# SUPREME COURT OF THE STATE OF NEW YORK
# NEW YORK COUNTY

**PRESENT:** **HON. DAVID BENJAMIN COHEN** **PART** **58**
*Justice*

FITZGERALD EDIBLES, INC. D/B/A P.J.CARNEYS,

Plaintiff,

- v -

OSBORNE TENANTS CORP., JOSEPH FERRARA, YUNGA CONSTRUCTION INC.

Defendant.

**INDEX NO.** 150625/2012

**MOTION DATE** 1/12/2017

**MOTION SEQ. NO.** 003

**JUDGMENT**

The following e-filed documents, listed by NYSCEF document number 80, 81, 82, 83, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120

were read on this application to/for Set Aside Verdict .

Defendant Osborne Tenants Corp. ("Osborne") is the owner of a building located at 906 Seventh Avenue, New York, New York 10019 (the "building"). The ground floor of the building, consisting of commercial stores on both 57th Street and Seventh Avenue, and the basement, is net leased to 57th and 7th Associates, Inc. ("57") which is controlled and managed by Jack Resnick & Sons, Inc. ("Resnick"). Defendant Joseph Ferrara ("Ferrara") was a shareholder of Osborne and served as president of the board of directors.

Since 1981, plaintiff subleased stores numbered 18, 19, 20 and 21, from Resnick, in which it operates a bar and restaurant. Resnick did not sublease any space in the basement to plaintiff. The area at issue in this case is a common vestibule in the basement space. The master lease between Osborne and Resnick provides Osborne with the right of access to the garbage

room through the common vestibule and provides Resnick with access to certain storage space in the basement through the common vestibule. Plaintiff did not lease any space in the basement from Resnick. Plaintiff and Osborne use the common vestibule as a pass through between the alley behind the building and other areas of the basement. Within the common vestibule there are three distinct "niche" areas totaling 97 square feet in space. At some point in time, plaintiff began keeping some of its equipment, including an ice maker, compressors and refrigeration units, in these niches. Defendants contend that plaintiff moved this equipment into the area around September 2011 when it was required to move this equipment out of the adjoining garbage room. As per the testimony of plaintiff's principal, Mr. Fitzgerald, the ice machine and compressors were moved from the garbage room to the common vestibule niches about two weeks apart. Defendants further contend that prior to this time, the common vestibule niches did not contain any equipment belonging to Osborne, Resnick or plaintiff. Plaintiff offered testimony at trial that it had been using these niches for equipment for at least 30 years prior to January 2012, that Resnick allowed it to use the common vestibule since 1976, its use of the common vestibule had been open and notorious and without any complaint from the Osborne prior to 2011, and that its predecessor in interest, 906 Tavern Corp., had also previously been using the common vestibule incident to its lease to operate a bar. It should be noted that Ferrara testified that, to his knowledge, plaintiff had been using the common vestibule niches for at least thirty years prior to 2011 with consent from Osborne, until plaintiff exceeded that consent in September 2011, presumably by moving addition equipment into these spaces.

At trial, evidence was presented that on December 16, 2011, Osborne sent plaintiff a letter seeking that they remove all of their equipment from the common vestibule in order to relocate the waste line under the floor. The letter represented that with respect to the common

vestibule, the scope of work was going to be the relocation of a waste pipe in the floor, removing the plywood wall, and whitewashing the walls. Plaintiff contends that this scope of work did not require removal of its equipment from the common vestibule and it did not remove its equipment. Defendants chose to do the work the week of January 3, 2012 for the convenience of the plaintiff since plaintiff would be closed for its annual renovations. Yunga Construction Inc. ("Yunga") was the general contractor retained by Osborne to perform the work in the basement, including in the common vestibule. At the time, plaintiff contended that it had ice machines, refrigerators, freezers, compressors and other equipment located in the niches of the common vestibule. Prior to starting the work, Ferrara directed its contractors to remove all of plaintiff's equipment located in the vestibule; and the equipment was removed on or about January 4, 2012. During the course of the renovation, the Osborne decided to lower the floor of the entire common vestibule to improve overhead clearance in the room. After the equipment was moved, Yunga began excavating the entire floor of the vestibule and this work continued through Friday January 6, 2012. Ferrara then authorized Yunga to perform the additional work of fabricating and installing locking metal cage doors enclosing the niches in the vestibule, thereby preventing plaintiff from returning its equipment to the niches. Plaintiff became aware of the removal of its equipment on or about January 9, 2012. Plaintiff was never restored to use of the niches that were locked behind the metal cage doors and the area has remained free of equipment. Plaintiff has never claimed that it was excluded from possession from any portion of the ground floor bar and restaurant which is continued to operate profitably through the date of trial.

Plaintiff claimed that, as a result of the destruction of the equipment, including refrigerators, ice machines, compressors and other equipment, its business was harmed as its reopening was delayed by two weeks. Mr. Fitzgerald's testimony as to the duration of the

closure was impeached at trial using his deposition testimony that the closure was only five days beyond when he expected to reopen. Plaintiff also claimed that it incurred higher costs to maintain and replace equipment with more expensive equipment, and the amount of food served and stored has been diminished, increasing plaintiff's costs.

At trial, the jury returned a verdict in favor of plaintiff finding both defendants liable for wrongful eviction, trespass to chattel and conversion. The jury found defendants not liable for trespass to land and not liable in fraud, finding that Osborne did not make a false representation to plaintiff and that Ferrara did not make a representation to plaintiff. The jury awarded to plaintiff $37,000 in compensatory damages for property damage and loss, and $17,000 for loss of business profits -- significantly less than plaintiff had sought. The jury awarded punitive damages against Osborne in the amounts of $20,000 on the claim for wrongful eviction and $37,000 on the claim for conversion, and awarded punitive damages against Ferrara in the amounts of $138,355.94 on the claim for wrongful eviction and $23,288.12 on the claim for conversion.

Treble Damages

Plaintiff seeks the imposition of treble damages on the compensatory award. The jury returned a verdict in favor of the plaintiff on the cause of action for wrongful eviction. "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 wrongdoer." (RPAPL 853). An award of treble damages pursuant to RPAPL 853 is discretionary (*see Moran v. Orth*, 36 AD3d 771, 772 [1st Dept 2007]; *Lyke v. Anderson*, 147

AD2d 18, 28 [2d Dept 1989]). At bar, the deliberate resort to self-help, unlawful eviction, removal, damage and destruction of plaintiff's property from the side niches in the common vestibule, and the installation of cages to prevent reentry was not unintentional (*see Moran* at 773), and, as per the verdict, was the cause of the delayed reopening and some ensuing loss of profits. A showing of physical force or violence is not necessary to sustain an award of treble damages (*O'Hara v. Bishop*, 256 AD2d 983, 984 [3d Dept 1998]). Further, treble damages are subject to pre-judgment interest (*Mohassel v. Fenwick*, 5 NY3d 44 [2005]); *Altman v. 285 West Fourth LLC*, 143 AD3d 415 [1st Dept 2016]). Under these circumstances, an award of treble damages is the appropriate exercise of this Courts discretion and plaintiff shall be awarded a trebling of damages in the total amount of $162,000.00 with statutory interest from January 9, 2012.

Restoration to Possession

Plaintiff seeks an injunction under the fifth cause of action, seeking to be restored to the premises. RPAPL 853 provides that a tenant is entitled to be restored to possession of the premises unless the restoration would be futile (*110-45 Queens Blvd. Garage, Inc. v. Park Briar Owners, Inc.*, 265 AD2d 415 [2d Dept 1999]). A party is not entitled to restoration to possession to a commercial property to which it cannot assert an enforceable leasehold (*Pied-A-Terre Networks Corp. v. Porto Resources, LLC*, 33 Misc3d 126[A] [App Term 1st Dept 2011]) as restoration would result in certain eviction (*Soukouna v. Canal Corp.*, 48 AD3d 359 [1st Dept 2008]).

The master lease documents refer to this area in question as a common vestibule and confers on both Resnick and the Osborne mutual rights of passage through the common vestibule

as a means of access from the alley behind the building to and from other areas of the basement. Plaintiff's sublease with Resnick did not give, nor could it have given, plaintiff the right to possess any space within the basement that Resnick itself did not possess. Generally, a sublease cannot confer rights greater than those to which the lessor is entitled (*Morris Hgts. Health Ctr., Inc. v. Della Pietra*, 38 AD3d 261 [1st Dept 2007]). Consistent with this, was the jury determination that, although the plaintiff was wrongfully evicted from the niches, plaintiff did not establish that a trespass to land resulted from its removal and exclusion from the niches. Thus, plaintiff has no right to exclusive use of these niches and restoration to exclusive use would be contrary to the controlling lease documents and therefore, futile.

