

<b>W.J. Enterprise, Inc. v Nomad 28th St. LLC</b>
2019 NY Slip Op 32761(U)
September 20, 2019
Supreme Court, New York County
Docket Number: 152208/2019
Judge: Andrew Borrok
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# SUPREME COURT OF THE STATE OF NEW YORK NEW YORK COUNTY

PRESENT: HON. ANDREW BORROK PART IAS MOTION 53EFM

*Justice*

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W.J. ENTERPRISE, INC. D/B/A MS. KIM'S KARAOKE

Plaintiff,

- v -

NOMAD 28TH STREET LLC,

Defendant.

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INDEX NO. 152208/2019

MOTION DATE 09/05/2019

MOTION SEQ. NO. 001

## DECISION + ORDER ON MOTION

The following e-filed documents, listed by NYSCEF document number (Motion 001) 26, 27, 28, 29, 30, 31, 32, 33, 34, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45

were read on this motion to/for CONSOLIDATE/JOIN FOR TRIAL.

Upon the foregoing documents and for the reasons set forth on the record (9/20/2019), plaintiff's motion pursuant to CPLR 602 to remove a subsequently-filed summary proceeding captioned *Nomad 28th Street LLC v W.J. Enterprise, Inc.* (L&T Index No. 19N065377) (the **Second Proceeding**) from Part 52 of New York County Civil Court and consolidating it with this action (the **First Action**) is denied, without prejudice to any relief plaintiff may wish to seek in Part 52 (i.e., a stay).

On March 1, 2019, W.J. Enterprise, Inc. d/b/a Ms. Kim's Karaoke (**WJ**) commenced the First Action against its landlord Nomad 28<sup>th</sup> Street LLC (**Nomad**) for breach of the parties' lease (the **Lease**) dated June 2016 for a commercial space located in a building (the **Building**) located at 6-8 West 28<sup>th</sup> Street, New York, NY (NYSCEF Doc. No. 28; Shaw Aff., Ex. 1; NYSCEF Doc. No. 40). As relevant, WJ alleges that after it spent over a million dollars on building-out its space, it discovered that the Building's base fire alarm system and related permits were not in place as

required under the Lease, resulting in WJ's FDNY permits being rejected and keeping WJ from opening its business.

The parties entered a stipulation dated May 17, 2019 extending Nomad's time to "answer, move or otherwise respond" to WJ's summons and verified complaint to July 12, 2019 (NYSCEF Doc. No. 29; Shaw Aff., Ex. 2). On July 12, 2019, Nomad filed an Answer with Affirmative Defenses and Counterclaim (the **Answer**) (NYSCEF Doc. No. 30, Shaw Aff., Ex. 3). The counterclaim seeks attorneys' fees in the event that Nomad prevails in this action, in accordance with the prevailing party provision of the parties' lease. The issues relating to the fire alarm system and associated permits were resolved in early July 2019.

On August 8, 2019, Nomad filed the Second Action for unpaid rent in the Non-Housing Part 52 of Civil Court, New York County seeking a total of \$811,515.43 in unpaid rent (NYSCEF Doc. No. 32, Shaw Aff., Ex. 4). WJ argues that, by commencing the Second Action rather than asserting its claim as a counterclaim in the First action, Nomad is attempting an "end run of the discovery process," and urges this court to consolidate the two actions (Memo. in Supp., p. 3). Nomad argues that the parties' Lease precludes consolidation because it contains "no set-off" and "waiver of counterclaims" provisions that should not be circumvented by the consolidation of the two lawsuits.

Specifically, section 2(C) of the Lease provides:

Tenant shall pay all Fixed Rent and Additional Rent due hereunder ... in advance, in equal monthly installments on the first day of every month, without any prior notice, demand, off-set, deduction or abatement whatsoever

(NYSCEF Doc. No. 40).

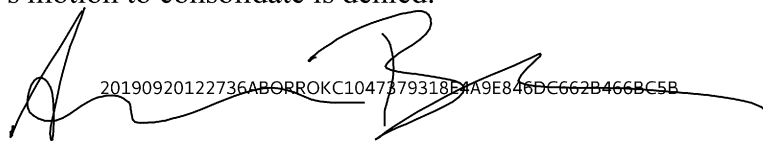
Section 20 (N) provides:

If Landlord commences any summary proceeding for nonpayment of rent, Tenant will not interpose any non-mandatory counterclaim of whatever nature or description in any such proceeding

(*id.*).

Nomad argues that WJ is “attempting to consolidate the [Second Action] with the [First Action] in an effort to, in effect, off-set its obligation to pay rent to Landlord (in violation of § 2(C) of the Lease) and to interpose an unrelated counterclaim against Landlord in response to its claim for unpaid rent (in violation of § 20(N) of the Lease)” (Memo in Opp., p. 7). Generally, consolidation of two related actions would be appropriate where they involve the same parties and common questions of law and/or fact, and the latter filed action would be consolidated into the first filed action (CPLR 602[b]; *see also* *Moretti v 860 W. Tower*, 221 AD2d 191 [1<sup>st</sup> Dept 1995]). However, where a lease contains a “waiver of counterclaim” provision, such provision may not be circumvented by consolidating the landlord’s summary proceeding with the Supreme Court action (*LRHC Flatbush NY v Aftor T. Realty*, 282 AD2d 577 [2d Dept 2001]). Waiver of counterclaim provisions in a lease are enforceable and, where the parties have agreed to such waiver in a lease, they are bound by its terms (*Amdar Co. v Hahalis*, 145 Misc 2d 987, 988 [App Term 1990] [tenant’s counterclaims for lost business damages based on landlord’s negligent elevator maintenance must be severed because not “inextricably related to landlord’s cause of action for rent”]). For the avoidance of doubt, and as discussed on the record, to the extent that the issues in this proceeding are materially related to the Second Action, WJ may always move for a stay of the Second Action in Part 52.

Accordingly, it is ORDERED that the plaintiff's motion to consolidate is denied.

  
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9/20/2019  
DATE

ANDREW BORROK, J.S.C.

CHECK ONE:

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CASE DISPOSED

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NON-FINAL DISPOSITION

☐

GRANTED

☒

DENIED

☐

GRANTED IN PART

☐

OTHER

APPLICATION:

☐

SETTLE ORDER

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SUBMIT ORDER

CHECK IF APPROPRIATE:

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INCLUDES TRANSFER/REASSIGN

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FIDUCIARY APPOINTMENT

☐

REFERENCE