

SUPREME COURT OF THE STATE OF NEW YORK— NEW YORK COUNTY

PRESENT : DONNA M. MILLS
Justice

PART 58

WHEN HARRY MET LINDA, LLC,
Plaintiff,
-v-
ROGERS INVESTMENTS NV LP,
Defendant.

INDEX No. 100941/11
MOTION DATE _____
MOTION SEQ. No. 001
MOTION CAL No. _____

The following papers, numbered 1 to _____ were read on this motion to DISMISS.

PAPERS NUMBERED
Notice of Motion/Order to Show Cause-Affidavits- Exhibits... 1+2
Answering Affidavits- Exhibits 3+4
Replying Affidavits 5

CROSS-MOTION: _____ YES NO

FILED


Upon the foregoing papers, it is ordered:

AUG 04 2011

SEE ATTACHED DECISION

NEW YORK
COUNTY CLERK'S OFFICE

Dated: 8/2/11


J.S.C.

DONNA M. MILLS, J.S.C.

Check one: FINAL DISPOSITION

_____ NON-FINAL DISPOSITION

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: I.A.S. PART 58

-----X
WHEN HARRY MET LINDA, LLC,

Plaintiff,

Index No.
100941/11

-against-

ROGERS INVESTMENTS NV LP,

Defendant.

FILED

AUG 04 2011

-----X
DONNA MILLS, J.:

NEW YORK
COUNTY CLERK'S OFFICE
Defendant Roger Investments NV

(1) pursuant to CPLR 3211 (a) (1) and (7), dismissing the complaint, and (2) pursuant to 22 NYCRR 130-1.1, for its attorneys' fees and costs.

Plaintiff When Harry Met Linda LLC, an entity which produces and presents dramatic stage plays and musicals, brings this action to recover damages resulting from the defendant's alleged wrongful eviction of the plaintiff from 43-49 Bleecker Street, New York, N.Y. (the Premises). The following facts are undisputed. In 2007, pursuant to a written lease, defendant, the owner of the Premises, leased to Tewksbury Management Group LLC (the Tenant), the first floor and basement of the Premises, which included a theatre (the Theatre). In early 2008, after the Tenant fell behind on its rent, defendant commenced a Landlord/Tenant proceeding against it in the Civil Court, New

York County, i.e., *Rogers Investments NV LP v Tewksbury Management Group LLC, and XYZ Corp.*, L&T Index No. 52568/08 (the L&T Proceeding). The L&T Proceeding was resolved, pursuant to a stipulation, wherein the Tenant consented to, inter alia, the issuance of a warrant of eviction (the Warrant), but enforcement was stayed upon the Tenant's compliance with an agreed upon payment schedule of its arrears. After the Tenant's failure to comply with its obligations thereunder, the Warrant was executed upon by the Marshal of the City of New York (the Marshal), and an eviction was effectuated on October 13, 2010.

The plaintiff commences this action, pursuant to Real Property Actions and Proceedings Law (RPAPL) § 853, alleging, inter alia, that it obtained a license to occupy and use the Leased Premises, pursuant to a Theatre License Agreement dated November 11, 2009, with the Tenant; that plaintiff took possession and began use of the Theatre on or about September 6, 2010, that it opened the play "The Deep Throat Sex Scandal" (the Play) thereat on October 10, 2010, which was scheduled to continue performances at least through December 19, 2010 (Complaint, ¶¶ 4, 7, 8), and that plaintiff had knowledge of the Theatre License Agreement and defendant's possession, occupancy and use of the Theatre beginning on or about September 6, 2010.

It further asserts that, on October 13, 2010, defendant, through the issuance and execution of the Warrant, forcibly ejected plaintiff from the Theatre by force and/or unlawful means, which resulted in plaintiff's inability to continue presenting the Play thereat, or obtain possession of the personal property necessary to present the Play elsewhere.

Defendant now moves to dismiss the complaint on the ground that plaintiff fails to state a cause of action for damages under RPAPL 853. On a motion to dismiss, pursuant to CPLR 3211, the court's task is to determine only whether the facts as alleged, accepting them as true and according plaintiff every possible favorable inference, fit within any cognizable legal theory (*Ladenburg Thalmann & Co., Inc. v Tim's Amusements, Inc.*, 275 AD2d 243 [1st Dept 2000]). Affidavits and other evidence submitted by plaintiffs may be considered for the limited purpose of remedying any defects in the complaint, thus preserving inartfully pleaded, but potentially meritorious, claims (*Rovello v Orofino Realty Co., Inc.*, 40 NY2d 633 [1976]).

RPAPL 853, states, in pertinent part, that: "[i]f a person is disseized, ejected or put out of real property in a forcible or unlawful manner, or, after he has been put out, is held and kept out by force or by putting him in fear of personal

violence or by unlawful means, he is entitled to recover treble damages in an action therefor against the wrong-doer." This statute "requires a showing that the plaintiff was ousted from real property by the defendant in a forcible or unlawful manner" (*Retropolis, Inc. v 14th St. Dev. LLC*, 17 AD3d 209 [1st Dept 2005]).

