

Buffington, Ltd. v 277 Bleecker LLC

2017 NY Slip Op 30706(U)

April 14, 2017

Supreme Court, New York County

Docket Number: 150277/14

Judge: Ellen M. Coin

Cases posted with a "30000" identifier, i.e., 2013 NY Slip Op 30001(U), are republished from various state and local government websites. These include the New York State Unified Court System's E-Courts Service, and the Bronx County Clerk's office.

This opinion is uncorrected and not selected for official publication.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK : IAS PART 63

-----x
BUFFINTON, LTD d/b/a
CAFFÉ VIVALDI,

Index No. 150277/14

Plaintiff,

- against -

277 BLEECKER LLC,

Defendant.
-----x

HON. ELLEN M. COIN, J.:

Defendant 277 Bleecker LLC moves: (1) pursuant to CPLR 3211(b) to dismiss the first through fifth causes of action in the amended Complaint of plaintiff Buffinton, Ltd. d/b/a Café Vivaldi; (2) pursuant to CPLR 3025(b), for leave to amend defendant's petition to include all rent due and owing through, and including the date of the decision of this Court; (3) pursuant to CPLR 3212, for summary judgment on defendant's petition and damages in the amount of \$271,476.74; (4) for an order granting defendant a judgment of ejectment against plaintiff, awarding defendant possession of the premises, and directing the New York City Sheriff to remove plaintiff from the premises; and (5) for summary judgment against plaintiff on its first counterclaim for recovery of defendant's legal fees and setting the matter down for a hearing to establish legal fees in favor of defendant.

BACKGROUND

Plaintiff operates a bistro, Café Vivaldi, in the building located at 32 Jones Street, New York, New York, pursuant to a

renewal lease agreement dated January 9, 2012 (Lease, Not of Mot, Exh J). Defendant is an assignee of the renewal lease agreement. The renewal lease states, in part, that "Owner hereby leases to Tenant and Tenant hereby hires from Owner the Store, inclusive of pro-rata share of basement in the building known as 32 Jones St, in the Borough of Manhattan, City of New York" (*id.*).

Paragraph 41 of the renewal lease agreement sets forth the base rent for the leased space (*id.*). Paragraph 72.1 states, in part:

"Either party hereby agrees to pay within ten (10) days of demand, as additional rent, all renewable attorneys' fees and disbursements (and all other court costs or expenses of legal proceedings) which either party may incur or pay out by reason of, or in connection with ...

C. Any action or proceeding brought by Tenant against Landlord (or any officer, partner or employee of Landlord) in which Tenant fails to secure a final unappealable judgment against Landlord; or any action or proceeding brought by Tenant against Landlord (or any officer, partner or employee of Landlord) in which Landlord fails to secure a final unappealable judgment against Tenant"

(*id.*). Defendant sends monthly rent bills to plaintiff by mail.

Prior to the renewal lease, plaintiff rented only the ground floor store. As the prior lease was coming to an end, plaintiff discussed with defendant the option of expanding the leased space to include a portion of the basement. Plaintiff planned to use the basement to create a lounge area that would generate additional revenue and retain customers from the upstairs bistro.

Plaintiff also planned to run beer taps for speciality beers from the basement to the ground floor. Plaintiff further intended to use a portion of the basement for storage, so that it could save money by purchasing certain items in bulk. Plaintiff anticipated using the increased revenue and cost savings it would generate from its plans for the basement to cover the additional cost of renting the basement. Defendant informed plaintiff that it was seeking another tenant to occupy the other portion of the basement.

When the parties executed the renewal lease, the only way to access the basement was through a padlocked hatch entrance in the sidewalk and down a set of stairs. Plaintiff contacted defendant to discuss constructing a divider in the basement, and to request a copy of the key to padlock. Defendant reportedly informed plaintiff that it was plaintiff's responsibility to construct its own access to the basement, and suggested that plaintiff build an internal staircase to the basement. Defendant did not give plaintiff a key to the padlock until October 2013. Due to the inability to access the basement, plaintiff revised its business plan, foregoing the lounge space and constructing a small storage space on the ground floor.

