

Hopkins Hawley LLC v Yarrow Two LLC

2023 NY Slip Op 30565(U)

February 24, 2023

Supreme Court, New York County

Docket Number: Index No. 150270/2021

Judge: Alexander M. Tisch

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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. ALEXANDER M. TISCH PART **18**

Justice

-----X

HOPKINS HAWLEY LLC

Plaintiff,

- v -

YARROW TWO LLC,

Defendant.

-----X

INDEX NO. 150270/2021

MOTION DATE 02/08/2022

MOTION SEQ. NO. 006

**DECISION + ORDER ON
MOTION**

The following e-filed documents, listed by NYSCEF document number (Motion 006) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198

were read on this motion to/for REARGUMENT/RECONSIDERATION.

Upon the foregoing documents, defendant moves pursuant to CPLR 2221 (d)(2) to reargue motion sequence 003, to renew motion sequence 003 pursuant to CPLR 2221 (e)(2), to disqualify and enjoin Kian Khatibi, Esq., and The Law Office of Kian D. Khatibi from appearing, litigating, or representing plaintiff in this action pursuant to CPLR 6301 and 6311, to dismiss and strike plaintiff's defenses to defendant's counterclaim for attorneys' fees and costs pursuant to CPLR 3211 (b), for summary judgment and expenses incurred by defendant landlord in the form of attorneys' fees, and to set this matter for inquest or immediate trial to determine the amount of damages to be awarded to the landlord.

This action arises out of a store lease that was entered into by and between plaintiff as tenant and defendant as landlord for the premises located at 229 Front Street, New York, NY 10038 (NYSCEF Doc No. 198, def's reply, ¶ 3). Plaintiff initiated this matter via Order to Show Cause seeking a *Yellowstone* injunction and the opportunity to cure alleged violations of the lease (*id.* at 4).

By decision and order dated November 1, 2021, the Court denied defendant's motion to disqualify Kian Khatibi, Esq. and The Law Office of Kian D. Khatibi from representing plaintiff, finding it was moot because plaintiff retained the Ilganayev Law Firm as counsel (NYSCEF Doc No. 147).

Defendant argues that it is entitled to leave to reargue motion sequence 003 because the Court overlooked or misapprehended the facts or mistakenly arrived at its November 1, 2021, decision, because plaintiff did not obtain new counsel and that Kian Khatibi, Esq. and The Law Office of Kian D. Khatibi continued to represent plaintiff.

A request to reargue "is addressed to the sound discretion of the court and may be granted only upon a showing 'that the court overlooked or misapprehended the facts or the law or for some reason mistakenly arrived at its earlier decision'" (William P. Pahl Equip. Corp. v Kassis, 182 AD2d 22, 27 [1st Dept 1992]). "An application to renew must be based upon additional material facts which existed at the time that the prior motion was made but which were not then known to the party seeking leave to renew and a valid excuse must be offered for not supplying such facts" (Cuccia v City of New York, 306 AD2d 2, 2 [1st Dept 2003]).

Here, the Court declines to grant leave to reargue but grants leave to renew. The Court did not anticipate that, after plaintiff retained separate counsel, that plaintiff's principal would continue to represent plaintiff for what the Court found to be a limited continued life of this litigation (see, e.g., NYSCEF Doc Nos 149, 201). Of course, this is something that the Court finds that Mr. Khatibi plainly cannot do, as noted on the record. Accordingly, that branch of the motion is granted.¹

¹ The Court finds it unnecessary to grant an injunction prohibiting Mr. Khatibi's firm's appearance as the order disqualifying him should bring the same result.

Pursuant to CPLR 3212, a motion for summary judgment may be granted when the moving party demonstrates that a genuine issue of material fact does not exist. A party seeking summary judgment must make a prima facie showing that they are entitled to judgment as a matter of law (Winegrad v New York Univ. Med. Ctr., 64 NY2d 851, 853 [1985]). To successfully oppose a motion for summary judgment, the opposing party must present “facts sufficient to require a trial of any issue of fact” (Zuckerman v City of New York, 49 NY2d 557, 562 [1980], quoting CPLR 3212[b]). “[M]ere conclusions, expressions of hope or unsubstantiated allegations or assertions are insufficient” to withstand dismissal (id. at 562).

