

**Progressive Cas. Ins. Co. v 809 Broadway Holding
LLC**

2020 NY Slip Op 31946(U)

June 17, 2020

Supreme Court, New York County

Docket Number: 155886/2019

Judge: Debra A. James

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This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

PRESENT: HON. DEBRA A. JAMES PART IAS MOTION 59EFM

Justice

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B & E 813 BROADWAY LLC

Petitioner,

- v -

809 BROADWAY HOLDING LLC,

Respondent.

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INDEX NO. 155886/2019

MOTION DATE 11/07/2019

MOTION SEQ. NO. 001

DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 7, 22, 23, 24, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 38, 39

were read on this motion to/for MISC. SPECIAL PROCEEDINGS

ORDER

Upon the foregoing documents, it is

ORDERED that the petition of petitioner B&E 813 Broadway, LLC, for a judgment of possession pursuant to Real Property Laws &n Rules § 713(7) is granted in part; and it is further

ORDERED that the License and Access Agreement dated November 25, 2017 (License) permitting respondent to enter the premises at 809 Broadway, New York, New York, owned by petitioner (Adjoining Property); First Amendment to the License dated May 31, 2016; Second Amendment to the License dated January 2017; and Third Amendment dated December 2018 to the License dated First Amendment, the License having expired by its terms on January 31, 2019, and ended upon the expiration of the

10-day period on May 27, 2019, by the Notice to Quit dated May 17, 2019; and is further

ORDERED and ADJUDGED that petitioner shall have a judgment of possession against respondent, and a warrant shall be issued forthwith, and judgment entered, accordingly, by the Clerk of the Court, with execution of such warrant stayed for thirty days from service of a copy of this order of notice of entry to allow respondent to carry out, as expeditiously as possible during phase 1 of the re-opening of New York City, with the cooperation of the petitioner, including its completion, as owner, of any paperwork required by the New York City Department of Buildings, the removal of remaining roof protection from the Adjacent Property; and it is further

ORDERED that the first and second counterclaims are severed and shall continue; and it is further

ORDERED that there are triable issues of fact with respect to such counterclaims, which shall be tried forthwith pursuant to CPLR § 410; and it is further

ORDERED that respondent/counterclaimant shall, within 20 days from entry of this order, serve a copy of this order with notice of entry upon counsel for all parties hereto and upon the Clerk of the General Clerk's Office (60 Centre Street, Room 119) and shall serve and file with said Clerk a note of issue and statement of readiness (with respect to the latter, neither party has sought

discovery pursuant to CPLR § 408) and shall pay the fee therefor, and such Clerk shall cause the matter to be placed upon the calendar for such trial before the undersigned; and it is further

ORDERED that such service upon the General Clerk's Office shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for Electronically Filed Cases* (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

DECISION

"A special proceeding to recover possession of property is available to obtain the removal of a licensee whose license has been revoked or has terminated; provided, as in other cases, the statutory 10 days' notice to quit is given. Under the statute, where one is a licensee of the person entitled to possession of the property at the time of the license, and: (1) his license has expired; or (2) his license had been revoked by the licensor; or (3) the licensor is no longer entitled to a possession of the property, the licensee and his tenants, assigns, or legal representatives can be removed by summary proceedings at the application of the person entitled to possession, provided the statutory 10 days' notice to quit is given.

A person entitled to possession of property occupied by a licensee may bring an action to recover possession of the property and dispossess the licensee."

49 N.Y. Jur.2d Easements and Licenses in Real Property § 243 (May 2020 Update).

Paragraph 1 of the License and Access Agreement dated November 25, 2017, as amended, (License), provides "Adjacent Owner (petitioner) grants Project Owner (respondent) a revocable

license". Paragraph 1 of the Third Amendment to the License dated December 2018, extended the term of the License to January 31, 2019.

The License expired by its term on January 31, 2019. Respondent does not dispute that the Agreement was a license, revocable at will. See Jossel v Filcori, 235 AD2d 205, 206 (1st Dept. 1977). However, respondent asserts that it removed the scaffolding from the Adjacent Property as of April 3, 2019, but could not remove the remaining roof protection, as it needed permission to access the petitioner's property, since the License had expired. Respondent also argues that it needed petitioner's cooperation with respect to the New York City Department of Buildings paperwork required to effectuate such removal.

This court disagrees with respondent's argument that it lacked the right to enter upon the Adjoining Property to remove the roof protection because the License expired by its terms. Until the expiration of the 10-day period under the Notice to Quit that petitioner served on respondent on May 17, 2019, respondent was free to remove the remaining roof protection. However, respondent has raised an issue of fact as to whether petitioner prevented the removal of the roof protection, as it refused respondent's request to file the necessary paperwork with the New York City Building Department. In any event, by

this decision and order, respondent is afforded an additional thirty (30) days to remove such remaining roof protection and petitioner must cooperate and submit any of the filings, required from the owner, with the New York City Buildings Department, to enable same.

The herein case is a special proceeding, in which respondent has interposed a counterclaim. Such counterclaim is permitted under CPLR § 402, which states that there shall be "a reply to a counterclaim".

Respondent alleges as a first counterclaim that petitioner breached the license agreement, from March 11, 2016 to January 17, 2017, by denying respondent access under the license, and that it suffered damages in the amount of fees that it remitted to petitioner during that period. As a second counterclaim, respondent asserts that petitioner is entitled to no monthly fee under the Third Amendment after 2019, since petitioner prevented such removal of the roof protection, which is minimal roof protection as well as required under local law and rules. By Answer (Reply), which was not verified by petitioner's principal, petitioner denies such counterclaims.

The court finds issues of fact as to both counterclaims, which can only be resolved at trial. See CPLR § 410.

The Verified Petition, petitioner's supporting affidavit, the Verified Answer and respondent's supporting affidavit, raise

issues of facts as both counterclaims, which implicate credibility. With respect to the first counterclaim, the issue is whether petitioner breached the License Agreement by denying respondent access to the Adjoining Property from March 11, 2016 to January 17, 2017, entitling respondent to the return of the license fees it remitted for that period.

As to the second counterclaim, respondent admits that it did not remove the scaffolding until April 2019, three months after the expiration date under the Third Amendment to the License, therefore entitling petitioner to additional fees from December 1, 2018 to April 2019. However, whether petitioner is entitled to additional fees after April 2019 rests on whether or not petitioner impeded and prevented respondent from removing the remaining roof protection. Such issue must likewise be resolved at trial.

At this juncture, neither petitioner nor respondent have prevailed in this proceeding, as the counterclaims must be resolved at trial. Since there is no prevailing party, each are responsible for their own attorneys' fees incurred in this proceeding. See Eastside Exhibition Corp. v 210 E. 86th St. Corp., 118 AD3d 474 (1st Dept. 2014).

The herein decision/order on attorneys' fees, is without prejudice to either party moving, by order to show cause, for an order awarding the recovery of attorneys' fees upon determination of the counterclaims at trial.

6/17/2020

DATE

Debra A. James
DEBRA A. JAMES, J.S.C.

CHECK ONE:

CASE DISPOSED

NON-FINAL DISPOSITION

GRANTED

DENIED

GRANTED IN PART

OTHER

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE