CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK: NON-HOUSING PART 52

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PILATES ISLAND INC. d/b/a PARK EAST PILATES,

Petitioner-Tenant,

-against-

1045 MADISON OWNER LLC,

Respondent-Landlord.

Index No. LT - 063580/18

ORDER WITH NOTICE OF ENTRY

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S I R S:

PLEASE TAKE NOTICE, that the within is a true copy of a Decision/Order by the Honorable Louis L. Nock, dated June 29, 2018.

Dated: New York, New York
July 5, 2018

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Attorneys for Respondent-Landlord

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Index No. LT-063580-18/NY
Motion Sequence No. 001

DECISION AND ORDER

LOUIS L. NOCK, J.

This matter came on for argument before this court by way of an order to show cause dated June 1, 2018, that was not issued by the undersigned. It was submitted to another member of this court by the tenant-party in this matter, which is Pilates Island Inc., d/b/a Park East Pilates (the "Tenant"), bearing the title "Order to Show Cause for Restoration and Award of Damages for Unlawful Eviction." Although an order to show cause may be submitted "in lieu of a notice of petition" in a special proceeding (CPLR 403 [d]; RPAPL 733 [2]), there still must be a petition (*see,* CPLR 403 [a], [b]; RPAPL 731 [1]), which Tenant has failed to submit. Tenant's only accompaniment to its procured order to show cause is an affirmation of its counsel, Nathaniel Muller, Esq., dated June 1, 2018 (the "Attorney Affirmation").

By said order to show cause, Tenant asks this court for an order restoring it to premises at 1045 Madison Avenue, Fifth Floor, New York, New York 10075; and enjoining the landlord-party in this matter, 1045 Madison Owner LLC (the "Landlord"), from preventing such restoration and from re-letting said premises. In other words, this ostensible summary proceeding commenced by Tenant in the manner that it did, is in the nature of what is commonly known as a reverse holdover proceeding, or illegal lockout, authorized by RPAPL 713 (10).

Tenant, by its procured order to show cause in this ostensible summary proceeding, also asks this court, *inter alia*, for an order awarding it compensatory, treble, and punitive damages. None of those categories of relief is available within the procedural context of this ostensible RPAPL Article 7 summary proceeding.[1] Thus, those categories of relief are denied on that procedural basis.[2]

In stark contrast to the scant and largely defective submission by Tenant, Landlord has submitted a detailed opposition consisting not only of its counsel's affirmation (Affirmation of Jeremy B. Honig, Esq., dated June 5, 2018 [the "Honig Aff."]); but also the sworn affidavits of actual fact witnesses attesting to relevant matters from their own personal knowledge (Affidavit of Senior Property Manager Tony Nezaj, sworn to June 5, 2018 [the "Nezaj Aff."]; Affidavit of Property Manager Account Executive Andrew Di Schino, sworn to June 5, 2018 [the "Di Schino Aff."], and Affidavit of Landlord Representative Yoseph Manor, sworn to June 5, 2018 [the "Manor Aff."]).

BACKGROUND

Tenant leased the subject premises from Landlord's predecessor pursuant to a written and fully executed lease agreement dated December 14, 2016 (Manor Aff. ¶ 5, Exh. D). That leasehold was extended by way of four separate and successive Extension of Lease Agreements (Manor Aff. ¶ 5, Exh. E). The final extension expired on December 31, 2017 (*see, id.*, Exh. E [Extension of Lease dated December 26, 2016]).

Prior to the December 31, 2017, expiration date, Landlord acquired ownership of the building containing the subject premises by deed dated October 24, 2017 (Manor Aff. ¶ 3, Exh.

[1] *Compare* RPAPL art 7 *with* RPAPL 853 (the latter, authorizing a separate "action" – not a summary proceeding – in redress of damages occasioned by an unlawful ejection from real property).
[2] Substantive basis for denial of said relief exists, as well, due to the dismissal of the entire proceeding, as set forth later in this decision.

