LL 1371 First Ave., LLC v Islam
2017 NY Slip Op 30634(U)
April 3, 2017
Supreme Court, New York County
Docket Number: 153201/2014
Judge: Nancy M. Bannon
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 42
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LL 1371 FIRST AVENUE, LLC

Plaintiffs

Index No. 153201/2014

v

DECISION AND ORDER

MUHAMMED S. ISLAM and S.A.S. NEWSSTAND CORP.

MOT SEQ 001, 002

Defendants.
----------X

NANCY M. BANNON, J.:

I. INTRODUCTION

This is an action by a landlord, inter alia, to recover damages for its tenants' conversion of approximately $144,000 worth of metered water from 2011 through 2014, and for a judgment declaring that the tenants are not entitled to divert that water for their own use. The plaintiff landlord moves pursuant to CPLR 3212 for summary judgment on the issue of liability on the first and second causes of action against the defendant tenants Muhammed S. Islam and S.A.S. Newsstand Corp. (SAS), respectively, and dismissing SAS's counterclaims, and pursuant to CPLR 3211(b) to dismiss SAS's affirmative defenses (SEQ 001). The defendants move for leave to amend the answer and counterclaims so as to assert them on behalf of Islam (SEQ 002).

The plaintiff's motion is granted to the extent that (a) it is awarded summary judgment on the issue of liability on the

second cause of action, which was asserted against SAS, (b) it is awarded summary judgment dismissing the first through tenth counterclaims asserted by SAS, and (c) the affirmative defenses asserted by SAS are dismissed pursuant to CPLR 3211(b). The plaintiff's motion is otherwise denied. The defendants' separate motion is denied.

II. BACKGROUND

In December 2012, the plaintiff purchased the subject mixed-use building on First Avenue and East 72nd Street in Manhattan.

In September 2008, Islam took possession of commercial retail space in the building in order to operate a candy, tobacco, and convenience shop In connection therewith, he entered into an assignment and assumption agreement with Mohammed Azam, an existing commercial tenant in the building, pursuant to which he agreed to accept the assignment of a 1994 lease between Azam and the plaintiff's predecessor-in-interest, 1371 First Avenue, LLC (1371), and assume all of Azam's obligations. The lease term of the 1994 lease was extended until November 30, 2012, and modified on September 25, 2008, by 1371 and Islam to include a basement storage area as part of the leasehold. In September 2012, Islam transferred his business to SAS, a corporation in which he is a principal. Shortly thereafter, 1371 entered into a 10-year lease with SAS, with a term beginning on

December 1, 2012, and terminating November 30, 2022 (the 2012 store lease). Upon the plaintiff's purchase of the building on December 17, 2012, it executed an assignment and assumption, pursuant to which it assumed most of 1371's obligations with respect to the building, including those set forth in the 2012 store lease with SAS, and accepted the assignment of 1371's right to enforce both the 1994 lease and the 2012 store lease.

According to Brian Rafferty, the director of operations of the plaintiff's managing agent, he began to review the plaintiff's water bills in April 2013, and noticed significant increases in the amounts of water used and water charges billed from 2008 through 2013. In order to investigate the reason for these increases, he visited the basement area that had been added to the leasehold in 2008, observed and traced water piping, and discovered that a store tenant, likely Islam, had tapped into the building's water supply in order to supply "once-through water-cooled refrigeration units," which need large amounts of water for their operation.

On April 3, 2014, the plaintiff commenced this action against Islam and SAS, alleging, among other things, that, beginning in 2011, Islam, and thereafter SAS, wrongfully diverted metered water from the building in order to operate the refrigeration units in the shop and to make ice. The plaintiff alleged that the terms of both the 1994 lease that was assigned

to Islam, and the 2012 store lease between 1371 and SAS, obligated those tenants to seek approval to tap into the building's water supply, and to pay for water that was used, or to otherwise make their own arrangements with the City of New York for the supply of water. As relevant here, the complaint alleges that Islam (first cause of action), and then SAS (second cause of action), converted a valuable resource to their own use.