Plaintiff's rental payment history is not disputed. The submissions reveal that from January 2012 to April 2012, Plaintiff paid the full amount contemplated by the renewal lease agreement, but paid a reduced amount for May and June 2012. On

June 7, 2012, plaintiff sent defendant an email stating that it had been denied access to the basement. Defendant served plaintiff with a five day notice, demanding payment of the rent withheld by plaintiff. Plaintiff did not pay rent for July, August, and September 2012. In addition, plaintiff paid the required amount for October 2012, and paid a reduced amount for November and December 2012. Plaintiff did not pay any rent for January and February 2013.

Plaintiff tried unsuccessfully to negotiate with defendant to amend the renewal lease agreement to reflect the leased space as constituting only the ground floor and to adjust the rent. Defendant continued to insist that plaintiff pay the entire amount contemplated by the renewal lease agreement.

Defendant commenced a summary non-payment proceeding (277 *Bleecker St., LLC. v Buffinton LTD.*, Civ Ct, New York County, Kotler, J., Index No. 72998/12) based on plaintiff's failure to pay the full amount of the rent due under the renewal lease agreement. By order dated February 15, 2013, the Court (Kotler, J.), after trial, dismissed the petition, concluding, in essence, that plaintiff's obligation to pay rent was suspended because it was partially evicted from the basement of the leased space (Order, Not of Mot, Exh P).

Plaintiff then commenced this action seeking to reform the lease and adjust the rent owed to reflect the leased space as constituting only the ground floor space. Plaintiff claims that

defendant waived its right to demand the full amount of the rent due under the renewal lease. Plaintiff also asserts that it relied on defendant's actions in denying it access to the basement portion of the leased space by modifying its business plan, and that it would be greatly prejudiced if, almost two years later, it were forced to take possession of and pay rent for the portion of the basement contemplated by the renewal lease.

The first cause of action in the amended Complaint alleges that defendant breached the renewal lease agreement by failing to provide plaintiff access to the basement portion of the leased space. The second cause of action, sounding in fraud and fraudulent inducement, alleges that plaintiff detrimentally relied on defendant's representations regarding the basement portion of the leased space, resulting in damages. The third cause of action alleges that the renewal lease agreement should be reformed and the rent adjusted to reflect that the leased space constitutes only the ground floor. In the fourth cause of action, plaintiff seeks a judgment declaring the rights and obligations of the parties under the renewal lease agreement. In the fifth cause of action, plaintiff seeks to recover attorneys' fees for this action and the summary nonpayment proceeding.

Defendant's answer includes a general denial of the allegations in the amended Complaint, numerous defenses, and a

counterclaim for attorneys' fees, pursuant to article 72.1© of the renewal lease agreement.

Defendant also commenced another summary nonpayment proceeding (*277 Bleecker LLC v Buffinton Ltd.*, Civ Ct, New York County, Kotler, J., Index No. 50519/14). By Order dated February 27, 2014, this Court granted plaintiff's motion to consolidate the second summary nonpayment proceeding with this action (Order, Not of Mot, Exh L).

Defendant now seeks (1) to dismiss the first through fifth causes of action; (2) to amend the petition to include all rent due and owing through and including the date of the decision of this Court; (3) summary judgment on its petition and damages in the amount of \$271,476.74; (4) judgment of ejectment against plaintiff, possession of the premises, and directing the New York City Sheriff to remove plaintiff from the premises; and (5) summary judgment against plaintiff on defendant's first counterclaim for recovery of defendant's legal fees and setting the matter down for a hearing to establish legal fees in favor of defendant.

DISCUSSION

Standard for Dismissal of Causes of Action

As the proponent for summary judgment, defendant must establish its cause of action or defense sufficiently to warrant the court as a matter of law in directing judgment in its favor (CPLR 3212[b]). The standard requires that defendant make a

prima facie showing of entitlement to judgment as a matter of law, by advancing sufficient "evidentiary proof in admissible form" to demonstrate the absence of any material issues of fact (*Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 [1985]; *Zuckerman v City of New York*, 49 NY2d 557, 562 [1980]). Upon such a showing, the burden shifts to plaintiff to present evidentiary proof in admissible form sufficient to raise a triable issue of fact (*Zuckerman v City of New York*, 49 NY2d at 562). Mere conclusions, expressions of hope, or unsubstantiated allegations or assertions are insufficient to defeat summary judgment (*id.*).

