

Faerstein v Burshtein
2022 NY Slip Op 33108(U)
September 7, 2022
Supreme Court, Kings County
Docket Number: Index No. 501262/2021
Judge: Carolyn E. Wade
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At an IAS Term, Part 84 of the Supreme Court of the State of New York, held in and for the County of Kings, at the Courthouse, at Civic Center, Brooklyn, New York, on the 7th day of September, 2022.

P R E S E N T:

HON. CAROLYN E. WADE,

Justice.

-----X

PAUL FAERSTEIN,

Plaintiff,

- against -

Index No. 501262/2021

GENE BURSHEIN A/K/A EUGENE BURSHEIN AND ABRAHAM LINCOLN LLC,

Defendants.

-----X

GENE BURSHEIN A/K/A EUGENE BURSHEIN AND ABRAHAM LINCOLN LLC,

Third Party Plaintiffs,

Mot. Seq. # 1

- against -

617 BRIGHTON LLC,

Third Party Defendant.

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The following e-filed papers read herein:

NYSCEF Doc Nos.

Notice of Motion/Order to Show Cause/
Petition/Cross Motion and
Affidavits (Affirmations) Annexed _____
Opposing Affidavits (Affirmations) _____
Reply Affidavits (Affirmations) _____

33-43
44-47

Upon the foregoing cited papers and after oral argument, Defendants/Third-Party Plaintiffs Gene Burshtein a/k/a Eugene Burshtein and Abraham Lincoln LLC's Order to Show

Cause for an Order: 1) Staying a Bench Trial in a Kings County Civil Court, Commercial Part proceeding, entitled *617 Brighton LLC v. Abraham Lincoln LLC*, index # LT-305863/2022-KI; 2) Consolidating the Commercial Landlord-Tenant proceeding with the instant action; and 3) Granting Third-Party Plaintiff Abraham Lincoln LLC leave to amend the complaint is decided as follows:

The underlying action sounding in abuse of process, malicious prosecution, intentional infliction of emotional distress, defamation and prima facie tort was commenced by plaintiff Paul Faerstein (“Plaintiff”) on January 18, 2021, against defendants Gene Burshtein a/k/a Eugene Burshtein and Abraham Lincoln LLC (collectively, “Defendants/Movants”). Plaintiff, by his Verified Complaint, alleges that the Defendants made misrepresentations to the police regarding their payment of rent, which led to him being arrested and jailed with criminal charges brought against him. Notably, Plaintiff is the owner of 617 Brighton LLC, which entered into a 20-year commercial lease with tenant, Abraham Lincoln LLC, in 2018, to rent the second floor and rear yard of 617 Brighton Beach Avenue, Brooklyn, New York (“Subject Premises”).

The Defendants subsequently filed a third-party complaint against 617 Brighton LLC. The third-party complaint pleads six causes of action: violation of the “antiharassment of commercial tenants statute,” tortious interference with business relations, breach of the covenant of quiet enjoyment, improper service of the Notice of Termination, illegal eviction and punitive damages.

On March 28, 2022, 617 Brighton LLC commenced a summary holdover proceeding¹ in

¹ 617 Brighton LLC commenced a prior holdover proceeding against Abraham Lincoln LLC, which settled and was discontinued. The parties agreed, inter alia, that Abraham Lincoln LLC pay 617 Brighton LLC \$34,742.28, representing rent owed through January 20, 2020, and real estate taxes owed through June 30, 2020. They also entered into an amended lease agreement.

Kings County Civil Court, Commercial Division (Part 52), to terminate the lease agreement due to Abraham Lincoln LLC's alleged failure to obtain a certificate of occupancy for a one-bedroom apartment plus 25% home office. Abraham Lincoln LLC joined issue, and the instant application ensued.

“On a motion for a preliminary injunction, the burden of proof is on the movant to show that success on the merits is likely in the action, that irreparable injury will occur unless the injunction is granted, and that the balance of equities is in the movant's favor” (*William M. Blake Agency, Inc. v Leon*, 283 AD2d 423 [2d Dept 2001]). It is well settled that “preliminary injunctive relief is a drastic remedy which will not be granted ‘unless a clear right thereto is established under the law and the undisputed facts upon the moving papers, and the burden of showing an undisputed right rests upon the movant’ [citations omitted]” *Id.*

After a meticulous examination of the respective submissions, this Court finds that the Movants have not satisfied their burden for such relief. Notably, a warrant of eviction has not been issued in the Civil Court summary proceeding; Abraham Lincoln LLC undisputedly has significant rental arrears, and has not filed plans with the Department of Buildings to secure a Certificate of Occupancy.

Moreover, the Court, in its sound discretion, denies the branch of the Movants' application which requests a consolidation of the instant action with the summary proceeding. This case is mainly premised on the Movants' filing of a criminal complaint against Plaintiff with the NYC Police Department, and shares no nexus with the pending Civil Court matter. To wit, that matter is a commercial summary holdover proceeding, whereby 617 Brighton LLC will seek possession of the Subject Premises by way of a bench trial, pursuant to the lease, and a judgment for unpaid rent. As previously noted, 617 Brighton LLC is owned by Plaintiff.

In fact, Abraham Lincoln LLC filed a motion for summary judgment in Civil Court, which is currently pending, to dismiss the summary holdover proceeding, on the ground that the Notice to Cure and Notice to Terminate were fatally defective. Thus, this Court finds that the Movants have not established any "special circumstances of novel issues requiring Supreme Court involvement" (*Corino v. 448-450 W. 19th Realty LLC*, 2015 NY Slip Op 32241(U), 7 [Sup Ct, NY County 2015]). Moreover, consolidation could cause confusion, as 617 Brighton LLC would be both a petitioner and a third-party defendant. Whereas Abraham Lincoln LLC would be both a respondent and a third-party plaintiff.

Given the Court's ruling on the branch of the Movants' application for a consolidation, the remaining branch of their application to amend the third-party complaint to add a breach of contract claim, breach of the covenant of good faith and fair dealing claim, and a request for permanent injunctive relief is denied. These proposed causes of action are directly predicated on the landlord-tenant relationship between 617 Brighton LLC and Abraham Lincoln LLC. Courts routinely finds that Civil Court is the preferred forum to adjudicate landlord-tenant disputes (*E. 41st St. Assocs. v 18 E. 42nd St., L.P.*, 248 AD2d 112, 114 [1st Dept 1998]).

Accordingly, based upon the above, Defendants' instant Order to Show Cause is denied in its entirety.

This constitutes the Decision and Order of the Court.

ENTER

J.S.C.

2022 SEP 15 AM 9:46
KINGS COUNTY CLERK
FILED

HON. CAROLYN E. WADE
JUSTICE OF THE SUPREME COURT