After the parties executed a stipulation extending the defendants' time to answer, SAS served an answer with counterclaims, but Islam did not answer the complaint. SAS denied all substantive allegations of liability, and asserted, as a defense, that the plaintiff lacked standing. It also asserted, as affirmative defenses, inter alia, that the action was time-barred and the plaintiff waived any right to collect for use of the water. SAS counterclaimed to recover credits and set-offs for its own expenditures in removing refrigeration equipment, making improvements to the electrical system, and paying overcharges, as well as for interference with its peaceful possession of the premises, for an award of costs and sanctions for prosecution of a frivolous action, and to recover business disparagement by virtue of the commencement of this action.

The plaintiff now moves for summary judgment on the first and second causes of action and dismissing the counterclaims, and to dismiss the affirmative defenses. The defendants separately

move for leave to serve an amended answer and counterclaims on behalf of Islam as well as SAS.

III. DISCUSSION

A. MOTION FOR LEAVE TO AMEND THE ANSWER AND COUNTERCLAIMS

Although Islam's submission of an executed stipulation extending his time to answer constitutes an appearance in the action (see Nardi v Hirsch, 245 AD2d 205 [1st Dept. 1997]), his failure to serve an answer after appearing constitutes a default. See Paulus v Christopher Vacirca, Inc., 128 AD3d 116 (2nd Dept. 2015). Under the circumstances here, the defendants' motion for leave to amend the answer and counterclaims so as to assert them on behalf of Islam is simply a mislabeled motion to vacate Islam's default in answering the complaint and compelling the plaintiff to accept a late answer. "To extend the time to answer the complaint and to compel the plaintiff to accept an untimely answer as timely, a defendant must provide a reasonable excuse for the delay and demonstrate a potentially meritorious defense to the action." Mannino Dev., Inc. v Linares, 117 AD3d 995, 995 (2nd Dept. 2014). Since Islam has shown neither a reasonable excuse nor a potentially meritorious defense to the allegations against him, the defendants' motion must be denied.

In any event, while leave to amend a pleading should be

freely granted, it should not be granted where there is an

inordinate, unexplained delay in seeking that relief that prejudices a party to the action. See Alcala v Soundview Health Ctr., 77 AD3d 591 (1st Dept. 2010); Heller v Louis Provenzano, Inc., 303 AD2d 20 (1st Dept. 2003). The defendants waited until September 14, 2016, or almost 2 1/2 years after the commencement of this action, to seek leave to amend, thus prejudicing the plaintiff in formulating a litigation strategy as to its claims against Islam individually. See Chemicraft Corp. v Honeywell Protection Servs., 161 AD2d 250 (1st Dept. 1990).

B. MOTION FOR SUMMARY JUDGMENT ON FIRST CAUSE OF ACTION AGAINST ISLAM

Notwithstanding Islam's default, the plaintiff, rather than moving for leave to enter a default judgment against him (CPLR 3215), seeks relief against him under CPLR 3212. This is improper since CPLR 3212(a) provides that "[a]ny party may move for summary judgment . . . after issue has been joined." Consequently, a motion for summary judgment on a complaint presupposes the joinder of issue. See Wittlin v Schapiro's Wine Co., 178 AD2d 160 (1st Dept. 1991); see also Spagnoletti v Chalfin, 131 AD3d 901 (1st Dept. 2015). The plaintiff's motion as against Islam must, therefore, be denied, albeit without prejudice to the submission of a proper motion for leave to enter a default judgment against him pursuant to CPLR 3215. See Salhi v 190 Mgt. LLC, 2016 NY Slip Op 32467(U), 2016 NY Misc LEXIS 4675

(Sup Ct, N.Y. County 2016) (Bannon, J.).

C. MOTION FOR SUMMARY JUDGMENT ON THE SECOND CAUSE OF ACTION AGAINST SAS

The second cause of action alleges that, from December 1, 2012, forward, SAS converted, to its own use, copious amounts of water provided by the City to 1371 and the plaintiff, that the City billed 1371 and the plaintiff for that water in the sum of approximately $34,000, and that SAS, as 1371's assignee, has the right to recover the value of building assets that were converted when 1371 owned the building.