As to the first cause of action, for breach of contract, defendant argues that plaintiff cannot properly seek damages since it elected not to pay the full amount of the rent due under the renewal lease agreement and already recovered a rent abatement totaling \$145,073.16. To be sure, where a tenant suffers a partial eviction and, as a result, refuses to pay rent, the refusal to pay rent constitutes an election of remedies, and the tenant has no claim for damages for the period in which the rent was unpaid (*see Frame v Horizons Wine & Cheese*, 95 AD2d 514, 518 [2d Dept 1983]).

However, where a tenant is partially evicted, liability for all rent is suspended although the tenant remains in possession of the portion of the leased space from which it was not evicted (*Barash v Pennsylvania Terminal Real Estate Corp.*, 26 NY2d 77, 83

[1970]). Here, it is undisputed that plaintiff remained in possession of the ground floor, despite having been partially evicted from the basement portion of the leased space for almost two years, and that plaintiff made rental payments; albeit at a reduced rate, during the period of partial eviction. "[A] tenant who elects to remain in possession and pay the rent after a partial eviction may claim damages from [the] lessor which include consequential damages" (*Bostany v Trump Org. LLC*, 88 AD3d 553, 554 [1st Dept 2011]). Thus, plaintiff may properly assert a claim for damages based on breach of contract. As such, the branch of the motion that seeks to dismiss the first cause of action must be denied.

The second cause of action, for fraud/fraudulent inducement, restates the allegations in the breach of contract claim and adds that defendant acted with willful intent to misrepresent its intentions with regard to the basement to induce plaintiff to enter into the renewal lease agreement and pay an increased rent. The alleged breach sounds in contract, not fraud. A contract action may not be converted into one for fraud by the mere additional allegation that the contracting party did not intend to meet his contractual obligation (see *Comtomark, Inc. v Satellite Communications Network, Inc.*, 116 AD2d 499, 500 [1st Dept. 1986]). Thus, the cause of action for fraud/fraudulent inducement is dismissed as duplicative of the cause of action for breach of contract.

The third cause of action seeks reformation of the renewal lease agreement and adjustment of the rent to reflect that the leased space constitutes only the ground floor. "An action to reform a written agreement rests upon the theory that the parties came to an understanding, but in reducing it to writing, through mutual mistake, or through mistake on one side and fraud on the other, omitted some provision agreed upon, or inserted one not agreed upon" (*Curtis v Albee*, 167 NY 360, 364 [1901]). The thrust of a reformation action is that a writing does not set forth the actual agreement of the parties (*Chimart Assoc. v Paul*, 66 NY2d 570, 573 [1986]). The object of such an action is to change the instrument, as written, to conform it to the agreement, as made, by inserting the provision omitted, or striking out the one inserted by mutual mistake (*Curtis v Albee*, *supra*).

There is a heavy presumption that a deliberately prepared and executed written instrument manifests the true intention of the parties (*id.*). A high order of evidence is required to overcome that presumption (*id.*). The proponent of reformation must show, by clear, positive, and convincing evidence, "not only that mistake or fraud exists, but exactly what was really agreed upon between the parties" (*id.*; *Amend v Hurley*, 293 NY 587, 595 [1944]). "Equity will not make a new agreement for the parties, nor, under color of reforming one made by them, add a provision which they never agreed upon and did not want when the contract

was written, 'although it may afterward appear very expedient or proper that it should have been incorporated'" (*Curtis v Albee*, *supra* [internal citation omitted]).

Here, the renewal lease agreement expressly states that the leased space consists of the ground floor and a "pro-rata share of basement" (Lease, Not of Mot, Exh J). Furthermore, the submissions include competent evidence indicating that both parties understood that the leased space included a portion of the basement. At an examination before trial ("EBT") held on June 20, 2015, plaintiff's witness, Ishrat Ansari, testified that the parties understood that the leased space included the portion of the basement "right underneath" the ground floor store (Ansari EBT, Not of Mot, Exh R, p. 66). On August 20, 2015, defendant's witness, Harvey Bojarsky, also testified that renewal lease agreement contemplated the portion "[o]f the basement that was underneath" the ground floor store (Bojarsky EBT, Not of Mot, Exh S, p. 13). Absent any evidentiary proof that the renewal lease agreement does not set forth the actual agreement of the parties, defendant is entitled to judgment dismissing the cause of action for reformation.