Prescriptive Easement

Plaintiff also seeks a declaration that they have a prescriptive easement to use the common vestibule spaces. This application is denied as academic as the plaintiff already has the right of passage through the common vestibule through Resnick and as Resnick's undertenant already has access through the common vestibule, what they would otherwise obtain by establishing the easement. In any event, such claim would be denied on the merits as the plaintiff has failed to satisfy the elements necessary to establish such an easement. The elements of a claim for a prescriptive easement are that the use "be adverse, open and notorious, continuous and uninterrupted for the prescriptive period." (*Di Leo v. Pecksto Holding Corp.*, 304 NY 505, 512 [1952]). Where the elements of open, notorious, and continuous use are proven, the element of adverse is presumed (*Bookchin v Maraconda*, 162 AD2d 393, 394 [1st Dept 1990]), but where the relationship between the parties and their predecessors is one of "cooperation and neighborly accommodation," permission may be inferred (*Bookchin,* at 394;

*Susquehanna Realty Corp v. Barth*, 108 AD2d 909, 910 [2d Dept 1985]). Accepting plaintiff evidence on this point, its use was not adverse. As stated above, Resnick had the right of passage through the common vestibule, and consented to plaintiff's making the same use. Likewise, the Osborne, in a show of cooperation and accommodation to plaintiff, and to plaintiff's predecessor, permitted plaintiff to use the niches in the common vestibule until, as Osborne contends, the use began to exceed its consent. Accordingly, plaintiff has failed to establish that its use of the common vestibule was adverse, and the declaration of a prescriptive easement is denied.

Punitive Damages

Defendants have moved to set aside the punitive damages award or alternatively to reduce the award. A verdict may be set aside where it is contrary to the weight of the evidence, or in the interest of justice (CPLR 4404[a]). A verdict may be set aside as a matter of law where there is no valid line of reasoning and permissible inferences, based on the evidence presented at trial, which could possibly lead rational people to the conclusion reached by the jury (*Obey v, City of New York*, 29 NY3d 958, 960 [2017]; *Cohen v. Hallmark Cards, Inc.*, 45 NY2d 493, 499 [1978]). A verdict may be set aside as contrary to the weight of the evidence where "the verdict could not have been reached on any fair interpretation of the evidence" (*Killon v. Parrotta*, 28 NY2d 101, 107 [2016]; *Lolik v. Big v Supermarkets*, 86 NY2d 744, 746 [1995]). The punitive damages verdict in this case is both contrary to law and against the weight of the evidence and must be vacated.

"Punitive damages are normally not recoverable for an ordinary breach of contract as their purpose is not to remedy private wrongs but to vindicate public rights"

*(Rocanova v Equitable Life Assur. Socy.,* 83 NY2d 603, 613, [1994], citing *Garrity v Lyle Stuart, Inc.,* 40 NY2d 354, 358 [1976]). "However, where the wrong complained of evinces a 'high degree of moral turpitude' and demonstrating 'such wanton dishonesty as to imply a criminal indifference to civil obligations' punitive damages are recoverable if the conduct was 'aimed at the public generally' (*Id.; quoting Walker v. Sheldon,* 10 NY2d 410, 404-405 [1961]). To recover punitive damages in a breach of contract case, (1) the defendants conduct must be actionable as an independent tort, (2) the tortious conduct must be egregious in nature as set forth in *Walker v. Sheldon*, (3) the conduct must be directed as the plaintiff; and (4) it must be part of a patter directed to the public in general (*New York University v. Continental Insurance Company*, 87 NY2d 308, 316 [1995]). As a matter of law, plaintiff has failed to meet several prongs of this test and the jury's verdict must be set aside.

First, there is no actionable independent tort. Here, the jury found that the plaintiff failed to prove a fraud by either Osbourne or Ferrara. Further, the defendants have not engaged in conduct outside the contract intended to defeat the contract (*New York University*, 87 NY2d at 316). Significantly, the conduct was not part of a pattern directed at the public generally and was solely aimed at a private entity.

To the extent that *Suffolk Sports Ctr. V. Belli Constr. Corp.,* 212 AD2d 241, 246 [2d Dept 1995], suggests that where an action is predicated on a landlord-tenant relationship, if the actions are sufficiently reprehensible, punitive damages may still be imposed, this holding has been rejected by the subsequent holding in *New York University*, 87 NY2d 308, which made it clear that punitive damages were recoverable in a contract action only "if necessary to vindicate a public right" (*TVT Records v. Island*

*Def Jam Music Group*, 412 F3d 82, 94, and at footnote 12). Even were this Court to follow *Suffolk Sports* holding that punitive damages are available where the action is predicated on a landlord-tenant relationship and the actions were "sufficiently reprehensible so as to warrant the imposition of punitive damages" (*Suffolk Sports*, at 246), this case is so distinguishable from *Suffolk Sports* that there would nevertheless be no reasonable view of the evidence supporting an award of punitive damages.