C). By written and fully executed Surrender Agreement dated January 5, 2018, Tenant agreed to vacate and surrender the subject premises to Landlord by 3:00 p.m. on May 31, 2018 (the "Vacate Date," so defined in said agreement at § 2), with time being of the essence (Manor Aff. ¶ 7, Exh. H; Nezaj Aff. ¶ 9).

On May 31, 2018 – the vacate day identified in the Surrender Agreement – Tenant moved out of the subject premises, including all of its heavy Pilates equipment and signage (Di Schino Aff. ¶¶ 7-11). The only items left behind by Tenant were a computer, a ceiling fan, an air conditioner, and some cleaning supplies (*id.*, ¶ 10). Although the vacate time stated in the Surrender Agreement was 3:00 p.m. (Manor Aff. ¶ 7, Exh. H § 2), Landlord waited till much later – midnight – before it changed the locks on the subject premises (Di Schino Aff. ¶¶ 10-11).

DISCUSSION

The Attorney Affirmation is without evidentiary value

Assuming, as Tenant apparently desires, that this matter is to be cast as a special summary proceeding under RPAPL 713 (10) for illegal lockout: "The standards governing motions for summary judgment are applicable to special proceedings generally, of which the summary proceeding to recover possession of real property is a species." (*Brusco v Braun*, 199 AD2d 27, 31 [1st Dept 1993] [citations omitted], *affd,* 84 NY2d 674 [1994].) Therefore, the petitioner must tender evidentiary proof in admissible form sufficient to warrant the court as a matter of law in directing judgment in its favor (*see, Zuckerman v City of New York*, 49 NY2d 557 [1980]). This standard has not been met. The Attorney Affirmation is not attested by a witness with actual knowledge concerning the relevant facts of this matter; but rather, by Tenant's attorney, Mr. Muller, concededly, "upon information and belief" (Attorney Affirmation at unnumbered page 1). Nor does it offer any reason, at all, why no supporting affidavit from

any actual fact witness was submitted by Tenant. "While RPAPL 741 permits a petition to be verified by the attorney for the landlord, it is well settled that an affidavit of counsel is of no probative value for purposes of summary determination unless accompanied by documentary evidence" (*Brusco, supra,* at 32 [citations omitted]). Although three exhibits are annexed to the Attorney Affirmation, no basis for the authenticity or admission of said exhibits is provided by the attorney-affiant, Mr. Muller.[3] Neither the Attorney Affirmation or its unauthenticated exhibits amount to evidence, let alone in admissible form.

Additionally, even assuming for the moment that the Attorney Affirmation and its exhibits could constitute competent evidence in this matter, they do not demonstrate that Tenant was in actual or constructive possession of the subject premises at the time Landlord took possession, which is an essential element of an illegal lockout proceeding (*see*, RPAPL § 713 [10]).

Accordingly, Tenant has not met its burden of proof herein, and the proceeding is dismissed on that basis.

Tenant surrendered the subject premises

The admissible evidence in this proceeding demonstrates that Tenant intended to, and did, surrender possession of the subject premises pursuant to the parties' Surrender Agreement, and that Landlord accepted such surrender. The surrender was manifest by the express agreement of the parties, as set forth in their Surrender Agreement, as well as by the parties'

[3] The three exhibits present as: (i) a partially executed, or draft, copy of a surrender agreement – in contrast to the fully executed Surrender Agreement between the parties, identified and annexed to the Manor Affidavit (*see*, Manor Aff. ¶ 5, Exh. H); (ii) email exchanges between attorneys for the parties, none whom is the affiant, Mr. Muller; and (iii) a copy of a photograph of a door secured by a chain and padlock, with no indication of who took the photograph, when it was taken, where it was taken, or any other authenticating indicia necessary for it to possess any probative value of anything, let alone as admissible evidence of anything sufficient to satisfy Tenant's burden in this ostensible special summary proceeding.

actions taken consistent therewith. "A surrender by operation of law occurs when the parties to a lease both do some act so inconsistent with the landlord-tenant relationship that it indicates their intent to deem the lease terminated" (*Riverside Research Inst. v KMGA, Inc.*, 68 NY2d 689, 691 [1986]). Tenant's actions reflect both an intention to surrender the subject premises and its actual surrender thereof, as follows.