Here, in liberally construing the complaint, it alleges that plaintiff was ejected from the Theatre by force and/or unlawful means, through the issuance and execution of the Warrant. As argued by defendant, plaintiff cannot seek damages for an unlawful eviction under RPAPL 853, in that it requires that the plaintiff establish that it had "the legal right to peaceful possession of the leased property" (*Lyke v Anderson*, 147 AD2d 18, 26 [2d Dept 1989]). Plaintiff acknowledges that it did rent the Theatre from defendant, and that it obtained its purported license to occupy and use the Theatre from the Tenant, not the defendant (Bertolino's affidavit dated 10/20/10; Complaint, ¶ 7). It is well settled that a licensee, as opposed to a tenant, acquires no possessory interest in property, and is subject to ouster without legal process by the owner (*Coppa v LaSpina*, 41 AD3d 756 [2d Dept 2007], *lv denied* 13 NY3d 706 [2009]; *P&A Brothers, Inc. v City of New York Department of Parks*

& Recreation, 184 AD2d 267 [1st Dept 1992]). Further, an entity which is not a party to a commercial lease could not recover treble damages against a landlord in an action for an unlawful eviction (*Bozewicz v Nash Metalware Co.*, 284 AD2d 288 [2d Dept 2001]). Accordingly, plaintiff, a purported licensee, and a non party to the Tenant's commercial lease, may not recover damages for an alleged unlawful eviction (*id.*; *Visken v Oriole Realty Corp.*, 305 AD2d 493 [2d Dept], *lv dismissed* 100 NY2d 639 [2003]; *Coppa v LaSpina*, 41 AD3d 756, *supra*).

However, as argued by plaintiff, parties, who may not have a superior right to possession, can assert a claim for a wrongful eviction based on a forcible entry or detainer (*Visken v Oriole Realty Corp.*, 305 AD2d 493, *supra*; *see also By the Stem, LLC v Optimum Properties, Inc.*, 20 Misc 3d 543 [Civil Ct, Kings County 2008]; *Yates v Kaplan*, 75 Misc 2d 259 [Civil Ct, NY County 1973]). This type of claim has been permitted when landlords/owners or their representatives have engaged in self-help measures to evict a party, without resorting to any legal process, and their conduct consists of threats to the occupant's employees to leave the property (*110-45 Queens Blvd. Garage, Inc. v Park Briar Owners, Inc.*, 265 AD2d 415 [2d Dept 1999]); padlocking or changing the locks to the doors of the premises

(*SITC Inc. v Riverplace I Holdings LLC*, 23 Misc 3d 219 [Civil Ct, NY County 2008]; *Braig v Palace Co.*, 1989 WL 299239 [Sup Ct, NY County 1989]; *Yates v Kaplan*, 75 Misc 2d 259, *supra*); and making threatening phone calls, padlocking the premises, and shutting off utility services (*By the Stem, LLC v Optimum Properties, Inc.*, 20 Misc 3d 543 [Civil Ct, Kings County 2008])). Here, the conduct complained of consists of padlocking or changing the locks to the doors of the Theatre by the Marshal, pursuant to the Warrant. There are no allegations in the complaint or in the supporting affidavit by David Bertolino, plaintiff's president, of self-help by the landlord, or any irregularity with respect to the issuance or execution of the Warrant. Further, a landlord is not liable for the manner in which a marshal executes a valid warrant (see *Funding Assistance Corp. v Mashreq Bank*, PSC, 277 AD2d 127 [1st Dept 2000]; *Burnell v Ocean Gates Associates*, 133 AD2d 242 [2d Dept 1987])). While Bertolino contends that there is a question of fact as to whether defendant had knowledge of plaintiff's possession, use and occupancy of the Theatre, he fails to state the relevance, if any, to plaintiff's proposed RPAPL 853 claim. Thus, plaintiff fails to allege a claim for a wrongful eviction, pursuant to RPAPL 853. Thus, defendant's motion to dismiss the complaint, pursuant to CPLR 3211 (a) (7),

is granted.

In view of the foregoing, this court need not address defendant's alternative argument, pursuant to CPLR 3211 (a) (1), for dismissal of the complaint.

Defendant also moves, pursuant to 22 NYCRR 130-1.1, for an order imposing attorneys' fees incurred in defending against plaintiff's purported frivolous complaint. The Rules of the Chief Administrator of the Courts Part 130, as set forth in 22 NYCRR 130-1.1, authorize the court, in its discretion, to impose financial sanctions upon any party in a civil matter who engages in frivolous conduct (see *Watson v City of New York*, 178 AD2d 126 [1st Dept 1991]). In order to impose sanctions, the court must find that the conduct of the plaintiff and/or its counsel was "completely without merit in law," was "undertaken primarily to delay or prolong the resolution of the litigation, or to harass or maliciously injure another"; or involved assertions of "material factual statements that [were] false" (22 NYCRR 130-1.1 [c] [1-3]; see *Premier Capital v Damon Realty Corp.*, 299 AD2d 158 [1st Dept 2002]). Plaintiff's action in commencing the instant action does not rise to the level of frivolous conduct necessary to warrant the imposition of sanctions (see *id.*). Therefore, this branch of defendant's motion is denied.

Accordingly, it is

ORDERED that the part of defendant's motion which seeks to dismiss the complaint is granted and the complaint is dismissed in its entirety, with costs and disbursements to defendant as taxed by the Clerk of the Court, and the Clerk is directed to enter judgment accordingly in favor of the defendant; and it is further

ORDERED that the part of defendant's motion which seeks sanctions against plaintiff is denied.

Dated: 8/2/11

FILED

AUG 04 2011

ENTER:

NEW YORK
COUNTY CLERK'S OFFICE



J. S. C.