In support of its motion for summary judgment, the plaintiff submits the pleadings, Rafferty's affidavit, and an attorney's affirmation. In his affidavit, Rafferty, in addition to making the assertions described above, submits water bills for the building, and authenticates the plaintiff's documentary submissions, which include copies of the deed, the 1994 lease and 2008 modification, an undated but executed contract for the sale of the initial tenant's business to Islam, the 2012 store lease, and a rider thereto. Rafferty also annexes and authenticates the assignment and assumption given by 1371 to the plaintiff, Islam's assignment of his business assets and obligations to SAS, and the transcript of Islam's deposition.

Rafferty asserts, upon his personal knowledge, that SAS is tapping into the line by which the City provides water to the

plaintiff's building, SAS has no permission to tap into that line, SAS has used a significant amount of water from the time that its lease term commenced on December 1, 2012, the plaintiff and 1371 have been billed by the City for that water, and the plaintiff assumed the obligation to pay 1371's water bills.

In opposition, the defendants submit an attorney's affirmation and an affidavit from Islam. Islam's affidavit primarily addresses his own potential personal liability, which has been rendered academic in light of the court's determination to deny that branch of the plaintiff's motion which is addressed to him. Other than his assertion that neither he nor SAS ever used the building's water to make ice, the remainder of his affidavit either addresses purely legal issues, makes claims for small credits and set-offs, or describes incidents in which Rafferty and Rafferty's coworkers allegedly "yelled" at him or his partners, or in which the plaintiff places recyclables and trash generated by the building's residents on the curb in front of SAS's store for collection, thus interfering with the quiet possession of the leasehold.

The plaintiff established its prima facie entitlement to judgment as a matter of law against SAS on the issue of liability on the second cause of action. A cause of action sounding in conversion requires proof that the plaintiff had a possessory right or interest in the disputed property and that the defendant

exercised dominion over the property or interfered with it, in derogation of the plaintiff's rights. See Pappas v Tzolis, 20 NY3d 228 (2012); Joseph P. Carroll Ltd. v Ping-Shen, 140 AD3d 544 (1st Dept. 2016). The wrongful diversion of utility services constitutes a conversion. See Good Sports of N.Y., Inc. v Llorente, 280 AD2d 261 (1st Dept. 2001). Moreover, where, as here, a lease imposes no duty upon a landlord to furnish water to a tenant free of charge, and the tenant, without permission, nonetheless takes the water provided to the landlord by the City, the tenant is liable to pay the landlord for that water to the extent that the landlord is ultimately responsible to the City. See New York Univ. v American Book Co., 132 App Div 732 (1st Dept. 1909), affd 197 NY 294 (1910). The plaintiff demonstrated, prima facie, that it had a possessory right in the water supplied to it by the City, and that SAS exercised dominion over and interfered with it, thus injuring the plaintiff. It also made a prima facie showing that it had no duty to supply water to SAS, let alone free water, that SAS nonetheless took water provided to it by the City without its permission, and that it thereupon became responsible to the City to pay for SAS's use of the water.

1. NO DUTY TO PROVIDE WATER TO SAS

Paragraph 49(a) of the rider to the 2012 store lease between 1371 and SAS provides, in relevant part, that SAS "acknowledges that Owner shall have no obligation to supply the Demised

Premises with utility services including, but not limited to, gas, electric or internet service. In connection therewith, [SAS] agrees that it will make its own arrangements with the public utility companies servicing Building." Even though the issue of water supply is not expressly enumerated in that paragraph, the use of the phrase "including, but not limited to" compels the conclusion that the parties intended that no obligation was to be imposed upon the owner with respect to the provision of any and all utility services, not just those enumerated. See Vucetovic v Epsom Downs, Inc., 45 AD3d 28 (1st Dept. 2007). It is beyond dispute that the provision of water is a utility service within the common meaning and understanding of the phrase. See Dermody v Tilton, 85 AD3d 1682 (4th Dept. 2011).

