

<b>Abdelfattah v 887 Fulton Realty LLC</b>
2022 NY Slip Op 33647(U)
October 13, 2022
Supreme Court, Kings County
Docket Number: Index No. 501867/2019
Judge: Ingrid Joseph
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At an I.A.S. Term, Part 83 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 13th day of October 2022.

P R E S E N T : HON. INGRID JOSEPH, J.S.C.  
SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF KINGS

-----X  
ABER ABDELFATTAH a/k/a ABER NAJUIB  
and HAKAM ABDELFATTAH,

Index No.:501867/2019

Plaintiff,

-against-

887 FULTON REALTY LLC.,

Defendant.

-----X  
The following e-filed papers considered herein:

	<u>E-Filed Papers Numbered</u>
Notice of Motion/Affirmation/Statement of Material Facts/Exhibits.....	64 - 75
Affirmation in Opposition/Statement of Material Facts/Exhibit.....	86 - 97
Reply.....	99

In this matter, Defendant, 887 Fulton Realty LLC (“Fulton”), moves by Notice of Motion (Motion Sequence 3) for an order pursuant to CPLR § 3212, granting summary judgment in favor of Fulton on its Counterclaims and to dismiss the Amended Verified Complaint of Plaintiffs, Aber Abdelfattah a/k/a Aber Najuib (“Aber”) and Hakam Adbelfattah (referred to collectively as “plaintiffs”).

Plaintiffs commenced this matter by Summons and Verified Complaint on January 29, 2019, seeking a declaratory judgment, money damages, and injunctive relief.

In the First and Second Causes of Action, plaintiffs request judicial declarations that the lease for the premises known at 887 Fulton Street, Brooklyn, New York is in full force and effect, with no leasehold violations for failure to pay rent or maintain the appropriate general liability insurance. In the Third and Fourth Causes of Action, plaintiffs seek damages in the amount of \$49,000 for breach of contract and a permanent injunction enjoining Fulton from taking steps to terminate plaintiffs' tenancy. In the Amended Verified Complaint, plaintiffs assert an alternative cause of action for \$49,000 premised upon the doctrine of promissory estoppel.

Fulton interposed a Verified Answer and Counterclaims, as amended on March 7, 2019, wherein it seeks, among other things, an order directing the ejectment of Aber, a judgment of possession, and unpaid rent totaling \$126,000, for the period covering January 2014 through March 2019.

Fulton contends it is a party to a lease agreement with Aber Abdelfattah for the Country House Diner located at 887 Fulton Street, Brooklyn, New York. Fulton alleges that the lease was executed on May 15, 2015 and purportedly expires in 2040 with a flat rent rate of \$2,000 monthly, inclusive of water and real estate taxes. Fulton asserts that Aber breached the lease by failing to obtain general liability insurance in accordance with paragraph 8 of the lease. Additionally, Fulton claims that Aber has failed to pay rent since January 2014. Fulton indicates that it served a Notice of Default upon Aber on January 5, 2019, and, in response, Plaintiff commenced the instant matter together with an

order to show cause for a Yellowstone injunction.

Fulton contends that plaintiffs' allegations are flatly contradicted by express provisions of the lease and other documentary evidence. Fulton argues that Aber has not paid expenses associated with the building and there is no verbal agreement that suspends Aber's monthly rent obligation. To corroborate its arguments, Fulton points out that a predecessor justice, in a decision dated May 8, 2019, denied the plaintiffs' application for a Yellowstone injunction on the grounds that plaintiffs failed to provide adequate proof of their ability and willingness to pay rent arrears and inability to establish that an insurance policy was procured in accordance with the lease. Fulton now moves for summary judgment pursuant to CPLR § 3212, dismissing plaintiffs' causes of action and granting judgment in Fulton's favor on its counterclaims for ejectment, a judgment of possession, and rent arrears of \$172,000 from January 2014 through February 2021. Fulton further seeks the recovery of costs, disbursements and reasonable attorney fees.

Plaintiffs argue that Fulton's motion should be denied because Fulton is no longer the owner of the premises, as evinced by the deed that reveals Fulton transferred its ownership interest to another entity, ABC Realty Inc. ("ABC Realty"), in February 2021 (NYSCEF Doc. No. 88). Plaintiffs also argue that Fulton cannot establish the elements of an ejectment claim, including a superior possessory right. Additionally, plaintiffs contend that documentary evidence raises issues of fact regarding Fulton's allegation that Aber breached the lease. Plaintiffs claim no rent is owed under the lease because a prior

owner, Mohammad Najar, waived Aber's rent obligation. Plaintiffs explain that Aber incurred expenses of \$171,000 to maintain the premises from 2003 to 2013 and in exchange, Aber's rent obligation was dispensed with until the sum of unpaid rent equates to \$171,000. Plaintiffs steadfastly maintain that Aber ceased paying rent in January 2014, and, since that time, Fulton, which took ownership the same year, has not objected to the cessation of rent payments. Plaintiffs acknowledge that Aber's rent abeyance is not in writing but argues that Fulton should be equitably estopped from raising the statute of frauds, or a contractual writing defense. Additionally, plaintiffs contend that Fulton has misstated the lease provision related to insurance, which merely requires Aber to maintain a standard form insurance in favor of the owner and Aber. Plaintiffs also point out that Fulton failed to serve a five-day notice for Aber's alleged failure to comply with such provision and therefore, failed to meet the prerequisites for maintaining the counterclaim for eject and a judgment of possession.