In addition to the undeniable fact of the existence of the Surrender Agreement itself: Tenant arranged for Landlord's Senior Property Manager – Tony Nezaj – to conduct a walkthrough of the subject premises shortly before the Vacate Date fixed in the Surrender Agreement (Nezaj Aff. ¶¶ 11-13, Exhs. K, L). Tenant requested, and received, from Mr. Nezaj a letter of recommendation for Tenant, for consideration by Tenant's prospective landlord (Nezaj Aff. ¶¶ 14-15, Exhs. M, N). Tenant provided Mr. Nezaj with an insurance certificate for the moving company it retained to conduct the move out of the subject premises (Nezaj Aff. ¶ 16, Exh. O). Most notably, Tenant actually did move out on May 31, 2018 – the vacate day fixed in the Surrender Agreement – taking with it all its heavy equipment and other belongings, leaving behind nothing more than a computer, a ceiling fan, an air conditioner, and some cleaning supplies (Di Schino Aff. ¶ 10), and as to which Landlord, through its counsel, afforded Tenant a post-surrender opportunity for access and retrieval (Honig Aff. ¶ 57, Exh. Y).

Thus, there can be no doubt that Tenant surrendered the subject premises – and on the very vacate day fixed in the parties' Surrender Agreement. Consonantly, there can be no doubt that Landlord accepted Tenant's said surrender, as evidenced by an email communication from Landlord's counsel to Tenant's counsel, dated June 1, 2018 – the day following the Vacate Date – confirming that: "Our client now has legal and physical possession of the Premises free and clear of any occupants, tenants and/or residents and, as such, our client changed the locks to the

Premises last night. . . ." (Honig Aff. ¶ 57, Exh. Y.) Consistent with said acceptance of surrender, Landlord caused the vacated premises to be inspected subsequent to Tenant's move-out and, after confirming the fact of said move-out, changed the locks on the already-vacated premises (Di Schino Aff. ¶¶ 10-11; Manor Aff. ¶¶13-15). Such actions are entirely consistent with an acceptance of Tenant's surrender.

Because Tenant surrendered possession of the subject premises, as anticipated by the parties' Surrender Agreement, and such surrender was accepted by Landlord, Tenant possesses no cognizable right whatsoever to restoration to its pre-surrender possession. This proceeding is, therefore, dismissed on said ground, distinct of the ground for dismissal discussed hereinabove.[4]

The parties' reciprocal requests for sanctions are denied

Each side seeks an order from this court, sanctioning the other (*see*, Order to Show Cause; Honig Aff. ¶ 75). Said relief is discretionary (22 NYCRR 130-1.1). As of the present time, this court declines to impose such measures.

[4] The parties expend a modicum of effort discussing whether Tenant encountered some physical obstacles during its move-out on the vacate day (*Compare* Attorney Affirmation ¶ 9 *with* Di Schino Aff. ¶ 5). It is of no consequence. As discussed in the text hereinabove, the move-out occurred, as demonstrated by the admissible evidence presented by Landlord. Tenant counsel's odd assertion that Landlord somehow prevented the move-out that indisputably occurred is deserving of no weight.

CONCLUSION

For the reasons set forth hereinabove, it is hereby

ORDERED that this proceeding is dismissed, and that the relief requested in the Order to Show Cause dated June 1, 2018, procured by Tenant, is denied; and it is further

ORDERED that the temporary stay set forth in said Order to Show Cause is lifted, except that Landlord shall afford Tenant an opportunity to retrieve its leftover belongings from the subject premises, under Landlord's supervision, for a period of two business days following service of a copy of this decision and order on Tenant's counsel; and it is further

ORDERED that Landlord's request for sanctions is denied.

Dated: New York, New York
June 29, 2018

ENTER:

Louis L. Nock, J.C.C.