

**Dar v 412 W. 36 Realty LLC**

2019 NY Slip Op 30222(U)

January 28, 2019

Supreme Court, New York County

Docket Number: 154698/2015

Judge: Kathryn E. Freed

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 2

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ALI ASIF DAR and EZ TRADING INC.,

**DECISION AND ORDER**

Plaintiffs,

Index No.: 154698/2015

-against-

Mot. Seq. Nos. 003 and 004

412 WEST 36 REALTY LLC, ICON REALTY  
MANAGEMENT LLC, JIN M. KIM, and NJS NEW  
DEVELOPMENT INC.,

Defendants.

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**KATHRYN E. FREED, J.S.C.:**

The following e-filed documents, listed by NYSCEF document number (Motion 003) 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 70, 71, 72, 73, 74, 76, 78, 81, 82, 83, 84, 89, 90 were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 77, 79, 85, 86, 91, 92 were read on this motion to/for DISMISS

In motion sequence No. 003, defendant JNS New Development, Inc., s/h/a NJS New Development (JNS) moves, pursuant to CPLR 3212, for summary judgment dismissing the complaint. In the alternative, JNS moves to preclude plaintiffs Ali Asif Dar (Dar) and EZ Trading Inc. (EZ) from offering any evidence as to their claims for property damage based on their spoliation of evidence. In motion sequence No. 004, defendants 412 West 36 Realty LLC (Owner) and Icon Realty Management (Icon) move, pursuant to CPLR 3126, to dismiss plaintiffs' complaint due to spoliation of evidence, or, in the alternative, for an order precluding plaintiff from offering evidence of property damage at trial, or a jury charge requiring a negative inference against plaintiffs with respect to the destroyed items.

Motion sequence Nos. 003 and 004 are hereby consolidated for disposition.

### Background

EZ, a wholesale shipper of perfumes, also operated a shipping and copy center and sold shipping supplies (Hoffman affirmation dated 2/16/18, exhibit E, Dar EBT dated 3/10/17 at 11:19-12:3). Dar was EZ's principal. During the relevant time period, EZ occupied the ground floor of the building located at 412 West 36th Street (the Premises). EZ's space consisted of a lobby area, an office and hallway leading to a storage room, and a bathroom (*id.* at 17:14-18:8). Dar testified that he stored perfumes for delivery in the lobby, and that the various appliances necessary for the shipping and copy centers were also in the lobby (*id.* at 18:16-23).

Icon managed the Premises for Owner, and Melissa DiGiacomo (DiGiacomo) served as Icon's property manager (Hoffman affirmation, exhibit F, DiGiacomo EBT dated 12/15/17 at 6:6-25). Beginning in February 2014, Owner undertook a complete gut renovation of between 11 and 13 apartments at the premises (Hoffman affirmation, exhibit G, Mercado EBT dated 11/9/17 at 7:3-8, 8:10-23, 9:24-10:5). Jovencio Mercado (Mercado) served as Owner's representative for the renovation (*id.* at 5:18-6:9). Defendant Jin M. Kim (Kim) was the owner of JNS, which was the general contractor for the renovation (Hoffman affirmation, exhibit H, Kim EBT dated 1/16/18 at 6:19-7:19).

Dar testified that, beginning in January 2014 and continuing until EZ vacated the Premises in December 2014, there were several problems at the Premises related to the construction that unduly impacted his business.<sup>1</sup> Chiefly, water leaks caused significant damage to his furnishings, appliances and inventory of perfumes and colognes (Dar EBT at 69:7-70:11,

<sup>1</sup> The parties differ as to when construction began, as Mercado testified that construction began in February 2014 (Mercado EBT at 7:3-8). However, plaintiff consistently testified that both the construction and the problems began in January 2014, so there is no issue of fact in this regard (Dar EBT at 19:15-20:15, 40:25-41:5).

71:3-7, 80:8-81:7, 92:17-93:21).<sup>2</sup> In late January 2014, water began leaking from the ceiling into the part of the lobby where Dar stored perfumes for shipment, and where the equipment for his shipping and copying businesses was set up (*id.* at 19:15-20:15). He began calling DiGiacomo at Icon about the leak in February and, on March 18, 2014, he emailed DiGiacomo about the leak and other disturbances caused by the construction (*id.* at 39:24-41:15). Icon informed Dar that it would send someone to fix the leak, and the building superintendent and a plumber came to the Premises two days later and shut off the water to the building (*id.* at 28:10-18; DiGiacomo EBT at 32:2-25). Two days after, Icon sent workers to the Premises to fix the leak, which Dar testified took two weeks (*id.* at 30:18-31:14). He further testified that EZ was closed for two to three days due to the repairs, although he could not remember whether the store had been closed part-time on any other days (*id.* 147:11-148:8). A second leak occurred in the hallway leading to the storage room, but Dar stated that the leak stopped on its own, and it does not appear to have caused any significant damage to the Premises (*id.* at 32:11-21, 34:4-7).

