generally, 6B New York Forms Legal & Bus. §12:2 (2015). In any event, there is a genuine issue of material fact as to whether the language in the Indemnification Agreement modified the Respondent's duty under the Lease to pay taxes to the City directly and independent of whether the Petitioners have paid them.

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[27] See, C. Hilpert Affid., ¶14.
[28] See, B. Nelson Reply Affirm, ¶12
[29] See, B. Nelson Reply, Exh. A-1(a), Rider ¶ I

Index No. LT-546-15

B. Respondent's Cross Motion to Dismiss the Petition

The Respondent moves to dismiss the Petition on various grounds.

I. Dismissal of Petition for failure to Annex Pleadings

The Petitioners application to dismiss the Petition for failure to attach the pleadings is DENIED. Although the Petitioners' motion for summary judgment is indeed procedurally defective for failure to annex the pleadings, the Court has discretion to decide the motion on the merits where the record is "complete." See, Reyes v. Sanchez-Pena, 117 A.D.3d 621 (1st Dept. 2014). Further, since the Petitioners annexed the missing pleadings to their reply affirmation and, doing so did not prejudice the Respondent, the Court can proceed to the merits of the motion. Avalon Gardens Rehabilitation & Health Care Center, LLC v. Morsello, 97 A.D.3d 611 (2d Dept. 2012).

II. Dismissal for Failure to Support Summary Judgment Motion with an Affidavit from a Person with Personal Knowledge

Respondent's cross motion to dismiss the summary judgment motion for failure to annex an affidavit from a person with personal knowledge is DENIED. Although an attorney affirmation is insufficient to support or oppose a motion for summary judgment [See, Zuckerman v. City of New York, 49 N.Y.2d 557 (1980); Iacone v. Passanisi, 89 A.D.3d 991 (2d Dept. 2011)], an attorney affirmation can provide the vehicle for

annexing documentary evidence, rather than affidavits of fact on personal knowledge. See, Alvarez v. Prospect Hospital, 68 N.Y.2d at 325; Rozina v. Casa 74th Development LLC., 29 Misc.3d 675, 907 N.Y.S.2d 603 (Sup. Ct. New York County 2010). Since the Petitioners have attached affidavits to their reply affirmation, the procedural defect in their summary judgment motion has been cured. See, Avalon Gardens Rehabilitation & Health Care Center, LLC v. Morsello, supra.

III. The Dismissal of the Affirmative Defenses Should be Denied

The Respondent's application that the Petitioners' motion to dismiss its affirmative defenses be denied is GRANTED in part and DENIED in part for the reasons set forth in Paragraphs III and V, supra.

IV. Respondent Argues that Summary Judgment Should be Denied based on Factual Issues and Prematurity

The Respondent argues that the Petitioners' motion for summary judgment should be denied due to factual issues and due to the fact that discovery has not been completed which renders said motion premature. The Court agrees with the Respondent inasmuch as the Petitioners' motion for summary judgment should be denied due to factual issues, as well as the fact that the motion is premature due to non-discovery. See, Barletta v. Lewis, 237 A.D.2d 238 (2d Dept. 1997).

Index No. LT-546-15

V. Respondent Requests that Injunctive Relief be Denied

Respondent requests that Petitioners' request for injunctive relief be denied. For the reasons set forth in Paragraph A. I., supra, the Petitioners' request for injunctive relief is DENIED.

C. Cross Motion for Dismissal of Petition Due to Lack of Jurisdiction

Respondent's cross motion to dismiss the Petition due to lack of subject matter jurisdiction is DENIED subject to renewal for the reasons set forth in Paragraph A. III, supra.

D. Respondent's Application to Dismiss Marilyn A. Mayo from this Action as an Improper Party

Respondent's request that Marilyn A. Mayo be dismissed from this action due to the fact that she is an improper party is GRANTED. Marilyn A. Mayo is hereby dismissed from this action as an improper party. Respondent correctly asserts that upon the death of Richard Mayo, the spouse of Marilyn and partner with John T. Ross, the partnership dissolved. See, N.Y. Partnership Law §62(4). As the surviving spouse and representative of her husband's estate, Marilyn A. Mayo is entitled to demand an accounting from the surviving partner and to receive her husband's interest in the partnership. See, Priel v. Linarello, 44 A.D.3d 835 (2d Dept. 2007); Vick v. Albert, 17 A.D.3d 255 (1st Dept. 2005).

Index No. LT-546-15

Absent an agreement to the contrary, on the death of Mr. Mayo his partnership interest in the Premises vested in Mr. Ross only for partnership purposes. See, N.Y. Partnership Law §51(2)(d). It is critical to note that Mr. Ross, as the surviving partner, has the sole legal title to the Premises as well as the exclusive right to possess and control the Premises as against the heirs, devisees, and creditors of Mr. Mayo for the purpose of paying the partnership debts and disposing of its effects for the benefit of himself and the estate of Mr. Mayo. See, Niagra Mohawk Power Corp. v. Silbergeld, 58 Misc.2d 285 (Sup Ct. Niagara County 1968). The rights of a deceased partner are governed by the Partnership Law and not by the Decedents Estate Law. Id.

Since Mr. Mayo's death dissolved the partnership between him and Mr. Ross, Marilyn A. Mayo's only remedy as the fiduciary of his estate is to demand an accounting, unless the Partnership Agreement vested her with his share of the partnership—which it did not.[30] Therefore, Ms. Mayo is an improper party to this proceeding inasmuch as she is not legally empowered to commence same and she is hereby dismissed. See, Gaentner v. Benkovich, 18 A.D.3d 424 (2d Dept. 2005).

Any request for relief not specifically addressed by this Decision

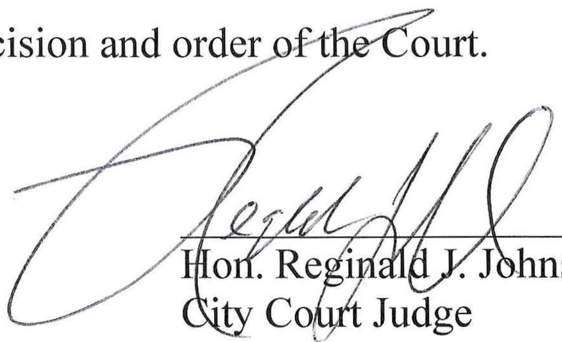
[30] See, B. Nelson Reply Affirm., Partnership Agreement, Exh. E-1(a), ¶10.1.

Index No. LT-546-15

and Order is DENIED.

The parties are directed to appear for a conference on January 12, 2016 at 9:30 am.

This constitutes the decision and order of the Court.



Hon. Reginald J. Johnson
City Court Judge

Dated: Peekskill, NY
December 21, 2015

Order entered in accordance with the foregoing on this ____ day of December, 2015.

Concetta Cardinale
Chief Clerk

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