| **Kryolan Corp. v 277 Bleecker LLC** |
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| 2017 NY Slip Op 30728(U) |
| April 13, 2017 |
| Supreme Court, New York County |
| Docket Number: 652062/15 |
| Judge: Barry Ostrager |
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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: IAS PART 61

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KRYOLAN CORPORATION

Plaintiff,

-against-

277 BLEECKER LLC,

Defendant.

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INDEX NO. 652062/15

Motion Seq. No. 003

OSTRAGER, J:

Presently before the Court is a post-note of issue motion for summary judgment on the issue of liability by plaintiff, Kryolan Corporation ("Kryolan" or "Tenant"), a commercial tenant that leased ground floor retail space and a cellar from defendant 277 Bleecker LLC ("Landlord") pursuant to a Lease Agreement and Rider dated November 13, 2013 and effective November 22, 2013 (Lundy Affirmation, Exh. 7). As the leased premises are located in a Co-Operative mixed-use building, the Landlord is bound by a proprietary lease or "Master Lease" dated September 1, 1983 (Lundy Aff, Exh. 6). The Tenant commenced this action to recover approximately two years' rent and lost revenues aggregating at least $750,000 (Amended Complaint, ¶46) due to the Landlord's delay in repairing a structural defect in the cellar of the leased premises which prevented the Tenant from occupying the ground floor space for a two-year period. The motion for summary judgment is denied for the following reasons.

The 10-year Lease Agreement provided Kryolan with 3 to 4 months within which to complete certain improvements rent free.[1] Within days of signing the Lease Agreement, Kryolan's Chief Operating Officer, Ms. Claudia Longo, inspected the premises and, having found the leased premises

[1] Lease Rider ¶41(A)(i) provides that Tenant shall pay Landlord $0.00 per month for period commencing on November 22, 2013 and ending on March 14, 2014 (Lundy Aff., Exh. 7). Exhibit A to the Lease Rider entitled "Tenant's Work" contemplates tenant improvements for a period of three months commencing on November 22, 2013 (*id.*).

with debris and leaks, she and associates commenced negotiations with the Landlord, through its managing agent, for additional time within which to complete clean-up and improvements rent free (Lundy Aff., Exh. 9). Kryolan's architect provided the Tenant with a proposal concerning the contemplated improvements in January 2014 (Rowland Aff., Exh. C), and filed plans and drawings with the New York City Department of Buildings ("DOB") in May 2014 (*id.,* Exh. D), after months of delay by the Landlord and/or its managing agent in delivering the premises in a suitable condition and providing the Tenant with information the Tenant needed to file with the DOB. (Lundy Aff., ¶31; *id.*, Exh. 10). Following the DOB filings, Kryolan's general contractor commenced renovations and, upon commencement, discovered a defective structural beam in the cellar which stopped the contractor from continuing with the planned renovations, pending further inspection by structural engineers and remediation work (Goldstein Affidavit, Exh. B). Subsequently, the Tenant made repeated requests to the Landlord's managing agent to repair the leaks and the structural defect to enable the Tenant to complete its planned renovations and open for business (Lundy Aff., Exhs. 9, 10) (Rowland Aff., Exh. G). The Landlord eventually repaired the structural defect in September 2015, nearly 2 years after execution of the lease, and after several site meetings (*see* Lundy Aff., Exh. 11), a default notice dated July 10, 2014 issued by the Co-Op Board to the Landlord (*id.,* Exh.12), and a DOB violation issued on January 12, 2015 which directed the Landlord to repair the hazardous structural defect "no later than 1/26.15 [sic]" (*id.*, Exh. 13). The Tenant occupied the space and opened for business at some point after the Landlord's remediation of the structural defect in September 2015 (Lundy Aff., ¶¶55-56). The Tenant paid the monthly rent at a rate of roughly $24,000[2] per month throughout the two-year period in which the Tenant could not occupy or use the space due to the Landlord's delay (*id.*, ¶57) (Amended Compl., ¶¶33, 36) ( Longo transcript at 120:17-25; 121:1-11).

[2] Lease Rider ¶41(A) provides that the Tenant shall pay base rent in the amount of $23,500 per month from March 21, 2014 to November 30, 2014, and of $24,500 per month from December 1, 2014 to November 30, 2015 (Lundy Aff., Exh. 7).

Plaintiff asserts five causes of action in its first amended complaint, sounding in breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment,[3] negligence, and a declaratory judgment that plaintiff may terminate the lease.[4] The defendant asserted two counterclaims, sounding in breach of lease for the Tenant's failure to "substantially complete" renovations within the first three months of the lease, and negligence. The Landlord seeks to recover $70,500 for the three months of free rent provided in Paragraph 41 of the Lease Rider because the Tenant has not "substantially completed" its improvements within that time period pursuant to Exhibit A of the Lease Rider (Lundy Aff., Exh. 7).

The Court heard oral argument on the plaintiff's motion for summary judgment on April 12, 2017 and reviewed with extreme care the Lease Agreement, Lease Rider, Master Lease, and all the affidavits and exhibits attached to the motion papers. The motion for summary judgment is denied, primarily because there is an ambiguity in Paragraph 60 of the Lease Rider concerning a four-month notice period within which the Tenant was obligated to "notify" the Landlord of "defects," and secondarily because there are material issues of fact as to whether or not the Tenant provided the Landlord with notice in the requisite time period which preclude summary judgement as a matter of law.

In support of its motion, the plaintiff argues that it is entitled to summary judgement on its first claim for breach of contract because, among other things, Paragraph 4 of the Lease Agreement expressly precludes the Tenant from making alterations, additions or improvements to the premises that are "structural" (plaintiff's Memorandum of Law in support at 12). In addition, Section 7.1 of the Master Lease explicitly obligates the Landlord to repair structural defects which are caused by the Landlord.

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[3] As the defendant correctly argues, a quasi-contract claim such as unjust enrichment is not viable where the conduct underlying the claim is governed by a contract. *Schroeder v Pinterest, Inc.*, 133 AD3d 12, 33 (1st Dept 2015). For that reason, the claim for unjust enrichment is hereby dismissed.

[4] The fifth cause of action has been rendered moot by the Tenant's agreement to occupy the leased premises following the Landlord's remediation of the structural defects in September 2015, and is hereby dismissed.

The Tenant presented evidence demonstrating that, months prior to execution of the Lease Agreement, the Landlord completed renovations on the first floor of the building where the Landlord demolished the existing flooring and replaced it with a 4"-5" concrete slab which overstressed the center steel beam in the cellar (Panzarino Affidavit, ¶13; MOL in supp. at 6). In addition, the Co-Op Board mailed a certified letter dated July 10, 2014 to the Landlord's managing agent, requiring the Landlord to reimburse the Co-Op for temporary emergency repair that the Co-Op paid for as a result of the hazardous condition that the Landlord failed to timely remediate, and requesting that the Landlord "immediately commence the requisite permanent repairs" in accordance with Section 7.1 of the Master Lease which requires the Landlord to:

> properly maintain the interior portions of the demised premises in good order and condition or to promptly, at its sole cost and expense, make all necessary interior and storefront repairs, including structural repair necessitated by the acts of the Lessee [Landlord].

In opposition, the defendant asserts that while it agreed to perform repairs to "public portions" of the building under Paragraph 4 of the Lease Agreement, the defendant did not agree to perform repairs to any portion of the leased premises with the exception of "latent defects" which plaintiff was required to "identify" within four months of the lease commencement date of November 22, 2013 (MOL in opposition at 10). The provision upon which the defendant relies is Paragraph 60(a) in the Lease Rider, which the Court finds to be ambiguous when read in conjunction with the Lease Agreement, and which provides:

> Tenant acknowledges that it has made a full and complete inspection of the demised premises and is thoroughly familiar with the condition thereof, and Tenant agrees to accept possession of the demised premises on the Commencement Date in their then "as-is" condition. Tenant acknowledges that it inspected the Demised Premises for defects and had the opportunity to notify Landlord of defects prior to commencement of Tenants work. Landlord shall remain responsible for any latent defects in the Demised Premises that can be conclusively established to predate the Tenant's Lease Commencement Date. This warranty shall extend for a period of four (4) months following the Lease Commencement Date.

The defendant also argues that, notwithstanding the DOB violation, the Master Lease, and redress by the Co-Op Board, the Tenant had no right under the Lease Agreement to compel the Landlord to make the structural repairs at issue (MOL in opp. at 11). Furthermore, defendant argues, the plaintiff acknowledged that it accepted the leased premises "As Is" and agreed to a four-month warranty period to identify any alleged latent defects. Finally, the defendant argues there is conflicting testimony and evidence as to whether the Tenant notified the Landlord, or its managing agent, of the defective beam within the four-month warranty period. Specifically, the defendant points out that while Ms. Longo stated at her deposition that she sent emails to the Landlord's managing agent from December 2013 through March 2014 (and beyond) concerning the beam (*see* Longo Tr. 61:12-18), Ms. Longo failed to produce such emails pursuant to the defendant's post-EBT demands (Rowland Aff, Exh. H). Defendant contends that it learned of the defective beam for the first time upon receipt of the Tenant's general contractor's email dated May 21, 2014 (Goldstein Aff, ¶16, Exh. B), well beyond the 4-month period. The email which was sent to Ms. Longo and a senior property manager employed by the managing agent, Christine Bermudez, and others, provides in relevant part:

> Christine,
>
> When we attempted to make connection to support the new ceiling system we came across an issue we would like your team to comment on. Please see attached photos of the structural steel "I" Beam that is not installed properly and is causing deflection of the steel and could be a potential issue for Kryolan and the building. Please have your structural engineer visit the site to confirm that this I Beam is installed properly and we are safe to precede [sic] …

First, it is unclear whether the four-month warranty period in Paragraph 60(a) of the Lease Rider applies to structural defects caused by the Landlord, particularly in light of Paragraph 7.1 of the Master Lease. Second, the sentence in Lease Rider ¶60 that "Tenant acknowledges that it … had the opportunity to *notify* Landlord of *defects* prior to commencement of Tenants work" could, on the one hand, be construed to apply to the Tenant's notice of the debris and leak in the first 3 to 4 months following

execution of the Lease Agreement, which is evidenced by email exhibits attached to the motion papers, or, on the other hand, to notice of the structural defect which the landlord claims did not occur until May 21, 2014, beyond the four-month warranty period. In addition, there are no lease provisions requiring the Tenant to provide written notice of defects.

Third, even assuming that the four-month warranty period applies to structural defects, the fact that Ms. Longo testified that she sent various emails to the Landlord's managing agent about the beam from December 2013 to March 2014 but could not produce such emails creates a material issues of fact concerning notice which will have to be resolved at trial. What is more, Mr. Oren Goldstein, the managing agent's Chief Operating Officer, appeared for a deposition on June 16, 2016 as the Landlord's corporate representative, and in response to approximately 160 questions, he testified "I don't know" or "I don't recall" (Lundy Aff, Exh. 5) (MOL in supp. at 7). These evasive responses are irreconcilable with Goldstein's affidavit annexed to the opposition motion papers which contain particular details and facts concerning the beam, which he did not know or could not recall nearly one year ago at his deposition. For example, Goldstein attests in his affidavit that "none of the professionals retained by 277 Bleecker for the renovation work ever advised of any concerns with the beam either prior to, or after the renovations work" whereas Goldstein stated at his deposition that he "could not recall" who was completing the renovation work, the scope of work, or whether he spoke to anyone about the work.

Notably, the defendant failed to include an affidavit by Steve Rappaport, an agent of the Landlord, whom Ms. Longo testified was present at the leased premises when she contends she first complained about the ostensible structural issues in December 2013 ("The beam in that one room was hanging – was not straight, and I was mentioning that to Steve Rappaport or to my broker, as well, that it looks strange, and that this is – we need to take a look at that at a later time. And there was leaks there. There was debris there. There was a lot of dirt there") (Longo Tr. 109:21-110:4). Ms. Longo also

testified that met with representatives of the Landlord's managing agent in their offices in January 2014 and expressed concerns with the beam, among other issues at the premises ("... the main focus, it was on the beam that we don't know, because we could not open it up, what might be behind the walls, the encasing of the beam") (Longo Tr. 122:17-20). However, Mr. Goldstein maintains in a conclusory affidavit statement that the first notice concerning the beam was given to the managing agent only on May 21, 2014.

Even assuming that the Tenant did not provide notice in the requisite time period, there are issues as to whether the Landlord can rely on a lease provision which contains a four-month limitation period, thereby shifting the Landlord's undisputed duty to maintain the structural integrity of leased commercial premises which are open for business to the general public. S*ee e.g., Board of Managers of Loft Space Condominium v SDS*, 142 AD3d 881, 882 (1st Dept 2016) ("To the extent the first cause of action, alleging breach of contract against SDS, is based on items that are hazardous, dangerous, and/or violate the law [that is, exceptions to the "as is" clause], the "as is" clause [in the condominium offering plan] does not bar the claim"). *See also, Invesco Advisers, Inc. v. Marsh & McLennan Co., Inc.*, 92 AD3d 414, 417 (1st Dept 2012) (A landlord's argument that "asbestos was exposed during the tenants's [sic] work, thus requiring the cost of remediation to be borne by the tenant... was repeatedly rejected on the ground that the leases and the law placed the responsibility for such structural remediation on the landlord").

Finally, as for the defendant's first counterclaim sounding in breach of lease and seeking the recovery of the three months' of rent in the amount of $70,500, a search of the record establishes by irrefutable documentary evidence that the defendant waived any claim for return of free rent by acknowledging that leaks and debris in the basement precluded a build out of the leased premises within

three months or, indeed, a very substantial time thereafter. As for the defendant's second counterclaim sounding in negligence, defendant's counsel agreed to dismiss it at the April 12, 2017 oral argument.

Accordingly, it is hereby

ORDERED that the plaintiff's motion for summary judgment is denied; and it is further

ORDERED that the plaintiff's third and fifth causes of action are dismissed; and it is further

ORDERED that the defendant's first and second counterclaims are dismissed; and it is further

ORDERED that all liability and damage issues will be resolved at the May 31, 2017 trial.

Dated: April 13, 2017

J.S.C.

BARRY R. OSTRAGER
JSC