The third and final leak began in July 2014 in the corner of the bathroom wall and spread to other parts of the Premises (*id.* at 35:12-36:14). Dar complained to Icon about the leak and, while someone came to look at the wall, the leak continued (*id.* at 63:21-64:7). Mercado testified that the risers installed in the back wall of the bathroom were set to be renovated after EZ moved out, and that the wall leaked during heavy storms (Mercado EBT at 47:2-18, 48:21-49:3). At some point, that leak ceased as well.

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<sup>2</sup> Dar testified that he disposed of his damaged inventory, furnishings, and appliances, without informing defendants that he was doing so (Dar EBT at 74:23-75:9, 76:2-10, 80:8-81:7, 92:17-93:21).

In addition to the leaks, Dar testified that the construction caused unreasonable levels of noise in the Premises, a hole in the ceiling, a draw on his power, and, on one occasion, a cut landline. With respect to the landline, he claimed that his phone line stopped working, and that a repair person from Time Warner Cable determined that someone from JNS had inadvertently cut the cable during construction (Dar EBT at 101:10-24). He also claimed that his electric bill was higher for a period of time, leading him to believe that JNS was drawing on his power (*id.* at 104:21-105:6). Dar made several complaints to DiGiacomo regarding the noise complaints and the hole in the ceiling, and met with workers from JNS in March 2014 to address the problems (*id.* at 39:24-40:23, 41:11-15, 43:19-44:8, 45:7-14). The workers repaired the hole in the ceiling, but the noise appears to have continued throughout the construction (*id.* at 45:15-24).

Finally, Dar testified that a construction dumpster and sidewalk shed were placed in front of his store, which hindered his ability to do business (*id.* at 99:24-100:13). Specifically, he stated that he was not allowed to place a sign advertising his business on the sidewalk shed, although he did not testify as to who prevented him from doing so (*id.* at 101:3-6). Kim testified that JNS did not erect the sidewalk shed, which was erected sometime after construction began (Kim EBT at 36:12-17). DiGiacomo testified that the sidewalk shed was erected by nonparty Hassan General Contracting, and taken down on October 18, 2014 (DiGiacomo EBT at 26:14-27:11). Kim testified that the dumpster was 960 cubic feet, and located directly outside the Premises on 36th Street (Kim EBT at 29:12-22).

Defendants present varied accounts of which of their witnesses was aware of some or all of Dar's complaints. DiGiacomo stated that she communicated by e-mail with Dar and passed on his complaints to upper management at Icon, who then sent someone to respond (DiGiacomo EBT at 8:20-10:14). She could not recall whether she ever told JNS to work more quietly (*id.* at

41:3-6). Mercado was aware of Dar's complaints but never spoke to him directly (Mercado EBT at 32:14-33:10, 34:14-19). Kim represented that Dar never complained to him directly, although he did not know whether Dar complained to anyone else (Kim EBT at 38:4-13, 39:19-40:10). He also did not recall whether he had ever discussed project complaints with Mercado (*id.* at 50:4-8).

In response to Dar's complaints, Owner did ultimately reduce his rent for the duration of the construction (Dar EBT at 48:6-20; Gaven affirmation dated 3/6/18, exhibit 6, Lowenberg EBT dated 10/2/17 at 15:8-15). EZ ultimately vacated the premises in December 2014 (DAR EBT at 8:18-21).

On May 11, 2015, plaintiffs filed a complaint against defendants and subsequently dismissed defendant Kim (NYSCEF Doc. No. 1). The complaint alleges three causes of action: constructive eviction (first cause of action); loss of income (second cause of action); and property damage (third cause of action).

## Discussion

### *Summary Judgment*

Summary judgment is appropriate where there are no disputed material facts (*Andre v Pomeroy*, 35 NY2d 361, 364 [1974]). The moving party must tender sufficient evidentiary proof to warrant judgment as a matter of law (*Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). The opposing party must proffer its own evidence to show disputed material facts requiring a trial (*id.*). However, the reviewing court should accept the opposing party's evidence

as true (*Hotopp Assoc. v Victoria's Secret Stores*, 256 AD2d 285, 286-287 [1st Dept 1998]), and give the opposing party the benefit of all reasonable inferences (*Negri v Stop & Shop*, 65 NY2d 625, 626 [1985]).

JNS seeks summary judgment dismissing plaintiffs' claims because it claims it did not cause any of the conditions Dar alleges.<sup>3</sup> Specifically, it states that Dar does not know what caused the leaks, and JNS' plumber did not do anything to the pipes in the building during the construction. Further, it claims that another company put up the sidewalk shed. Finally, it asserts that it was not on notice of any of plaintiffs' complaints because neither DiGiacomo nor Mercado passed any of them on to Kim.

In opposition, plaintiffs argue that JNS was the only contractor working at the Premises at the time Dar complained of the above conditions, and defendants' ignorance of certain complaints is not enough to warrant granting summary judgment against plaintiffs. Moreover, Icon and Owner believed the complaints were serious enough that they reduced EZ's rent, which belies JNS' characterization of plaintiffs' claim.