Defendant argues that summary judgment is warranted and that there are no issues of fact because plaintiff has committed defaults which are prohibited under the lease, and such defaults have caused defendant to incur damages. In opposition, plaintiff argues that defendant has failed to prove a prima facie case, demonstrating that defendant is entitled to judgment as a matter of law.

The Court finds that defendant has met its prima facie burden entitling it to summary judgment by demonstrating that plaintiff violated paragraph 19 of the lease, which entitles defendant to damages for plaintiff’s failure to perform according to the terms and provisions of the lease.

“If Tenant shall default in the observance or performance of any term or covenant on Tenant’s part to be observed or performed under, or by virtue of, any of the terms or provision in any article of this lease...Owner may immediately, or at any time thereafter, and without notice, perform the obligation of Tenant thereunder, and if Owner, in connection therewith or in connection with any default by Tenant in the covenant to pay rent hereunder, makes any expenditures or incurs any obligations for the payment of money, including...reasonable attorney’s fees, in instituting, prosecuting or defending any actions or proceeding, and prevails...such sums so paid or obligations incurred with interest and costs shall be deemed to be additional rent hereunder and shall be paid by Tenant to Owner within ten (10) days of rendition of any bill or statement to Tenant therefore, and if Tenant’s lease term shall have expired at the time of making such expenditures or incurring of such

obligations, such sums shall be recoverable by Owner as damages” (NYSCEF Doc No. 157, lease, ¶ 19).

It is irrelevant that the defaults are allegedly cured as plaintiff proposes, because the mere fact that plaintiff committed the defaults and moved to obtain a Yellowstone injunction, to prevent defendant from terminating the lease, demonstrates a violation of the lease and defendant’s entitlement to summary judgment. Without more than simply alleging that defendant has failed to prove a prima facie case, the Court finds that defendant is entitled to summary judgment, and that plaintiff’s defenses to defendant’s counterclaims for attorneys’ fees and costs are dismissed.

It is hereby ORDERED that the branch of defendant’s motion for leave to renew and reargue motion sequence no. 003 is granted to the extent that leave to renew is granted and, upon renewal, the branch of the motion to disqualify Kian D. Khatibi, Esq. of The Law Office of Kian D. Khatibi, PLLC is granted; and it is further

ORDERED that the branch of the motion for summary judgment on the single counterclaim for attorneys’ fees is granted and the determination of the amount of attorneys’ fees to be awarded to defendant is referred to a Special Referee to hear and report; and it is further

ORDERED that counsel for the defendant shall, within 30 days from the date of this order, serve a copy of this order with notice of entry, together with a completed Information Sheet,¹ upon the Special Referee Clerk in the General Clerk’s Office (Room 119), who is directed to place this matter on the calendar of the Special Referee’s Part for the earliest convenient date; and it is further

ORDERED that such service upon the Special Referee Clerk shall be made in accordance with the procedures set forth in the *Protocol on Courthouse and County Clerk Procedures for*

¹ Available on the Court’s website at www.nycourts.gov/supctmanh under the “References” link on the navigation bar.

Electronically Filed Cases (accessible at the "E-Filing" page on the court's website at the address www.nycourts.gov/supctmanh).

This constitutes the decision and order of the Court.



2/24/2023
DATE

ALEXANDER M. TISCH, J.S.C.

CHECK ONE:

<input checked="" type="checkbox"/>	CASE DISPOSED	<input type="checkbox"/>	DENIED
<input checked="" type="checkbox"/>	GRANTED		

<input type="checkbox"/>	NON-FINAL DISPOSITION	<input type="checkbox"/>	OTHER
<input type="checkbox"/>	GRANTED IN PART		

APPLICATION:

SETTLE ORDER

SUBMIT ORDER

CHECK IF APPROPRIATE:

INCLUDES TRANSFER/REASSIGN

FIDUCIARY APPOINTMENT

REFERENCE