Paragraph 3 of the 2012 store lease permits SAS to make nonstructural alterations, additions, installations or improvements to the leasehold, provided that they do not "affect utility services or plumbing . . . lines." This provision is supplemented by paragraph 44(a) of the rider, which provides that all fixtures, equipment, improvements, installations, and appurtenances that are permanently attached or built into the leasehold remain the property of the owner. Other than these provisions, and the requirement that SAS maintain a workable sprinkler head for fire suppression, there is nothing else in the lease or rider that addresses water supply. The general

assignment dated December 17, 2012, demonstrates, prima facie, that the plaintiff acceded to 1371's rights and obligations under the 2012 store lease.

These lease and assignment provisions establish that neither the plaintiff nor 1371 had an obligation to supply water to SAS.

Thus, Rafferty's affidavit and the annexed water bills establish, at the very least, that SAS tapped into the building's water supply in order to operate its refrigeration equipment, or employed taps previously installed by Islam or other assignees of the 1994 lease for that purpose, that SAS did so without written permission from the plaintiff or 1371, and that this unauthorized usage significantly increased the expenses that both the plaintiff and 1371 incurred for water from December 1, 2012, until at least early 2014.

2. NO WAIVER OF THE PLAINTIFF'S RIGHT TO CHARGE FOR WATER

A waiver is an intentional, voluntary relinquishment of a known right. See Jefpaul Garage Corp. v Presbyterian Hosp. in City of N.Y., 61 NY2d 442 (1984); Russo v Rozenholc, 130 AD3d 492 (1st Dept. 2015). Paragraph 24 of the 2012 store lease provides that

> "the failure of Owner to seek redress for violation of, or to insist upon the strict performance of any covenant or condition of this lease shall not prevent a subsequent act which would have originally constituted a violation from having all the force and effect of an original violation."

Moreover, paragraph 20 of the 2012 store lease provides that no rights or licenses are deemed to be acquired by SAS by implication. Hence, any failure of 1371 to demand payment of SAS for use of water between December 1, 2012, and December 17, 2012, did not create any right to continued free usage or a license to tap into the water line. Nor did the plaintiff's determination to wait until April 3, 2014, to commence this action constitute a waiver. The 1994 lease contained a provision identical to paragraph 24 of the 2012 store lease. Hence, any failure of 1371 to demand payment from Islam for water usage under the 1994 lease from September 25, 2008 to December 1, 2012—or from any tenant or occupant from 1994 to 2008—does not constitute a waiver of either 1371's or the plaintiff's right to demand it now.

3. DEFENDANTS' OPPOSITION

In opposition to the plaintiff's showing, Islam's affidavit fails to raise a triable issue of fact as to SAS's liability, or as to whether the no-waiver clauses in the 1994 lease and 2012 store lease are unenforceable. See Excel Graphics Techs., Inc. v CFG/AGSCB 75 Ninth Ave., LLC, 1 AD3d 65 (1st Dept. 2003). Islam does not deny that SAS tapped into the building's water supply or that neither he nor SAS sought permission from 1371 or the plaintiff to do so. To the extent that he asserts that neither he nor SAS ever used the water supplied to the building in order

to make ice, this assertion only goes to the extent of damages, not to the issue of liability for unauthorized use of the water.

D. DISMISSAL OF DEFENSES AND AFFIRMATIVE DEFENSES

There is no merit to SAS's defenses or affirmative defenses.

An assignee stands in the shoes of its assignor. See American States Ins. Co. v Huff, 119 AD3d 478 (1st Dept. 2014). The plaintiff, as the assignee of all rights and obligations of the prior owner of the building, thus has standing to enforce both the 1994 lease and the 2012 store lease, and to recover for conversion of its own property, as well as such property that was subject to the assignment and wrongfully taken from 1371. See Sterling Natl. Bank v Polyseal Packaging Corp., 104 AD3d 466 (1st Dept. 2013).

As noted above, there is no merit to SAS's affirmative defense that the second cause of action is barred by the doctrine of waiver.

Nor is the second cause of action barred by the three-year limitations period applicable to conversion actions. This action was commenced in 2014, and SAS did not even begin to convert the water to its own use until December 1, 2012. Moreover, the plaintiff only seeks to recover damages on the conversion causes of action that began to accrue as of April 3, 2011, or precisely three years prior to the date of commencement. Hence, the second

cause of action was timely interposed against SAS. See Stanley v Morgan Guaranty Trust Co. of N.Y., 173 AD2d 390 (1st Dept. 1990).