In the fourth cause of action, plaintiff seeks a judgment declaring the rights and obligations of the parties under the renewal lease agreement. However, a cause of action for a declaratory judgment is unnecessary and inappropriate where, as here, the plaintiff has an adequate, alternative remedy in

another form of action, such as breach of contract (see *Apple Records, Inc. v Capital Records, Inc.*, 137 AD2d 50, 54 [1st Dept 1988]). Thus the cause of action for a declaratory judgment is dismissed.

In the fifth cause of action, plaintiff seeks to recover attorneys' fees for this action and the nonpayment summary proceeding. However, it is well settled that attorneys' fees are incidents of litigation and a prevailing party may only recover them from the losing party if such recovery is authorized by statute, agreement or court rule (*U.S. Underwriters Ins. Co. v City Club Hotel, LLC*, 3 NY3d 592, 597 [2004]). Here, paragraph 72.1 of the renewal lease agreement expressly permits plaintiff to recover attorneys' fees under certain circumstances. Thus, the branch of the motion that seeks to dismiss the cause of action for attorneys' fees must be denied.

In sum, the branch of the motion that seeks summary judgment dismissing the amended Complaint is granted to the extent that the second, third, and fourth causes of action in the amended Complaint are dismissed and it is otherwise denied. The first and fifth causes of action are severed and continued.

Motion to Amend Defendant's Petition,

Defendant also seeks to amend the petition in the summary proceeding to include all rent due and owing through and including the date of decision of this Court. The petition sought rent for the period from November 2013 to January 2014.

Defendant asserts that the petition should be amended to include all rent due and owing to date. Defendant fails to include a copy of the proposed pleading.

Leave to amend a pleading should be freely given, absent prejudice or surprise, to the nonmoving party when the amendment is not patently lacking in merit (see CPLR 3025(b); *Holst v Liberatore*, 105 AD3d 1374, [4th Dept. 2013]). The decision to allow or disallow the amendment is committed to the court's discretion (*Edenwald Contr. Co. v City of New York*, 60 NY2d 957, 959 [1983]).

Any motion to amend pleadings "shall be accompanied by the proposed amended...pleading clearly showing the changes or additions to be made to the pleading." CPLR 3025(b). Here, defendant fails to include the proposed amended pleading. Thus, in an exercise of discretion, the Court denies leave to amend the petition (*McBride v KPMG Intern.*, 135 AD3d 576, 581 [1st Dept 2016]).

Motion for Summary Judgment on Defendant's Petition

Defendant fails to provide sufficient evidentiary proof to establish entitlement to summary judgment on its petition in the summary nonpayment proceeding and judgment in the amount of \$271,476.74. Thus, the request for summary judgment is denied.

Motion for Judgment of Ejectment against Plaintiff

Similarly, defendant fails to provide competent evidence to support its request for a judgment of ejectment against

plaintiff, possession of the premises, and intervention by the New York City Sheriff to remove plaintiff from the premises. Thus, the request is denied.

Motion for Summary Judgment on Counterclaim for Attorneys' Fees

Citing paragraphs 19 and 72 of the renewal lease agreement, defendant asserts that it is entitled to attorneys' fees based on plaintiff's alleged breach of its rental obligations. Defendant argues that it was compelled to commence the 2014 summary nonpayment proceeding and defend this action based on plaintiff's failure to pay the full amount of the rent contemplated by the renewal lease agreement. Defendant's request for attorneys' fees is premature since the Court has not issued a final determination in the 2014 summary nonpayment proceeding or in this action. Thus the request for summary judgment on the counterclaim for attorneys' fees is denied.

Accordingly, it is

ORDERED that the branch of the motion that seeks summary judgment dismissing the causes of action in the amended Complaint is granted to the extent of dismissing the second, third, and fourth causes of action and it is otherwise denied; and it is further

ORDERED that the second, third and fourth causes of action in the amended complaint are dismissed; and it is further

ORDERED that the remainder of the action is severed and continued; and it is further

ORDERED that the branch of the motion that seeks to amend the petition is denied; and it is further

ORDERED that the branch of the motion that seeks summary judgment on the petition in the 2014 summary nonpayment proceeding is denied; and it is further

ORDERED that the branch of the motion that seeks a judgment of ejectment against plaintiff is denied; and it is further

ORDERED that the branch of the motion that seeks summary judgment on defendant's counterclaim for attorneys' fees is denied.

This constitutes the decision and judgment of the Court.

Dated: April 14, 2017

ENTER:

Ellen M. Coin A.J.S.C.