In *Suffolk Sports*, the plaintiff was the operator of a fitness related baseball clinic. In its ongoing effort to evict the plaintiff from possession of the leased premises, the defendant landlord first refused to accept rent, and insisted that the tenant enter into a one-year lease in place of its existing longer-term lease. When the tenant refused, the landlord chained and locked the premises, thereafter removing the lock. Then, at a later point the landlord blockaded one entrance with two five-ton cement blocks and the other entrance with a tremendous red truck, preventing plaintiff from operating and effectively evicting the tenant from its business. The blockage was removed 37 days later pursuant to court order, but the blockade caused plaintiff to be unable to operate, prevented member of the public from patronizing their gym, and unable to reestablish customer loyalty. Plaintiff suffered reduced gross revenue and was forced to close its business for good after the season. The jury awarded plaintiff a total of just under $100,000.00 in compensatory damages and $300,000 in punitive damages. Affirmed on appeal were the trial court's determinations that, although punitive damages were appropriate, the award was disproportionate to the amount of compensatory damages, and the ordering of a new trial on the issue unless the parties stipulated to an award of $60,000. In finding punitive damages appropriate, the Appellate Division noted that:

> [Defendant] embarked upon a calculated effort to vitiate the landlord-tenant relationship between it and [plaintiff], by repeatedly insisting that [plaintiff] enter into a new lease for one year only, demanding that Suffolk expend additional monies to improve the property, and threatening to interfere with [plaintiff]'s business operation. When it became apparent that [plaintiff] would not be intimidated, [defendant] resorted to the more drastic tactic of preventing [plaintiff] from gaining access to the premises, with the result that [plaintiff] was essentially forced out of business.

(*Id.*, at 247). The Appellate Division held that defendant's actions "involve[d] that degree of bad faith evincing a 'disingenuous or dishonest failure to carry out [the parties'] contract'" so as to justify the imposition of punitive damages" (*Id.* at 247; *quoting Williamson, Picket, Gross, Inc. v Hirschfeld,* 92 AD2d 289, 295 [1st Dept 1983] and *Gordon v Nationwide Mut. Ins. Co.,* 30 NY2d 427, 437 [1972]).

At bar, defendants' conduct was not the sort of calculated effort to vitiate the landlord-tenant relationship contemplated by *Suffolk Sports*. Defendants took one action, and in so doing it wrongfully evicted plaintiff from an area totaling just 96 square feet of space that it used for equipment storage in the basement, for which it had not leasehold interest. The eviction did involve the use of force or violent means, plaintiff was never restricted in any way from access to its bar and restaurant storefront, and plaintiff was not forced out of business. Although in considering punitive damages, the jury found that the defendants conduct was sufficiently egregious and morally culpable, it also found in favor of defendants on the trespass to land and the fraud claims, specifically that neither the Osborne nor Ferrara made a false representation to plaintiff. On this record, the punitive damages award in favor to the plaintiff is both contrary to law and against the weight of the evidence. This case is remarkably unlike *Suffolk Sports* in that it did not involve an ongoing pervasive effort to actually evict a tenant from a business to which they held a lease, resulting in the business ultimately closing for good. At bar, as a matter

of law, defendants conduct was not sufficiently reprehensible as to warrant to imposition of punitive damages in the absence of conduct aimed at the public generally (see *Suffolk Sports*, at 246). On these facts, there can be no valid line of reasoning and permissible inferences, which would support any punitive damages award as a matter of law and a verdict awarding punitive damages could not have been reached on any fair interpretation of the evidence. Accordingly, it is hereby

ORDERED that the plaintiff is awarded treble damages and the Clerk is directed to enter judgment in favor of plaintiff and against both defendants Osborne and Ferrara in the sum of $162,000.00, with interest at the rate of 9 % per annum from the date of January 9, 2012, until the date of the decision on this motion, and thereafter at the statutory rate, as calculated by the Clerk, together with costs and disbursements as taxed by the Clerk; and it sis further

ORDERED that plaintiff's application for a declaratory judgment restoring it to possession of the niches in the common vestibule in the building basement is denied; and it is further

ORDERED plaintiff's application for a declaration that they have a prescriptive easement is denied; and it is further

ORDERED that defendants' post trial motion to vacate the jury's punitive damages award is granted and the punitive damages awards as against defendant Osborne and Ferrara are hereby vacated.

5-9-2018
~~5/8/2018~~
DATE

DAVID BENJAMIN COHEN, J.S.C.
HON. DAVID B. COHEN
J.S.C.

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| CHECK ONE: | [X] | CASE DISPOSED | [ ] | NON-FINAL DISPOSITION | | | |
| | [ ] | GRANTED | [ ] DENIED | [X] | GRANTED IN PART | [ ] | OTHER |
| APPLICATION: | [ ] | SETTLE ORDER | | [ ] | SUBMIT ORDER | | |
| CHECK IF APPROPRIATE: | [ ] | DO NOT POST | | [ ] | FIDUCIARY APPOINTMENT | [ ] | REFERENCE |