All of the claims asserted in the complaint properly state causes of action, based on conversion, as explained above (first and second causes of action), breach of contract for failure to comply with the terms of the 2012 store lease (third cause of action)(see Community Counseling & Mediation Servs. v Chera, 115 AD3d 589 [1st Dept. 2014]), and for declaratory relief referable to the future rights and obligations of the parties as to the supply and use of water (fourth cause of action). See Matter of Patchogue-Medford Congress of Teachers v Board of Educ. of Patchogue-Medford Union Free School Dist., 70 NY2d 57 (1987).

The other allegations in the answer that are characterized as defenses, in effect, constitute simple denials of the plaintiff's right to recover.

E. SUMMARY JUDGMENT DISMISSING COUNTERCLAIMS

1. FIRST COUNTERCLAIM: COST OF REMOVING REFRIGERATORS

The plaintiff's submissions also establish its prima facie entitlement to judgment as a matter of law dismissing SAS's counterclaims. The plaintiff established, prima facie, that it properly informed SAS that SAS must seek and obtain approval for the use of and then pay for the water, unless SAS made its own arrangements with the City to provide and bill SAS for water.

Failing that, it properly informed SAS that the refrigeration units had to be removed or rendered inoperable. In opposition, Islam's affidavit only asserts in conclusory fashion that the plaintiff's demand for removal was "wrongful." SAS thus failed to raise a triable issue of fact as to the validity of its first counterclaim, which seeks a credit for the costs incurred in removing the units.

2. SECOND AND THIRD COUNTERCLAIMS: LATE CHARGES AND ATTORNEY'S FEES

The plaintiff also established that it had the right, under paragraphs 43(f) and 62 of the store lease, to add appropriate late fees and legal fees to the monthly rent bill, and that it properly added such charges to SAS's bill because SAS tendered late rent payments and the plaintiff incurred legal fees in pursuing collection. In opposition, Islam's affidavit does not raise a triable issue of fact as to the timeliness of SAS's rent payments or the legitimacy of the $900 in attorney's fees added to the bill. In fact, at his deposition, he could not explain why he believed that these charges were wrongful, or represented improper overcharges. Hence, summary judgment must be awarded to the plaintiff dismissing the second and third counterclaims.

3. FOURTH COUNTERCLAIM: SET-OFF FOR TENANT'S ELECTRICAL WORK

The plaintiff established that there was no basis for SAS's claim to a set-off for amounts incurred in performing electrical

work within the leasehold, as it demonstrated that there was no electrical work actually undertaken by SAS. In opposition, Islam's affidavit failed to raise a triable issue of fact as to what work was performed, or how much was actually expended thereon. Thus, the plaintiff is entitled to summary judgment dismissing the fourth counterclaim.

4. FIFTH AND SIXTH COUNTERCLAIMS: BREACH OF COVENANT OF QUIET ENJOYMENT

"In the absence of a constructive eviction, there is no breach of the covenant of quiet enjoyment." Board of Mgrs. of Saratoga Condo. v. Shuminer, _____ AD3d _____, 2017 NY Slip Op 02381, *1 (1st Dept 2017). "A constructive eviction occurs when a tenant, though not physically barred from the area in question, is unable to use the area for the purpose intended." Dinicu v Groff Studios Corp., 257 AD2d 218, 224 (1st Dept. 1999).

The plaintiff, relying on, among other things, the transcript of Islam's deposition and Rafferty's affidavit, established, prima facie, that it did not engage in any activity that constructively evicted SAS from the subject leasehold by rendering the leasehold unusable as a store. The plaintiff demonstrated that neither it nor its agents engaged in "yelling and making threatening words and gestures towards" SAS's principals or unlawfully or unreasonably leaving trash on the curb in front of SAS's store, as alleged in the fifth and sixth counterclaims.