In response, Fulton insists that plaintiffs' defenses are barred by the statute of frauds, the parol evidence rule, and the "no waiver" provision at paragraph 24 in the lease. Fulton reiterates that a predecessor justice already determined that Aber failed to obtain a general public liability policy that covered Fulton. Fulton contends that Aber's failure to pay rent or obtain the appropriate insurance coverage entitles Fulton to exercise its right of re-entry under the lease. Fulton acknowledges that title to the premises transferred from 887 Fulton Realty LLC to 887 ABC Realty Corp but maintains that such

transfer is an irrelevant, nominal transaction that does not affect Fulton's standing.

To demonstrate entitlement to judgment on a cause of action for ejection, Fulton is required to establish that it is the owner of 887 Fulton Street; that it has a present or immediate right to possession of the premises; and that the tenant, Aber, is in present possession of the estate” (*City of New York v. Anton*, 169 AD3d 999, 1001 [2d Dept 2019], quoting *RPAI Pelham Manor, LLC v. Two Twenty Four Enters., LLC*, 144 AD3d 1125, 1126 [2d Dept 2016]). Here, Fulton failed to establish that it is the owner of the subject property. The deed annexed to Fulton's motion reveals that Mohammed Najar sold his ownership interest to Fulton on August 11, 2014. However, plaintiffs submitted the copy of a bargain and sale deed, which reveals that 887 Fulton Realty LLC conveyed its ownership interest to 887 ABC Realty Corp. during the pendency of this action, on or about February 17, 2021. Consequently, Fulton has failed to establish that it is currently the owner of the premises for purposes of ejection and a judgment of possession.

Additionally, Fulton failed to demonstrate its entitlement to rent arrears of \$126,000, for the period covering January 2014 through March 2019. The Successors and Assigns clause, at paragraph 29 of the lease, provides that the “covenants, conditions, and agreements contained in [the] lease ... bind[s] and inure[s] to the benefit of [the] Owner and Tenant and their respective ... successors ...” Therefore, the issue of unpaid rent, may not be resolved without addressing whether Fulton, or its successor, 887 ABC Realty Corp., is entitled to the aforementioned sum for unpaid rent. There further exists

questions of fact concerning the oral agreement that allegedly relieved Aber's monthly rent obligation until the sum of rent owed is commensurate with the expenses that Aber allegedly incurred to maintain the premises.

Contrary to Fulton's contention, plaintiffs' assertion that there exists an oral agreement is not readily dismissible on statute of frauds grounds, since partial performance and promissory estoppel are exceptions to that defense (*Richardson & Lucas, Inc. v. New York Athletic Club of City of N.Y.*, 304 AD2d 462, 463 [2d Dept 2003]). Plaintiffs' allegation that Aber ceased paying rent, to its detriment, in reliance on Fulton's oral agreement that its rental obligation would be suspended is within contemplation of the promissory estoppel exception. In fact, Fulton's assertion that Aber has failed to pay rent since January 2014 corroborates Aber's allegation that such payments ceased upon oral agreement of the parties. Moreover, the cessation of payments may be deemed "unequivocally referable" to the alleged oral agreement, because Aber's nonpayment, and, concomitantly, Fulton's acquiescence without commencing a nonpayment proceeding, would be inconsistent with any other explanation (*See Vogel v Vogel*, 128 AD3d 681, 684 quoting *Hannigan v. Hannigan*, 104 AD3d 732, 736 [2d Dept 20123] *Richardson & Lucas, Inc. v. New York Athletic Club of City of N.Y.*, 304 AD2d 462, 463 [2d Dept 2003]).

The court finds that Fulton also failed to establish prima facie entitlement to summary judgment on its counterclaim for a declaration that Aber breached the lease by

failing to obtain insurance, as required under paragraph 17(1) and (2) of the lease. At the outset, the court notes that the issue of ownership makes unclear whether Fulton or ABC Fulton Realty has the right to assert a cause of action for breach of the lease at this time. Since ownership of the property was transferred, the parties to the lease are now Aber and Fulton's successor-in-interest, ABC Fulton. Moreover, it may be irrelevant whether Aber failed to comply with the insurance requirements during the period in which Fulton was the owner-landlord, because there is no showing that there exists a cause of action, or other matter, that would implicate Fulton for personal injury, or other third-party claim during the relevant period. Thus, that branch of Fulton's motion must also be denied.

Since there is no showing that Fulton is the owner of the premises, it follows that plaintiffs may not pursue a declaration, against Fulton, that the lease is in full force and effect and there exists no leasehold violations. For this reason, the court finds that Fulton has demonstrated entitlement to summary judgment as a matter of law on plaintiffs' First and Second causes of action, and plaintiffs have failed to raise a triable issue of fact. Plaintiffs' Third and Fourth causes of action for damages of \$49,000 and permanent injunction to enjoin Fulton from taking steps to terminate Aber's tenancy, respectively, raise issues related to the expenses that Aber allegedly incurred to maintain the premises as well as Fulton's standing, at this time, to enforce the terms of a lease for which it is no longer a party. Thus, the court finds that Fulton has failed to demonstrate its entitlement to summary judgment on either cause of action.

Accordingly, 887 Fulton Realty LLC's motion for summary judgment (Motion Sequence 3) is granted solely to the extent that judgment is granted in favor of 887 Fulton Realty LLC's, dismissing plaintiffs' First and Second Causes of Action.

This constitutes the decision and order of the court.

ENTER,



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HON. INGRID JOSEPH, J.S.C.

**Hon. Ingrid Joseph  
Supreme Court Justice**