JNS has failed to establish prima facie entitlement to summary judgment. In its moving papers, JNS does not challenge any of the defective conditions recounted above, arguing only that JNS' workers did not cause them. The record reflects, however, that JNS was retained to perform a gut renovation of the entire building, and was the only contractor working at the building at the time the damage was allegedly caused to the Premises (DiGiacomo EBT at 29:2-5; Mercado EBT at 7:3-8, 8:10-23, 9:24-10:5; Kim EBT at 6:19-7:19). Accordingly, JNS's references to its lack of notice for certain conditions, and alternate theories regarding the causes

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<sup>3</sup> JNS also argues that it is entitled to summary judgment because it was incorrectly sued as NJS New Development, an entity with no connection to the project. As this appears to be a mere typographical error on plaintiffs' part, and as JNS has answered the complaint and participated fully in this action without previously making this objection, this argument is unavailing.

of the leaks, such as the design of the building, do no more than raise questions of fact as to JNS's possible liability. For example, with respect to the third leak, the parties do not dispute that the corner wall of the bathroom was to be renovated after EZ vacated the premises because it leaked during bad weather (Mercado EBT at 47:2-18, 48:21-49:3). However, JNS fails to establish that its construction activities did not exacerbate the problem. Similarly, the fact that JNS's plumber did not do any work on the water pipes in the Premises does not establish that JNS did not disturb the flow of water in the Premises while it was gutting the floors above it.

In the first instance, it is JNS's burden, as the moving party, to establish that, as a matter of law, it was not responsible for the conditions at the Premises (*see Zuckerman*, 49 NY2d at 562). The fact that Dar does not know for certain that JNS caused the leaks and other conditions is irrelevant; plaintiffs have no burden as the non-moving parties to prove causation unless JNS first establishes prima facie entitlement to summary judgment (*William J. Jenack Estate Appraisers and Auctioneers, Inc. v Rabizadeh*, 22 NY3d 470, 475 [2013] ["Where the moving party fails to meet this burden, summary judgment cannot be granted, and the non-moving party bears no burden to otherwise persuade the court against summary judgment"]). Accordingly, that branch of JNS's motion for summary judgment dismissing the complaint is denied.

### *Spoliation of Evidence*

CPLR 3126 provides that when a party "wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just . . . ." "Under New York law, spoliation sanctions

are appropriate where a litigant, intentionally or negligently, disposes of crucial items of evidence involved in an accident before the adversary has an opportunity to inspect them” (*Kirkland v New York City Hous. Auth.*, 236 AD2d 170, 173 [1st Dept 1997]).

JNS, Icon, and Owner all move to dismiss plaintiffs’ complaint based upon Dar’s disposal of the damaged appliances, furnishings, and perfumes. Alternatively, defendants seek an order precluding plaintiffs from offering evidence as to their property damage. Defendants argue that they have been irreparably prejudiced because they cannot examine the items that are the basis for plaintiffs’ property damage claims. This Court notes, however, that plaintiffs have been equally prejudiced since, by their own actions, they have deprived themselves of evidence vital to their property damage claims. Moreover, the motion papers do not reflect that plaintiffs disposed of the damaged items to frustrate discovery. Thus, spoliation sanctions are not warranted (*Ifraimov v Phoenix Indus. Gas*, 4 AD3d 332, 334 [2d Dept 2004] [“Further, the plaintiffs are equally prejudiced by the loss of the items in their investigation of the proximate cause of the accident and have not reaped an unfair advantage in the litigation”] [internal citations omitted]; *O’Reilly v Yavorskiy*, 300 AD2d 456, 457 [2d Dept 2002] [Spoliation sanctions not warranted where defendant’s garage destroyed tire that caused accident, as both parties were prejudiced thereby]).

Accordingly, Icon and Owner’s motion, as well as that branch of JNS’s motion seeking spoliation sanctions, are denied. This Court has examined the remaining arguments of the parties, and finds them to be unavailing.

Therefore, in accordance with the foregoing, it is hereby:

ORDERED that the motion of defendant JNS New Development, Inc. s/h/a NJS New Development, Inc. for summary judgment dismissing the complaint pursuant to CPLR 3212, and, alternatively, for spoliation sanctions pursuant to CPLR 3126, is denied in all respects; and it is further

ORDERED that the motion of defendants Icon Realty Management LLC and 412 West 36 Realty LLC, for spoliation sanctions pursuant to CPLR 3126 is denied; and it is further

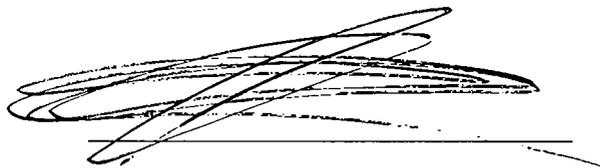
ORDERED that, within 20 days after this order is uploaded to NYSCEF, counsel for plaintiff shall serve a copy of this order, with notice of entry, upon all parties to this action; and it is further

ORDERED that the parties shall appear for a status conference on June 10, 2019 at 80 Centre Street, Room 280, at 2:15 p.m.; and it is further

ORDERED that this constitutes the decision and order of the court.

Dated: January 28, 2019

ENTER:

A handwritten signature in black ink, appearing to read 'Kathryn E. Freed', written over a horizontal line.

HON. KATHRYN E. FREED, J.S.C.