In opposition to that showing, SAS failed to raise a triable issue of fact. Islam testified at his deposition that Rafferty and others who worked for the plaintiff's managing agent came into the store to discuss SAS's siphoning of water from the building, the very issue raised by this action, and told Islam's partner that the plaintiff was going cut off SAS's water supply. Islam, however, merely asserted that Rafferty and the others were "loud," and he could not identify any threatening gestures. Nor did he know whether any customers were in the store during any such conversation. He could not identify any business lost by SAS as a result of any such encounter and did not explain how the leasehold was thereby rendered unusable.

Islam also could not refute the plaintiff's showing that it was required by City ordinance to place residential trash and recyclables on the curb in front of the building, or that the plaintiff did so lawfully and in accordance with the schedule of the Department of Sanitation. Nor could Islam identify any sanitation citations issued to SAS or him as a consequence of the plaintiff's placement of the household trash and recyclables on the curb, any customers who ceased patronizing the store as a result of the presence of those materials, the amount of revenue lost as a consequence of that decrease in business, or any manner in which the leasehold was thereby rendered unusable. Hence, summary judgment is awarded to the plaintiff dismissing the fifth and sixth counterclaims.

5. SEVENTH, EIGHTH, AND NINTH COUNTERCLAIMS: DEMAND FOR SANCTIONS AND ATTORNEYS' FEES

There is also no basis for an award of sanctions or attorney's fees against the plaintiff, as sought in SAS's seventh, eighth, and ninth counterclaims, since the demand for that relief is based solely on the commencement of this action, which is decidedly not a frivolous action. See Matter of Schulz v Washington County, 157 AD2d 948 (3rd Dept. 1990). Summary judgment must thus be awarded dismissing those counterclaims.

6. TENTH COUNTERCLAIM: BUSINESS DISPARAGEMENT

Disparagement of business reputation constitutes a form of defamation, which requires the claimant to prove publication of a false and injurious statement that causes special damages to the business entity. See generally Equinox Mgt. Group, Inc. v. Guardian Life Ins. Co. of Am., 28 AD3d 246 (1st Dept. 2006); SRW Assocs. v Bellport Beach Prop. Owners, 129 AD2d 328 (2nd Dept. 1987). The mere commencement of an action alleging conversion, which SAS asserts as the basis for its tenth counterclaim, does not constitute a defamatory statement, since "absolute immunity from liability for defamation exists for oral or written statements made by attorneys in connection with a proceeding before a court when such words and writings are material and pertinent to the questions involved." Front, Inc. v Khalil, 24 NY3d 713, 718 (2015) (citation and internal quotation marks omitted). The plaintiff established, prima facie, that, inasmuch

as the commencement of the action is the only basis on which SAS premised the tenth counterclaim, it has established its prima facie entitlement to judgment as matter of law. Since SAS failed to raise a triable issue of fact in opposition with allegations showing that there is a factual basis for the counterclaim beyond the mere commencement of this action, summary judgment must be awarded to the plaintiff dismissing that counterclaim.

The court has not considered any sur-replies in determining the within motions.

IV. CONCLUSION

In light of the foregoing, it is

ORDERED that the branch of the plaintiff's motion which is for summary judgment on the issue of liability on the second cause of action against S.A.S. Newsstand Corp. (SEQ. 001) is granted; and it is further,

ORDERED that the branch of the plaintiff's motion which is for summary judgment dismissing the first through tenth counterclaims asserted by S.A.S. Newsstand Corp. (SEQ. 001) is granted, and those counterclaims are dismissed; and it is further,

ORDERED that the branch of the plaintiff's motion which is

pursuant to CPLR 3211(b) to dismiss the defenses and affirmative defenses asserted by S.A.S. Newsstand Corp. is granted (SEQ. 001), and those defenses and affirmative defenses are dismissed; and it is further,

ORDERED that the plaintiff's motion is otherwise denied (SEQ 001); and it is further,

ORDERED that the defendants' motion for leave to amend the answer and counterclaims of the defendant S.A.S. Newsstand Corp. so as to assert the answer and counterclaims on behalf of the defendant Muhammed S. Islam is denied (SEQ. 002).

This constitutes the Decision and Order of the court.

Dated: 4/3/17

ENTER: _____

J.S.C.

HON. NANCY M. BANNON